

Equal Treatment and Discrimination. Equal Treatment in Public Procurement Law

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Abstract

In this study we propose an overall analysis of equal treatment highlighting fundamental rights, including the context of positive discrimination with an approach ranging from legislative, doctrinal and jurisprudential perspective, a critical approach to discrimination on criteria not specifically stipulated in the European Convention on Human Rights as well as the legal implications that this generates. Another aim of the study is to draw a brief parallel between equal treatment in general and this principle in public procurement law and the legislative and doctrinal analysis of the categorization of the latter as being included or not among the rights protected by the European Convention on Human Rights. The method will be observational, qualitative, based on the analysis of legislation in the field and on the collection and interpretation of doctrinal sources. It is intended that the results and conclusions of the study will eventually form the basis of future research through the novel elements that they could contribute to the academic debate in Romania, but also through their own analytical contents.

Keywords: equal treatment, human rights, positive discrimination, public procurement.

JEL Classification: K23, K33, K38

DOI: 10.62768/PLPA/2025/14/1/05

Please cite this article as:

Onica, Adriana Iulia, „Equal Treatment and Discrimination. Equal Treatment in Public Procurement Law”, *Perspectives of Law and Public Administration* 14, no. 1 (March 2025): 89-105.

Article History

Received: 9 December 2024
Revised: 4 February 2025
Accepted: 9 March 2025

1. Introductory considerations

As a principle of fundamental importance in the human rights system, equal treatment is specifically legislated in all European legal systems and no legal system accepts arguments in favor of discriminatory actions and manifestations of intolerance directed against persons belonging to a certain race, ethnicity, age, gender or other such minorities.

The overall analysis of equal treatment in the light of fundamental rights, including in the context of positive discrimination proposed by the study, is intended to be carried out from a legislative, doctrinal and jurisprudential perspective starting with a discussion of the normative framework of the principle in European Union law, the legislation of the right to equality in the Convention for the Protection of Human Rights

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and Fundamental Freedoms² (or European Convention on Human Rights - hereinafter referred to as the Convention) as well as a case study of situations in which discrimination occurs on the basis of criteria that are not specifically stipulated in the Convention. Since one of these possible situations lies in the realm of public procurement law, another aim of the study is a brief parallel between equality of treatment in general and this principle in public procurement law and the legislative and doctrinal analysis of the categorization of the latter as being or not being part of the rights protected by the Convention.

We believe that systematizing a relevant part of the legislation in the field will help to clarify the application of this legislation in certain situations by exemplifying the approach of European norms and analyzing the solutions in case law and the collection and interpretation of doctrinal sources will generate an overview of the expert opinions of specialists in the field.

2. The right to equal treatment - a fundamental right

The adaptation of legal systems to the social, political, economic and cultural reality is an implicit consequence of the continuous evolution of society, requiring certain laws to be supplemented, amended or repealed in order to keep pace with this evolution. However, respect for fundamental human rights remains the basis of any system of law in countries with democratic traditions.

Present at European level and also specifically included in the provisions of art. 14 of European Convention on Human Rights, the principle of equal treatment guarantees that no one shall be denied the enjoyment of his or her rights on discriminatory grounds, and art. (1) of Protocol no. 12³ to the Convention places an obligation on participating States to ensure the enjoyment of the rights and freedoms provided by law without discrimination on any ground such as "sex, race, color, language, religion, political or other such opinion, national or social origin, association with a national minority, property, birth". The phrases "in particular" and "in any other circumstances" indicate that the prohibition in the second sentence of Article (1) imposed on public authorities in Council of Europe member States is not confined strictly to the criteria expressly mentioned, but reaches a wider permissive scope.

The European Court of Human Rights (ECHR) is the institution set up to deal with human rights complaints from Council of Europe member states, the ultimate interpreter of the European Convention on Human Rights. The ECHR's task is to ensure that the provisions of the European Convention on Human Rights and secondary legislation on the subject are respected and implemented by the signatory states. Article 14 of the European Convention on Human Rights has, over the years, given rise to extensive ECHR case law, and there have been numerous cases in which the Court has found violations of Article 14 of the Convention and the rights and freedoms covered

² Drawn up within the Council of Europe and signed in Rome on November 4, 1950.

³ ETS 177, signed in Rome, November 4, 2000, entered into force April 1, 2005.

by it. We recall here the ECHR judgment⁴ in the case of *Deaconu v. Romania*, where the ECHR criminalizes discrimination on grounds of age, the ECHR judgment⁵ in the case of *Moldovan and Others v. Romania*, which criminalizes discrimination on ethnic grounds. Also, in its judgment of 19 March 2024 in *B.T. v. Russia*⁶ the ECHR establishes that there was a difference in treatment on the basis of sex between female and male police officers in relation to the right to parental leave, and in its judgment of 26 March 2024 in *V.I. v. Republic of Moldova*⁷ the Court criminalizes discrimination on the basis of intellectual disability.

