On the Assessment of Discrimination in Private Law Relationships

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ABSTRACT

In the EU, non-discrimination is a general principle and a fundamental right, developed primarily within EU employment law and extended only partially to consumption matters – confined largely to discrimination on the grounds of gender, ethnic origin, and nationality. The Slovenian legislator has gone beyond the scope of EU secondary law by prohibiting discrimination based on all personal characteristics in both the public and private sectors with the adoption of the Protection Against Discrimination Act. As a result, the EU Charter of Fundamental Rights does not apply to all areas covered by the Act. Still, as this contribution demonstrates, even where the Charter and the CJEU extensive case law are not formally applicable, their principles remain highly relevant as interpretive guidance, helping to shape the standards for assessing equality and discrimination. A central question raised by the assessment of discrimination in private law relationships, and one that this article seeks to explore, is whether the prohibition of discrimination applies and is to be interpreted identically in the context of both public and private actors.

Keywords: prohibition of discrimination, private law relationships, EU Charter of Fundamental Rights, Protection Against Discrimination Act, proportionality test, method of practical concordance

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O presoji diskriminacije v zasebnopravnih razmerjih

POVZETEK

V EU je prepoved diskriminacije tako splošno načelo kot temeljna pravica, ki je bila razvita predvsem v okviru zaposlovanja in le delno razširjena na področje ponujanja blaga in storitev na trgu – in sicer na podlagi spola, etnične pripadnosti in narodnosti. Slovenski zakonodajalec je s sprejetjem Zakona o varstvu pred diskriminacijo presegel obseg sekundarnega prava EU, saj je prepovedal diskriminacijo na podlagi vseh osebnih značilnosti tako v javnem kot v zasebnem sektorju. Zato Listina EU o temeljnih pravicah ne velja na vseh področjih, ki jih zajema ta zakon. Kljub temu, kot prikazuje ta prispevek, tudi kadar se Listina in obsežna sodna praksa Sodišča EU formalno ne uporabita, njuna načela ostajajo pomembna kot smernice za razlago, saj pomagajo oblikovati standarde za presojo enakosti in diskriminacije. Osrednje vprašanje, ki ga postavlja presoja diskriminacije v zasebnopravnih razmerjih, in ki ga ta članek naslavlja, je, ali se prepoved diskriminacije uporablja in razlaga enako v kontekstu javnih in zasebnih akterjev na trgu.

Ključne besede: prepoved diskriminacije, zasebnopravna razmerja, Listina EU o temeljnih pravicah, ZVarD, test sorazmernosti, metoda praktične konkordance

1. Introduction

This contribution examines the application of the principle of non-discrimination in the field of access to and supply of goods and services, a domain traditionally regulated by private law and shaped by the autonomy of the contracting parties. In the EU, non-discrimination is a general principle and a right primarily rooted in EU employment law,

which has been extended to consumption matters, though so far only with regard to gender, ethnic origin, and nationality (Council Directive 2000/43/EC, 2000; Council Directive 2004/113/EC, 2004). The Slovenian legislator has gone beyond the scope of EU secondary law by prohibiting discrimination based on all personal characteristics in both the public and private sectors with the adoption of the Protection Against Discrimination Act (ZVarD). As a result, the prohibition of discrimination in consumption matters based on certain personal characteristics, like age, does not derive from EU law, which precludes the applicability of the EU Charter of Fundamental Rights (the Charter) under Article 51(1) in certain contexts. Nevertheless, as this contribution demonstrates, the Charter and the Court of Justice of the EU's (CJEU or the Court) extensive jurisprudence remain crucial reference points for interpreting domestic legal concepts in fields where established national practice is lacking.

The ZVarD has been in force in Slovenia for almost a decade. During this time, it has slowly begun to take effect in administrative and judicial practice. Its main objective is to transpose five EU anti-discrimination directives relating to race or nationality (Council Directive 2000/43/EC, 2000), employment and work (Council Directive 2000/78/EC, 2000), equal treatment of men and women in access to and supply of goods and services (Council Directive 2004/113/EC, 2004), equal treatment of men and women in employment and occupation (Directive 2006/54/EC, 2006), and rights in the context of the free movement of workers (Directive 2014/54/EU). As mentioned, the legislator decided that the ZVarD would generally apply to both public and private entities (legal and natural persons), including when it comes to trading in goods and services ("access to and supply of goods and services which are available to the public, including housing"; Article 2(1) ZVarD). In the latter case, the ZVarD provides for a higher level of protection than that provided for in secondary EU legislation.

This article will discuss the application of ZVarD in horizontal (also private law or civil law) relationships in the context of access to and supply of goods and services. The prohibition of discrimination in private law relationships is more commonly discussed in the field of employment law. In this regard, the CJEU has played an important role, confirming that Article 21 of the Charter, which prohibits discrimination, and Article 31 (2) of the Charter, which contains the right to paid annual leave, also have horizontal direct effect, meaning that parties can also invoke them in private law relationships (see, e.g., CJEU, C-569/16 and C-570/16, 2018; CJEU, C-414/16). However, when it comes to offering goods and services to consumers or other individuals, such explicit general prohibition of discrimination is new in the Slovene legal system and, as such, also presents a challenge for practice since legal standards are yet to be developed.

