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Subject: ASSESSMENT OF DISCRIMINATORY CHARACTER of the Ordinance Temporarily Prohibiting the Offering and Sale of Goods and Services to Consumers in the Republic of Slovenia and the Decree on the Implementation of Screening Programs for the Early Detection of SARS-CoV-2 Virus Infection (Article 38 of the Protection Against Discrimination Act - "ZVarD")

I. Subject of the received requests to initiate the assessment

The Slovenian Hospitality and Tourism Industry Union (hereinafter referred to as: "the Union") sent the Advocate of the Principle of Equality an open letter, complaining of increasing "repression" and "pressure" from employers over as-yet unvaccinated and healthy employees working in the hospitality and tourism industry. In their letter, they noted that they had approached a number of institutions, from the Prime Minister to the Minister of Health, the Chamber of Crafts' Hospitality and Tourism Section, and the Human Rights Ombudsman. They pointed out what they presumed to be unequal treatment of employees caused by the Government's measures adopted in various industries in the services sector. They expressed their belief that it is inadmissible to enforce a RVT (Recovered-Vaccinated-Tested) requirement and to require hospitality industry workers to conduct RVT checks, and pointed to less invasive testing procedures. Now they turn to the Advocate, on grounds that the employees who had not yet been vaccinated for a variety of reasons are presumably discriminated against in various areas.

They argue that the mandatory RVT requirement checks in the hospitality industry discriminates against healthy persons, that it is illogical that the RVT checks would be required to be conducted outdoors as well, in cases where sufficient social distancing cannot be ensured, that it is impermissible and unacceptable to discriminate between people based on their being vaccinated vs. unvaccinated, their having recovered from the disease vs. healthy persons, and they also pointed out that conducting RVT requirement checks by employees is yet another in a series of impractical additional burdens imposed upon employees. The Union argues that unvaccinated and untested citizens are not only subjected to excessive curtailment of personal integrity and dignity, but the freedom also to make decisions about their bodies, health and medical treatments, and even that they are denied access to certain goods and services. They further add that the measures violate their freedom of movement.

They also point out the provisions of the Decree on the Implementation of Screening Programs for the Early Detection of SARS-CoV-2 Virus Infection, which is set to come into force and effect on 23 August 2021. They are of the view that the Decree is also in violation of human rights, as it requires hospitality workers to get tested with a Rapid Antigen Test (RAT) every 48 hours, or a Polymerase Chain Reaction (PCR) test every 78 hours, whereas they were required to get tested once per week thus far. As this Decree abolishes testing free of charge, hospitality industry workers will now be required to pay for the testing themselves. They add

that the Decree results in substantial pressure being put on the workers to either get vaccinated or pay for the testing out of their own pockets, even though the law is clear: vaccination of the population is to be done on a voluntary basis, and the costs of testing for work purposes are to be covered by the employer. Furthermore, they argue that discrimination of hospitality workers in other service industries is also inadmissible.

The Union also enclosed with its public letter a motion to initiate an inspection audit procedure against the restaurant company Gostilna in Pizzerija Jurman, which states that the employer appeal to its employees to get vaccinated, and warned employees that they will be required to cover the cost of testing out of their own pockets. Subsequently, the Union sent the Advocate another motion to initiate an inspection audit procedure, which it had filed against Hotel Slon d.d., Ljubljana. Again, it is evident from this motion that the employer had appealed to its employees to get vaccinated and informed them that after 23 August 2021, all unvaccinated and non-recovered employees would be required to cover the cost of testing out of their own pockets. They turn to the Advocate asking for his response and assistance, in order to ensure that all citizens are treated equally and prevent discrimination between the privileged vaccinated population and the underprivileged healthy population.

II. Legal basis for performing the assessment of discriminatory character

Pursuant to Article 38 of the Protection Against Discrimination Act (ZVarD), if the Advocate assesses that an act or any other regulation is discriminatory, the person proposing a review of constitutionality and legality may be informed thereof, or the Advocate may submit a request for a review of constitutionality or legality of a regulation or general legal act issued to execute public authorizations. For the purposes of potentially taking action under Article 38 of the ZVarD, the Advocate carried out an assessment of discriminatory character of the relevant regulations which are the subject of the request to initiate the assessment of that which is presumed to be discrimination.