In one case⁸, the applicant's dismissal from her job amounted to a disproportionate interference with her rights under Article 8 of the Convention, which protects the right to respect for private and family life, and the ECHR finds that this interference was based solely on sexual orientation grounds. In violation of Article 14, the Court concludes that, contrary to the authorities' claims, the only real and discernible reason for the applicant's dismissal was her sexual orientation. On this occasion the Court points out that Article 14 does not have an independent existence, since it has effect only in relation to the "exercise of the rights and freedoms" guaranteed by the provisions of the Convention. Although the application of Article 14 does not imply a breach of those provisions - and to that extent it is autonomous - there can be no room for its application unless the facts in question fall within the scope of fundamental rights and freedoms.

The Charter of Fundamental Rights of the European Union⁹ enshrines a wide range of fundamental rights enjoyed by EU citizens and residents in primary EU law, and with the entry into force of the Lisbon Treaty¹⁰ it became legally binding. Article 21 of the Charter states in paragraph (1) that "Discrimination of any kind" on grounds such as "sex, race, color, ethnic or social origin, genetic characteristics, language, religion or beliefs" is prohibited, as is discrimination based on "political or any other opinions, membership of a national minority, property, birth, disability, age or sexual orientation", and paragraph (2) adds that "within the scope of application of the Treaties and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited".

In the case of *Ms. Molla Sali*¹¹, widow of a Greek Muslim minority citizen, who complained about the application of Sharia law to an inheritance dispute concerning her husband's Greek and Turkish properties, the ECHR found a violation of Article 14 of the Convention in conjunction with Article 1 of Protocol No. 1 and found that, by failing to comply with "the undertakings it has given in the Convention and its

⁴ Published in the Official Gazette, Part I No 863 of October 25, 2019.

⁵ Published in the Official Gazette, Part I No 317 of April 10, 2006.

⁶ Case *B.T. v Russia*, [2024] ECLI:EC:ECHR:2024:0319JUD001528419.

⁷ *V.I. v Republic of Moldova*, [2024] ECLI:EC:ECHR:2024:0326JUD003896318.

⁸ Case *A.K. v Russia*, [2024] ECLI:EC:ECHR:2024:0507JUD004901416.

⁹ Charter of Fundamental Rights of the European Union (C 326 of October 26, 2012, OJEU).

¹⁰ Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community (C306 of December 17, 2007, OJEU).

¹¹ Case *Molla Sali v. Greece* [2020] ECLI:EC:ECHR:2020:0618JUD00202045214.

Protocols", Greece had breached its primary obligation under the Convention to ensure guaranteed rights and freedoms (Article 1 of the Convention).

On this occasion, the ECHR also reiterates that in the exercise of the rights and freedoms guaranteed by the Convention, Article 14 provides protection against different treatment applied without justification, to persons in similar situations. For the purposes of Article 14, a difference of treatment is discriminatory if it "lacks an objective and reasonable justification", i.e. if it does not pursue a "legitimate aim" or if there is no "reasonable relationship of proportionality" between the means used and the aim to be achieved¹², so that it can be inferred that if there is justification or proportionality between means and aim, discrimination becomes positive.

Protocol No. 12 to the Convention according to Art. (1) establishes the obligation of participating States to ensure the exercise of any right provided by law, irrespective of any criterion, extending non-discrimination in the exercise of rights provided by the domestic law of the signatory States and by Art. (2) extends the guarantee of non-discrimination in relation to the actions of public authorities. As early as in the preamble, the Protocol refers to positive discrimination, recalling that the principle of non-discrimination does not prevent States Parties from taking measures to promote full and effective equality, provided that there is an objective and reasonable justification for such measures.

A series of subsequent directives have clarified and supplemented the European legislative framework on equal treatment, but discrimination is a topical issue which is often manifested internationally due to the fact that regulation in this area is complex. We note that the case law of the Court of Justice of the European Union (CJEU) has a variety of cases in which it has upheld citizens' complaints against Member States concerning discrimination and unequal treatment, which confirms the importance of the field and the need for research, clarification and further development of the legal provisions.

Directive 79/7/EEC¹³, a directive designed to apply progressively the principle of equal treatment for men and women in the field of social security, is one of the first directives to focus on equal treatment. Although discrimination is generally directed against women, there are also cases in case law to the contrary. An application by a man for a pension supplement was rejected by the competent national authority on the basis of a national rule restricting the right to a pension supplement to women only. In its judgment delivered on September 14, 2023¹⁴ by the CJEU following a reference for a preliminary ruling initiated by the High Court of Justice of Galicia - Spain in the case of DX against the competent Spanish institutions concerning their refusal to grant DX (male) a pension supplement which, under national legislation, was available only to women who had at least two biological or adopted children. The CJEU issues a

¹² Idem.

¹³ Directive 79/7/EEC of the Council of the European Communities on the progressive implementation of the principle of equal treatment for men and women in matters of social security (L 6/24 of January 10, 1979, OJEU).

¹⁴ Case C-113/22, *DX v Instituto Nacional de la Seguridad Social (INSS) and Tesorería General de la Seguridad Social* [2023] ECLI:EU:C:2023:665.

preliminary ruling finding that this legislation constitutes direct discrimination on grounds of sex and reiterates the settled case-law according to which, if discrimination contrary to EU law is found and no measures have been adopted to restore equal treatment, the solution is to grant persons in the disadvantaged category the same advantages as those enjoyed by persons in the privileged category, in order to respect the principle of equality. Not surprisingly, the Court's judgment was in favor of the members of the disadvantaged group, to whom the same regime must be applied as that enjoyed by the members of the latter category.