Well-known cases of alleged discrimination in the sale of goods or the provision of services concern situations in which bakeries in the US and the UK refused to produce cakes ordered by same-sex couples on grounds of the owners' religious or moral convictions (the so-called "gay cake" cases; *Lee v Ashers Baking Company Ltd and others*, 2018; *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, 2018). In Slovenia, a topical debate emerged in 2025, when a spa resort decided to offer its services exclusively to adults or to individuals above the age of fourteen. Although the "adults-only" business model is common in other jurisdictions, this instance marked its first application in Slovenia. The compliance of this practice with ZVarD was assessed by the Advocate of the Principle of Equality (Equality Advocate), who concluded that it did not constitute discrimination (Decision of the Advocate of the Principle of Equality, 17. 7 2025).

A central question raised by this assessment, and one that this article seeks to explore, is whether the prohibition of

discrimination applies and is to be interpreted identically in the context of both public and private actors. More specifically, should the strict proportionality test, which permits differential treatment under certain conditions in public-law settings, be adapted or reconceptualised when applied to relationships governed by private law?[1]

2. On fundamental rights in private law relationships

Fundamental rights are traditionally understood as part of public law, as limitations on state power, and as such incompatible with the autonomy of private law. Traditionally, therefore, fundamental rights have served to protect individuals from interference by public authorities, i.e., in vertical legal relationships. However, for some time now, they have no longer been understood merely as rights that protect individuals only against public authorities, but also have an effect on private law relationships (see, e.g., Trstenjak and Weingerl, 2016).

Initially the doctrine of "indirect effect" of fundamental rights on private law (*mittelbare Drittwirkung*) was recognised, but today it is increasingly accepted that they can be applied also directly in certain contexts. However, the European Convention on Human Rights and Fundamental Freedoms (ECHR) does not apply directly to disputes in the civil-law sphere, as it binds only states. Nevertheless, the European Court of Human Rights (ECtHR) has developed certain mitigating doctrines through the concept of positive ob-

[1] For some more or less recent discussions of the topic of proportionality and private law, see, inter alia: Cauffman, 2015; Kennedy, 2011; Koref, 2024. These discussions mainly deal with the use of "proportionality language in general contract doctrine" which is "distinct from the invocation of a public law-proportionality analysis in the constitutionalised private law context." (Xing Tan, 2020, p. 243). Bauer (2023, p. 25) developed a distinction between "genuine private law proportionality" in contrast to "constitutionally infused proportionality". Thus, they discuss two colliding private law principles. In contrast, this contribution discusses the collision of fundamental rights in relationships between private parties. See also Bauer, Köhler, 2023.

ligations, requiring states to take measures that influence the conduct of private actors (See Section 3.2.). By contrast, the Charter may, under certain circumstances, also bind individuals. Article 51(1) of the Charter, which defines its personal scope of application (*ratione personae*), does not explicitly refer to individuals. However, the CJEU has recognised that provisions of the Charter may, in principle, have horizontal direct effect, and may therefore be invoked in disputes between private parties where the relevant conditions are met. The Court has already confirmed such horizontal applicability in relation to the prohibition of discrimination under Article 21, the right to paid annual leave under Article 31(2), and the right to an effective remedy and a fair trial under Article 47 of the Charter (CJEU, C-569/16 and C-570/16, 2018; CJEU, C-414/16, 2018).

In Slovenia, the effect of constitutional rights on private-law relationships is governed by Article 15 of the Constitution of the Republic of Slovenia (Constitution), which provides that human rights and fundamental freedoms shall be exercised directly on the basis of the Constitution. In principle, this also extends to horizontal relationships. In practice, however, references to constitutional rights in civil-law adjudication remain relatively rare and typically arise in cases concerning the infringement of personality rights (Article 134 of the Code of Obligations) or claims for non-pecuniary damages resulting from such infringements (Article 179 of the Code of Obligations). While human rights historically developed as safeguards against arbitrary state interference, personality rights are conceived as fundamental rights of individuals likewise applicable in their relations with one another (Finžgar, 1985, pp. 60, 62).

Protection under Articles 134 and 179 of the Code of Obligations is therefore designed to safeguard personality rights within private-law relationships. When conflicts between different rights arise in such relationships, courts apply the method of practical concordance. This means that conflicts

between two rights at the horizontal level are resolved, both in constitutional doctrine and judicial practice, by assessing the relative weight[2] of the competing rights, taking into account the relevant circumstances of the case and the intensity of the interference. On this basis, courts determine, on a case-by-case approach, the rule governing the coexistence of the rights in question, that is, the extent to which the exercise of each right must be restricted to the minimum degree necessary to ensure the effective realisation of the other (USRS, Up-472/20-23, 2024, para. 25; USRS, U-I-191/09, Up-916/09, 2010, para. 12; VSRS, II Ips 23/2020, 2020; VSRS, II Ips 25/2019, 2018; see also Zobec, 2011). This method, coined by Konrad Hesse, is applied also in practice of other constitutional courts, e.g. also by the German Constitutional Court (Poscher, 2024, p. 26; see also Marauhn, Ruppel, 2008, pp. 273–296; Brems, 2008). Some scholars prefer different expressions for this method of "rights optimisation", e.g. "compromise" (Smet, 2017, p. 73).

