

PROCEDURAL PATHS TO HUMAN DIGNITY: ENFORCING THE PROHIBITION OF DISCRIMINATION IN SLOVENIA AND BEYOND

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Abstract: *This paper examines the procedural aspects of protection against discrimination, focusing on the legal framework of the European Union and Slovenia. In Slovenia, protection is ensured both before the equality body and before the courts. Unlike purely advisory institutions, the Slovenian equality body conducts discrimination proceedings that may result in declaratory decisions, while victims may also seek remedies before civil courts, which can order the cessation of discriminatory practices and award compensation. This dual system is problematic, as the competences of the two mechanisms are not clearly delineated, which may lead to conflicting outcomes.*

Key words: *anti-discrimination law, EU law, equality body, effective legal protection.*

1. Introduction

Protection against discrimination cannot be limited solely to substantive legal issues. Rather, in the pursuit of implementing its concepts in practice, it must consider procedural mechanisms. This contribution aims to conceptualize the role of equality bodies, which were established within the legal systems of Member States pursuant to European union (EU) anti-discrimination directives, in relation to other authorities that provide legal protection in cases of discrimination, particularly courts. Equality bodies, which were initially established under EU law merely as advisory entities, have, with the adoption of Council Directive (EU) 2024/1499 of 7 May 2024 on standards for equality bodies in the field of equal treatment between persons irrespective of their racial or ethnic origin, equal treatment in matters of employment and occupation between persons irrespective of their religion or belief, disability, age or sexual orientation, equal treatment between women and men in matters of social security and in the access to and supply of goods and services, and amending Directives 2000/43/EC and 2004/113/EC (OJ L, 2024/1499, 29. 5. 2024), and with Directive (EU) 2024/1500 of the European Parliament and of the Council of 14 May 2024 on standards for equality bodies in the field of equal treatment and equal opportunities between women and

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men in matters of employment and occupation and amending Directives 2006/54/EC and 2010/41/EU (OJ L, 2024/1500, 29. 5. 2024) (collectively as the Equality Bodies Directives), gained the capacity to provide more formalized protection for individuals alleging discrimination. Such a distribution of potential competences raises the question of the position of equality bodies in relation to other decision-making authorities, such as inspectorates, and, above all, courts. The simultaneous allocation of the same competence to different bodies allows for the possibility of conflicting decisions, thereby creating legal uncertainty and, ultimately, inefficiency in providing legal protection. Slovenia serves as an example of such a system, where the equality body is (already) endowed with an authoritative, rather than merely advisory, role.

2. Protection against Discrimination: Selected Authorities, Procedures, and Institutions

Procedural aspects of protection against discrimination are – assuming an appropriate substantive basis – essential for safeguarding the rights of discriminated persons. Procedural regulations must ensure that legal protection is accessible and effective, particularly when one of its objectives is prevention (Ellis & Watson, 2014, pp. 502–507). Legal theory has noted that systems based on individual complaints often overlook the power imbalance between perpetrators and victims, as they shift the burden of legal protection onto the victim. This is evident both with regard to rules on the burden of proof and with respect to the duration and costs of (particularly judicial) proceedings.

Some legal systems attempt to address this systemic gap by establishing bodies whose procedures are less costly and less formalized than judicial proceedings, such as the United Kingdom with employment tribunals, the Equal Opportunities Commission and the Commission for Racial Equality, South Africa with Equality Courts, and the United States with the Equal Employment Opportunity Commission, although these bodies also primarily rely on the proactivity of discriminated individuals (Fredman, 2022, pp. 435–437) (see also Kádár, 2018, p. 145).