Directive 2000/43/EC¹⁵ concerns the application of the principle of equal treatment between persons irrespective of racial or ethnic origin, the first instance of unequal treatment to have attracted the attention of legal scholars and perhaps taken together with sex discrimination, one of the oldest forms of discrimination in the world. Article (5) draws attention to the permission given to States to adopt specific measures with a view to putting full equality into practice. The principle of equal treatment must not prevent a Member State from adopting and maintaining such measures to prevent or compensate for disadvantages linked to racial or ethnic origin. On this occasion, the Council of the European Union reiterates that the EU rejects those theories which assert the existence of separate human races and also clarifies that the use of the term "race" in the Directive in no way implies acceptance of those theories.

In a case brought before the CJEU¹⁶, an electricity supply company installed electricity meters at a height of 6-7 meters, and the disputed practice was only instituted in neighborhoods where the population was predominantly made up of Bulgarian nationals of Roma origin. The fact that the main reason for the unlawful connections is based on the Roma origin of the majority population suggests that the contested practice is based on stereotypes or ethnic prejudice. On this occasion, the CJEU clarifies a number of notions such as the notion of 'apparently neutral' provision, criterion or practice which it defines as a 'provision, criterion or practice which is formulated or applied in an apparently neutral manner', the notion of 'particular disadvantaged situation', which for the purposes of Article 2(2)(b) of Directive 2000/43 does not mean a situation of manifest and serious inequality which is particularly unfavorable, manifest and serious, but implies that it is persons of a particular racial or ethnic origin in particular who are disadvantaged by the provision or practice in question.

Council Directive 2000/78/EC of the Council of the European Union¹⁷ concerns the implementation of the principle of equal treatment in employment and occupation, establishing a general framework for combating discrimination on grounds of religion or belief, disability, age or sexual orientation. The provisions are specific, but, for example, on the question of whether one employee should be treated differently from another, in terms of pay, in identical conditions, the CJEU has made it clear that the

¹⁵ Directive 2000/43/EC of the Council of the European Union of June 29, 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (L 180 of July 18, 2000, OJEU).

¹⁶ Case C 83/14, *CHEZ Razpredelenie Bulgaria AD v Komisia za zashtita ot diskriminatsia* [2015] ECLI: EU:C:2015:480.

¹⁷ Council Directive 2000/78/EC of the Council of the European Union establishing a general framework for equal treatment in employment and occupation (L 303/16 of December 2, 2000, OJEU).

Directive must be interpreted as precluding discrimination only where it is based on one of the grounds expressly listed in Article (1) of the Directive.¹⁸

We note in the case law of the CJEU¹⁹ that the scope of the principle of equal treatment for men and women cannot be restricted to the prohibition of discrimination on the basis of whether a person is of one sex or the other but applies equally to discrimination based on sex reassignment, and the third sentence of Article 5 of Directive 2024/1500 brings to the attention of groups which are prevented from accessing information for various reasons (low economic status, age, disability, level of written and written skills, nationality or residence status or lack of access to online tools.

3. Equal treatment - non-discrimination and positive discrimination

Creating an opening for differential treatment is not primarily about the need to change the rules; rather, the main requirement is to prepare to contemplate the idea that there should - in certain situations - be a freedom to select characteristics deemed to be applicable, even when they are related to a person's gender²⁰. Arguments based on considerations involving advantages relating to the working environment or the business as such, for example whether the staff at the workplace is evenly distributed between the sexes, or setting a percentage of employees belonging to a particular minority are not in line with Article (2) of Directive 2000/78 and even less with its interpretation in case law to date. The 'positive discrimination' ground must constitute an essential and determining occupational requirement, so that the objective is legitimate and the requirement is proportionate.

From the provisions of Article 2(5) specifying the non-interference of the provisions of the Directive in measures provided for by national law we can conclude that the EU approach to positive action is one in the sense that there is no obligation for Member States or other parties to permit or adopt positive action measures, with the remark by some authors²¹ that the Community provisions on positive action give Member States an option which, within the general limits provided for by Union law, is essentially at their discretion.

In fact, the decisive factor in determining whether we are actually dealing with direct discrimination is the way in which certain characteristics are viewed as gender-related or as qualities themselves, lifestyles or perhaps choices. These boundaries are not at all clear and neither are the boundaries between direct and indirect discrimination. The concept of indirect discrimination implies recognizing that justice for the individual

¹⁸ Case C-301/21, *Court of Appeal Alba Iulia and Others v YF and Others* [2021] ECLI:EU:C:2022:811.

¹⁹ Case C-117/01 *K.B. v National Health Service Pensions Agency and Secretary of State for Health* [2001] ECLI:EU:C:2004:7; C-423/04, *Sarah Margaret Richards v Secretary of State for Work and Pensions* [2004] ECLI:EU:C:2006:256; C-451/16, *M.B. v Secretary of State for Work and Pensions*, [2016] ECLI:EU:C:2018:492.

²⁰ Ann Numhauser-Henning, "On equal treatment, positive action and the significance of a person's sex" in *Legal perspectives on equal treatment and non-discrimination* (Springer, 2001), 241.