Examples include conflicts between freedom of expression and the right to privacy in media reporting, or between the right to property and the right to a healthy living environment (see also Article 133 of the Code of Obligations). Importantly, such balancing may never result in depriving either right of its essential, constitutionally protected content (Zobec, 2011, p. 16). In performing this assessment, courts may draw on criteria developed in the extensive case law of the ECtHR, the Constitutional Court of Slovenia, and the Supreme Court of Slovenia. Though, the interpretative standards developed by the ECtHR cannot be transposed mechanically to private-law relationships; rather, they must be appropriately adapted to the distinct normative and doctrinal context of civil law (Weingerl, 2025).

[2] This contribution uses concepts which encompass "weighing" terminology for pragmatic reasons. Some scholars rightly argue that human rights do not have weight and cannot be balanced against each other due to their incommensurability. See e.g. Smet, 2017, p. 3; Möller, 2012, pp. 25 and 137–139; Letsas, 2023.

However, this method is not compatible with the assessment of the admissibility of restrictions on human rights by public authorities in vertical relationships. The method of practical concordance involves testing the narrow scope of the exercise of conflicting rights, so that the exercise of one individual's right does not result in excessive interference with the rights of another (USRS, Up-1005/15, Dissenting opinion of Dunja Jadek Pensa, 2018). When assessing the permissibility of interference with a right in a vertical relationship, the right is the object of protection, and the permissibility of its restriction is assessed by a strict proportionality test, in which the right is weighed against the constitutionally permissible objective that the measure is intended to achieve (VSRS, II Ips 23/2020, 2020; see also USRS, Up-1005/15, Dissenting opinion of Dunja Jadek Pensa, 2018). In this context, the appropriateness, necessity, and proportionality of the measure in the narrow sense (*stricto sensu*) are assessed (*ibid.*). However, in the private law context, there is no one-dimensional relationship between the objective and the means, as is characteristic of the vertical proportionality test (see e.g. Jouannaud, 2023, p. 46).

When discrimination by private entities arises in the context of offering goods and services on the market, the situation does not always involve a classic conflict of personality rights requiring mutual balancing. Rather, in certain contexts it concerns the conduct of private actors that increasingly resembles the exercise of regulatory power (cf. Leczykiewicz, 2013, p. 492). This occurs, for example, when individuals, through their decisions or practices, exclude certain persons or social groups from their offer – that is, when they refuse to conclude contracts with them within the framework of contractual freedom. Examples include hotels providing services exclusively to adults, saunas accessible only to women, or barbers offering services solely to men.

Freedom of contract forms part of the broader freedom to conduct a business, which constitutes a fundamental right

protected by Article 74 of the Constitution and Article 16 of the Charter (CJEU, C-283/11, 2013). In exercising this freedom, private actors must ensure that they do not interfere impermissibly with the rights of other individuals participating in the market. This raises the central question: to what extent may a provider of goods or services legitimately exclude certain groups from access to their offer?

In this context, the question of justifying interference with contractual freedom is important but beyond the scope of this article. Contractual autonomy, a fundamental principle of private law, has always been limited by considerations such as public order and protection of weaker parties. The prohibition of discrimination extends this tradition, ensuring that fundamental rights are effective in private relationships, consistent with the logic of the internal market. Contractual freedom does not, in principle, include a freedom to exclude.

3. Prohibition of discrimination in EU law and the ECHR

3.1. Prohibition of discrimination in EU law

3.1.1. Introductory remarks

Equality and non-discrimination are recognised as fundamental values of the EU, as reflected in Article 2 TEU. They also constitute central elements of European integration, supporting the functioning of the internal market. As it is well-known, over time, the EU's equality framework has evolved from an instrument of economic integration into a tool for empowering individuals, developing over the past five decades from a market right into a social and ultimately a fundamental right.

At the level of primary law, the key Treaty provisions prohibiting discrimination are Article 18 TFEU, which prohib-

its discrimination on grounds of nationality, and Article 19 TFEU, which empowers the Union to enact legislation combating discrimination on grounds including sex, racial or ethnic origin, religion or belief, disability, age, and sexual orientation. Article 10 TFEU further commits the EU to mainstreaming the fight against discrimination across all its policies.

The Charter is also important. Article 21 enumerates a broad range of protected personal characteristics, such as sex, race, colour, ethnic or social origin, language, religion or belief, disability, age, and sexual orientation, though Article 51 ensures that the Charter does not extend the competences of the Union beyond those conferred by the Treaties (see CJEU, C-256/11, 2011, para. 71).

In EU secondary law, EU anti-discrimination legislation initially applied only to gender equality in employment and social security (FRA, Handbook on European non-discrimination law – 2018 edition). With the Treaty of Amsterdam (1999), the EU obtained an explicit legal basis for combating discrimination on multiple grounds (Article 13 TEC), leading to the adoption of key directives: Directive 2000/43/EC (racial or ethnic origin), which has the broadest scope and covers areas including access to goods and services; Directive 2000/78/EC (religion or belief, disability, age, sexual orientation) in employment; and Directive 2004/113/EC (sex) in access to goods and services. A proposal for a horizontal anti-discrimination directive was tabled in 2008 but has yet to be adopted. The Commission has resumed efforts to revive it in 2025.

3.1.2. Prohibition of discrimination between private parties

As shown above, in private-law relationships it is necessary to distinguish between discrimination in employment and occupation on the one hand, and discrimination in ac-

cess to goods and services on the other. The former covers a wider range of protected characteristics, while Directive 2004/113 prohibits discrimination solely on grounds of sex. In addition, Directive 2000/43 bans discrimination based on race or ethnic origin in several areas, including access to goods and services.

