

FIRST COME, FIRST SERVED: HUMAN RIGHTS AT STAKE

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Abstract

Resource allocation naturally involves to some extent a competition, apart from the eligibility criteria, which sort out some of the potential applicants. Those left in the competition have to be ranked or are subject to a randomization process, at the end of which some succeed and others are left out. The first come, first served allocation and ranking principle is not inherently discriminatory and does not affect equal opportunities, but applied in a large-scale digital competition with tens of thousands of potential beneficiaries of different ages, with different backgrounds and having different levels of education, who have only seconds to complete an on-line application form, it generates unintended effects, some of which distort competition, infringe fundamental human rights and force people to take risks regarding the security of their personal data. This is an issue for many of the government funding programmes run by the Environmental Fund Administration, including the “Photovoltaic Green House” programme, in an era where technological advances seem to widen the gap between the digitally educated ones and those left behind, especially in the case of Romania.

This study aims to analyse how such a system of allocation can create human rights concerns and, in the way it is applied, how public authorities may depart from the broader concept of good administration.

Keywords: *allocation, ranking, first come – first served, discrimination, personal data protection, good administration, human rights*

JEL Classification: *[K10, K38]*

1. Introduction

First come, first served is a widely used scheduling and resource allocation method, which has become an idiom meaning “that people will receive something or be dealt with in the order in which they ask or arrive” (Cambridge Dictionary, n.d.). Besides being a basic scheduling algorithm used in operating systems, this competition method is used in all cases where the goods or services offered for sale or the finite number of resources available do not allow the full range of interested parties to be served. In promoting equitable allocation, this principle is not only considered, but perceived by the public as one of the fairest (Bunel & Tovar, 2024), along with random distribution by lottery, but it may show its limits, for example in health emergencies such as the COVID-19 crisis, when “it is very likely to favor certain groups, such as those closest to a distribution center, those with access to better information, or those who are most well-off” (World Health Organization,

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2020, p. 5). We note at this point that prioritization may result in longer waiting times, but may also lead to the exhaustion of resources before all those interested have been served. This is also the case for several EU grants, e.g. DiscoverEU, ENEN+ mobility grants, SME vouchers, where this principle is used, but where several selection criteria are used before applying the *first come, first served* method as a measure of last resort. A significant number of domestic funding programmes follow this rule for ranking, including the well-known “Photovoltaic Green House” programme run by the Environmental Fund Administration.

2. The “Photovoltaic Green House” programme

2.1. Legal background and public interest

The programme on the installation of photovoltaic panel systems for the production of electricity to cover consumption needs and to deliver the surplus to the national grid (“*Photovoltaic Green House*” programme) was launched in 2018 and has enjoyed popularity since its inception. The conditions and procedure for obtaining non-reimbursable funding have undergone several changes over time, but the programme still addresses a broad mass, and is currently being carried out on the basis of Order of the Minister of the Environment, Water and Forests No. 2045/2024¹, which substantially amends the basic normative act, namely the Order of the Minister of the Environment, Water and Forests No. 1063/2023².

The purpose of the programme is to provide state funding for the purchase and installation of individual photovoltaic systems, which are non-polluting and renewable energy sources for increasing energy efficiency in individual homes, improving air quality and reducing greenhouse gas emissions. The funding can be accessed in annual instalments, which have been running under similar conditions for two years now, with the application period and the funds available being allocated by region. In 2023, application periods of three days were allocated to each region, with funds being exhausted on average in less than 5 minutes, in 2024 this period was reduced to one day and funds exhausted on average well under 2 minutes.³

2.2. Eligibility criteria and the “first come, first served” allocation rule

In order to be eligible for funding, the applicant must be a natural person residing in Romania, have no outstanding obligations to the state or local budget, be the owner of the property and be domiciled at the implementation address. According to Article 18 Paragraph (2) of the funding guide, approved by the above-mentioned ministerial orders, the application is made by filling in predefined fields and uploading the necessary documents. As far as the funding allocation system is concerned, the *first come, first served* rule is not explicitly stated in the funding

¹ Published in the Official Gazette of Romania, Part I, no. 955 of September 24, 2024.

² Published in the Official Gazette of Romania, Part I, no. 364 of April 28, 2023.

³ The exact average times are 4,8083 minutes for the 2023, and 1,7104 minutes for the 2024 session. The data was provided by the Environmental Fund Administration.

guidelines, the provisions of the President of the Environmental Fund Administration or the official press releases of the funding authority, but it can be deduced from terms such as “reservation”, “registration number” or “until funds are exhausted”. It is ruled, however, sufficiently clear, that the programme is intended to be accessed by individuals in their own behalf and within their own powers.

3. Human rights concerns

3.1. Equal access and discrimination

In a rule of law state, legal certainty is a central aspect, that implies also the accessibility of the law, treated under two aspects: availability and predictability or comprehension (Bălan, 2016). Similarly, equal access means far more than just an open call. Accessibility implies, but is not limited to being “entitled to” something. In order to gain access, one needs to possess the means, i.e. being able to access it, and this is the point at which a number of variables, both within and outside the control of the individual, come into play.

