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# Equality bodies in the European Union: The Spanish independent authority for equal treatment

Organismos de igualdad en la Unión Europea: La autoridad independiente española para la igualdad de trato

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**Summary:** 1. Introduction: the origin of equality bodies. 2. Multiple paces of implementation among the different European Union Member States. 3. Proposal for modification of the rules governing equality bodies. 4. The Independent Authority for Equal Treatment and Non-Discrimination in Spain. Conclusion: challenges and pending tasks. References.

**Abstract:** The preceding two decades have been characterized by the evolution of equality bodies at the domestic level. Recently, several propositions have been advanced with the aim of instituting minimal prerequisites for the functioning of equality entities, aimed at enhancing their efficacy and ensuring their independence, thus fortifying the enforcement of the principle of equal treatment. In Spain, Law 15/2022 has provided for the creation of the Independent Authority for Equal Treatment and Non-Discrimination, but after the six months established for its configuration, it has not been set up. This work critically examines the proposed reforms within the Equality Directives concerning these bodies and their implementation in the case of Spain. At the same time, it assesses, from a proactive perspective, how to develop European standards in line with the proposal, so that equality bodies can deploy their full potential.

**Keywords:** Equality, equality bodies, European standards, Spain

**Resumen:** Las dos últimas décadas han estado marcadas por el desarrollo de los organismos de igualdad a nivel nacional. Recientemente se han presentado varias propuestas que tienen por objeto establecer unos requisitos mínimos para el funcionamiento de los organismos de igualdad que mejoren su eficacia y garanticen su independencia, a fin de reforzar la aplicación del principio de igualdad de trato. En España, la Ley 15/2022, ha previsto la creación de la Autoridad Independiente para la Igualdad de Trato y la No Discriminación, pero transcurridos los seis meses establecidos para su configuración, esta no se ha producido. Este trabajo revisa de manera crítica la reformas que se proponen en las directivas de igualdad en relación con estos organismos y su concreción en el caso de España. Al mismo tiempo valora, desde una perspectiva proactiva, la forma de desarrollar los estándares europeos, en la línea de la propuesta, para que los organismos de igualdad puedan desplegar todo su potencial.

**Palabras clave:** Igualdad, organismos de igualdad, estándares europeos, España.

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## 1. Introduction: the origin of equality bodies<sup>1</sup>

Since their inception, equality bodies, broadly denominated as such by the European Commission, have been characterized by their diversity, both in terms of the forms of discrimination they address and their operational frameworks. Member States of the European Union are required to establish national entities to combat discrimination; however, the scope of their mandates and competencies varies from one State to another. It is precisely this variation that highlights the imperative to articulate European standards, the gradual implementation of which has engendered doubts and debates.

This work critically examines the implementation of these standards and the reform currently proposed in various Equality Directives, with special emphasis on Directive 2000/43 concerning equality bodies. Within this context, a section is dedicated to the Spanish case to analyze the impending establishment of the Independent Authority for Equal Treatment and Non-Discrimination, ensuring its alignment with European proposals. In doing so, from a proactive standpoint, it provides a necessary scientific analysis for the development of these common European guidelines, facilitating the continued consolidation of equality bodies.

Council Directive 2000/43/EC of 29 June 2000, implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, established the creation of equal treatment bodies as a tool to promote, analyze and monitor the effective application of the principle of equal treatment among all persons, that is, as a mechanism of protection against discrimination based on racial or ethnic origin. This provision arises in application of Article 13 of the Treaty establishing the European Economic Community, which is now Article 19 of the Treaty on the Functioning of the European Union, which allows the Council, unanimously, on a proposal from the Commission and after consulting the European Parliament, to adopt appropriate measures to combat discrimination based on sex, racial or ethnic origin, religion or beliefs, disability, age or sexual orientation.

These bodies are independent and specialized entities in each Member State, with competences to analyze existing problems, study possible solutions and provide specific assistance to victims. They are regulated by Article 13 of the Directive, which states that their powers

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<sup>1</sup> This work has been carried out within the framework of the R&D&I project PID2019-105018RB-100/ AEI/10.13039/501100011033, "Racismo y Discriminación: los Derechos Humanos bajo amenaza", funded by the Ministry of Science and Innovation.

include carrying out studies and publishing independent reports on discrimination, and the formulation of recommendations on any issue related to this type of discrimination. This provision expressly imposes an obligation on the Member States when it states that they must designate one or more bodies responsible for promoting equal treatment among all persons without discrimination based on their racial or ethnic origin. Under this provision, different equal treatment bodies have proliferated in the various Member States, as a phenomenon that evidences the importance of combating discrimination and the central role of equal treatment (Kádár 2018).

This article aligns with other provisions of European anti-discrimination law that advocate for the establishment of equality bodies as a permanent or systematic element of the European framework of guarantees in the fight against discrimination, operating with respect to the six features mentioned (Rey 2019) especially protected by EU law<sup>2</sup>. In transposing European legislation, as will be discussed further below, some Member States have chosen to establish equality bodies with competence for these six traits, while others, such as Spain, have initially created specific bodies for the fight against racial and ethnic discrimination, and another for discrimination based on sex, and only recently has their modification been proposed.

The aforementioned Directive 2000/43 includes a section dedicated to the establishment of an equality body, which is influenced by precedents that had already highlighted the significance of these entities. These include, first of all, the so-called Paris Principles relating to the status and functioning of national institutions for the protection and promotion of human rights, adopted on 20 December 1993, by the United Nations General Assembly, and the General Comments for their interpretation and implementation, as well as the general recommendations of the United Nations Committee on the Elimination of Racial Discrimination, which have provided important additional work in this field<sup>3</sup>.

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<sup>2</sup> The Employment Equality Directive (2000/78/EC) and the Directive on Gender Equality in Social Security (79/7/EEC) do not include provisions on equality bodies. However, such bodies are provided for in the Directive on Gender Equality in the Access to and Supply of Goods and Services (2004/113/EC), the Directive on Gender Equality in Employment (2006/54/EC) and the Directive on Gender Equality in Self-Employment (2010/41/EU). In any case, some Member States have chosen to entrust the equality bodies with the grounds of discrimination covered by those two Directives that do not include them.

<sup>3</sup> Among these, General Recommendation No. 36 (2020) on preventing and combating racial profiling by law enforcement officials, 17 December 2020, CERD/C/

On the other hand, General Policy Recommendation No. 2 of the Council of Europe's Commission against Racism and Intolerance (ECRI)<sup>4</sup> establishes several fundamental ideas and conclusions on these bodies. These include the need for these bodies to have broad and clear competencies in the fight against discrimination; to be provided with adequate resources to implement their functions; to work closely with other relevant actors, such as civil society and the media; to raise awareness of discrimination and its detrimental effects on society as a whole; and to work closely with the courts and law enforcement agencies to ensure an effective response to acts of discrimination.

Among the recommendations made in this document, three are particularly noteworthy: independence, accessibility and quality. Firstly, the document emphasizes the need to organize these bodies with full independence, adopting the necessary guarantees to ensure that they operate without interference from the State, for example, in such basic matters as the administration of their own resources (which must be sufficient to ensure their proper organization) or the selection of their staff. The body must be accessible to the people whose rights it must defend, and in this sense, it is essential to establish local agencies to facilitate access and increase the effectiveness of its educational and training functions. Lastly, it is required that the investigations and opinions carried out by these bodies be of high quality, to reinforce their credibility both with the groups whose rights they are supposed to defend and with the national authorities.