Another common mechanism to ease the position of the complainant is the reversed burden of proof, whereby the burden of demonstrating that the principle of equal treatment has not been violated is placed on the respondent. The complainant must first establish facts from which it may be presumed that discrimination has occurred. In accordance with this rule the person seeking legal protection must prove facts allowing a *prima facie* finding of discrimination, after which the respondent must demonstrate that no unequal treatment occurred (Henrard, 2023, p. 428). The reversed burden of proof stems from the recognition that requiring discriminated individuals to provide the evidentiary material and ultimately convincing the court is overly difficult (Henrard, 2023, p. 427). Marginalized groups often have more difficulty accessing relevant information (Roberts, 2021, p. 1690), a challenge that is particularly pronounced in situations of unequal power relations, such as the relationship between an employee and an employer (Ellis and Watson, 2014, pp. 157–163). It should also be noted that proving discrimination can be inherently challenging. The reason for differential treatment is often not explicitly stated or appears to be related to other factors rather than the protected grounds of the individuals concerned (*Priročnik o evropskem protidiskrimacijskem pravu*, 2021, p. 226). In EU law, the Court of Justice of the

European Union (CJEU) initially established the reversed burden of proof, which was later codified as a rule in anti-discrimination directives (Article 8(1) of the Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (the Racial Equality Directive), OJ L 180, 19. 7. 2000, pp. 22–26; Article 10(1) of the Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (the Framework Directive), OJ L 303, 2. 12. 2000, pp. 16–22; Article 9(1) of the Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services (the Gender Equality Directive in the field of goods and services), OJ L 373, 21. 12. 2004, pp. 37–43; and Article 19(1) of the Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast) (the Gender Equality Directive in the field of employment), OJ L 204, 26. 7. 2006, pp. 23–36. The rule on the reversed burden of proof has also been applied, *mutatis mutandis*, in discrimination cases before the European Court of Human Rights (Henrard, 2023) and is likewise recognized within the broader framework of international law (*Priročnik o evropskem protidiskriminacijskem pravu*, 2021, p. 234).

2.1. EU Law: Equality Bodies as (Informal) Guardians

The EU has sought to establish a more accessible mechanism for protection against discrimination through equality bodies. They were first established by the Racial Equality Directive, which, in Article 13, imposed on Member States the obligation to set up a body for the promotion of equal treatment irrespective of racial or ethnic origin. This provision intervenes with the institutional autonomy of the Member States, as it requires them to establish a body competent for the public law protection against discrimination (Rossi and Casolari, 2017, p. 139). In addition to the grounds of race and ethnic origin, equality bodies also promote equal treatment in relation to the grounds of sex, particularly in the areas of access to goods and services, employment, and self-employment – domains covered by other anti-discrimination directives.

Equality bodies are conceived as non-judicial institutions aimed at the promotion of equality (Rossi & Casolari, 2017, p. 133). The text of the directives reveals that the core functions of these bodies are primarily advisory and include providing independent assistance to victims of discrimination in pursuing their complaints, conducting independent surveys concerning discrimination, and publishing independent reports and making recommendations on issues relating to such discrimination. Furthermore, the Gender Equality Directive in the field of employment and the Directive 2010/41/EU of the European Parliament and of the Council of 7 July 2010 on the application of the principle of equal treatment between men and women engaged in an activity in a self-employed capacity and repealing Council Directive 86/613/EEC (the Gender Equality Directive in the field of self-employment, OJ L 180, 15. 7. 2010, pp. 1–6) also envisaged cooperation between equality bodies and relevant EU institutions, such as the European Institute for Gender Equality.