In funding programmes like the “Photovoltaic Green House”, the general eligibility criteria and easy-to-procure documents could not keep the large number of interested people in check, and the competition was expected to be fierce, especially after the experience of the 2023 session. A number of specialized websites, electrical installation companies or third parties, mostly not disinterested, anticipated the fierce competition and made available tutorials in which potential applicants were advised on various IT solutions for quick completion, directed towards “helpful” software and browser extensions, and provided websites cloned from the official application website where they could practice their data entry skills.⁴ In no case was the security of the personal data provided and possibly stored in these solutions ever questioned. No contracts or personal data protection statements were signed, these facilities circulated on the internet unhindered, all based on a pre-memorisation, pre-saving or simply a provision of personal data to be filled in or uploaded. As the programme progressed with the opening and closure of a funding window for a region, and access data began to circulate in print, broadcast and online media (Hotnews, 2024), concerns grew among potential applicants, as a number of additional factors had to be taken into account that were beyond their control, such as the stability and speed of the internet connection, or even the data entry time, that have proven to be shorter than expected, causing even more people to search for help.

⁴ Examples of such tools are available at <https://www.optimenergy.ro/completareformularcasaverde>, <https://wattmann.ro/?firmAct=instructiuni-antrenament>, <https://fotosolar.ro/simulator-afm-casa-verde-2024/>, https://kilowat.ro/simula_tor-formular/, <https://www.romsir.ro/simulare-casa-verde-2024>, <https://www.youtube.com/watch?app=desktop&v=KG5f9Sxk50s>, <https://www.youtube.com/watch?v=we412-TsP8c> [Accessed 10 12 2024].

Statistics for 2024 show that 88.6% of all households in Romania had access to the internet at home and 94.7% of the population aged between 16 and 74 had already used the internet at least once (National Institute of Statistics, 2024), so in theory at least the technical conditions were in place for potential beneficiaries to enter the competition for funding with a fair chance. Although internet coverage in rural areas, precisely the area of interest for the government programme, is a few percent below this average (National Institute of Statistics, 2024), the problem was and remains not merely the lack of technical facilities, but rather the level of digital literacy, where Eurostat statistics conclude that only 28% of the Romanian population has at least basic digital skills (Eurostat, 2023). Thus, almost three quarters of the country's population would have to seek help from someone in order to access the programme, all the more so as the rate of use of online public services in Romania is one of the lowest among European countries (Şandor, et al., 2020). On the other hand, basic digital skills did not guarantee success, and in light of the registration times, not even a fair start. In the official communications of the funding authority, a lot of emphasis has been placed on how simple the programme has been designed, how few and handy documents need to be uploaded, how simple and intuitive the form is in which data has to be entered (Environmental Fund Administration, 2024), and it is precisely this simplification that has made access very difficult. Those who had advanced digital skills took the lead, became first among equals, already just a few, used various IT solutions for fast uploads and offered their services in different forms and for different considerations to others. It is also worth noting that after the first funding window opened for the North-West region, application times have been significantly reduced, which again raises questions about the organic nature of this improvement, given the very short time of only three days between the first and second funding windows.

Table 1. Submission statistics

Region	Date	First successful submission (min.)	Applications submitted	Running out of funds (min.)
West region	08.10.2024	00:14.73	7.637	01:26.00
South-West region	07.10.2024	00:14.67	6.640	01:20.00
Bucureşti-Ilfov region	04.10.2024	00:14.51	3.804	01:05.00
South Muntenia region	03.10.2024	00:14.36	10.700	01:59.00
South-East region	02.10.2024	00:17.49	8.091	01:54.00
North-East region	01.10.2024	00:13.75	10.646	02:08.00
Central region	30.09.2024	00:17.28	9.335	01:48.00
North-West region	27.09.2024	00:24.59	9.143	02:01.00

(Data source: Environmental Fund Administration)

Data provided by the Environment Fund Administration shows that the fastest applicant managed to upload the application form in 13.75 seconds, but the first applicant in each region managed to achieve a time of less than 25 seconds. In the South Muntenia region, for example, 10,700 applications were registered from the first to the last application, an average of one application every 0.13 milliseconds.

3.2. Captcha test: I'm human – says the bot

Two CAPTCHA (Completely Automated Public Turing Test to Tell Computers and Humans Apart) tools, i.e. challenge-response tests were included in the online form to be filled in with alphanumeric characters, designed to distinguish between human users and various IT solutions for automatic data upload or autocompletion. The literature is replete with data on the speed of human solving such tests, with average results reported for text-based tests starting from 21.33 seconds at a success rate of 47.8% (Adesina, et al., 2022) or 20.17 seconds at a success rate of 69.81% (Gafni & Nagar, 2016), up to a result between 9 and 15.3 seconds at a success rate of between 50% and 84%, as concluded a recent study, also noting that IT solutions solved the test in less than 1 second at a success rate of 99.8% (Searles, et al., 2023). Simply juxtaposing the average time taken to solve such tests and the best times of submission could reveal the true nature of this “competition”.

