

Allocation of burden of proof in cases of unequal treatment

Mag.^a Susanne Prisching
Austrian Ombud for Equal Treatment

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GLEICHBEHANDLUNGSANWALTSCHAFT ÖSTERREICH



Content of the presentation

- Introduction
- Historic development of current provisions on burden of proof in European law
- European legal bases governing the burden of proof
- CJEU rulings on the burden of proof
- Experiences in legal practice
- Summary



Ombud for Equal Treatment (GAW)

- **GAW as equality body** as defined by Dir. 2006/54/EC, Art.. 20; Dir. 2000/43/EC, Art.. 13; Dir. 2004/113/EC, Art.. 12 (bodies for the promotion of equal treatment) with the following tasks:
- Advice, support and mediation – confidential, free of charge, self-governing, independent and autonomous
- Information work – raising awareness
- Report on the development of equal treatment
- European network - Equinet

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Combating discrimination within the EU

Art. 3(3) TEU (ex Art. 2 EC)

The Union shall combat... discrimination and shall promote... equality between **men and women**.

Art. 19(1) TFEU (ex Art. 13 TEC)

Without prejudice to the other provisions of the Treaties and within the limits of the powers conferred by them upon the Union, the Council, acting unanimously in accordance with a special legislative procedure and after obtaining the consent of the European Parliament, may take appropriate action to combat discrimination based on **sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation**.

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Allocation of burden of proof in civil action

THE BURDEN OF PROOF

Court was not satisfied of the existence of the prosecuted claim - case is dismissed



Defendant was able to satisfy the court of the non-existence of the prosecuted claim - case is dismissed

Court was satisfied of the existence of the prosecuted claim – lawsuit can be won



Usual standard of proof lies with the court's satisfaction of a "high degree of probability"

It is normally for the person alleging facts in support of a claim to adduce proof of such facts. Thus, in principle, the burden of proving the existence of sex discrimination (as to pay) lies with the worker who, believing himself to be the victim of such discrimination, brings legal proceedings against his employer with a view to removing the discrimination.
(CJEU, 27/10/1993, C-127/92 Enderby).

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Discriminatory treatment or not?

(Typical) situation when applying for a job ...

Problematic nature:

Discrimination is experienced

Presumption that one (or all) of the protected grounds was a (or were among the) deciding factor(s) in the rejection of the application

There is circumstantial evidence that could point to that, but no definite information and no access to it

No possibility of "proving" the inner motivation (motive) for the behaviour

With the normal allocation of the burden of proof, there is little chance of Ms M winning this case, as, without "proof", it is unlikely that she can satisfy the court of the high degree of probability of her allegations.

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The CJEU takes difficult situation into account...

- *Commission v. France*: Special provisions for **recruitment procedures** contravene the rule of equal treatment, as, due to a lack of transparency, they make it impossible for the Commission, the national courts and persons concerned to carry out an effective review
- *Danfoss*: In an undertaking that applies a system of pay completely lacking in **transparency**, it is for the employer to prove that his pay policy is not discriminatory, provided that the female employee shows, in relation to a relatively high number of employees, that the average remuneration for women is less than that for men
- *Enderby*: Where an employee becomes a **prima facie** victim of discrimination, the burden of proof **is reversed** when, otherwise, no effective means would be available to achieve equality of remuneration. Where more people of one sex than of the other are put at a disadvantage, it must be proven that this is justified by objective factors that have nothing to do with discrimination based on sex.

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The first provisions on the burden of proof in European law... (1)

COUNCIL **DIRECTIVE 97/80/EC** of 15 December 1997
on the burden of proof in cases of discrimination based on sex

*Recital 17: Whereas plaintiffs could be deprived of any effective means of enforcing the principle of equal treatment before the national courts if the effect of introducing **evidence of an apparent discrimination** were not to impose upon the respondent the burden of proving that his practice is not in fact discriminatory.*

*Recital 18: Whereas the Court of Justice of the European Communities has therefore held that the rules on the burden of proof must be adapted when there is a **prima facie** case of discrimination and that, for the principle of equal treatment to be applied effectively, the burden of proof must shift back to the respondent when evidence of such discrimination is brought.*

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The first provisions on the burden of proof in European law... (2)