Member States have been granted a relatively broad margin of discretion in establishing equality bodies and determining their modes of operation, which has resulted in significant divergence across the EU (European Commission, 2018, p. 3). The directives permit that equality bodies need not be established as fully autonomous but may instead operate within broader human rights bodies, such as the Human Rights Ombudsman. Nevertheless, one of the core requirements under EU law is the institutional independence of equality bodies (see Recitals (18) and (17) of the Equality Bodies Directives). This requirement is illustrated by the case of Slovenia, where the equality body was initially set up under the Ministry of Labour, Family and Social Affairs and thus within the administrative and executive branch of government (see Draft Protection Against Discrimination Act, EVA 2015-2611-0046). Following a letter of formal notice from the European Commission (violation no. 2014/2093) concerning the independence requirement, Slovenia subsequently established an autonomous and independent public authority responsible for the protection against discrimination (Bedič & Strojan, 2022, p. 1285). The wording of the anti-discrimination directives remains relatively open regarding the functions and competences of equality bodies. Their mandates may therefore range from primarily advisory and promotional activities to more formalised procedures, such as handling individual complaints and issuing (typically non-binding) opinions or decisions (Rossi and Casolari, 2017, p. 142). Equality bodies also provide assistance to victims of discrimination in pursuing their claims, including participation in judicial or administrative proceedings where individuals seek protection on specific protected grounds (Article 7(2) of the Racial Equality Directive, Article 8(3) of the Gender Equality Directive in the field of goods and services, Article 17(2) of the Gender Equality Directive in the field of employment, and Article 9(2) of the Gender Equality Directive in the field of self-employment). It should be recalled that the CJEU has held that equality bodies are not "courts or tribunals" entitled to make references for a preliminary ruling (Case C-394/11 *Belov*, EU:C:2013:48).

The provisions concerning legal protection are regulated separately from those establishing equality bodies. Member States are required to ensure that all persons who consider themselves victims of discrimination have access to judicial and/or administrative procedures, which may also include conciliation processes (Article 7(1) of the Racial Equality Directive, Article 8(1) of the Gender Equality Directive in the field of goods and services, Article 17(1) of the Gender Equality Directive in the field of employment, Article 9(1) of the Gender Equality Directive in the field of self-employment). Furthermore, the Gender Equality Directive in the field of goods and services, the Gender Equality Directive in the field of employment, and the Gender Equality Directive in the field of self-employment require Member States to provide measures ensuring real and effective compensation, which must be dissuasive and proportionate to the damage suffered. In relation to such judicial or administrative proceedings, the anti-discrimination directives establish a rule of reversed burden of proof (Article 8 of the Racial Equality Directive, Article 9 of the Gender Equality Directive in the field of goods and services, Article 19 of the Gender Equality Directive in the field of employment, Article 10 of the Framework Directive).

2.2. Equality bodies in the New Directives

In May 2024, the European Parliament and the Council of the EU adopted two new directives laying down standards for equality bodies. These Equality Bodies Directives expand the competences of equality bodies. The new framework now encompasses protection against discrimination on the grounds of religion or belief, disability, age, or sexual orientation in employment and occupation, as established by the Framework Directive, as well as the promotion of equal treatment between men and women in matters of social security, as set out in Council Directive 79/7/EEC of 19 December 1978 (OJ L 6, 10. 1. 1979, pp. 24–25). The Equality Bodies Directives explicitly require that equality bodies operate independently and be free from external influence in the performance of their functions. They must not receive instructions from governments or from any other public or private entities (Article 3 of both Equality Bodies Directives). The directives also introduce several new procedural instruments. Equality bodies are required to receive and handle discrimination complaints and to offer parties the possibility of alternative dispute resolution – either before the equality body itself or before other competent authorities (Articles 6(2) and 7 of both Equality Bodies Directives). Building on practices developed in the Member States, the new directives allow equality bodies to issue either non-binding opinions or binding decisions (Article 9 of both Equality Bodies Directives). Moreover, equality bodies are empowered to conduct investigations (Article 8 of both Equality Bodies Directives). Where an equality body issues binding decisions, it must have the right to participate in judicial review proceedings concerning those decisions (Article 10(4) of both Equality Bodies Directives). In line with the case law of the CJEU, the directives explicitly grant equality bodies the right to initiate court proceedings on behalf of one or several victims, to participate in judicial proceedings in support of one or several victims, and to bring proceedings in their own name to defend the public interest (Article 10(3) of both Equality Bodies Directives). Member States are required to transpose the new directives into their national legal orders by 19 June 2026 (Article 24(1) of both Equality Bodies Directives).