²¹ Marc De Vos, *Beyond formal equality: positive action under directives 2000/43/EC and 2000/78/EC*, European Commission: Directorate-General for Employment, Social Affairs and Inclusion, Publications Office (2007), 38.

cannot be judged independently of the group and that the discriminatory potential of certain criteria must be considered in relation to the effects they have on the group to which the disadvantaged individual belongs. Even if certain cases have been interpreted by the CJEU as containing indications that the Court might, in certain circumstances, be open to the idea that direct discrimination may also be justified, there is no firm basis for such a conclusion²².

Directive 2006/54/EC of the European Parliament and of the Council of the European Union²³ legislates the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation, and the rules of this Directive are clear and exclusive with the CJEU stating²⁴ that, for example, Article 2(1)(e) and Article 4 of Directive 2006/54/EC of the European Parliament and of the Council must be interpreted as meaning that allowances of different amounts granted to groups composed predominantly of men and women respectively are not prohibited by that directive 'where those two groups of workers do not perform the same work or work to which equal value is attributed'.

Directive 2010/41/EU lays down the framework for the implementation in the Member States of the principle of equal treatment between men and women engaged in or contributing to the pursuit of activities in a self-employed capacity, with regard to those aspects not covered by Directives 2006/54/EC and 79/7/EEC²⁵ and defines in Article 3 "direct discrimination" as the situation where "a person is treated less favorably on grounds of sex compared to another person who is, has been or would be in a comparable situation".

Directive 2024/1500²⁶ which came into force in June 2024 confirms in its preamble the designation by Member States of equality bodies under the previous equality and non-discrimination directives and the emergence of good practices but notes that these bodies face challenges particularly in terms of resources, independence and the powers needed for their ultimate purpose. The preamble makes it clear that the prohibition of discrimination should be without prejudice to the maintenance or adoption of measures intended to prevent or compensate for disadvantages suffered by a group of persons of a particular religion or belief, disability, age or sexual orientation.

The Directive lays down minimum requirements for the functioning of equality bodies in order to improve their effectiveness and guarantee their independence, reinforcing the application of the principle of equal treatment, provides for the adoption

²² Ann Numhauser-Henning, *op. cit.*, 240.

²³ Directive 2006/54/EC of the European Parliament and of the Council of the European Union on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (L204 of July 26, 2006, OJEU).

²⁴ Case C-314/23, *Ministerio Fiscal v Air Nostrum, Líneas Aéreas del Mediterráneo SA and Others* [2023] ECLI:EU:C:2024:842.

²⁵ Directive 2010/41/EU of the European Parliament and of the Council of July 7, 2010 on the application of the principle of equal treatment between men and women engaged in an activity in a self-employed capacity and repealing Council Directive 86/613/EEC (L810 of July 7, 2010, OJEU).

²⁶ Directive (EU) 2024/1500 of the European Parliament and of the Council on standards for bodies promoting equal treatment and equal opportunities for men and women in matters of employment and occupation and amending Directives 2006/54/EC and 2010/41/EU (L of May 29, 2024, OJEU).

by the state of awareness-raising, promotion and prevention actions and assistance to victims of discrimination. It also draws attention to the aspect of intersectionality, multiple discrimination, where several areas intersect, i.e. discrimination on grounds of sex in combination with any other grounds of discrimination laid down in the relevant directives, which must be taken into account in both national and EU-level policies in order to guarantee the protection of victims.

Positive policies or measures have their origins in the 17th-19th centuries but took the form of legislation after the end of the First World War, when some countries in Europe introduced a system of percentage employment quotas for war veterans. In the following years quota schemes were extended to cover civilians with disabilities and became part of a more comprehensive package that included services for all people with disabilities, and as disability laws moved from a welfare model to an anti-discrimination model, in many cases quotas were retained as positive anti-discrimination measures²⁷. Then, as opposition to discrimination gained momentum after the Holocaust, accompanied by the widespread adoption of positive measures, positive action was enshrined in international conventions prohibiting racial and gender discrimination²⁸.

On the official website of the European Commission positive discrimination is defined as "A policy or program that provides advantages to certain groups of people who are perceived to have been traditionally discriminated against"²⁹ and aims to create a more equal society. As such, positive discrimination appears to be a series of additional rights granted to a minority in order to preserve its identity. In certain situations, the right to equal treatment does not necessarily mean the right to identical treatment. Effective equality may require that people be treated differently in different circumstances in order to achieve social equality, and this implies the necessary normative changes and adjustments, including measures to facilitate each individual's participation in every area of social life on an equal footing with others. This conduct, these positive measures, can lead to so-called 'positive discrimination' and the question arises whether this is the legitimate way to help disadvantaged individuals, communities or nations.

In common parlance, this term is often used to refer to positive measures or positive actions, however 'positive discrimination' seems to be technically meaningless. Following the general practice of using the term 'discrimination' exclusively to designate certain 'arbitrary', 'unjust' or 'illegitimate' actions, the term 'positive discrimination' seems an oxymoron: either the action is justified and legitimate (because it is not arbitrary) and therefore cannot be called 'discrimination', or the action in

²⁷ Lisa Waddington, "The Relationship between Disability Non-Discrimination Law and Quota Schemes: A Comparison between Common Law and Civil Law Jurisdictions in Europe," in *Anti-Discrimination Law in Civil Jurisdictions*, ed. Barbara Havelková and Mathias Möschel (Oxford University Press, 2019), 86.