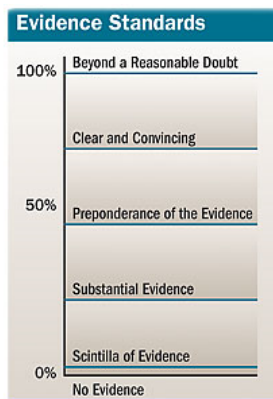
COUNCIL **DIRECTIVE 97/80/EC** of 15 December 1997
on the burden of proof in cases of discrimination based on sex

*Art. 4(1): Member States shall take such measures as are necessary, in accordance with their national judicial systems, to ensure that, when persons who **consider themselves wronged** because the principle of equal treatment has not been applied to them **establish**, before a court or other competent authority, **facts** from which it **may be presumed** that there has been direct or indirect discrimination, it shall be **for the respondent to prove** that there has been no breach of the principle of equal treatment.*

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Degree of satisfaction that something is deemed true



The allocation of the burden of proof and the required standard of evidence play an essential role in the effective enforcement of claims

Standard of evidence
The higher the required degree of satisfaction of the correctness of the statement of facts to the court hearing the case

→
the more difficult it can be to win

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Mechanism of burden of proof reversal in ADR (1)

- No full reversal of burden of proof – burden of proof remains fundamentally on the plaintiff
- But reversal of burden of proof **prima facie** (substantiated apparent unobjective treatment)
- That **exonerates the plaintiff** from the difficulty of achieving the **full/high degree of satisfaction** of the court that discrimination has taken place

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Mechanism of burden of proof reversal in ADR (2)

- By pleading such, plaintiff creates (before defendant refutes the fact) the **"refutable presumption of discrimination"**
- The burden of proof passes to the defendant, who has to prove that the unequal treatment is founded on objective and justified grounds
- It is for the court or competent authority to decide whether the presentation of the case is sufficient to invalidate the presumption of discrimination – free judicial, independent and non-reviewable evaluation of the evidence
- Court does **not** — as otherwise customary in many national legal systems — have to be satisfied, **with near-certain probability**, of the existence of the discrimination specific to gender, rather it is sufficient if, on consideration of all the facts, a **preponderant probability** gives reason to believe it

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Current European legal norms on the burden of proof

Equal Treatment Directive 2006/54/EC

Art. 19(1):

Member States shall take such measures as are necessary, in accordance with their national judicial systems, to ensure that, when persons who consider themselves wronged because the principle of equal treatment has not been applied to them establish, before a court or other competent authority, facts from which it may be presumed that there has been direct or indirect discrimination, it shall be for the respondent to prove that there has been no breach of the principle of equal treatment.

The two similarly worded directives are also almost identical:

Employment Equality Directive 2000/78/EC, Art. 10(1)

Racial Equality Directive 2000/43/EC, Art. 8(1)

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Examples of transposition in the Member States

- Germany, Section 22 AGG (General Act on Equal Treatment):
"Where, in case of conflict, one of the parties is able to establish facts from which it may be presumed that there has been discrimination on one of the grounds referred to in Section 1, it shall be for the other party to prove that there has been no breach of the provisions prohibiting discrimination."
- Hungary: Plaintiff must prove that protected characteristic and disadvantage exist, but not the causal connection between the two facts; burden of proof is then reversed – more favourable provision than directives require

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Transposition of Directive in Austria in compliance with European law?

- Section 12(12) GIBG (Equal Treatment Act):
*If, in the event of a dispute, the person affected cites the facts of discrimination as defined in Sections 3, 4, 6 or 7, he/she must **substantiate** them. When Sections 3 or 4 are cited, it is incumbent upon the defendant **to prove that, on weighing up all the facts, it is more probable that another motive established by the defendant was decisive in the different treatment or that the other sex is an indispensable prerequisite for the work to be carried out or that there is a justification as defined in Section 5(2).** When Sections 6 or 7 are cited, it is incumbent upon the defendant to prove that, on weighing up all the facts, it is more probable that the facts established by the defendant correspond to the reality.*
- Austria: Copy of Section 105(3) No. 1(i) Industrial Relations Act (Contesting dismissal due to a prohibited motive)
- Criticism in theory and literature with regard to insufficient transposition of the directives
- OGH (Supreme Court of Justice): when interpreted in compliance with the directives, national burden of proof rule is in compliance with European Community law

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Legal examination in the case of presumed discrimination

- Discrimination characteristic: on what grounds does the person affected feel he/she has been discriminated against? What is the inner motive of the person doing the discriminating?
- Discrimination facts: by what does the person affected feel discriminated against (e.g. grounds, remuneration, termination, etc.)?
- Which form of discrimination (direct, indirect) is it?
- What legal options are there?
- What are the time periods for enforcing a possible legal right?