Building upon the newly adopted framework, Member States retain a relatively broad margin of discretion regarding the organisation and operation of equality bodies. These bodies may adopt either non-binding or binding decisions concerning the existence of discrimination. Such an arrangement raises questions about the relationship between equality bodies and other authorities competent to adjudicate discrimination cases, particularly the courts. In other words, it calls into question whether a binding decision of an equality body on the (non-)existence of discrimination has binding effects on other authorities dealing with the same legal and factual issues. EU law does not regulate these matters, leaving them instead to the autonomy of the Member States.

Slovenia serves as an illustrative example of a system envisaging binding decisions and the related challenges. Slovenia has not yet, however, transposed the new Equality Bodies Directives into its national legal order.

3. The Case of Slovenia: Discrimination Between Equality Bodies and the Judiciary

3.1. General procedural framework

Slovenia established its equality body, the Advocate of the Principle of Equality (the Advocate), through the Protection Against Discrimination Act (PADA, Official Gazette of the Republic of Slovenia, No. 33/16 et seq.) in 2016. As explained above, the establishment of the Advocate followed a formal notice from the European Commission, which held that Slovenia's equality body, organized as part of the competent ministry, lacked the necessary independence (Bedič & Strojan, 2022, p. 1285). The PADA transposed most EU anti-discrimination directives into the Slovenian legal order, while its scope is broader than that of the EU legislation. The prohibition of discrimination applies to all state authorities, local community bodies, holders of public authority, as well as private law entities, in the fields of employment, social protection, education, and access to goods and services (Article 2(1) PADA). Moreover, the list of protected grounds under PADA is broader than in EU law – the protected grounds are illustrative rather than exhaustive (Article 1 PADA).

In Slovenia, the protection against discrimination is divided among several state authorities. Under PADA, the Advocate performs advisory and promotional functions, such as conducting independent research in the field of discrimination, publishing independent reports, raising public awareness, and monitoring the situation in Slovenia (Article 21 PADA). In addition, the Advocate conducts administrative proceedings to determine whether discrimination has occurred. The competence to conduct administrative proceedings is, however, contested. PADA does not explicitly authorise the Advocate to conduct such declaratory proceedings; instead, it empowers the Advocate to issue regulatory decisions ordering the elimination of irregularities, to propose the adoption of measures to prevent further discrimination or to remedy its consequences, and to prohibit further discriminatory conduct (Article 42(3) PADA). The Advocate takes the position that PADA should explicitly provide that a request for consideration constitutes the initiation of an inspection procedure. Consequently, the Advocate does not conduct such procedures but instead carries out proceedings for determining discrimination, in which only a declaratory decision is issued (Advocate of the Principle of Equality, 2019, pp. 46–48). In addition to the provisions of PADA, the Advocate conducts proceedings in accordance with the law governing general administrative procedure (see Article 3 of the General Administrative Procedure Act, GAPA, Official Gazette of the Republic of Slovenia, No. 24/06 et seq.). The Advocate may initiate proceedings on the basis of a complaint submitted by a person who believes they have been discriminated against, in which case that person acquires the status of a party to the proceedings, or *ex officio* if the Advocate becomes aware of the existence of discrimination (Articles 33 and 34 PADA). In proceedings before the Advocate, the rule on the reversed burden of proof applies (Article 40 PADA). Decisions of the Advocate may be challenged before the competent Administrative Court. Another important competence of the Advocate is the ability to request a constitutional review of laws or regulations deemed discriminatory (Article 38 PADA). For instance, the Advocate submitted a request to the Constitutional Court to review the constitutionality of

provisions that restricted same-sex couples from entering into marriage and adopting children (Advocate of the Principle of Equality, 2021, p. 76), as well as provisions that prevented single women from accessing medically assisted reproduction (Advocate of the Principle of Equality, 2025, pp. 85–86).