²⁸ David B. Oppenheimer, "The Ubiquity of Positive Measures for Addressing Systemic Discrimination and Inequality: A Comparative Global Perspective," in *Brill Research Perspectives in Comparative Discrimination Law* 3, 3-4 (2019): 1-114, <https://doi.org/10.1163/24522031-12340007>.

²⁹ https://home-affairs.ec.europa.eu/networks/european-migration-network-emn/emn-asylum-and-migration-glossary/glossary/positive-discrimination_en, last accessed October 30, 2024.

question is unjustified or illegitimate (because it is arbitrary) and should not be labeled 'positive', a more appropriate term being 'reverse discrimination'. Both formulations are used, from "positive discrimination" in the UK, to "discrimination positive" in France, "positive Diskriminierung" in Germany or "positive action" in Greece, to the use of both terms, as in the case of the Court of Justice of the European Union, "positive discrimination or positive action (affirmative action)"³⁰. The most appropriate linguistic approach would suggest that where the measure has a direct effect, such as the imposition of quotas, it is more appropriate to use the terminology "positive discrimination", whereas if the measure has an indirect effect, thus encouraging participation of under-represented groups without setting quotas, the term "positive/affirmative action" is more appropriate³¹.

Socially, affirmative action is closely linked to the concept of democracy, but this link cannot be seen in isolation from the intrinsic link between equality and democracy. The basic idea of democratic equality (in antithesis to natural equality and liberal equality) tends to give all people the same opportunities by reducing the advantages that favorable conditions such as environment, wealth, place of birth, skin color and so on may confer on certain individuals. What this theory has in common with affirmative action is that both aim to reduce the disadvantages of vulnerable groups, but when affirmative action becomes a goal in the allocation of benefits, it becomes discrimination and this reverse discrimination should be susceptible to the same rules that prohibit discrimination.

The need for people to be treated differently in different circumstances in order to facilitate access of members of disadvantaged groups to social life on equal terms with others is achieved by positive action under the concept of indirect discrimination, as long as the relevant criteria are transparent and open to review, and justified in the context of the assessment, based on the principle of proportionality, which accompanies the concept of indirect discrimination or a review of the rules allowing positive action³². But affirmative action is a highly controversial issue and there are arguments for and against it³³ while in other views affirmative action programs tend to work in practice³⁴ and the discernment between measures of direct and indirect effect can also contribute significantly to the conceptual clarity of affirmative action³⁵.

Returning to Article 14 of the European Convention on Human Rights, it does not specifically imply positive discrimination in situations where it is not justified³⁶, of

³⁰ Opinion of Advocate General Jacobs, C-409/95, *Hellmut Mrchall v. Land Nordrhein-Westfalen*, p. 1-6363, para. 11.

³¹ George Gerapetritis, *Affirmative Action Policies and Judicial Review Worldwide* (Springer International Publishing, 2015), 5.

³² Ann Numhauser-Henning, *op.cit.*, 252.

³³ Kasper Lippert-Rasmussen, *Making Sense of Affirmative Action* (Oxford University Press, 2020), 204, 222.

³⁴ See Alan H. Goldman, *Justice and Reverse Discrimination* (Princeton University Press, 2015).

³⁵ George Gerapetritis, *op.cit.*, 5.

³⁶ Case *Chapman v Great Britain* [2001] ECLI:EC:ECHR:2001:0118JUD00272723895. "Moreover, to accord to a Gypsy who has unlawfully stationed a caravan site at a particular place different treatment from that accorded to non-Gypsies who have established a caravan site at that place or from that accorded

course, but neither does it prohibit it, because the difference in treatment unfavorable to a group or person disadvantaged by the measure as compared to the group benefiting from it can be objectively and reasonably justified precisely by the underlying idea of positive action.

Preferential treatment given to racial or sexual minorities, situations where women are given preferential treatment, the voluntary application of a parity system whereby women have to occupy a certain percentage of posts, or preferential treatment (at least in education) given to Roma by allocating eligible scholarships does not seem to be a way of solving the problems of discrimination and unequal treatment. This system is objectionable on moral as well as constitutional grounds (there is a danger that it may in fact contravene the principle of equality and disadvantage non-minorities), and from a social point of view it may lead to animosities, escalation of conflicts with members of minorities and the disappearance of incentives for the development of those from the minority group due to guaranteed access to specifically tailored scholarships.

Positive action should not involve favoring one minority group over another but should encourage and maximize the chances of the disadvantaged on the basis of their own merits or abilities, in the final selection or decision race, sex or any other criterion should be ignored in order to respect the fundamental right to equal treatment, whether in civil, criminal or any other field. In administrative law there are also implications of this fundamental right, regulated by the Treaties, specific legal rules and a number of directives, and in terms of positive measures and actions they are intended to complement the real objectives of public procurement, for example, which are limited to economic and financial parameters and are based on a transparent and predictable legal background³⁷.

4. The right to equal treatment in public procurement - primary legislation or separate legislative line?

The question arises whether the principle of equal treatment in public procurement law can be categorized as part of primary legislation, of the rights protected by Article 14 of the European Convention on Human Rights, or rather as the subject of a completely separate line of legislation.