The same line is insisted on in the revision made to the aforementioned Recommendation in 2017<sup>5</sup>, which in addition to highlighting the need for independence, effectiveness, accessibility and oversight, urges the strengthening of competencies such as those of advocacy and prevention, decision-making, support and litigation, and the powers to obtain evidence and information.

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GC/36; General Recommendation No. 35 (2013) on combating racist hate speech; 26 September 2013, CERD/C/GC/35; General Recommendation No. 34 (2011) on racial discrimination against people of African descent, 03 October 2011, CERD/C/GC/34; and General Recommendation No. 33 on follow-up to the Durban Review Conference, 29 September 2009 CERD/C/GC/33.

<sup>4</sup> General Policy Recommendation No. 2 of the Council of Europe Commission against Racism and Intolerance (ECRI) of 13 June 1997 entitled "Equality Bodies to Combat Racism and Intolerance at National Level".

<sup>5</sup> General Policy Recommendation No. 2 of the Council of Europe Commission against Racism and Intolerance (ECRI) of 13 June 1997 entitled "Equality Bodies to Combat Racism and Intolerance at National Level".

Taken together, these provisions therefore make clear the importance of having national equality bodies to combat racism and intolerance, with a clear mandate and sufficient budget to carry out their tasks; the need for such national equality bodies to work in coordination with other national, regional and local bodies and authorities to combat discrimination and promote equality; the centrality of the independence and impartiality of national equality bodies, which must be protected from any political or economic influence; the importance of these national bodies having the support and cooperation of civil society and organizations representing vulnerable groups; and the importance of ongoing training and capacity building for the staff of national equality bodies, as well as data collection and research on discrimination and intolerance.

Equality bodies have played a fundamental role in the protection of rights and the fight against discrimination in relation to certain groups, including, significantly in terms of the number of cases, Romani people and immigrants. Thus, as an example, an emblematic case is worth mentioning that demonstrates the role that these bodies can play in guaranteeing equal treatment and opportunities. Indeed, among the emblematic decisions of the Court of Justice of the European Union in this area, the *Feryn*<sup>6</sup> case concerning an employer's public declaration of its intention to discriminate is worth highlighting. This case concerns proceedings brought by the Belgian Center for Equal Opportunities and Opposition to Racism against *Feryn*, a company specializing in the installation of garage doors. The director of this company made a public statement that he wanted to hire installers but not employees of a particular ethnic origin, namely "immigrants", as the company's customers were reluctant to give these people access to their homes during installation work. In accordance with Belgian law, the Belgian Center brought discrimination proceedings, even in the absence of an identifiable complainant. The Belgian Center for Equal Opportunity and Opposition to Racism alleged in the national proceedings that *Feryn*'s recruitment policy was discriminatory.

The Court held that the fact that an employer publicly declares that it will not hire employees of a certain ethnic or racial origin constitutes

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<sup>6</sup> CJEU of 10 July 2008, *Feryn*, C-54/07, ECLI:EU:C:2008. It cannot be overlooked that the case law of the CJEU has traditionally contributed to creating a hierarchy of grounds of discrimination such that protection against discrimination on some grounds is stronger than on others. By acting in this way, it has missed some great opportunities to contribute to a coherent and sustainable equality regime in the European Union (Howard 2018).

direct discrimination within the meaning of Directive 2000/43/EC. Moreover, it stressed that such statements may strongly discourage certain candidates from applying and thus hinder their access to the labor market. In line with the aim of the Directive, the Court understood that the absence of an identifiable complainant is not an obstacle to a finding of direct discrimination (Solanes 2022, 41-42).

In order to ensure that equality bodies can develop their full potential, contribute effectively to compliance with all the Equality Directives and help victims of discrimination to access justice, the Commission adopted the 2018 Recommendation on standards for equality bodies<sup>7</sup>. This Recommendation lists measures to achieve optimal implementation of the provisions of the Equality Directives to ensure that equality bodies can effectively execute their functions. To this end, it focuses on the mandate of these bodies and identifies two important issues: the grounds for protection and the minimum standards for these bodies in European law. Regarding the first issue, it reiterates that the Community framework considers racial or ethnic origin, gender, religion or belief, disability, age or sexual orientation as protected grounds. Regarding the second aspect, it establishes what are to be considered ideal standards: independence, effectiveness, accessibility, and coordination and cooperation between equality bodies (and other entities) throughout the European Union. It is noteworthy that this Recommendation enables Member States in which equality bodies hold legal competence to identify discrimination based on due process standards and issue remedies in the form of suitable, effective, and proportionate sanctions, thereby allowing them to render binding decisions. However, it must be emphasized that conferring quasi-judicial powers upon national equality bodies extends beyond the mandatory functions outlined in the Directives (Iordache and Ionescu 2022, 74).

The fundamental purpose of the 2018 Recommendation was to remedy the problems arising from the lack of clarity and the shortcomings of the provisions relating to equality bodies contained in the various Directives, but it has not succeeded in doing so, among other reasons because it is not a binding instrument that would make it possible to establish a mandatory minimum standard.

The European Commission published in 2021 a report on the implementation of Directive 2000/43 and Directive 2000/78<sup>8</sup> that

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<sup>7</sup> European Commission, Commission Recommendation (EU) 2018/951 on standards for equality, Brussels, 22.6.2018.

<sup>8</sup> European Commission, Report from the Commission to the European Parliament and the Council on the application of Council Directive 2000/43/EC implementing the



recognizes the importance of equal treatment bodies in the promotion of equality and the fight against discrimination, but at the same time emphasizes the need to strengthen their resources and competences so that they can adequately fulfill their functions. This paper follows up on the aforementioned 2018 Recommendation, which finds that equality bodies have become necessary and valuable institutions at the individual, institutional and broader societal levels, but many of the issues that the Recommendation set out to address remain unresolved. As will be discussed below, the uneven status of such bodies in different States prevents some of them from being able to play their role effectively. The Recommendation has been found to be insufficient, among other things, because of the non-binding nature mentioned above, which leaves a wide margin of action to individual States. As a result, protection against discrimination, compliance with the Directives, promotion of equality and awareness-raising among the public and in national institutions continue to be unequal. With this document, a commitment is made that the Commission will consider proposing alternatives to existing legislation with the aim to reinforce the role of national equality bodies.

The adoption of new rules to strengthen equality bodies is presented as an essential strategy to enable these entities to reach their full potential and is supported by the Parliament, the Council and the European Economic and Social Committee. Thus, in 2021, on the one hand, the Parliament asked the Commission to propose legislation on the rules applicable to equality bodies, providing them with a stronger mandate and adequate resources<sup>9</sup>. On the other hand, in 2022, the Council called on the Member States to support strong equality bodies and to adopt a legislative framework enabling them to carry out their tasks independently, and to allocate adequate resources to implement their tasks effectively<sup>10</sup>. Finally, the European Economic and Social Committee insisted on the need to support these bodies, especially in terms of improving their independence and increasing their staffing and financial resources<sup>11</sup>.

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principle of equal treatment between persons irrespective of racial or ethnic origin (“the Racial Equality Directive”) and of Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation (“the Employment Equality Directive”) COM (2021) 139 final, Brussels, 19.3.2021.

<sup>9</sup> European Parliament resolution of 10 March 2021 on the implementation of Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation in light of the UNCRPD (2020/2086(INI)).

<sup>10</sup> Conclusions of the Council of the European Union on combating racism and antisemitism - 6406/1/22 REV 1., 2.3.2022.