These directives allow for differences in treatment if they are justified by a *legitimate aim*, while any limitation should be *appropriate* and *necessary* in accordance with the criteria derived from case law of the CJEU (Articles 2 and 4(5) and recital 16 of Directive 2004/113. Emphasis added). The 'proportionality' element of the strict proportionality test is not mentioned by the Directives. When adjudicating cases of fundamental rights in conflict, the CJEU emphasises that a "fair balance" must be struck between different fundamental rights in question. Importantly, the CJEU does not favour a solution in which one of these parties' rights prevails over the others. Instead, the Court arguably seeks an equilibrium between the fundamental rights in conflict (Smet, 2017, p. 227). This resembles of the method of practical concordance or the search for a compromise between different fundamental rights.

The CJEU has developed extensive case law on discrimination in employment, largely due to incorrect national transposition of Directive 2000/78 and the resulting questions about the horizontal application of the Charter (see e.g. CJEU, C-414/16, 2018; though differently CJEU, C-157/15, 2017). Although these disputes occur in horizontal settings, the core problem is usually vertical: a Member State's failure to fulfil its obligations under the Treaties (Weingerl, 2019, pp. 110-111).

A similar dynamic is visible with Directive 2004/113 on equal treatment between men and women in access to goods and services. In the *Test-Achats* judgment, the Court annulled the provision of the Directive permitting gender-based actuarial factors in insurance. Although the dispute

involved private insurance contracts, the underlying issue was again vertical, stemming from the incompatibility of EU secondary law with fundamental rights (CJEU, C-236/09 2011).

3.2. Prohibition of discrimination in the ECHR

3.2.1. Introductory remarks

Under the ECHR, discrimination is prohibited by Article 14, which requires that all rights and freedoms under the Convention be secured without discrimination on grounds such as sex, race, colour, language, religion, political opinion, national or social origin, property, birth, or "other status."[3] The ECtHR has expanded these grounds to include, for example, age, sexual orientation, and disability. Importantly, Article 14 can be invoked only in conjunction with another Convention right.

The ECHR contains no definition of discrimination, so the ECtHR has developed one through its case law. A claim under Article 14 requires a difference in treatment between persons in analogous situations based on a protected ground. The applicant must show they are in a comparable situation to others treated more favourably (Nilsson, 2020, p. 128). There is debate over whether Article 14 focuses primarily on equal treatment (Aristotle's maxim that "like cases should be treated alike" (Aristotle, 2020, paras 1131a–b) or on addressing structural disadvantage. In practice, it covers both unequal treatment and measures that create or reinforce social disadvantage (Nilsson, 2020, p. 128).

Article 14 of the ECHR not only includes the obligation for the state to refrain from adopting and implementing discriminatory laws and policies, but also numerous positive obligations to combat discriminatory acts by private parties (see e.g. Nilsson, 2020, p. 129).

[3] Emphasis added.

Not all unfavourable treatment linked to a protected ground amounts to a violation. Differential treatment may be justified if it pursues a legitimate aim and is proportionate. The ECtHR's proportionality analysis aligns with Alexy's widely adopted four-stage model (Alexy, 2010, p. 66; this model is not without alternatives, see e.g. Smet, 2017, p. 9; Jakab, 2025): (1) the measure must pursue a legitimate aim; (2) it must be suitable to achieve that aim; (3) it must be necessary, meaning no less restrictive but equally effective alternative exists; and (4) it must be proportionate in the strict sense (*stricto sensu*), requiring a balancing of the competing interests.

3.2.2. Prohibition of discrimination between private parties

Under the ECHR, complaints must be directed against a Contracting State to be admissible *ratione personae*, making proceedings before the ECtHR inherently vertical, with an individual suing the state (Article 34 ECHR). However, many cases originate from disputes between private actors at the domestic level – so-called "verticalized" cases (Loven, 2020, p. 2). Here, a private party initially sues another private party in national courts, then brings a complaint to the ECtHR due to the state's (in)action, effectively converting a horizontal dispute into a vertical one (Loven, 2020, p. 2).

Over time, the ECtHR has extended substantive protection of Convention rights in private-law relationships by imposing horizontal positive obligations on states, requiring them to take measures ensuring that private actors respect these rights. These obligations arise from the state's responsibility for its acts and omissions regarding private conduct (Loven, 2020, p. 2). Thus, domestic horizontal disputes are "verticalized" before the ECtHR, and imposing positive obligations remains the Court's primary means of protecting rights between private parties.

Notably, the ECtHR case law should not be uncritically applied to domestic horizontal disputes. As Smet argued, a failure to treat conflicts between human rights as special has detrimental consequences for human rights practice (Smet, 2017, p. 35). On the conception of proportionality employed by the ECtHR, treating human rights conflicts identical to "traditional" human rights cases causes the so-called "preferential framing" (Smet, 2017, p. 35). As Smet explains, the procedural logics of the ECHR system are partially responsible for "preferential framing" effects, "leading the ECtHR to frame the case around the directly invoked human right, while disregarding (to a greater or lesser extent) the importance of the other human right at stake" (Smet, 2017, p. 36). Protection of the invoked human rights is the rule; justified restrictions are the exception. The Court's proportionality test is thus loaded in favour of the invoked human right. This makes perfect sense when a human right is opposed by a public interest, but if the same logic is applied to conflicts between human rights, "preferential framing" effects unjustifiably skew the Court's reasoning in favour of the directly invoked human right, and against the other human right at stake (Smet, 2017, p. 36).