What does the evidence situation look like – in the case of direct or indirect discrimination or in harassment situations

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Direct discrimination - Definition

Art. 2(1)(a) Directive 2006/54/EC:

For the purposes of this Directive, the following definitions shall apply

'direct discrimination': where one person is treated less favourably on grounds on sex than another is, has been or would be treated in a comparable situation.

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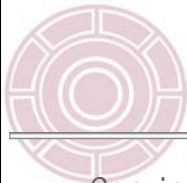
Direct discrimination

The existence of the following has to be examined

- a **comparable situation** and
- a **disadvantage** and

the **(inner motive) reason** for that disadvantage:
... based on sex/age... – this motive must be at least one of the deciding factors in the disadvantage (causality)

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What can serve as proof/circumstantial evidence - how can establishment of truth be supported?

- Convincing “clear” personal testimony (credible testimony characterised by detail, originality and logical consistency)
- Witnesses
- Records
- Documents, personnel files, statistics
- Comments and stories, previous grievances, minutes (of meetings)
- Contradictory behaviour or statements
- How the grievance is dealt with, and problem-solving strategies
- Specific questions and consolidation of foundation

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Prima facie in the case of direct discrimination

the **plaintiff** was able to establish...

- the existence of a comparable situation and
- the existence of a disadvantage and
- the inner connection with the protected characteristic

so that he/she is “**prima facie**” a victim of discrimination that can be explained only by the different sex – the connection between disadvantage and the victim’s sex is an apparent motive

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Invalidation of prima facie case

Employer can invalidate this prima facie case by:

providing evidence

- that there is **no comparable** situation and/or
- that there is **no disadvantage** and/or
- of a higher degree of probability of **another motive** for the different treatment, i.e. that this is based on a difference independent of the sex (of the plaintiff)

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Procedure in the case of presumed discrimination

- First, it would be useful to allege **direct** discrimination (disadvantage "based on sex/age")...

If the defendant pleads a ground (motive) for the disadvantage which (motive) is independent of the protected characteristic...

- ...there is still the possibility of considering the existence of **indirect** discrimination

Central question: "Is the one group systematically put at a disadvantage compared to the other on this ground which is neutral for the protected characteristic?"

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Indirect discrimination - Definition

Art. 2(1)(b) Dir 2006/54/EC:

(For the purposes of this Directive, the following definitions shall apply)

... 'indirect discrimination': where an apparently neutral provision, criterion or practice would put persons of one sex at a particular disadvantage compared with persons of the other sex, unless that provision, criterion or practice is objectively justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary.

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Indirect discrimination

The existence of the following has to be examined

- a **comparable situation** and
- a **disadvantage** and

The **cause** of that disadvantage:

...an apparently neutral criterion is particularly likely to... put the persons concerned at a disadvantage (one group more affected by it than the other)

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Prima facie in the case of indirect discrimination

the **plaintiff** was able to establish

- the existence of a **comparable situation** and
- the existence of a **disadvantage**

...

- due to a **criterion** that is **neutral** in terms of the sex in itself, but which is likely to put women at a particular disadvantage compared to men or vice versa

(statistical difference or particular suitability of the neutral criterion), this results in the...

...presumption of discrimination

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Invalidation of prima facie case

Employer can invalidate this presumption by:

providing evidence

- that there is **no comparable** situation and/or
- that there is **no disadvantage** and/or
- of the existence of a **permissible justification** and of the appropriateness of the means

a weighing-up of interests must be carried out...

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Justification of indirect discrimination

- ... between
 - the **rule of equal treatment** and
 - the **desired objective** of the undertaking (the aforementioned justification as to why the systematic disadvantage is not illegal)
- Question: Is the justification (the objective) permissible and the action to achieve that objective appropriate, necessary and proportionate?
- CJEU *Bilka*: Justification possible due to objective factors unrelated to discrimination based on sex, where the **objective serves a genuine need of the undertaking** and the **means are proportionate**

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The CJEU and the burden of proof in the last few years (1)

- *Feryn*: **Public comments** in which an employer makes known that, in the context of his recruitment policy, he will not employ a worker of a given ethnic origin or race, **are sufficient to substantiate a presumption** of the existence of a directly discriminatory recruitment policy. It is then incumbent upon that employer to prove that there was no breach of the principle of equal treatment. He can do this by proving that the actual recruitment practice of the undertaking does not correspond to those comments.
- *Kelly*: Neither Dir 97/80 nor 76/207 or 2002/73 mention the right to disclosure of the relevant documents. **But it cannot be ruled out** that a **refusal** by the defendant **to provide information** in the context of establishing such facts may compromise the achievement of the objectives pursued by Directive 97/80 and, in this way, strip this provision of its practical effectiveness.