<sup>11</sup> Own-initiative opinion of the European Economic and Social Committee on Improving equality in the EU, SOC/724-EESC-2022, adopted on 26.10.2022.

This marks the beginning of a phase that has not yet been completed to propose binding rules to strengthen the role and independence of equal treatment bodies, among other issues. The aim is to correct many of the weaknesses detected to date.

## 2. Multiple paces of implementation among the different European Union Member States

After the deadline for transposition of Directive 2000/43 on 19 July 2003, the reality in the different States was very diverse. This was evidenced by Holtmaat (2006, 20-25) who, in her report for the European Commission, already pointed out the great disparity that existed from the outset among equality bodies. For example, in some countries there was only one body and in others more than one; in the grounds of discrimination covered and the fields of application, some of these bodies were dedicated only to anti-discrimination law, while others worked in the field of all human rights in general; and in some, such as Spain (together with Denmark, Finland and Italy), reference was made only to racial or ethnic discrimination. There were also substantial differences in material terms: the budget varied in different cases, in some cases the bodies lacked financial autonomy, the number of staff was strikingly uneven, and several of them were not transparent in terms of their organization and functioning. Particularly remarkable was the fact that of the three functions assigned to the bodies by the Directives (assisting victims, conducting surveys, and issuing recommendations and reports), some did not fulfill the mandate to assist victims of discrimination, although two-thirds of all bodies had some power to investigate and resolve complaints, and a minority even functioned as “quasi-judicial” agencies. Such assistance is essential and, in some cases, has yielded excellent results (Van de Graaf 2020).

The operation at different speeds (in all respects) of the national equal treatment bodies in the various Member States remains, in my view, the hallmark of these institutions today, as will be seen from the ongoing regulatory reform. It is understandable that the landscape of equality bodies varies according to the differences in the transposition of Equality Directives by Member States. This variation is largely a result of political contexts, national legal cultures, and societal involvement, which lead to the adoption of legal solutions. The objective is not to encourage the mirroring of equality bodies across different States, as this is incompatible with the distinctive features of their legal systems. On the contrary, the necessary development of European standards to

coordinate equality bodies should not entail the elimination of the various possibilities, tailored to national frameworks, that already exist—many of which have yielded highly positive results. With the aim of advancing the struggle for equality and against all forms of discrimination, these European guidelines delve deeper into best practices, drawing from the shared vision established by the Equality Directives and the potential for further growth that these bodies can achieve through them (Iordache and Ionescu 2022, 120).

From the first studies analyzing the operations of equality bodies (Holtmaat 2006, among others), allusions were made to the imperative requirement for further research and monitoring of these entities to be able to clearly assess the question of whether the Member States had correctly implemented Article 13 of Directive 2000/43 and whether the equality bodies that were officially designated to carry out the functions mentioned in this article were doing so in an independent and effective manner. Several weaknesses that have accompanied the equality bodies since their creation and which persist to a large extent to the present day, are already apparent at this point. Terms such as “assistance”, “surveys” and “reports” are not defined, just as it is not clear what exactly “independent” means in this context, nor are there any rules on what can be considered effective functioning. Regarding the variety of competencies and powers of equality bodies, it is recommended that a clearer distinction be made between various competencies to know which ones can be combined in an equality body and which ones should be assigned to separate institutions. Regarding independence, the list of indicators developed in the framework of this study can serve as a tool. In terms of effective functioning, it is proposed that guidelines be developed on the minimum amount of money and staff that should be made available to equality bodies; and to reach an agreement on a common format for the assessment of the actual performance of the core competencies of Article 13.

From this study, it emerges that there are two types of bodies. Those that want to concentrate on legal “assistance”, which could be classified as having a “reactive role” insofar as they act in the face of discrimination that has already occurred; and those bodies that want to concentrate on their “proactive role”, to prevent discrimination in the future, so that they prioritize surveys, reports, recommendations, and go so far as to draft codes of good practice and play a role in monitoring the implementation of positive non-discrimination duties (Holtmaat 2006, 57). It is clear that the second group is more in line with European minimum standards and more protective, but equality bodies with this profile have not proliferated.

A good part of the warnings made in this study were later confirmed in Crowley's report (2018, 7), which gives a good account of the great variety of equality bodies and the persistence of the weaknesses pointed out which, added to others, can constitute real threats to the performance of the functions assigned to these entities. It should be noted that this study examined a total of 43 equality bodies in 31 countries (EU Member States and EFTA countries). It is essential, to understand the context and the relevance of the proposed regulatory reform, to show concisely that the differences between equality bodies in the different States are due to three variables that I consider particularly relevant: the configuration (mandate and functions), the political context and independence.

Regarding their mandates, a significant diversity exists among these bodies, with their functions not being mutually exclusive. A part of these bodies investigates and adjudicates claims of discrimination, while a second group focuses on providing legal counsel to victims, and a third group allocates most of their resources towards promotional and awareness-raising activities. Concerning the protected grounds by these bodies, the reality has surpassed, at the national level, the mandates stipulated in the Directives. In most Member States, one or more equality bodies cover a broader range of grounds and operate in more domains than those envisioned in the Directives, except for Spain. As we shall see, Spain adhered strictly to the Directives' provisions until the enactment of the Equal Treatment Act (Solá 2023).

This great diversity among the different bodies with respect to the protected features of discrimination and the fact that some entities do not conform to EU law that calls for them to deal with all or most of the grounds, has been from the beginning, and continues to be, one of the main friction points. This issue connects with particularly sensitive issues such as, for example, whether a different equality body than the general one is necessary for gender equality. Spain, for example, will have to take a position on this issue when setting up the Authority, which is discussed in the next section. Moreover, the development of these bodies has seen a merging of mandates of the various equality bodies and national human rights institutions as a growing trend (Crowley 2016).

In terms of the political context that has obviously marked the evolution of these bodies, the report groups States from the most adverse to the most favorable contexts. The political hostility that has marked the impossibility of full development of these bodies is evident in eight countries (Bulgaria, Croatia, Cyprus, Italy, Poland, Romania,

Sweden and the UK [Britain]), lack of political interest and indifference in twelve States (Austria, Belgium, Estonia, Finland, Greece, Hungary, Liechtenstein, Luxembourg, Lithuania, Slovakia, Slovenia and Spain) and there is an evident political context of support in seven countries (France, Germany, Iceland, Ireland, Latvia, Netherlands and Portugal).

Regarding the independence of equality bodies, as one of the four ideal standards, Crowley (2018, 10-11) notes that thirty-one out of the forty-three bodies examined have their own legal personality, which is considered, rightly in my opinion, the best practice. Spain, for example, so far, is at the other extreme with respect to some of its equality bodies, since, as will be seen, its Council for the Elimination of Racial or Ethnic Discrimination (CEDRE) has no legal personality of its own and is not accountable. Advocating for the legal recognition of national equality bodies is not only related to the vulnerability of the victims of discrimination (which should also be considered). Rather, it also facilitates the enforcement and efficacy of equality laws. Simultaneously, this legal status may be regarded as a natural consequence of the mandate to provide independent assistance to victims of discrimination, as outlined in the Equality Directives (Kádár 2019).