4. ZVarD and prohibition of discrimination

4.1. Introductory on ZVarD

The ZVarD, adopted in 2016, replaced the earlier Act on the Implementation of the Principle of Equal Treatment (ZUNEO). While ZUNEO guaranteed equal treatment in access to and supply of goods and services, including housing (Article 2), it did not explicitly bind private individuals or legal persons.

The ZVarD protects individuals from discrimination on grounds including gender, nationality, race or ethnic origin, language, religion or belief, disability, age, sexual orienta-

tion, gender identity and expression, social or financial status, education, or any other personal circumstance in various social, political, economic, cultural, and civil contexts (Article 1(1) ZVarD). Like the Charter and the ECHR, it provides illustrative rather than exhaustive examples of protected personal circumstances.

The Advocate of the Principle of Equality (Equality Advocate), as an independent state body established on the basis of the ZVarD, plays a key role in the implementation of this right in both the public and private sectors (Article 19 et seq. ZVarD). Judicial protection against the decisions of the Equality Advocate is possible in administrative disputes before the Administrative Court of the Republic of Slovenia, while individuals can seek legal protection also in civil court proceedings (Articles 42(5) in 39 ZVarD).

In proceedings concerning discrimination, the burden of proof is reversed (Article 40 of the ZVarD). This means that in cases of proven suspicion of discrimination, it is up to the alleged perpetrator to prove the possible legitimacy of their practices.

4.2. Discrimination and unequal treatment

ZVarD prohibits discrimination, which includes any unjustified differential treatment, direct or indirect, based on personal circumstances that hinders or nullifies the enjoyment of rights and freedoms (Article 4 ZVarD). Other prohibited forms include harassment, sexual harassment, instructions or incitement to discriminate, and retaliation (victimization) (Article 7 ZVarD). Equal treatment is defined as the absence of discrimination or any conduct constituting discrimination under the ZVarD (Article 5(1) ZVarD).

Direct discrimination occurs when a person or group is treated less favourably due to a personal characteristic. Indirect discrimination arises from apparently neutral measures that place certain individuals at a disadvantage, unless

justified by a legitimate aim with appropriate and necessary means.

To this end, two types of horizontal relationships are relevant under the ZVarD. First, private entities may offer goods or services exclusively to certain consumers (e.g., men, women, adults), which constitutes direct discrimination. Second, goods or services may be offered to all, but under conditions that may indirectly exclude certain individuals, constituting indirect discrimination.

The ZVarD appears to apply two distinct tests to justify unequal treatment: one for direct discrimination and another for indirect discrimination. Direct discrimination may be justified if it is "based on a *legitimate aim* and the means of achieving that aim is *appropriate*, *necessary*, and *proportionate*."[4] Indirect discrimination is justified if an apparently neutral provision, criterion, or practice is "objectively based on a *legitimate aim* and the means of achieving that aim is *appropriate* and *necessary*."[5] Thus, similarly as in the EU anti-discrimination directives, ZVarD does not prescribe the third limb of the strict proportionality test (proportionality *stricto sensu*) for the assessment of the indirect discrimination. This opens the space for the method of practical concordance. This method should in any case be applied to both forms of discrimination, in accordance with the established judicial and constitutional practice in horizontal relationships and as specifically required by the Administrative Court of the RS in the ZVarD context (see section 5 below).

Article 13 outlines exceptions allowing for direct discrimination. In employment and work, direct discrimination is largely prohibited, with limited statutory exceptions. In other areas, such as social protection, education, and access to goods and services, unequal treatment based on nationality, race, or ethnic origin is always prohibited. Unequal treatment based on sex may be justified when providing services

[4] Emphasis added.
[5] Emphasis added.

exclusively or primarily to one sex, if it meets the proportionality test (legitimate aim, appropriate, necessary, and proportionate means). Examples include offering fitness services, saunas, changing rooms, etc. exclusively to women. Direct discrimination on other grounds, such as age or sexual orientation, may also be justified if "proportionate".

In sum, the ZVarD establishes a hierarchy of protection: nationality, race, and ethnic origin enjoy absolute protection; gender is conditionally protected; and other personal circumstances may justify unequal treatment if "proportionate".

5. Discrimination in private law relationships: the strict proportionality test or the method of practical concordance?

The ZVarD's broad definition of discrimination raises practical questions for market transactions. The Equality Advocate often refers to the fact that companies must sell goods or provide services to all consumers under the same conditions, as stipulated in Article 6 of the Consumer Protection Act.[6] If a retailer offers a discount to a customer, is it obliged to give it to every customer? Can a café "treat" a regular customer to a discount or a free cake? Can a particular product or service be advertised to only one gender?[7] When considering these questions, it should be noted that, in cases of discrimination, the decisive reason for less favourable treatment must be a specific personal circumstance. A discount for a regular customer is not discriminatory, as it is based on market behaviour rather than personal circumstances. Similarly, promotional offers to one gender may be problematic

[6] See e.g. URL: https://zagovornik.si/oglasevanje-brezplacne-udelezbe-na-dogodku-za-en-spol-pomeni-diskriminacijo/, 14. 12. 2025.
[7] See, e.g., the Pravna mreža's position that such advertising is discriminatory: https://pravna-mreza.si/objave/osmomarcevski-popusti-zgolj-za-osebe-zenskega-spola-so-dikriminatorni/.

only if based on personal characteristics. Especially problematic unequal treatment arises when businesses exclude certain groups, such as children, the elderly, or individuals of a particular sex or sexual orientation from access to goods or services. Whether such exclusion is permissible depends on compliance with the ZVarD and its proportionality requirements.