Article 4 of the ZVarD defines discrimination as any undue actual or legal unequal treatment, differentiation, exclusion, limitation or failure to act due to personal circumstances, the result or consequence of which is hindrance, reduction or nullification of equal recognition, enjoyment or exercise of human rights and fundamental freedoms, other rights, legal interests and benefits. Discrimination based on any personal circumstance is prohibited.

In order to confirm a finding of discrimination, a specific personal circumstance must be a significant reason for comparably worse treatment. These circumstances are either inherent or acquired personal characteristics, features, conditions or statuses, which, as a rule, are either permanently and inalienably linked to a particular individual and their personality, in particular their identity; or cannot easily be changed by the individual. In accordance with Article 1 of the ZVarD, this includes gender, nationality, racial or ethnic origin, language, religion or belief, disability, age, sexual orientation, gender identity or gender expression, social status, financial situation, education, or any other personal circumstance. According to Article 14 of the Slovenian Constitution, everyone in Slovenia shall be guaranteed equal human rights and fundamental freedoms irrespective of national origin, race, sex, language, religion, political, or other conviction, material standing, birth, education, social status, disability, or any other personal circumstance.

ZVarD defines several forms of discrimination. Direct discrimination occurs if a person, or a group of people, are, were or could be treated less favorably in the same or similar circumstances due to certain personal circumstances compared to how another person or a

group of people is, was or would be treated (first paragraph of Article 6 of the ZVarD). Indirect discrimination occurs when a person or a group of people in certain personal circumstances is, was or could be in a less favorable position compared to other people due to an apparently neutral regulation, criterion, or practice, unless such provision, criterion, or practice is objectively pursuing a legitimate objective and the means of attaining this objective are appropriate and necessary (second paragraph of Article 6 of the ZVarD).

ZVarD explicitly protects against discrimination affecting access to goods and services available to the public (eighth indent of the first paragraph of Article 2 of the ZVarD).

Discrimination may occur in various aspects of social life, where Article 2 of the ZVarD requires state authorities, local communities, holders of public authorizations, legal entities and natural persons to ensure protection against discrimination or equal treatment of all persons in all fields of decision-making, legal transactions and other operations or conduct to afford protection from discrimination and ensure equal treatment of all persons.

The Advocate performed the assessment using the method developed by the Constitutional Court in its evaluation of potential discriminatory treatment. In the Constitutional Ruling no. U-I-425/06 of 2 July 2009 (Section 7 of the Reasoning Section), the Constitutional Court took the position that the following questions must be answered when assessing the legitimacy of an alleged case of discriminatory treatment: 1) Does the alleged discriminatory treatment apply to the protection or exercise of a human right or fundamental freedom; 2) if so, is there a case where the complainant was treated differently from another party against whom the complainant is compared; 3) are the actual positions which the complainants are comparing essentially the same, and therefore the discrimination derives from the circumstance mentioned in the first paragraph of Article 14 of the Constitution; and 4) if there is discrimination based on a circumstance mentioned in the first paragraph of Article 14 of the Constitution, which therefore constitutes a violation of the right to non-discriminatory treatment, is such a violation admissible under the Constitution. If the answers to the first three questions are affirmative and the violation thus fails the so-called strict test of proportionality, then the matter is deemed a case of unconstitutional discrimination.

In the Advocate's view, the same mechanism applies to the assessment of alleged discrimination within the meaning of Article 4 of the ZVarD, where discrimination is deemed to mean any undue actual or legal unequal treatment, differentiation, exclusion, limitation or failure to act due to personal circumstances, the result or consequence of which is hindrance, reduction or nullification of equal recognition, enjoyment or exercise of not only human rights and fundamental freedoms, but also other rights, legal interests and benefits (infringement of a constitutionally sanctioned good).