In general, while European norms concerning the independence of these bodies are relevant and comprehensive, as noted by Crowley (2021, 13), there exists a deficiency in the inclusion, within the European Commission's standard, of the decision-making function of an equality body as part of its competencies in independent assistance, a matter that could be addressed in the Commission's formulation of indicators for this standard. Though it may not be straightforward to delineate this set of indicators, EQUINET (2023) has made significant contributions that could serve as a starting point in this regard. Nonetheless, given that this is a work in progress, special consideration should also be given to indicators such as the active management of multiple mandates, measures taken to address tensions between functions, and the active management of cross-sector mandates.

The aforementioned 2021 report on the implementation of Directive 2000/43 and Directive 2000/78 and the working documents it incorporates, already highlights that, in this first stage, the creation and progressive strengthening of equality bodies has been promoted. There is currently a long list of these bodies according to the EQUINET directory<sup>12</sup>.

Within the complex landscape of national bodies that the Directive seeks to structure, it is undeniable that progress has been made. Some

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<sup>12</sup> <https://equineteurope.org/european-directory-of-equality-bodies/>

of these advances can be deemed notably innovative, particularly in terms of the multi-sector and cross-domain approach adopted to address discrimination in a significant number of Member States. Such a perspective solidifies the interconnection of human rights and highlights the transversal nature of the fight against discrimination. In the same vein, considerable advances have been taken in the treatment accorded to victims (who often cannot bear the expenses associated with the litigation of their cases), taking into account pertinent aspects such as fee exemptions and the establishment of specific funds for legal proceedings. Equally noteworthy, on the national dimension, are the substantive regulations transposing the Equality Directives, which often go beyond the strict requirements of the European Union *acquis*, for example, by contemplating mechanisms for collective redress or by establishing the possibility of initiating strategic litigation, either on their own behalf or on behalf of victims of discrimination, by national equality bodies to address structural and systematic discrimination (lordache and Ionescu 2022, 120).

Despite acknowledging these advancements, it cannot be denied that there is room for improvement in the implementation of the 2018 Recommendation for all equality bodies to be able to fully fulfill their role. Ensuring the implementation and enforcement of EU law on combating unequal treatment and discrimination is yet to be completely achieved as some equality bodies are not adequately equipped in terms of powers and resources to effectively assist victims. Underreporting remains a major problem, and at the same time, public awareness and knowledge of discrimination is very limited. In addition, it is essential to increase prevention, as levels of discrimination remain high and there is room for improvement in raising victims' awareness of their rights<sup>13</sup>.

### 3. Proposal for modification of the rules governing equality bodies

As noted above, the Commission is working with the support of the Parliament, the Council and the European Economic and Social

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<sup>13</sup> Cf. European Agency for Fundamental Rights (FRA) 2017. Europeans believe that discrimination is widespread in their countries, in the following percentages: 59% discrimination related to ethnic origin, 53% discrimination related to sexual orientation, 47% discrimination based on belief or religion, 44% discrimination related to disability, and 40% discrimination related to age. European Commission, *Standing up for victims of discrimination. Commission proposal on binding standards for equality bodies*. December 2022.

Committee, from 2022, to develop binding rules to strengthen the role and independence of equality bodies. This proposal is part of the Commission's policy orientations for 2019-2024<sup>14</sup>. After analyzing the development of equality bodies from 2000 to 2021, a second phase for these entities can be considered to begin in 2022.

In this regard, the proposal for a Council Directive<sup>15</sup> expressly states that the aim of the proposal is to establish binding rules for equality bodies in the field of equal treatment between persons irrespective of racial or ethnic origin; equal treatment between persons in matters of employment and occupation irrespective of religion or belief, disability, age or sexual orientation; and equal treatment between women and men in matters of social security and in the access to and supply of goods and services. The Commission presents another parallel proposal to establish binding rules for equality bodies in the field of equal treatment and equal opportunities for women and men in matters of employment and occupation, including self-employment<sup>16</sup>.

As Solá (2023) aptly emphasizes, it is noteworthy that two Directives of similar content are proposed. The explanation for this lies in the distinct legal basis upon which the various Directives in the field of equal treatment are promulgated. Concerning the Directive related to equality bodies in the field of equal treatment and equal opportunities between women and men in matters of employment and occupation, it is suggested in line with the provisions of Article 157.3, while the proposal concerning equality bodies in the domain of equal treatment regardless of racial or ethnic origin, equal treatment

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<sup>14</sup> The regulatory amendment to articulate mandatory provisions is intended to correct the merely partial compliance with the 2018 Recommendation, but in any case, it is articulated in parallel to other non-legislative interventions that will continue, such as the active network of equality bodies funded by the Commission (Equinet); exchanges of good practices; and direct funding through the Citizens, Equality, Rights and Values programme.

<sup>15</sup> European Commission, Proposal for a Council Directive on standards for equality bodies in the field of equal treatment between persons irrespective of their racial or ethnic origin, equal treatment in the field 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 deleting Article 13 of Directive 2000/43/EC and Article 12 of Directive 2004/113/EC, COM (2022) 689 final, Brussels, 7.12.2022.

<sup>16</sup> European Commission, Proposal for a Directive of the European Parliament and of the Council on standards for equality bodies in the field of equal treatment and equal opportunities between women and men in matters of employment and occupation and deleting Article 20 of Directive 2006/54/EC and Article 11 of Directive 2010/41/EU, COM (2022) 688 final, Brussels, 7.12.2022.

regardless of religion or beliefs, disability, age, or sexual orientation in matters of employment and occupation, and equal treatment between women and men in matters of social security and access to goods and services and their provision is made on the basis of Article 19.1 of the Treaty on the Functioning of the European Union. For the purposes relevant to our analysis, and given the overlaps, the point of reference, as has been consistently indicated, is the first of these provisions on this matter, namely, Directive 2000/43.

The retrospective analysis presented in the analytical document accompanying the aforementioned proposed amendment to the Directive 2000/43<sup>17</sup> shows some substantial negative and positive aspects. First, the effectiveness of the EU regulatory framework can be considered limited for various reasons, including the fact that, as noted above, this regulation is too general and, at the same time, limited in scope to provide for the establishment of equality bodies. Moreover, the 2018 Recommendation has had a limited impact<sup>18</sup>, since less than half of the Member States reported having taken measures to comply with the Recommendation and only four Member States reported to be working on legislative reforms<sup>19</sup>. Similarly, the efficiency of the different entities is difficult to delineate in terms of costs and benefits as there is little data on this that can be compared. Furthermore, with

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<sup>17</sup> European Commission, Commission staff working document, Analytical document, Accompanying the documents, Proposal for a Council Directive on standards for equality bodies in the field of equal treatment between persons irrespective of their racial or ethnic origin, equal treatment in the field 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 deleting Article 13 of Directive 2000/43/EC and Article 12 of Directive 2004/113/EC and Proposal for a Directive of the European Parliament and of the Council on standards for equality bodies in the field of equal treatment and equal opportunities between women and men in matters of employment and occupation, and deleting Article 20 of Directive 2006/54/EC and Article 11 of Directive 2010/41/EU, SWD (2022) 386 final, Brussels, 7.12.2022.

<sup>18</sup> Vid. European Commission, Commission Staff Working Document, Equality bodies and the implementation of the Commission Recommendation on standards for equality bodies, Accompanying the document, Report from the Commission to the European Parliament and Council on the application of Council Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin ("the Racial Equality Directive") and of Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation ("the Employment Equality Directive"), COM (2021)139 final, SWD (2021) 63 final, Brussels, 19.3.2021.

<sup>19</sup> Among them, Portugal, Malta, Lithuania and Spain, in the latter case, the aforementioned Law 15/2022 of July 12, 2022, has been approved.



markedly different and often insufficient resources to perform their functions, efficiency cannot be adequately assessed either.