When assessing private entities' conduct in the market, the Equality Advocate consistently applies the strict proportionality test under the ZVarD also to private disputes. In an administrative dispute concerning bus advertising, the Administrative Court of the Republic of Slovenia examined whether the Equality Advocate had properly balanced conflicting rights, specifically freedom to conduct a business and freedom of expression in connection with equality before the law, freedom of conscience, and the protection of privacy and personal rights (UPRS, I U 1228/2019-42, 2021, paras. 100-10). The case concerned the removal of advertisements by an anti-abortion organization from Ljubljana city buses because, contrary to the policy of neutrality of the bus owner contained in a contract, the advertisements sparked controversy on social media.

The Administrative Court emphasized that the method for weighing conflicting rights depends on both the alleged basis for discrimination (e.g., race, ethnic origin, religion) and the context in which it occurs (e.g., employment, access to public goods, advertising, or expression in public spaces) (UPRS, I U 1228/2019-42, 2021, paras. 108). It noted that discrimination in market transactions not based on race, nationality, ethnic origin, or gender does not invoke EU law, and the Charter does not, in principle, apply. Nevertheless, in the absence of domestic case law, the Court drew on CJEU and ECtHR jurisprudence to establish standards for assessing discrimination.

A key point of the judgment is that the strict proportionality test and the method of practical concordance are mu-

tually exclusive. Article 15(2) of the Constitution of the Republic of Slovenia governs strict proportionality test, while Article 15(3) governs practical concordance. The Administrative Court clarified that in cases where constitutional rights conflict, such as freedom of expression in advertising and freedom to conduct a business, the method of practical concordance must be applied (UPRS, I U 1228/2019-42, 2021, para. 122). This method seeks a compromise that limits each right only to the extent strictly necessary to protect the other, ensuring both rights retain their "core."

The Administrative Court criticized the Equality Advocate's view that freedom to conduct a business must be subordinated entirely to the prohibition of discrimination based on religion or belief (UPRS, I U 1228/2019-42, 2021, para. 123). It instructed that a practical concordance assessment should guide the retrial, balancing the protection of each right while drawing on relevant CJEU and ECtHR case law (UPRS, I U 1228/2019-42, 2021, para. 128).[8] The Court highlighted that standards developed by the CJEU in employment discrimination cases could be analogously applied to market advertising, even when the alleged victim does not claim employment rights (UPRS, I U 1228/2019-42, 2021, para. 132).

The Court expressly referred to several CJEU judgments to illustrate how the fair balance should be sought between conflicting rights. It recalled that in the *Egenberger* case (CJEU, C-414/16, 2018), the decision was based on the requirement to ensure a "fair balance" between the autonomy of these organisations and their ethics on the one hand, and on the other hand, the right of the applicant for the job not to be discriminated against on the basis of religion or belief, because these two rights may be conflicting and need to be

[8] In the retrial, the Equality Advocate again found discrimination of the organization because an advertisement by an organization that advocates for the right to life from conception on the basis of religion was prematurely removed from a Ljubljana city bus. The decision is available at URL: https://zagovornik.si/wp-content/uploads/2022/08/ODLOCBA-Izvajalec-javnega-prevoza--diskriminiral-na-podlagi-vere-ali-prepricanja-ponovljeni-postopek.pdf, 14. 12. 2025.

weighed against each other (UPRS, I U 1228/2019-42, 2021, para. 129).[9]

Accordingly, the discrimination test under the ZVarD must be interpreted in light of both constitutional jurisprudence and the case law of the CJEU. The application of the method of practical concordance is in accordance with Articles 6 and 13 of ZVarD, although these two articles seemingly prescribe the three-step proportionality test. For a constitutionally and Charter consistent application of this test, the third limb of the test, i.e. the assessment of proportionality *stricto sensu*, should be replaced by practical concordance. The former is premised on balancing the disadvantages caused by a measure against the aims pursued, ensuring that the burden imposed is not excessive. Such a balancing exercise is ill-suited to private law relationships. It leads to a similar result as what Smet calls preferential framing in the ECHR context – a framework in which one right effectively overrides the other rather than fostering a genuine compromise between them.

In 2025, the Equality Advocate assessed whether the first Slovenian spa that offered services only to adults or persons over 14, an "adults only" concept, complied with the ZVarD. Acting *ex officio* under Article 34 ZVarD, the Equality Advocate examined whether this constituted age discrimination in access to public goods and services, specifically hotel services. Applying the three-step proportionality test under Articles 6 and 13 ZVarD, the Equality Advocate concluded that the practice was not discriminatory.

In assessing the conflict between freedom to conduct a business and age discrimination, the Equality Advocate applied the ZVarD's three-part proportionality test rather than the method of practical concordance mandated by the Administrative Court in the context of bus advertising. The practical concordance method would probably lead to a similar result in this specific case, but this would not necessarily

[9] The Administrative Court referred also to cases CJEU, C-68/17, 2018; CJEU, C-188/15, 2017; and CJEU, C-157/15, 2017.

be the case in other situations. What is important is that the core of both rights remains effective. The Equality Advocate indirectly emphasized the preservation of the core rights of children in this case, by noting the availability of alternative services nearby.