III. Ordinance Temporarily Prohibiting the Offering and Sale of Goods and Services to Consumers in the Republic of Slovenia

Some of the Union's allegations apply to the provisions set out in the Ordinance Temporarily Prohibiting the Offering and Sale of Goods and Services to Consumers in the Republic of Slovenia (Official Gazette of the Republic of Slovenia, no. 122/21, 124/21 and 126/21, hereinafter referred to as: "Ordinance"). Therefore, this subject matter is explicitly covered under the Protection Against Discrimination Act. The subject matter is also covered under the second paragraph of Article 25 of the Consumer Protection Act, which requires companies to provide goods and services to all consumers under equal terms.

Inter alia, the Ordinance requires guests of hospitality establishments to comply with the RVT requirement, whereas checks for compliance with the RVT requirement must be carried out

by the establishments themselves before entry into the interior of the hospitality establishments, or even before allowing access to outdoor areas where a minimum of 3 meters distance between the edges of the tables cannot be ensured. The complainant is of the view that the provisions of the Ordinance discriminate against the unvaccinated and untested population, who are being prevented access to goods and services, and furthermore, the complainant considers that it is impracticable for the Ordinance to require RVT compliance checks to be carried out by the staff workers. While the Ordinance does infringe upon the statutory provision of Article 25 of the Consumer Protection Act, the assessment of such normative arrangement falls outside the Advocate's competence.

Over the course of the COVID-19 pandemic, along with the relaxing of preventive measures, access to a number of goods and services began to be contingent on the compliance with the RVT requirement: Recovered, Vaccinated & Tested persons. The Recovered requirement is deemed satisfied if a person is able to present proof of a positive PCR test which is older than 10 days but no older than six months, or proof that they have recovered from COVID-19 and no more than six months have passed since the onset of the symptoms, where they were vaccinated with one of the Ordinance-approved vaccines during the window which not longer than eight months from receiving a positive PCR test result or from the onset of the symptoms.

The Vaccinated requirement is deemed satisfied if a person is able to present proof of COVID-19 vaccination. The rules as to when a person is considered vaccinated vary depending on the type of vaccine the individual was vaccinated with.

The third requirement is the Tested requirement. This requirement is deemed satisfied if a person has negative tested for the presence of the SARS-CoV-2 virus. Both a PCR test (Polymerase Chain Reaction test) and a RAT (Rapid Antigen Test) are accepted as valid. Provision of certain services, which includes those involving the preparation and serving of food and beverages, a RAT test must be no older than 48 hours, while a PCR test must be no older than 72 hours.¹

The obligation to perform RVT compliance checks in the hospitality industry is defined by the Ordinance which entered into force on 26 July 2021.² The RVT requirement compliance checks for the interior of hospitality establishments and in outdoor areas, where it is not possible to ensure a minimum 3 meter distance between table edges (third paragraph of Article 2 of the Ordinance).

The motion applies to the issue of the employers' encouragements for the employees to get vaccinated, and notes the voluntary nature of vaccinations, which should therefore not be used as a requirement to gain access to goods and services. Having consideration to the substance of the motion, in assessing the question whether the RVT requirement is discriminatory in terms of access to goods and services, the key question is whether compliance with the "V" criterion (i.e. one's vaccination status) is a personal circumstance. Identifying the personal circumstance as a reason for inferior treatment is a key element in the assessment of whether or not the regulation is discriminatory.

Besides the explicitly listed personal circumstances (Article 1 of the ZVarD), the law also affords individual protections from discrimination based on so-called "other personal circumstances". In the concretization of the ambivalent legal term of "*other personal*

¹ More details on the access to goods and services available at the following web address: GOV.SI, Restrictions on Sale of Goods and Services, URL: <https://www.gov.si/teme/koronavirus-sars-cov-2/omejitve-prodaje-blaga-in-storitev/>.

² The current expiration date of the Ordinance is 15 August 2021, whereas the potential extension thereof is subject to change on a weekly basis.

circumstances”, the Advocate considers the definition of personal circumstances as “*either inherent or acquired personal characteristics, features, conditions or statuses, which, as a rule, are either permanently and inalienably linked to a particular individual and their personality, in particular their identity; or cannot easily be changed by the individual.*”³

In accordance with the aforementioned definition, the Advocate has thus far considered under the umbrella of “other personal circumstances” conditions such as pregnancy, parenthood, health status, citizenship, and place of residency.