Secondly, it is necessary to highlight in a more positive dimension the coherence that exists between the Treaties of the European Union and the Charter of Fundamental Rights of the European Union to improve equality and non-discrimination, which is also aligned with the aforementioned Paris Principles and ECRI Recommendation No. 2. The added value of the European Union is also considered to be positive, since the retrospective analysis shows that its intervention has been fundamental in encouraging the different States to promote this type of organization. In this regard, it cannot be forgotten that at the time of the adoption of Directive 2000/43, only half of the Member States of the then EU-15 had an equality body with a limited mandate.

In the current scenario, there is no doubt about the need for regulatory reform moving forward. It is important to remember that the choice of a binding initiative, after more than two decades of Directive 2000/43, responds to the political will to ensure that sufficient progress is made in all Member States to mitigate the significant differences that have been seen to exist in the level of protection against discrimination in the European Union. In any case, it cannot be overlooked that the minimum standards set out in the proposal consider the legal traditions of the Member States, with their singularities, and respect their institutional autonomy. Therefore, these rules are a standard that allows the different States to establish stricter provisions; and they leave a margin of discretion to decide on how to implement the proposed measures (with the primacy of the procedural autonomy of each State) and to establish more favorable rules regarding the functioning of the equality bodies. In other words, this initiative insists on respect for the principles of subsidiarity and proportionality.

Given the diversity of equality bodies, the impact of the new regulation will vary depending on the current situation in each Member State as regards the characteristics of their equality bodies<sup>20</sup>.

Regarding the designation of these bodies, Article 2 of the Directive proposal outlines the possibility, as previously stipulated, of designating one or more equality bodies, with the potential for these bodies to be part of entities at the national level responsible for safeguarding human rights or individual rights. It is noteworthy that

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<sup>20</sup> Vid. European Commission, Annex 4: Overview of the structure and functioning of equality bodies in Member States, SWD (2022) 386 final, Brussels, 7.12.2022.

the Commission does not exhibit a clear preference for a particular organizational model to consolidate existing bodies; rather, it provides a degree of discretion to Member States when transposing the Directive. Consequently, Member States may choose to establish one or several equality bodies or integrate them within their National Human Rights Institutions.

Significantly, the Directive explicitly states in its recital number 17 that, in pursuit of independence, it is preferable for equality bodies not to be subject to external influence, such that they “should not be set up as part of a ministry or body taking instructions directly from the government.” However, the compromise agreement reached by the Swedish presidency deviates from this assertion, expressly acknowledging the possibility that these bodies may be part of a ministry or another organizational entity, provided that their independence (including in relation to resources and personnel) is guaranteed, free from any external, direct or indirect influence, and refraining from seeking or receiving instructions from any party. Furthermore, this agreement also alludes to the option for Member States to designate one or more equality bodies not only based on the protected grounds of discrimination but also on the types of functions they assume. The competencies ascribed in the Directive are emphasized as being recognized without prejudice to those held by labor inspections or other enforcement bodies, as well as the role played by social partners.

The Directive proposal addresses the vagueness of the current rules and examines aspects of particular importance. Among them, I would like to focus on four issues which, without being the only relevant novelties, may represent a turning point in this second regulatory phase of the reform: independence (Article 3), assistance to victims of discrimination (Articles 6 to 9), opinions and recommendations (Articles 8, 13 and 14) and cooperation (Article 12).

Without wishing to be exhaustive, as far as independence is concerned, until now the various equality Directives have only required bodies to act independently in the exercise of their competences, but the proposal establishes a general obligation of independence for such bodies. It expressly mentions the requirements that may foster independence, including those that have been shown to undermine it<sup>21</sup>, such as the absence of accountability, a budget and adequate staffing.

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<sup>21</sup> Cf. European Commission, SWD (2021) 63 final, Brussels, 19.3.2021 y SWD (2022) 386 final, Brussels, 7.12.2022.

Special attention to guaranteeing their independence is required for equality bodies that are part of national human rights institutions or ombudsmen. The proposal itself warns that in these cases there may be conflict between these different mandates, for example, when ombudsmen are required to act impartially, and this is not always compatible with victim assistance. The alternative proposed here should be considered in the Spanish case with respect to the articulation of the Independent Authority, since, to avoid this possible collision, the adoption of an appropriate structure for the body is proposed, in which these competencies or mandates are exercised by different departments or specialized employees, i.e., creating structural “firewalls”.

Assistance to victims is one of the core powers of the bodies, and it is understood to cover the whole process of accompaniment from the filing of their complaints (including information on the legal framework), the available means of recourse, the services offered by the equality body, the applicable confidentiality rules, the protection of personal data and psychological support, although the latter is not provided directly by the equality bodies.

From my point of view, it is essential, and an issue eternally pending in States such as Spain, to connect this assistance to victims with the provision now contemplated in Article 9 (litigation) of the proposed Directive for States to ensure that equality bodies have the right to act before the courts in administrative and civil law matters related to the enforcement of the principle of equal treatment. In other words, to guarantee the right of the equality body to appear in the proceedings, to submit observations to the court in the form of *amicus curiae*; and to initiate proceedings or participate in them on behalf of or in support of one or more victims (with their approval). It seems to me that this could be a great step forward in cases such as the Spanish case, in which up to now it has not been possible to act before the courts, leaving the victims unaccompanied in the worst of times. Furthermore, I understand that there are many possibilities in this area and that those organizations in Spain, for example, should not rule out possibilities of great value such as collaboration with the public defender's offices of the Bar Associations and university legal clinics in the exercise of some of these rights.

The proposal for a Directive clarifies the competence that the bodies have had so far for recommendations on any issue related to discrimination. The strategic recommendations under Articles 13, 14 and 15 are retained, but for individual cases, non-legally binding opinions are used. These bodies can thus investigate possible cases of

discrimination and issue reasoned opinions (non-binding) or decisions (binding), following a complaint or on their own initiative. Differences here are unavoidable since national law applies to the issuing of decisions. What the Directive adds in these cases is an attempt to ensure compliance with binding decisions, thus requiring the States to establish mechanisms for the follow-up of these opinions, such as the obligation to submit information in this regard, and for compliance with the decisions. In addition, equality bodies are required to include preventive measures in their rulings and decisions, in addition to specific measures to remedy the situation.

As for cooperation, the proposed Directive articulates it with public and private entities, because it understands that both dimensions are essential to promote equal treatment and non-discrimination and insists on coordinating their actions.

This initiative already has the opinion of the European Data Protection Supervisor, who was consulted in accordance with Article 42(1) of Regulation (EU) 2018/1725, which gives its opinion on its Article 18. In its conclusions, it insists that the guarantees provided for in the rule in the that provision regarding the processing of personal data should apply not only to the collection but also to the further processing of such data<sup>22</sup>.

#### **4. The Independent Authority for Equal Treatment and Non-Discrimination in Spain**

In Spain, Article 33 of Law 62/2003<sup>23</sup> established the creation of a body for equal treatment and non-discrimination of persons based on racial or ethnic origin (transposing Directive 2000/43), thus giving rise to the Council for the Promotion of Equal Treatment and Non-Discrimination of Persons Based on Racial or Ethnic Origin. Two subsequent regulations specified its composition, competences and operating regime<sup>24</sup>. The name of the Council changed with the reform

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<sup>22</sup> European Data Protection Supervisor, Summary of the Opinion of the European Data Protection Supervisor on the Proposals for Directives on standards for equality bodies in the field of equal treatment (2023/C 64/13), C 64/46, Official Journal of the European Union, 21.2.2023

<sup>23</sup> Law 62/2003, of December 30, 2003, on fiscal, administrative and social measures, BOE n. 313, 31.12.2003, pp. 46874 to 46992.