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The CJEU and the burden of proof in the last few years (2)

- *Asociatia Accept*: The **statement** of a financier that the Romanian football club FC Steaua will not bring any homosexual players into its team **can be judged to be a fact from which the existence of discrimination may be presumed**. Within the framework of the overall evaluation that the national court hearing the case would then have to carry out, the apparent discrimination based on sexual orientation could then be disproven with a set of mutually corroborative pieces of circumstantial evidence. FC Steaua could have refuted the prima facie case of a discriminating recruitment policy by e.g. clearly distancing itself from those statements.

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CJEU Galina Meister and the ruling of the Federal Labour Court (1)

Ms M sues undertaking for compensation

Pleadings of Ms M:

- her own qualifications match the job description perfectly
- apparent prejudices prevailing due to sex, age, ethnic origin
- general statistics suggest that it is predominantly men who work in the IT industry
- request for production of the successful applicant's application documents

Respondent's defence statement:

- no new placement of the job advertisement after the first rejection letter to Ms M
- booking for a longer-term placement of advertisement
- no entitlement to information on the personnel decision made or the reasons

Court of First Instance dismisses, as does Court of Appeal. Under Section 267 TFEU, the Federal Labour Court seized by means of appeal lays the question before the CJEU as to whether a right to information exists and, if so, the employer's silence on this point is a fact that leads to the presumption of discrimination.

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CJEU Galina Meister and the ruling of the Federal Labour Court (2)

Excerpt from the OPINIONS OF ADVOCATE GENERAL
PAOLO MENGOZZI on the case C-415/10
Galina Meister versus Speech Design Carrier Systems GmbH

Proving discrimination is deemed particularly difficult.

This conclusion is especially applicable where it concerns discrimination in recruitment. In the knowledge of that difficulty, the EU legislative body enacted measures intended to facilitate the petition of the applicants when they assert that they have suffered discrimination, particularly on the grounds of sex, age or origin. **The legislative body made a change to the burden of proof possible without, however, going as far as completely reversing the burden of proof**, as the freedom to which the employer is customarily entitled in decisions regarding the recruitment of his personnel could not be completely disregarded.

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CJEU Galina Meister and the ruling of the Federal Labour Court (3)

CJEU Meister

- Directives 2000/43, 2000/78 and 2006/54 do not contain any specific entitlement to publication of the application documents by the undertaking
- However, it cannot be ruled out that a refusal by the defendant to provide information in the context of establishing such facts may compromise the achievement of the objective pursued by this directive (*Kelly*)
- The national court must be vigilant in ensuring that the refusal of an undertaking to provide information is not liable to compromise the achievement of the objective. It must, in particular, **take account of all the circumstances of the individual case when determining whether there is sufficient evidence** of the existence of discrimination. (Here: complete refusal to provide information, rejection of Ms Meister twice, Ms Meister's qualifications were not disputed)

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CJEU Galina Meister and the ruling of the Federal Labour Court (4)

Federal Labour Court of 25.4.2013, 8 AZR (appeal ref. No.) 287/08
Appeal dismissed as unfounded

Disadvantage was sufficiently expounded (no invitation to interview)

No sufficient explanation of the treatment **“due to”** the grounds

- Conclusive presentation of the facts is necessary
- Actual grounds for allegation must be explained
- Allegation of the existence of a characteristic and the less favourable treatment because of it is insufficient
- Facts presented must, from an objective point of view, indicate causality with preponderant probability – only then “prima facie” case
- Circumstantial evidence systematically indicating a decision motivated in that way with respect to one sex was sufficient
- There is no appeal against the judgement of the Court of Appeal as the facts presented, neither considered in themselves nor in synopsis, substantiate the preponderant probability of causality

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CJEU Galina Meister and the ruling of the Federal Labour Court (5)