As stated above, the ECHR has consistently held³⁸ that Article 14 of the Convention complements the other substantive provisions of the Convention and its Protocols, not having an existence in its own right and only if the discriminatory attitude towards the group to which the alleged victim belongs is the determining factor of the conduct imputed to the authorities. Although the application of Article 14 does not necessarily imply a breach of those provisions - and to that extent it is autonomous -

to any individual who has established a house in that particular place would raise substantial problems under Article 14 of the Convention".

³⁷ Christopher H. Bovis, *Research Handbook on EU Public Procurement Law* (Edward Elgar Publishing, 2016), 17.

³⁸See *Savinovskikh and Others v Russia*, [2024] ECLI:EC:ECHR:2024:0709JUD00161620619; *A.K. v Russia* [2024] ECLI:EC:ECHR:2024:0507JUD004901416.

there can be no room for its application unless the acts in question fall within the scope of one or more of the situations of breach of equal treatment. Thus, the prohibition of discrimination enshrined in Article 14 extends beyond the exercise of the rights and freedoms which the Convention and its Protocols require each State to guarantee and applies also to those additional rights which fall within the general scope of any Article of the Convention and which the State has voluntarily decided to provide³⁹.

Among the rights protected by the Convention, in addition to inalienable rights such as the right to life, the right not to be held in slavery or to be subjected to torture as well as the right to liberty and security, there are also conditional rights including the right to freedom of association, freedom of movement and the prohibition of discrimination. Thus, we consider that the answer to the original question, whether equal treatment in public procurement law is one of the rights provided for in the Convention, is provided by the relevant European legislation.

The principles of transparency, equal treatment and non-discrimination in public procurement law are referred to in a number of articles of Treaty on the Functioning of the European Union⁴⁰ (TFEU). Articles 8, 9 and 10 of the TFEU already state that the Union shall aim to eliminate inequalities and to promote equality, guarantee adequate social protection and combat social exclusion and any discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation, Articles 56 and 63 prohibit restrictions on the freedom to provide services within the EU, on the movement of capital or payments between Member States and between Member States and third countries.

The obligation to respect the principle of equality is also laid down in Articles 18 and 76 of Directive 2014/24/EU⁴¹, which require contracting authorities to treat economic operators equally, without discrimination, and Member States to establish specific legal rules for the award of public procurement contracts in order to ensure compliance with the principle of equal treatment and transparency, taking into account "the specific needs of different categories of users, including disadvantaged and vulnerable groups". In addition, recital 90 of the same Directive provides that, when awarding contracts, Member States must take into account objective criteria ensuring compliance with the principles of transparency, non-discrimination and equal treatment in order to select, in conditions of effective competition, the most economically advantageous tender.

In *Commission v Italy*⁴², in its complaint against Italy the Commission argued that national law should ensure that the principles of transparency and equal treatment enshrined in the Treaty must be respected by explicit provisions, even if the estimated value of the contract is below the threshold for application of the Directive. On the one hand, the Court has refused to interfere in Member States' legislative choices in areas

³⁹ *Molla Sali v Greece* [2018] ECLI:EC:ECHR:2018:1219JUD00202045214.

⁴⁰ Treaty on the Functioning of the European Union, C326 of October 26, 2012, OJEU.

⁴¹ Directive 2014/24/EU on Public Procurement and repealing Directive 2004/18/EC (L94 of March 28, 2014, p. 65-242, OJEU).

⁴² Case C-412/04, *Commission v Italy* [2008] ECR I-619. See also Case C-507/03, *Commission v Ireland* [2007] ECR I-9777.

not covered by Community law, while, on the other hand, reiterating that the principles of EU law are not at issue in the case. In other words, the principles are applicable where there is a cross-border interest in the contract, even if national law does not itself provide for this obligation. The matter is left to the contracting authorities, which are entirely responsible for deciding whether there is a cross-border interest in the contract⁴³.

In the case of *Luxone Srl and Sofein SpA v Consip SpA* the Court establishes that the automatic execution of a provisional guarantee in the absence of any individualized justification contravenes the principles of proportionality and equal treatment, and these principles must be interpreted as excluding a national legislation that provides for the automatic forfeiture of the provisional guarantee provided by a tenderer following his exclusion from a procedure for awarding a public procurement contract under the conditions that the service in question was not awarded to it⁴⁴. Moreover, the CJEU has consistently stated⁴⁵ that public procurement procedures must comply with the fundamental rules of the Treaty and with the general principles of law relating in particular to the free movement of goods, the right of establishment, the freedom to provide services, non-discrimination and equal treatment, transparency and proportionality and that the contracting authority is subject to the fundamental rules and general principles of law and the objectives of the Charter.

As the legal nature of the public procurement contract is that of an administrative contract⁴⁶, its award generates administrative disputes both in national law and in the law of other Member States of the European Union, knowledge of the ways in which other states have transposed European Directives 2014/24/EU and 2014/25/EU⁴⁷ being of real interest⁴⁸, including in terms of legal meanings and implications of the principles underlying the award of the public procurement contract⁴⁹. Thus, in French law, the principle of equal treatment between candidates in a public procurement procedure has its origin in the principle of equality before the law

⁴³ This case is detailed in Dacian C. Dragoș, "Sub-dimensional public procurement in the European Union," in *Research Handbook on EU Public Procurement Law*, ed. Christopher Bovis, (Edward Elgar Publishing Limited, 2016):188, <https://doi.org/10.4337/9781781953266>.