Separate from the proceedings before the Advocate, PADA provides for legal protection before civil courts. A person who believes they have been discriminated against may bring an action seeking an end to discrimination, the payment of compensation, or the publication of the ruling in the media (Article 39(1) PADA). In judicial proceedings, it is generally not possible to request a mere declaratory finding of discrimination, as such a finding is already implicit in claims seeking the payment of compensation (see e.g. the judgment and order of the Higher Labour and Social Court, Pdp 533/2015 of 5 November 2015). It should be noted that the general lack of competence to issue declaratory decisions on the existence of discrimination may be inconsistent with the requirements developed by the CJEU concerning the effective, proportionate and dissuasive nature of sanctions for discrimination (Case C-30/19 *Diskrimineringsombudsmannen v Braathens Regional Aviation AB*, EU:C:2021:269). In addition, the Advocate may represent a person seeking protection against discrimination before ordinary courts, provided that the person performing procedural acts on behalf of the Advocate is employed by the Advocate and has passed the state bar exam (Article 41(1) PADA).

Given the statutory provisions, such regulation is problematic, as the competences of the Advocate and the courts – at least in the part relating to the elimination or prohibition of discrimination – overlap. The parallel competence of two different authorities, which may consequently adopt conflicting decisions, is inconsistent with the principle of legal certainty, a fundamental element of the rule of law (Concurring opinion of judge Pavčnik to the Decision of the Constitutional Court of the Republic of Slovenia, U-I-6/17 of 20 June 2019).

3.2. Binding effect of the advocate's declaratory decisions?

Neither Slovenian case law nor legal theory has yet critically examined in detail the competences granted to the Advocate under PADA. The (contested) practice of the Advocate raises the question of the relationship between the binding decisions issued by the Advocate in the form of administrative declaratory decisions and other state authorities. Courts do not, at least not in the operative part of their judgments, make an explicit finding as to the existence or non-existence of discrimination. The determination of discrimination is a prerequisite for a court to order an end to discrimination, the payment of compensation, or the publication of the judgment (see the judgment and order of the Higher Court in Ljubljana, I Cp 616/2022 of 28 June 2022).

The fundamental question, therefore, is whether courts are bound, in their decision-making, by a finding of discrimination previously determined by the Advocate of the Principle of Equality. This problem can be analysed through the legal institute of the preliminary issue, defined in legal theory as an issue concerning the existence of a right or legal relationship, the resolution of which determines the merits of the main case

(Dugar et al., 2018, p. 278). A preliminary issue is not the subject of a decision on the main case, but it may become the subject of a decision in another proceeding before a court or administrative authority (Ude et al., 2005, p. 121). If the preliminary issue has already been resolved by the competent authority, the principle of binding effect applies. Similarly, in administrative relations, a civil court is in principle bound by a final decision of an authority in which that authority has adjudicated on a right or legal relationship as the main matter. However, this is subject to the limitations arising from the rules on the objective and subjective scope of finality (Ude et al., 2005, pp. 130–134), which will not be examined here in detail. If the preliminary issue has not yet been resolved by a court or other competent authority, the court may resolve it itself; such a resolution does not form part of the operative part of the judgment on the main case and does not bind any other authority. If the court resolves the preliminary issue itself and the competent authority subsequently issues a different decision, this constitutes grounds for reopening the civil proceedings (Ude et al., 2005, pp. 134–135).