- The fact that an applicant who matches the job description is not invited to an job interview does not, from an objective point of view, substantiate the prima facie case that this is based on one of the grounds – there are many possible causes for it (e.g. appearance or content of the application letter)
- If this fact alone were sufficient, an employer would have to invite every applicant who, objectively speaking, appears suitable to a job interview, failing which he would have to furnish proof of non-discrimination
- No statistical data or evidence in the form of figures for the IT industry were presented – there may be various reasons for a possible surplus of male employees (e.g. fewer applications from women)
- Statements in connection with a rejection may indicate existence of a reason for discrimination – however no indication here
- The placement of the advertisement not being cancelled is not circumstantial evidence
- The non-production of the application documents is not circumstantial evidence

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CJEU Galina Meister and the ruling of the Federal Labour Court (6)

- Thus, refusal to provide information does not, considered in itself, constitute circumstantial evidence of the existence of discrimination, as there is no entitlement to information – refusing to provide a piece of information cannot have any unfavourable consequences, otherwise the undisclosed information alone would place the burden of proof on the employer
- According to the CJEU, an exception is made only when the refusal to provide information is liable to compromise the objectives aimed at in the directives
- However, this can be the case only if the rejected applicant at least conclusively explains that and why, because of the information the employer is refusing to provide, it is impossible or at least made unreasonably more difficult for said applicant to set out facts from which an undue disadvantage may be presumed or why the refusal to provide the information constitutes circumstantial evidence of such a disadvantage

Here, we come full circle ...

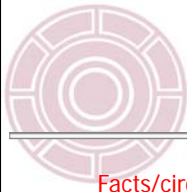
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CJEU CHEZ (1)

- The referring court must consider all the facts connected with the disputed practice in order to determine whether there are **sufficient grounds** to suggest that the **existence of direct discrimination on the grounds of ethnic origin has been proven**, and must ensure that a refusal on the part of the defendant, here CHEZ RB, to provide information in the context of establishing such facts, is not liable to compromise achievement of the objectives pursued by Directive 2000/43.
- In so far as a presumption of discrimination follows from this, CHEZ RB would have to demonstrate that the disputed practice and continuance are based exclusively on objective factors that are unrelated to discrimination due to race or ethnic origin

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CJEU CHEZ (2)

Facts/circumstantial evidence worthy of consideration are, in particular:

- The disputed practice was introduced only in parts of the city in which predominantly Bulgarian nationals of Romany origin are known to live
- The assertion that damage and theft of electricity are perpetrated mainly by those people (possible allusion to ethnic stereotype or prejudices)
- No furnishing of evidence of the alleged damage and tampering with meters and electricity theft, despite relevant requests of this court on the question of the burden of proof; instead only submission that these assertions are common knowledge
- Compelling, generalised and lasting nature of the practice and conclusion that may be drawn therefrom that people of Romany origin could, as a whole, be potential authors of those offences

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Challenges in practical enforcement of the law

- Burden of allegation is (including in discrimination cases) on plaintiff: necessary pleading of all essential allegations – sufficient substantiation of the claim
- Burden of proof rules apply only when court could not be fully satisfied anyway – the term “prima facie” continues to be problematic (what degree of satisfaction should be imposed)?
- Judge must be “satisfied” of the alleged course of events, if necessary (only) by means of circumstantial evidence – personal impression, knowledge of processes, experiences and knowledge of human nature play a big part in this
- No amendment in the next instance – highest courts do not decide on questions of fact – no review of assessment by the lower courts of the evidence

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Conclusion

- There are provisions in European law to facilitate the evidence situation, national provisions must be interpreted in compliance with European law
- Difficulties in the practical enforcement of law in the Member States continue...
- What has to be done:
 - Meticulous search for possible circumstantial evidence/proof
 - Training and awareness-raising of decision-makers regarding patterns and dynamics in discrimination situations
 - Familiarisation with and consistent application of the specific burden of proof provisions in ADR

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Further information

www.gleichbehandlungsanwaltschaft.at

- Information on the Equal Treatment Ombud
- Legal
- Recommendations of the Equal Treatment Ombud
- Current "case of the month"
- Electronic newsletter

Thank you for your attention



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Appendix – CJEU

- CJEU, 30/6/1988, *Commission v. France*, C-318/86
- CJEU, 17/10/1989, *Danfoss*, C-109/77
- CJEU, 27/10/1993, *Enderby*, C-127/92
- CJEU, 10/7/2008, *Feryn*, C-54/07
- CJEU, 21/7/2011, *Kelly*, C-104/10
- CJEU, 19/4/2012, *Meister*, C-415/10
- CJEU, 25/4/2013, *Asociatia Accept*, C-81/12
- CJEU, 16/7/2015, *CHEZ*, C-3/14