⁴⁴ Joined Cases C-403/23 and C-404/23, *Luxone Srl and Sofein SpA v Consip SpA* [2024] ECLI:EU:C:2024:805.

⁴⁵ Case T-461/08 *Evropaïki Dynamiki - Proigmena Systemata Tilepikoinonion Pliroforikis kai Tilematikis AE v. European Investment Bank* [2011] ECLI:EU:T:2011:494.

⁴⁶ See in this respect Cătălin-Silviu Săraru, *Tratat de contencios administrativ* (Universul Juridic, 2022), 208 -212; Dacian C. Dragoș, "Contractul de achiziție publică" ["Public Procurement Contract"], *Curierul Judiciar* no. 2 (2002): 37,38.

⁴⁷ Directive 2014/25/EU of the European Parliament and of the Council on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC (L 94 of 28 March 2014, p. 243-374, OJEU).

⁴⁸ Emilia Lucia Cătană, *Contenciosul actelor administrative asimilate. [The litigation of assimilated administrative acts]* (C.H. Bech Publishing House, 2019), 534.

⁴⁹ For this analysis in France, see, Emilia Lucia Cătană, *Contenciosul actelor administrative asimilate*. 534-540; see also, Emilia Lucia Cătană, "Semnificații juridice și implicații ale principiilor care stau la baza atribuirii contractului de achiziție publică în dreptul intern și dreptul comparat." ["Legal meanings and implications of the principles underlying the award of public procurement contracts in domestic and comparative law"], *Revista de Drept Public, Supplement* (2018): 62-65.

which, prior to its enshrinement in the French Constitution, was recognized as a general principle of law by the Council of State; the principle of equal treatment implies that all persons are treated in an identical manner to each other, if they are in a position of legal equality⁵⁰.

The protection of human or fundamental rights is obviously not the main purpose of public procurement, but the efficient use of public funds, "the satisfaction of the public interest, i.e. the development and improvement of the living environment of the community"⁵¹; however, it is not uncommon that such rights may intersect with the sphere of public procurement. The protection of human and fundamental rights is applicable throughout the entire procurement process, both in the contracting and implementation phases. The award of public procurement contracts must respect the fundamental principles of the European Union and, in particular, the free movement of goods, the freedom of establishment and the freedom to provide services, as well as the principles deriving therefrom such as equal treatment, non-discrimination, mutual recognition, proportionality and transparency.

Promoting the free market in the European Union is one of the most important objectives of the public procurement directives. This concerns the removal of trade barriers to establish the freedom to provide services in order to ensure the free movement of goods and services within the common market of the European Union⁵². Starting from the prohibition of discrimination on grounds such as nationality, the European public procurement directives emphasize the need for equal treatment of economic operators by contracting authorities, in addition to the obligation to act proportionately and transparently and the prohibition of discrimination.

The principle of equal treatment and the principle of non-discrimination on grounds of nationality imply, in particular, an obligation of transparency which allows contracting authorities to verify compliance with these principles⁵³ but, stemming from the fundamental right to equal treatment, the principle of equal treatment in public procurement law does not only refer to equality on the basis of nationality, even if it specifically provides for it, but has much more complex implications, all tenderers must be treated equally and the award criteria must be the same for all⁵⁴ and according to this principle the award criteria must not be adopted on the basis of elements which could have a discriminatory effect on one of the tenderers⁵⁵.

Equality of treatment is also found in context of "electronic justice", some authors considering that "it as a normatively established procedure for the activities of courts in considering and resolving cases, based on the use of information and communication technologies in the process of preparing and implementing legal

⁵⁰ Christophe Lajoye, *Droit des marchés publics* (Gualino, Lextenso, 2023), 115.

⁵¹ Cătălin-Silviu Săraru, *Tratat de contencios administrativ* (Universul Juridic, 2022), 209.

⁵² Daniela Cîmpean, *Public Procurement Contract Execution* (Pro Universitaria, 2024), 43.

⁵³ Christopher H. Bovis, *Research Handbook on EU Public Procurement Law* (Edward Elgar Publishing, 2016), 116.

⁵⁴ Daniela Cîmpean, *op.cit.*, 49.

⁵⁵ See to this effect C-331/04, *ATI EAC Srl e Viaggi di Maio Snc and Others v ACTV Venezia SpA and Others*, ECLI:EU:C:2005:718.

proceedings, aimed at speeding up judicial procedures, increasing their openness, and also ensuring, through special information means, equal and full access of all citizens to information about the activities of the courts and justice"⁵⁶. Transparency and equal access to information (also a form of equal treatment of bidders) is also ensured by electronic means in public procurement procedures carried out by electronic means at the national level of the member states and in the Official Journal of the European Union, more precisely in the supplement published on the dedicated web page⁵⁷ under certain conditions provided by the legislation in the field of each state, based on the EU rules on public procurement.