The case raises broader questions concerning the permissibility of excluding individuals from access to services or goods within a private law context. As demonstrated, the lawfulness of such exclusion depends on the interpretation of ZVarD and its criteria for assessing unequal treatment. This prompts a further question: should services, in principle, be offered to all individuals under equal conditions, with market demand determining their suitability for children or for any other group?

6. Conclusion

This contribution underscores the need for careful balancing of fundamental rights in private law relationships. Within the EU, race, ethnicity, and gender currently enjoy the broadest protection, whereas other grounds are predominantly regulated in the field of employment. The Slovenian ZVarD, however, extends protection against discrimination on all protected grounds across all sectors, including access to goods and services – a development that presents significant practical and interpretative challenges. However, in the access to goods and services context, other personal characteristics beyond nationality, race and gender constitute an area that falls outside of the scope of EU law, and thus outside of the scope of the Charter. Still, even where the Charter is not formally applicable in private law contexts, its principles remain highly relevant as interpretive guidance, helping to shape the standards for assessing equality and discrimination.

The key issue in this context is how should the ZVarD's test for the assessment of unequal treatment be applied to

private law relationships. Its application at the national level must be reconciled with the distinct method of practical concordance used in Slovenian constitutional law, which is also compatible with the CJEU's emphasis on a "fair balance" which must be struck between different fundamental rights in question. To this end, the Equality Advocate and the courts should seek to balance conflicting fundamental rights by preserving the core of each right, rather than focusing on the proportionality *stricto sensu* of a single measure. Recognizing this distinction is crucial, as it highlights that the assessment of private conduct must account both for the justifiability of measures and for the broader protection of rights in context.

LITERATURE AND SOURCES:

Act on the Implementation of the Principle of Equal Treatment (ZUNEO), Official Gazette of the Republic of Slovenia Nos. 93/07 and 33/16.

Alexy, R. (2010). A Theory of Constitutional Rights. Oxford: Oxford University Press.

Aristotle. (2020). The Nicomachean Ethics. London: Penguin Books.

Bauer, F. (2023). Proportionality in Private Law: An Analytical Framework. In: Proportionality in Private Law / Bauer, F., Köhler, B. (eds). Tübingen: Mohr Siebeck, 2023, pp. 15-32.

Bauer, F., Köhler, B. (eds). (2023). Proportionality in Private Law. Tübingen: Mohr Siebeck.

Brems, E. (ed). (2008). Conflicts between Fundamental Rights. Antwerp – Oxford – Portland: Intersentia.

Cauffman, C. The Principle of Proportionality and European Contract Law. In: Rules and principles in European contract law / Sirena, P. and Rutgers, J. W. (eds). Antwerp – Oxford – Portland: Intersentia.

CJEU, C-188/15, *Asma Bougnaoui and Association de défense des droits de l'homme (ADDH) v Micropole SA*, Court of Justice of the European Union, 14. 3. 2017, ECLI:EU:C:2017:204.

CJEU, C236/09, *Association belge des Consommateurs Test-Achats ASBL*, Court of Justice of the European Union, 1. 3. 2011, ECLI:EU:C:2011:100.

CJEU, C-68/17, *IR v JQ*, Court of Justice of the European Union, 11. 9. 2018, ECLI:EU:C:2018:696.

CJEU, C-256/11, *Murat Dereci and Others v Bundesministerium für Inneres*, Court of Justice of the European Union, 15. 11. 2011, ECLI:EU:C:2011:734.

CJEU, C-157/15, *Samira Achbita and Centrum voor gelijkheid van kansen en voor racismebestrijding v G4S Secure Solutions NV*, Court of Justice of the European Union, 14. 3. 2017, ECLI:EU:C:2017:203.

CJEU, C-283/11, *Sky Österreich GmbH v Österreichischer Rundfunk*, Court of Justice of the European Union, 22. 1. 2013, ECLI:EU:C:2013:28.

CJEU, C-569/16 and C-570/16, *Bauer and Broßonn*, Court of Justice of the European Union, 6. 11. 2018, ECLI:EU:C:2018:871.

CJEU, C-414/16, *Egenberger*, Court of Justice of the European Union, 17. 4. 2018, ECLI:EU:C:2018:257.