Only a legal matter that the legislator has entrusted to a competent authority empowered to decide with *res judicata* effect can be treated as a preliminary issue (Kerševan & Androjna, 2017, p. 258). As already indicated, Slovenian law does not explicitly grant the Advocate the competence to conduct proceedings concluding with a declaratory decision confirming or rejecting the existence of discrimination. Therefore, the mere determination of discrimination cannot be considered a competence of the Advocate. The Advocate may establish the existence of discrimination only with regard to measures to be adopted in inspection proceedings – namely, the elimination of irregularities, proposals for preventive or remedial measures, and the prohibition of further discrimination – but not in the operative part of the decision. Due to this contested competence, it cannot be assumed that courts are bound by a prior decision of the Advocate when deciding on an end to discrimination, the payment of compensation, or the publication of the ruling. It follows that the existence of discrimination must be established by the courts themselves for the purpose of adjudicating the claim.

This practice and regulatory framework are problematic from several perspectives. The Advocate's competence to issue binding decisions – beyond its advisory powers – is hollow, as courts may decide differently on the same legal and factual matters in subsequent proceedings. From the perspective of victims of discrimination, a prior declaratory decision of the Advocate does not guarantee that courts will find discrimination as well and grant the claim.

It should also be taken into account that proceedings before the Advocate are more favourable to the parties, being procedurally less complex and, above all, more cost-accessible. PADA provides that proceedings before the Advocate are free of charge for the parties (Article 35(1)). Under Slovenian law, the Advocate also has investigative powers (see Articles 37(1) and 139 GAPA), which do not apply in judicial proceedings, where the adversarial principle prevails. It is also significant that in proceedings before the Advocate, parties do not need a qualified representative, such as a lawyer (see Article 53 GAPA), which is not necessarily the case in judicial proceedings (see Articles 87 et seq. Civil Procedure Act, Official Gazette of the Republic of Slovenia, No. 73/07 et

seq.). It is therefore likely that victims of discrimination would first turn to the Advocate and, following a potentially favourable decision, subsequently initiate judicial proceedings seeking an end to discrimination, compensation, or publication of the ruling. The value of these more accessible proceedings, in which a person can first verify the existence of discrimination, is significantly undermined if other state authorities are not bound by the Advocate's findings.

Thus, despite its practice of issuing binding declaratory decisions, the most important function of the equality body in Slovenia remains its advisory role. It is therefore necessary to reconsider how the competences of the Advocate should be more appropriately regulated and defined in relation to other state authorities, both in terms of parallel competences and the binding nature of its decisions.

4. Conclusion

The law against discrimination, due to specific features inherent to this legal field, requires procedural adaptations that enable effective implementation of the principle of equal treatment. The EU has addressed some of these issues through its anti-discrimination directives. Among others, it required Member States to establish equality bodies, which, given the institutional autonomy, vary significantly across jurisdictions: from bodies with competences limited to advisory and promotional functions, to those empowered to make substantive decisions, as well as institutions combining elements of both (Kádár, 2018, p. 147). The new Equality Bodies Directives seek to harmonise those standards. However, the EU does not regulate the relationships between equality bodies and other state authorities, such as courts, leaving this to the autonomy of Member States. An unclear division of competences between equality bodies and other authorities that are likewise competent to rule on discrimination may result in contradictory decisions and, ultimately, undermine the role of equality bodies.

The current Slovenian framework provides an illustrative example of inadequate regulation. PADA does not clearly define the competences of the Advocate of the Principle of Equality, and as a result, the Advocate cannot conduct inspection procedures to remedy discrimination through regulatory decisions (Advocate of the Principle of Equality, 2019, pp. 40–42). Even if such a competence were unambiguously granted, it would raise concerns from the perspective of legal certainty, as the same power is also given to the courts. As the Advocate does not exercise inspection powers, it issues only declaratory decisions confirming or rejecting the existence of discrimination. Nevertheless, this competence lacks a clear legal basis, resulting in the Advocate's decisions not being binding upon other state authorities competent to adjudicate discrimination cases. Slovenia will have to address this inconsistency in the process of transposing the new Equality Bodies Directives, particularly since Article 9(2) of both directives requires equality bodies, in their decisions, to indicate specific measures to remedy any breach of the principle of equal treatment found and to prevent further occurrences.

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