On the issue of the individual’s unvaccinated status, the question arises whether in the specific case in question, the unvaccinated status can be considered as an “other personal circumstance” under the ZVarD and the Slovenian Constitution, which is either inherent or acquired and are part of the individual’s identity which the individual could not easily change. When rendering his decision regarding what constitutes “other personal circumstances”, the Advocate is bound under the definition contained in the Explanation of the Articles in the ZVarD Bill.

As a rule, persons who were vaccinated in the Republic of Slovenia were vaccinated according to the National COVID-19 Vaccination Strategy, as amended from time to time. Said strategy set out the certain groups who were prioritized over other individuals for the purposes of vaccination. Among other criteria, the priority groups were defined based on the personal circumstances of age, health status and societal status, which derived from their specific functions, jobs and social roles. All other demographic categories who did not meet these criteria due to not being characterized by the specified personal circumstances did not have access to the vaccines, which were only available in limited quantities at the time, and at that time, the Advocate assessed potential restrictions from the perspective of the existence of potential discrimination against all persons who did not yet have access to vaccination due to personal circumstances they exhibited (health status, age, social position, in the sense of prioritization of certain demographics).

In recent months, however, vaccines are widely available to the population, and everyone is able to get vaccinated. Vaccinations are being carried out at various vaccination spots without an appointment, and people are able to choose their preferred vaccine.⁴ Vaccination is available free of charge to all persons over the age of 12. This means that the individual’s decision whether or not to get vaccinated is a personal choice, i.e. an individual decision. Even if this choice is conditioned by certain life preferences, emotions or other subjective factors on the part of the individual, the Advocate cannot broadly consider the fact that one is unvaccinated as an “other personal circumstance” within the meaning of ZVarD. People are unwilling to accept vaccinations for a broad variety of reasons - either because they distrust the vaccines themselves, out of distrust for the government, general rejection of vaccination, because they feel COVID-19 is not a dangerous illness, because they feel vaccination to be unnecessary, because they had already recovered from COVID-19, because they feel the vaccine is ineffective, etc.⁵ The Advocate does not identify the nature of personal circumstances as such in one’s decision to not get vaccinated, having regard to the definition of personal circumstances, i.e. either inherent or acquired personal characteristics, features, conditions or statuses, which, as a rule, are either permanently and inalienably linked to a

³ ZVarD Bill, Explanation of the Articles.

⁴ As an example, we refer to the options of getting vaccinated at the Ljubljana University Medical Centre’s vaccination station until 20 August 2021: <https://www.zdravniskazbornica.si/informacije-publikacije-in-analize/obvestila/2021/07/23/epljenje-covid-19-v-ukc-ljubljana-od-19.07.-do-20.08.2021>.

⁵ See, for example, the Valicon public opinion poll, available at: <https://www.24ur.com/novice/korona/skupina-ki-ne-zaupa-v-cepiva-izgubljena-za-precepljenost-ključni-neodločeni.html>. See also the physicians’ initiative “18 reasons why I’m not getting the vaccine”: <https://www.slovenskizdravniki.si/18-razlogov-zakaj-se-ne-bom-cepil/>

particular individual and their personality, in particular their identity; or cannot easily be changed by the individual. An individual may choose for themselves whether or not to get vaccinated. It is therefore a matter of personal choice, rather than the decision being forced upon the individual due to their unalterable and inherent characteristics. This means that in this specific case discrimination between the unvaccinated and the vaccinated does not constitute discrimination. Namely, personal circumstances are not the reason for the discrimination, which is required under the ZVarD in order to confirm the existence of discrimination.

Exceptions from the above analysis might potentially be persons who are unable to get vaccinated or who are even prohibited from doing so for medical reasons. In the latter category, the Government had already provided for the group's disenfranchisement based on the personal circumstance of their health status and introduced proper adjustments in order to counterbalance the disenfranchisement which these persons would otherwise be exposed to. Furthermore, unvaccinated persons have access to goods and services based on a negative test result. Persons who are unable to get vaccinated and can present medical proof will continue to have access to free (i.e. state-sponsored) RAT after 23 August, when the Decree on the Implementation of Screening Programs for the Early Detection of SARS-CoV-2 Virus Infection⁶ enters into force and effect.