<sup>24</sup> Royal Decree 1262/2007, of September 21, 2007, regulating the composition, competences and operating regime of the Council for the Promotion of Equal Treatment and Non-Discrimination of Persons on the Basis of Racial or Ethnic Origin

operated through Law 15/2014, of September 16, on the rationalization of the Public Sector and other measures of administrative reform<sup>25</sup>, becoming designated as it is currently known: CEDRE. The main purpose of this amendment, as expressly stated, is to adapt the Council to the reality of the new administrative organization, to simplify its name in order to promote better and easier access to its services by citizens in general, and by potential victims of discrimination in particular, to clarify its areas of action and to expressly include independence in the exercise of its functions, an essential requirement in the actions of the equality bodies provided for in the aforementioned Article 13 of Directive 2000/43. Within the Council, the role played by the Service for Assistance and Guidance to Victims of Racial or Ethnic Discrimination is particularly relevant<sup>26</sup>. Several of the recommendations made by ECRI to Spain are precisely related to this body<sup>27</sup>.

In line with the similar entities that exist in the European Union, to which reference has been made above, CEDRE has been criticized since its creation for its lack of independence to become a strong institution and for its limited effectiveness. Both aspects have been partially questioned, for example, in the case of Spain, in contrast to other States such as France or the United Kingdom (Hamman and Frank 2015). In articulating the Council for the Elimination of Racial or Ethnic Discrimination, it was considered that it would have been necessary to encourage more decisively (since, it is mentioned, but it seems a mere rhetorical insistence) the independence of public and political power

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(BOE no. 237, 3.10.2007) and Royal Decree 1044/2009, of June 29, amending Royal Decree 1262/2007, of September 21, which regulates the composition, competences and operating regime of the Council for the Promotion of Equal Treatment and Non-Discrimination of Persons based on Racial or Ethnic Origin (BOE no. 177, 23.7.2009).

<sup>25</sup> BOE no. 226, 17.9.2014.

<sup>26</sup> This CEDRE Service is state-run and free of charge and assists and guides victims of racial or ethnic discrimination. It is a collegiate body currently attached to the Directorate General for Equal Treatment and Ethnic-Racial Diversity, Ministry of Equality, created in 2009 in compliance with Article 13.1 of Directive 2000/43/EC. Since March 15, 2013, the Fundación Secretariado Gitano (FSG) manages this service, developing it together with seven other social entities specialized in the fight against discrimination: CEAR, Acceem, Spanish Red Cross, Cepaim Foundation, Movimiento por la Paz, Red Acoge and Asociación Rumiñahui. Vid. 2021 Annual Report on the results of the service of assistance and guidance to victims of CEDRE. [https://igualdadynodiscriminacion.igualdad.gob.es/novedades/novedades/2022/pdf/22\\_07\\_Memoria\\_anual\\_de\\_resultados\\_2021.pdf](https://igualdadynodiscriminacion.igualdad.gob.es/novedades/novedades/2022/pdf/22_07_Memoria_anual_de_resultados_2021.pdf), accessed on 2.4.2023.

<sup>27</sup> ECRI, ECRI Report on Spain (fifth monitoring cycle), adopted on 5.12.2017 and published on 27.2.2018.

and to specify an annual budget allocation that would appear in the General State Budget (Esteve 2013, 52-53).

In general, the transposition that was carried out in the Spanish legal system can be considered very deficient, meeting even the minimum requirements in a precarious manner, in such a way that, as Cachón (2004) rightly points out, the opportunity to set up a strong equal treatment body with competence in all fields and for all reasons was already missed at that time.

From my perspective, of the different external conditions necessary for equality bodies to be independent and effective, three that I consider particularly noteworthy had not been sufficiently developed until the 2022 regulation in the Spanish case. Firstly, the introduction of provisions for discrimination that would jointly contemplate, at least, the six features specially protected by EU law to address matters from that approach and achieve greater effectiveness. Second, there was a need for a transparent, competency-based, and participatory procedure and a restructuring of the accountability required of the equality body so that it would keep the Parliament informed through its annual report, but with a sole responsibility limited to the relevant state audit. Finally, adequate funding was essential to enable it to carry out its functions, with powers to make legally binding decisions and impose sanctions, have legal standing before the courts, and promote standards for good fairness and diversity in practice.

For these and other issues, the need for a reform of CEDRE was repeatedly pointed out. Finally, Law 15/2022, of July 12, 2022, on Equal Treatment and Non-Discrimination<sup>28</sup>, created the Independent Authority for Equal Treatment and Non-Discrimination, which is regulated in Articles 40 to 45. This provision attempts to respond to two demands that have been reiterated over time, on the one hand, the need for a comprehensive equality law and, on the other, the need for an independent authority to combat discrimination (Cachón 2011).

Article 40 of this regulation establishes this body as an independent authority responsible for protecting and promoting equal treatment and non-discrimination of persons on the grounds of the causes and in the areas of competence of the State provided for by law, both in the public and private sectors. Precisely, the extension of the protected features, from this integral perspective from which this regulation is articulated, is one of the notable novelties contained in Article 2. It prohibits discrimination based on birth, racial or ethnic

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<sup>28</sup> BOE no. 167, 13.7.2022.

origin, sex, religion, conviction or opinion, age, disability, sexual orientation or identity, gender expression, disease or health condition, serological status and/or genetic predisposition to suffer pathologies and disorders, language, socioeconomic situation, or any other personal or social condition or circumstance. In this way, the categories protected by European Community law were expanded.

In any case, in conjunction with Articles 2.2 and 4.2, discrimination is not considered to establish differences in treatment when the criteria for such differentiation are reasonable and objective and when what is pursued is to achieve a legitimate purpose or is so authorized by law, or when they result from regulatory provisions or general decisions of public administrations aimed at protecting individuals or population groups in need of specific actions to improve their living conditions or promote their incorporation into the workplace or various essential goods and services and ensure the exercise of their rights and freedoms on equal terms.

From this provision, it follows that once again any difference arising from immigration law may be, a priori, covered by that difference in treatment justified based on the aforementioned arguments, unless it is shown that in the case in question such reasonableness, objectivity and purpose do not concur.

As expressly stated in Article 41, this agency is a public law entity<sup>29</sup>, with its own legal personality and full public and private capacity, which acts for the fulfillment of its purposes with full independence and functional autonomy with respect to the public administrations.

Regarding the personnel and economic resources available to the Authority, they are mentioned in Article 42, referring, among others, to the allocations established annually from the General State Budget, the subsidies and contributions granted in its favor, the assets and rights that constitute its patrimony, as well as its products and income, the considerations derived from the collaboration agreements entered into, and any others that may be legally attributed to it. This economic solvency, as mentioned above, may be a good starting point for achieving the desired independence.

The law also clears up the mystery of the relationship between the Authority and the Ombudsman, maintaining the distinction between the two. Part of the jurists' doctrine considers that this body should form part of the Ombudsman, thus conceptualizing the Authority as an

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<sup>29</sup> In accordance with the provisions of Article 109 of Law 40/2015 of October 1, on the Legal Regime of the Public Sector), BOE no. 236, 2.10. 2015.

ombudsman specialized in the matter. In this sense, as it will be analyzed below, it is true that taking advantage of the Ombudsman's Office to locate the Authority within it would make it possible to comply with a several of the standards of EU law, both the current one and the initiatives already proposed, which are presented in the following section.