In EU case law there are plenty of typical examples⁵⁸ of violation of the tenderer's right to good administration leading also to violation of the principle of equal treatment and transparency. These include, among others: accepting as compliant a bid that does not meet the requirements of the tender, eliminating a bidder from the procedure without relevant justification, awarding the contract to a bidder ignoring (intentionally or unintentionally) the existence of a conflict of interest. In the case of the elimination of a tenderer from the procedure, for example, the Directive requires that all measures necessary to ensure equal treatment must be taken and only if these measures cannot be taken for objective reasons is the decision to exclude the tenderer from the procedure, and "the exclusion of the tenderer is not automatic but is conditional on the prior granting of a right to countermand the exclusion measure" demonstrating, with reasoned justification, the absence of an advantage which can lead to unfair competition⁵⁹.

As stated by the CJEU⁶⁰ the duty of care, which is inherent in the principle of good administration and which applies generally to the work of the administration in its relations with the public, requires it to act carefully and prudently and public procurement must be carried out strictly in accordance with the basic principles of public procurement in the EU: Fairness, non-discrimination, transparency, proportionality, proportionality, effectiveness and efficiency, in addition to respecting the principle of good administration which is implicit, and when an administrative authority negotiates how it exercises its discretion, there is more at stake than the single use of discretion in a specific case. Consistent and systematic action by administrative authorities and treating similar cases equally will limit the possibilities for the use of its

⁵⁶ Kozakevych O.M. "Ensuring access to justice in transitive conditions." PhD Thesis PhD of Law. National University "Odessa Law Academy" (2021):39 [in Ukrainian], *apud* Shevchuk, Oleksandr, Ihor Kompaniets, Olena Volianska, Oleksandra Shovkopljas and Vasyl Baranchuk, "Electronic Administrative Judicial Procedure of Ukraine and the Right to Judicial Protection: Problems of Legal Regulation and Practical Issues," *Juridical Tribune - Review of Comparative and International Law* 14, no. 1 (2024): 109.

⁵⁷ TED - Tenders Electronic Daily, Supplement to the Official Journal of the EU, <https://ted.europa.eu>.

⁵⁸ Case C-307/87, *Commission v. Greece* [1988] ECLI:EU:C:1988:527, Case C-304/01, *Spain v. Commission* [2004] ECLI:EU:C:2004:495, Case C-231/03, *Consorzio Aziende Metano (Coname) v. Comune di Cingia de' Botti*, [2005] ECLI:EU:C:2005:487.

⁵⁹ Monica Amalia Rațiu, *Public Procurement Law* (Universul Juridic, 2018), 240.

⁶⁰ Case C-337/15 P, *European Ombudsman v Claire Staelen*, [2017] ECLI:EU:C:2017:256.

discretion, because that action will have to be repeated when the same conditions are met in another situation⁶¹.

Even if the legal rules applicable to public procurement were not enshrined in a treaty, the case law of the CJEU proves the incidence of the TFEU provisions in the field of fundamental freedoms (from the fundamental freedoms to those derived from them, such as equal treatment and non-discrimination) and the application of these principles has been expressly indicated by the CJEU in a number of cases challenging decisions of contracting authorities to award public procurement contracts directly, without the application of procedures, on grounds relating to the value of the contracts, which was below the thresholds laid down in the directives, or to the specific nature of the subject-matter of the contract which excluded it in whole or in part from the application of the rules laid down by the directives in the field⁶².

5. Conclusions

Respect for fundamental human rights is the basis of any system of law in states with democratic traditions, but the implicit consequence of this evolution is the adaptation of legal systems to the social, political, economic and cultural reality in order to keep pace with the permanent evolution of society, requiring the completion, amendment or repeal of certain laws to keep pace with this evolution. The principle of equal treatment and the right to non-discrimination enjoy legal protection through a large number of legislative acts but, although the regulations in this area are multiple and complex, discrimination is a topical issue which is often seen throughout the world, sometimes making positive action necessary. We consider that positive action measures, which are extremely important in the context of achieving the desideratum of equal treatment, nevertheless represent a derogation from the principle of equality and should be interpreted strictly, in the light of current case law on discrimination and taking into account the generous and explicit legislative framework in the field.

The fundamental right to equal treatment is a complex area of law and its regulation in the distinct field of public procurement has obviously been made taking into account primary legislation, including the provisions of the European Convention on Human Rights. In addition to compliance with the principle of equal treatment, an obligation established by the specific public procurement legislation, the general right to non-discrimination is paramount and failure to comply with it may, under certain circumstances, lead to disputes within the jurisdiction of the courts specialized in settling cases of human rights violations, and we can conclude that extending the application of human and fundamental rights in European public procurement is not only the wish of the EU and its initiatives, but also a reality, and the application of the legislation and general principles, in particular the principle of equality, does not seem to create problems for the courts of the CJEU.

⁶¹ Kars J. de Graaf et al, "Mediation in Administrative Proceedings: A Comparative Perspective," in Dacian Dragoș and Bogdana Neamțu (eds.), *Alternative Dispute Resolution in Administrative Law* (Springer, 2014): 598, <https://doi.org/10.1007/978-3-642-34946-1>.

⁶² Monica Amalia Rațiu, *op. cit.*, 14.

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