Possible exceptions could be persons who refuse to get vaccinated on religious grounds or on the grounds of a conviction (it is important to note that such conviction cannot be equated to an opinion on a specific issue, but rather that this refers to a held worldview equivalent to a religion).⁷ However, the complainant does not cite these as reasons, but rather objects to the discrimination based on vaccination status in general, and to the obligation of those working in the hospitality and tourism sector to get tested every 48 or 72 hours.

As an alternative to presenting proof of vaccination or recovery, all individuals are afforded the option to present a negative test result. Having considered the above, the Advocate considers that through the available vaccination and testing options described above, it is ensured that all segments of the population are provided access to goods and services, and that no one is excluded. In places where RVT restrictions are enforced, access to the rights and privileges is provided not only to vaccinated persons or those who recovered from COVID-19, but also to other persons, provided they are able to present a negative test result.

With consideration to the above, the Advocate considers that the third part of the constitutional test, i.e. the determination whether the actual positions which the complainants compare are essentially the same and whether the discrimination is therefore based on the circumstance mentioned in the first paragraph of Article 14 of the Constitution, is not satisfied, since the discrimination established by the Ordinance, requiring unvaccinated persons to present negative test results, is not founded on the individual's personal circumstance.

IV. Decree on the Implementation of Screening Programs for the Early Detection of SARS-CoV-2 Virus Infection

The second part of the Union's allegations refers to the provisions of the Decree on the Implementation of Screening Programs for the Early Detection of SARS-CoV-2 Virus

⁶ Decree on the Implementation of Screening Programs for the Early Detection of SARS-CoV-2 Virus Infection, Official Gazette of the RS no.: 118/2021, URL: <https://www.uradni-list.si/glasilo-uradni-list-rs/vsebina/2021-01-2548/uredba-o-izvajanju-presejalnih-programov-za-zgodnje-odkrivanje-okuzb-z-virusom-sars-cov-2>.

⁷ See Supreme Court of the Republic of Slovenia ruling no. I Up 27/2008 of 23 June 2008.

Infection (hereinafter referred to as: "Decree"). The complainant points out as problematic the fact that immediately after the Decree coming into force and effect, the testing will become obligatory for hospitality workers either every 48 hours (RAT) or every 72 hours (PCR), whereas testing will no longer be provided free of charge. The complainant argues that such a provision would result in pressure on the staff to get vaccinated, as well as pressure for employers to shoulder the cost of testing.

The Decree, which comes into force and effect on 23 August 2021, eliminates the option of free testing. The budgeted funds from the rapid antigen test budget will only be used to fund the needs of persons who are unable to get vaccines for medical/health reasons, subject to presentation of medical proof, and of persons who may cause the spread of COVID-19 because of the nature of their work or their activity in environments which constitute a direct risk of spreading the virus. These include users of health services, wards of social services and institutions, inmates in prisons and juvenile correction facilities, alien centers, safehouses, asylum facilities, integration facilities and crisis centers for children.⁸ "Direct risk" is to be determined by the minister of health.⁹ The Advocate notes that the Decree does not impose any obligation for 48- or 72-hour testing for hospitality and tourism industry employees, nor does it stipulate any such requirements for any other industry. The fact that changes of the current regulation are upcoming for the hospitality and tourism industry¹⁰ is evident from the announcements released by the competent authorities.¹¹ The enclosed letters sent by the Union also show that certain employers have already informed the employees that after 23 August 2021 they will have to cover the cost of testing out of their own pockets. The Union has already contacted the Labor Inspectorate of the Republic of Slovenia in reference to this matter.

The subject matter regulated by the Decree falls outside the scope of the Advocate's competence. Screening programs for early detection of SARS-CoV-2 infection are being carried out for persons who have not recovered from COVID-19 or who are not fully vaccinated against COVID-19 infection. Considering that there are sufficient vaccines available for the entire population and that anyone wishing to do so is able to get vaccinated, the decision to either get vaccinated free of charge or to refuse to get vaccinated is an individual choice. As a result, this means that, in case where access to various goods and services requires compliance with the RVT requirement, the individual who chooses not to get vaccinated (and has not recovered from COVID-19) in fact opts for the T requirement, i.e. opts to present a negative test result. As explained above, the individual's personal decisions are not construed to be personal circumstances within the meaning of the ZVarD. From the perspective of assessment of potential discrimination, the decision on elimination of free testing would thus be relevant to those who cannot or should not get vaccinated for medical reasons, however the Government of the Republic of Slovenia made adequate provisions for such persons, allowing them continued access to free testing even after 23 August.