The Ombudsman meets the historical requirement of independence that has been demanded of national equality bodies since their creation and would certainly make it possible to converge the different areas to be protected. This would not be a novel option since it already exists at the European level. Furthermore, it is obvious that, if this option were chosen, the infrastructure that the Ombudsman already has at both the national and regional levels could be used, which would facilitate a greater presence throughout the territory. At the same time, advantage could be taken of the knowledge that citizens already have of the Ombudsman to bring the Authority closer to society and to highlight the important work that it is called upon to do in the fight against discrimination, thus overcoming the great lack of knowledge of these entities that, as we have seen, is often held even by the victims themselves. There is no doubt from my personal standpoint that, with respect to resources, both material and personal, it would be essential to have a markedly different set of resources that would allow the Authority to fulfill its functions and, at the same time, be efficient and effective.

To articulate this proposal, there is a problem of a legal nature that has to do with the legal regulation that Article 54 of the Constitution specifies in relation to the Ombudsman. This provision states that "he may supervise the activity of the Administration, reporting to the Cortes Generales", therefore, it is outside the private sphere, unlike what is required by EU law. The question is whether it would be necessary to reform the article in order for the Authority to be able to perform all of its functions. In my opinion, the answer is affirmative and the possibility of articulating it is feasible. In this sense, Rey (2021, 341) is in favor of converting the Ombudsman into the equality body required by European legislation, in such a way that the regional ombudsmen's offices could assume, following an agreement with the state ombudsman's office, the functions of the equality body at the regional and local level (with regard to the administrations) and to the possible harm to equality between individuals in the territory of the respective Autonomous Community, reserving the defense of equality against the state administration and the institutional administration for the state ombudsman's office. This would be, as the author points out,



a more sustainable and powerful model of transposition of the European regulations in this field, but not the only one, since it is also possible that the Authority could be configured as a body outside the Ombudsman, although necessarily, in my view, as a stronger, more active and dynamic entity than the CEDRE.

Law 15/2022, in Article 45, has chosen this second possibility and therefore specifies the relationship between the Authority and the Ombudsman. In this sense, it states that the Authority has a duty to collaborate with the Parliament, the judicial bodies, the Public Prosecutor's Office, the Ombudsman and the Public Administrations. Specifically, with respect to the Ombudsman, it is expressly stated that the Authority will exercise the functions attributed to it by law without prejudice to the powers of the Ombudsman or similar bodies of the Autonomous Communities. The law makes it possible for this body to enter into collaboration agreements with the Ombudsman or similar bodies of the Autonomous Communities to establish the cooperation mechanisms deemed appropriate. In my view, such agreements will be necessary since there are overlapping areas of action in which joint action will be essential for efficiency.

At present, the other equality body in Spain is the *Instituto de las Mujeres* (Women's Institute). In this case, as such an entity in line with Directives 2006/54/EC, 2010/41/EU and 2004/113/EC, there was the designation of an already existing body through Organic Law 3/2007, of March 22, for the effective equality of women and men<sup>30</sup>. The name *Instituto de las Mujeres* has replaced, in accordance with the provisions of the fourth final provision of Law 11/2020<sup>31</sup>, the previous name *Instituto de la Mujer y para la Igualdad de Oportunidades* (Woman's Institute and for Equal Opportunities) which replaced, in turn, the traditional name *Instituto de la Mujer* (Woman's Institute), in accordance with the provisions of Article 17 of the aforementioned Law 15/2014.

This Institute deals with gender equality policies. Its main purpose is to promote and foster the conditions that make possible freedom, real

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<sup>30</sup> Vid. Law 16/1983, of October 24, 1983, on the creation of the Women's Institute Autonomous Organization, BOE no. 256, 26.10.1983, and eighteenth additional provision of Organic Law 3/2007, of March 22, 2007, for the effective equality of women and men, which designates the Women's Institute as an equal treatment body for the purposes of the provisions of Directives 2006/54/EC and 2004/113/EC, BOE no. 71, 23.3.2007.

<sup>31</sup> Law 11/2020, of December 30, on the General State Budget for the year 2021, BOE no. 341, 31.12.2020.

and effective equality between women and men and the participation of women in political, civil, labor, economic, social and cultural life, as well as the prevention and elimination of all types of gender discrimination. Unlike CEDRE, it has its own legal personality, its own treasury and assets, and autonomy in its management, although it is subject to the strategic direction, control and evaluation of the ministerial department to which it is attached. The Institute also has its own staff, assets and resources.

## **Conclusion: challenges and pending tasks**

The second phase, which begins at the end of 2022 with the proposal for a Directive on the rules on equality bodies in the field of equal treatment and in which we are immersed, is, the way I see it, very positive. As has been shown in this analysis, after the first stage that has strategically promoted the creation and proliferation of equality bodies in the different Member States, the next step requires new legislation to ensure the strengthening of these entities. The proposal therefore focuses on crucial issues for bodies such as mandate, competences, access, cooperation, surveys, data collection, monitoring, compliance, independence, resources and structure.

With this amendment, I believe that the three objectives that expressly underlie the European Union's intervention in the fight against discrimination can be met, namely, to contribute to compliance with EU law in this area (of the six equality Directives); to help victims of discrimination effectively to access justice; and to promote equal treatment and prevent discrimination.

As highlighted above, the aim of the reform is for equality bodies to be free from external influence, which has not happened in all cases so far, so that they can carry out their functions independently; that they have the necessary resources to fulfill their tasks; and that if an equality body is part of an entity with a multiple mandate, an internal structure (referred to as a "firewall") is in place to ensure independence and sufficient resources for the equality mandate.

The analytical document accompanying the proposal gives a good account of the impact that the modification may have on the criteria that are understood to be relevant. I believe that in terms of effectiveness, the proposed measure contributes to progress, as well as efficiency, and can help build a better relationship between the resources used and the changes it is expected to generate. It is also essential to deepen the coherence with other international, national

and European Union instruments and the added value of regulatory action from the Union, since, from my point of view, the proposed measure can generate changes that cannot be expected from the interested parties alone if they do not act in any way. All this from the strict respect of the principles of subsidiarity and proportionality that underlie the field of EU law.

Particularly relevant to me is the fact that the proposal expressly refers to the importance of the system for assessing its real impact. In this connection, it is envisaged that Member States will report on its implementation every five years to evaluate the effectiveness with which this initiative achieves its objectives. The Commission shall adopt an implementation report based on information provided by Member States and data collected by FRA<sup>32</sup> and EIGE<sup>33</sup> based on a list of indicators to be drawn up by the Commission in cooperation with these bodies and EQUINET. The Commission intends to set up an expert group to consult Member States on these indicators, including Member States, FRA and EIGE. The results of these reports can be compared with the work that has already been implemented, for example, in relation to some indicators on the mandate and independence of equality bodies (Farkas 2022).