Code of Obligations (Obligacijski zakonik, OZ), Official Gazette of the Republic of Slovenia No. 83/01 et seq.
Constitution of the Republic of Slovenia, Official Gazette of the Republic of Slovenia No. 33/91-I et seq.
Consumer Protection Act (Zakon o varstvu potrošnikov, ZVPot-1), Official Gazette of the Republic of Slovenia No. 130/22.
Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin. Official Journal of the European Union, L 180, 19.7.2000, pp. 22–26.
Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation. Official Journal of the European Union, L 303, 2.12.2000, pp. 16–22.
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. Official Journal of the European Union, L 373, 21.12.2004, pp. 37–43.
Decision of the Advocate of the Principle of Equality, 17. 7 2025. URL: https://zagovornik.si/wp-content/uploads/2025/07/Odlocba_Zagovornik-ni-ugotovil-diskriminacije-pri-ponujanju-hotelskih-storitev-izkljucno-starejsim-od-14-let.pdf, 14. 12. 2025.
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). Official Journal of the European Union, L 204, 26.7.2006, pp. 23–36.
Directive 2014/54/EU of the European Parliament and of the Council of 16 April 2014 on measures facilitating the exercise of rights conferred on workers in the context of freedom of movement for workers Text with EEA relevance. Official Journal of the European Union, L 128, 30.4.2014, pp. 8–14.
Finžgar, A. (1985). Osebnostne pravice. Zbornik znanstvenih razprav, 27, pp. 250-253.
FRA, Handbook on European non-discrimination law – 2018 edition. URL : https://fra.europa.eu/en/publication/2018/handbook-european-non-discrimination-law-2018-edition, 14. 12. 2025.
Jakab, A. (2025). Six Alternatives to the Proportionality Test in Fundamental Rights Adjudication. Max Planck Institute for Comparative Public Law & International Law (MPIL), Research Paper No. 2025-10.
Jouannaud, V. (2023). The Various Manifestations of the Constitutional Principle of Proportionality. In: Proportionality in Private Law / Bauer, F., Köhler, B. (eds). Tübingen: Mohr Siebeck, pp. 35-61.
Kennedy, D. (2011). A Transnational Genealogy of Proportionality in Private Law. In: The foundations of European private law / Brownsword, R. (ed). Oxford: Hart Publishing.
Koref, T. (2024). Defragmentation of (Private) Law Through the Proportionality Test. A Review Essay on Ondřejek's Monograph 'Defragmentation of Law: Reconstruction of Contemporary Law as a System'. Ratio Publica, 1, pp. 4-17.
Leczykiewicz, D. (2013). Horizontal Application of the Charter of Fundamental Rights. European Law Review, 38(4), pp. 479-497.
Lee v Ashers Baking Company Ltd and others [2018] UKSC 49.
Letsas, G. (2023). Balancing as a Legal Method: What it is and how (not) to do it. Faculty of Laws University College London Law Research Paper No. 01/2023.
Loven, C. (2020). "Verticalised" cases before the European Court of Human Rights unravelled: An analysis of their characteristics and the Court's approach to them. Netherlands Quarterly of Human Rights, 38(4), pp. 246-263.
Marauhn, T., Ruppel, N. (2008). Balancing Conflicting Human Rights: Konrad Hesse's Notion of "praktische Konkordanz" and the German Federal Constitutional Court. In: Conflicts between Fundamental Rights / Brems, E. (ed). Antwerp – Oxford – Portland: Intersentia, pp. 273-296.
Masterpiece Cakeshop v. Colorado Civil Rights Commission, 584 U.S. 617 (2018).
Möller, K. (2012). The Global Model of Constitutional Rights. Oxford: Oxford University Press.
Nilsson, A. (2020). Same, Same but Different: Proportionality Assessments and Equality Norms. Oslo Law Review, 7(3), pp. 126-144.

Poscher, R. (2024). What would it take? The potential and limits of proportionality analysis in law. *Jurisprudence*, pp. 1–34.

Protection against Discrimination Act (Zakon o varstvu pred diskriminacijo (ZVarD)), Official Gazette of the Republic of Slovenia Nos. 33/16 and 21/18 – ZNOrg.

Smet, S. (2017). Resolving Conflicts between Human Rights: The Judge's Dilemma, Routledge.

VSRS, II Ips 23/2020, Supreme Court of the Republic of Slovenia, 28. 8. 2020, ECLI:SI:VSRS:2020:II.IPS.23.2020.

VSRS, II Ips 25/2019, Supreme Court of the Republic of Slovenia, 30. 5. 2019, ECLI:SI:VSRS:2019:II.IPS.25.2019.

Trstenjak, V., Weingerl, P. (eds). (2016). The influence of human rights and basic rights in private law. Cham: Springer.

UPRS, I U 1228/2019-42, Administrative Court of the Republic of Slovenia, 10. 11. 2021, ECLI:SI:UPRS:2021:I.U.1228.2019.42.

USRS, Decision U-I-191/09, Up-916/09, Constitutional Court of the Republic of Slovenia, 30. 9. 2010, ECLI:SI:USRS:2010:U.I.191.09.

USRS, Decision Up-472/20-23, Constitutional Court of the Republic of Slovenia, 14. 2. 2024, ECLI:SI:USRS:2024:Up.472.20.

USRS, Up-1005/15, Constitutional Court of the Republic of Slovenia, Dissenting opinion of Dunja Jadek Pensa, 2. 7. 2018, ECLI:SI:USRS:2018:Up.1005.15.

Weingerl, P. (2019). Uporaba Listine Evropske unije o temeljnih pravicah v horizontalnih razmerjih. Dignitas, 83-84, pp. 99-114.

Weingerl, P. (2025). Komentar k členu 134 OZ. In: Komentar Obligacijskega zakonika – splošni del / Možina, D. (ed). Ljubljana: Uradni list (fortcoming).

Xing Tan, Z. (2020). The Proportionality Puzzle in Contract Law: A Challenge for Private Law Theory? Canadian Journal of Law & Jurisprudence, 33, 1, pp. 215-244.

Zobec, J. (2011). Praktična konkordanca v ustavnosodni presoji. Pravosodni bilten, 32, 2, pp. 11-28.