As regards the Union's arguments that after elimination of testing for hospitality industry workers free of charge and introduction of mandatory 48-hour (RAT) and 72-hour (PCR) testing, pressure on employees will increase, and that employees will transfer the costs of

⁸ The first paragraph of Article 2 of the Decree.

⁹ The second paragraph of Article 2.

¹⁰ The current regulation stipulated in Article 1 of the Ordinance Temporarily Prohibiting the Offering and Sale of Goods and Services to Consumers in the Republic of Slovenia requires that employees in the hospitality industry preparing and serving food and beverages are required to get tested once per week. Of course, this applies to unvaccinated employees or employees who have not recovered from COVID-19.

¹¹ RTVSLO: 248 infections confirmed on Wednesday, no deaths, URL:

<https://www.rtvsllo.si/zdravje/novi-koronavirus/v-sredo-potrjenih-248-okuzb-smrti-ni-bilo/590497>.

testing onto the shoulders of employees, the Advocate finds that the issues of the frequency of testing and the costs of testing are issues which fall beyond the Advocate's scope of competence. Provisions defining the industries in which employee testing is required and the required frequency of testing are based on the professional medical assessments and are not linked to the individuals' personal circumstances.

Also beyond the scope of the Advocate's competence is the question of whether the state or the employer should shoulder the cost of testing, since this is not a question of unequal treatment of individuals based on personal circumstances.

As for the question of potential violations of the employer's obligation to cover the costs of testing with the employers transferring these costs onto the employees, under existing labor law, such determinations fall within the competence of the Labor Inspectorate of the Republic of Slovenia. The costs of the tests will most certainly be the employers' responsibility, since the Occupational Health and Safety Act stipulates that compliance with occupational health and safety regulations must not create any financial liabilities for the employee, and the health impacts associated with the work must not affect the employee's salary or interfere with their material and social status gained through work. Such regulation was confirmed by the state secretary at the Ministry of Health.¹² Consequently, this means that in the case of the specific companies, which you also sent to the Advocate, employers will not be able to pass the burden of paying the costs of rapid antigen testing onto the employees even after 23 August. If they do so, the authority competent for assessing potential violations is the Labor Inspectorate of the Republic of Slovenia.

In conclusion, the Advocate also addresses the complainant's claims alleging that the Government offers different treatment to employees in other sectors, and that such unequal treatment is inadmissible. The industry or sector in which an individual is employed cannot be considered a personal circumstances within the meaning of the ZVarD. The individual's choice of employment is a free decision, which can be changed. One's employment is not an individual's inherent and unalterable personal circumstance which would enjoy protections under the ZVarD. Unlike other personal circumstances defined by the law, this is therefore not a personal circumstance linked to an individual's identity or permanently associated with such individual.

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In light of the above, the Advocate deems that the Vaccinated or Tested requirements, which are encompassed within the RVT requirement, do not constitute discrimination based on the individuals' personal circumstances, as defined in the ZVarD.

Confirmation of a personal circumstance is a key element in determination of discrimination and assessment whether a certain regulation is discriminatory within the sense provided for in the ZVarD. The RVT requirement effectively covers all segments of the population when it comes to access to goods and services. In places where V and T restrictions are enforced for persons who have not recovered from COVID-19, access to the rights and privileges is thus provided not only to vaccinated persons, but also to other persons, subject to the additional condition that they are able to present a negative test result. In the case the complainant presented to the Advocate, the fact of whether a person is vaccinated or unvaccinated is therefore a result of an individual's choice, rather than personal circumstance, as is required under the ZVarD.

¹² 24.ur.com: Costs of rapid antigen testing for employees to be charged to the employers, URL: <https://www.24ur.com/novice/korona/stroski-hitrega-testiranja-za-zaposlene-v-breme-delodajalca.html>.

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