In any case, the proposal for a Directive can be improved in terms of its interpretation in specific aspects which, moreover, are largely mentioned in its recitals. In this sense, EQUINET (2023) makes some points regarding this initiative for a Directive that are particularly interesting. Among them I share and believe that those that refer to independence are essential when it is specified that the provisions of Article 3.1 must be interpreted including the clarifications of recital 17, which requires that equality bodies not be created as part of a ministry or body that receives instructions from the government. In relation to Article 3.3, it is essential to define and interpret in more detail this idea of firewalls or adequate safeguards to avoid a kind of strict and unnecessary firewall between different competences. Likewise, it is positively valued that the Directive contains provisions for bodies with multiple mandates, to ensure the resources and visibility necessary for the equality function, but the meaning of the "autonomous exercise of the equality mandate" of article 3.4 should also be defined and

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<sup>32</sup> Article 4 of Council Regulation (EC) No 168/2007 of 15 February 2007 establishing a European Union Agency for Fundamental Rights, OJ L 53, p.1.

<sup>33</sup> Article 3 of Regulation (EC) No 1922/2006 of the European Parliament and of the Council of 20 December 2006 on establishing a European Institute for Gender Equality, OJ L 403 p. 9.

interpreted to ensure that it does not require a hermetic separation between different mandates where they can be used to strengthen and complement each other, especially since this can be of benefit both to the people who come to these agencies and to the efficient spending of public funds.

In general, the recitals of the Directive pay attention to sensitive issues that cannot be ignored in the interpretation of its articles. It would be advantageous for this proposal to succeed, even if some minor nuances are introduced during negotiations and the Directive is approved. This would demonstrate the leadership of the European Union and its Member States in the fight against discrimination, without regression in existing standards and with the willingness to adopt, transpose, and enforce the regulation with strict provisions.

Nonetheless, there exists a risk that must be acknowledged. I am referring to the possibility of regression or backsliding in the work carried out by these bodies. While the potential for growth and synergy-seeking among various national equality bodies is desirable to facilitate collaboration for the progressive implementation of non-discrimination norms, it cannot be ruled out that, in certain instances, regression may occur. This has already transpired in the case of the Hungarian Authority for Equality, which commenced its work with high expectations but lost momentum when unprecedented democratic setbacks adversely impacted its mandate, resources, and public standing (Iordache and Ionescu 2022, 121). Hence, the significance of continually solidifying both European and national legislative frameworks, alongside strengthening institutional agreements that prioritize equality and non-discrimination as an ongoing process.

With regard to Spain, the first additional provision of Law 15/2022 establishes that within six months from the entry into force of this law, the Independent Authority for Equal Treatment and Non-Discrimination will proceed with the integration of functions, entities, bodies, and administrative services assigned to the General State Administration that are determined by Royal Decree, approved with the authorization of the Ministries of Economic Affairs and Digital Transformation and of Treasury and Public Function, with the prior approval of the Ministry of Presidency, Relations with the Courts and Democratic Memory. Likewise, within the same period, the Statute of the Authority provided for in Article 41.3 of the law will be approved by Royal Decree. Finally, within one year from the establishment of the Authority, the department responsible for equal treatment will submit a proposal for the establishment of a Documentation and Memory Center on Discrimination, Hate and Intolerance.

The law was approved on July 12, 2022, published in the BOE on July 13, and according to its tenth final provision, it came into force the day after its publication in the aforementioned BOE, that is, on July 14. Therefore, on January 14, 2023, the initial six-month deadline had elapsed, after which compliance with the mandate has not been fulfilled. Two months after the expiration of the deadline granted to the government for the creation of the Authority, the entities that make up the Alliance for the Equality Law recalled that without an entity that ensures compliance, it is practically impossible to effectively apply the regulation. In addition, the Alliance rightly insisted that the obligations established in Law 15/2022 apply to the entire public sector. Therefore, the competent Public Administrations have the duty to promote the right to equal treatment and attend to victims of discrimination<sup>34</sup>.

Undoubtedly, the establishment of the Authority in Spain represents a significant opportunity to advance in the fight against discrimination that cannot be delayed, as it would enable the overcoming of the deficient model consolidated by the CEDRE. From my perspective, the most positive aspect of this Council, which should be valued and incorporated into the future Authority's activities, is the aforementioned service of assistance and guidance to victims of racial or ethnic discrimination. To achieve this, the service could be included within the scope of participation referred to in Article 43 of Law 15/2022. However, it would be essential to include entities that combat all types of discrimination, not just racial or ethnic. This would leverage the excellent experience and solvency of the service, which has a significant presence throughout the national territory. Additionally, within the participation contemplated in Article 43 of the law, I believe that the Authority should collaborate closely with the third sector, i.e., legally constituted national associations and organizations whose activity is related to the promotion or defense of equal treatment and non-discrimination, which the regulation expressly refers to, and that have been covering the significant deficiencies of public institutions in this area thus far.

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<sup>34</sup> The Alliance for the Equality of Treatment Law (*Alianza por la Ley de Igualdad de Trato*) demands the government to establish the independent authority for equality of treatment and non-discrimination, March 14th, 2023. Signatories (the Alliance is currently made up of): Accem, Asociación Rumiñahui, CERMI, CESIDA, Comisión Española de Ayuda al Refugiado, Cruz Roja, Fundación Cepaim, FELGTB, Fundación Secretariado Gitano, HOGAR SÍ, Movimiento por la Paz-MPDL, Provivienda, Red Acoge y Save The Children.

From the existing regulation, it is evident that this new body would have functions related to victim support and promotion, leaving aside decision-making competencies, except for its establishment as a mediation and conciliation body. The exception to the possibility of making decisions and imposing sanctions has been a subject of debate among legal scholars, as it has been in various working documents preceding legislative reforms.

On the one hand, some authors argue for the necessity of granting this body sanctioning powers, as is already the case in certain instances within the European context, to ensure its effectiveness and provide it with greater institutional strength. Indeed, one could argue that educational, labor, and other types of inspections already exist, yet instances of discrimination persist. Thus, the power to impose sanctions would constitute a significant innovation, endowing this entity with greater visibility among the public. It should also be noted that differences in opinions may arise in certain cases between the Commissioner and the sanctioning body in question, and in such cases, the latter's will shall always prevail, thereby manifestly weakening the Commissioner's institutional position (Rey 2021, 338).

On the other hand, some believe that, due to both the immaturity of the system and the associated risks, it may not be appropriate to grant sanctioning authority. In fact, this danger has been highlighted by the European Commission itself, which has noted that when equality bodies combine this function with victim support, their impartiality can be seriously affected, leading to internal issues and budgetary resource allocation challenges between the two functions. A serious exercise of sanctioning authority in this context requires substantial resources. Additionally, this option entails difficulties from the perspective of the territorial application of the infringement and sanction regime within the Spanish administrative framework (Solá 2023).

In my view, the maximalist approach advocated by the first position (possibly necessary in the long term) could lead to delays and serious practical challenges in establishing this body. Therefore, to expedite the establishment of the Authority, and thereby align it with European standards for equality bodies, I believe it is more appropriate to obviate this sanctioning capacity and instead strengthen the rest of the functions mentioned.

The establishment of the Authority in Spain is essential to realize the intention that the law explicitly states as the desire to shape a specific anti-discrimination right that covers existing and future discrimination and the challenges of equality that change with society.

If this national equality body is implemented without concessions, in line with European standards, it could contribute to positioning Spain (as intended by the law) among the states in our environment with the most effective and advanced institutions, instruments, and legal techniques for equal treatment and non-discrimination.

Undoubtedly, the opportunity to establish this Authority in Spain aligns perfectly with the second phase of strengthening equality bodies in the European Union, which, in my opinion, represents an undeniable, necessary, and pressing advance in the respect and guarantee of equality as a principle, value, and norm.

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