<i>Best human average solving time for 2 CAPTCHA tests</i>	<i>Average of the first successful upload times for the 8 regions</i>
00:18 min.	00:16 min.

(Data source: Searles, et al., 2023; Environmental Fund Administration)

3.3. Domestic press echoe

In articles dedicated to the “Photovoltaic Green House” programme, the national print and broadcast media both reported on the enormous interest from potential beneficiaries, but also denounced the speculators who offer to upload the application in seconds for a fee (Știrile ProTV, 2024), and the dishonest practice of using automatic upload programmes. Experts questioned, representatives of energy communities and software company owners all drew attention to the discriminatory nature of the application procedure or impossibility of human enrolment in the registered application times, expressing their concern that those who use intermediaries, should do so on a contractual basis, so as not to be left with the money given and no funding (Euronews Romania, 2024/1), but only a few raise the issue of the thousands of personal data that end up in the hands of these intermediaries and which can be abused by them or by third parties who gain access to them. The print media even reported about a person promoting an artificial intelligence-based software that promised for a fee a 9-second upload, including the solving of the two Captcha tests (Hotnews, 2024). Under media pressure, a series of investigations and checks were promised, but they did not lead to any concrete results, the authorities

settling for the outcome of an internal investigation, at the end of which the Environmental Fund Administration found no irregularities (Euronews Romania, 2024/2).

3.4. National anti-discrimination and data protection instruments

Article 16 of the Romanian Constitution⁵ provides for equality in rights, recognizing not only equality before the law, but also equality before the public authorities, without privileges and without discrimination, and Article 26 recognizes the State's role both as a passive respecter, and as an active protector of intimate, family and private life. The development of these principles can be found in Government Ordinance No 137/2000 on the prevention and sanctioning of all forms of discrimination⁶ and in several personal data protection legislative acts. In the event of an infringement of rights or legitimate interests by a public authority, a person is entitled to seek recognition of the right or legitimate interest and compensation for the damage caused, as stated in the Government Emergency Ordinance No 57/2019 on the Administrative Code⁷ or might address a petition to the National Council for Combating Discrimination on the ground of an indirect discrimination due to an apparently neutral practice. Good administration, as a fundamental principle of administration, goes beyond the notion of legality, having to achieve reasonable and fair results in all circumstances (Pătrașcu, 2001). However, when considered from the point of view of the actual implementation of these funding programmes, reasonableness and fairness are placed in another dimension. Some might argue that potential beneficiaries would have had the time and opportunity to prepare themselves for the application, and they surely did, but seeing the mind-boggling access times, every reasonable effort made seem to have been in vain. Success required IT support and automated solutions, but the funding guide or the information made public through the official communication channels of the funding authority did not contain any references whatsoever to advanced digital skills as a criterion or basis for eligibility.

Thus, in addition to the issue of equal opportunities and discrimination, we are also faced with challenges related to the circulation of personal data, not in the framework of a transfer between states or to international organizations, regulated by specific European legislation, but in the dark area of personal data phishing and trafficking. In Romania, the National Supervisory Authority for Personal Data Processing is the “*guarantor of respect for the fundamental rights to privacy and personal data protection, as laid down in particular in Articles 7 and 8 of the Charter of Fundamental Rights of the European Union, Article 16 of the Treaty on the Functioning of the European Union and Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms*” (ANSPDCP, n.d.), yet

⁵ Republished in the Official Gazette of Romania, Part I, no. 767 of October 31, 2003.

⁶ Republished in the Official Gazette of Romania, Part I, no. 166 of March 7, 2014.

⁷ Published in the Official Gazette of Romania, Part I, no. 555 of July 5, 2019.

did nothing to stop or limit the immense personal data exposure, which could later be used for fraudulent purposes.

Up to this moment there is no information about an administrative appeal against the act by which the programme is being carried out, nor that anyone has complained to the National Council for Combating Discrimination on grounds of discrimination or that it has come to the attention of the European Court of Human Rights, but, nevertheless, the exercise and the reasoning on which such a case could be judged are not without any outcome.

3.5. The case-law of the European Court of Human Rights

Before bringing a case to the European Court of Human Rights, the applicant should make use of all available domestic remedies. However, even the Court itself admitted that the obligation regarding the exhaustion of domestic remedies must be applied with certain flexibility, since it has to be shown that these remedies are accessible and effective. Otherwise, a possible complaint directly to the Court could still be admitted and discussed (*Case of Ádám and others v. Romania*, 2020). The relevant case law of the European Court of Human Rights on discrimination and equal opportunities focuses on the grounds of discrimination explicitly listed in Article 14 of the European Convention on Human Rights (ECHR) and in Article 1 of Protocol No. 12. In such a case, as the one analysed with regard to the government funding system, possible discrimination could be investigated only in the light of the “other status”, which leaves open the non-exhaustive list of grounds of discrimination in the ECHR. Having become with Article 1 of Protocol No. 12 a “free standing right” (European Court of Human Rights, 2024), protection against discrimination also applies where “a person is discriminated by a public authority in the exercise of discretionary power (for example, granting certain subsidies)” (Council of Europe, 2000, p. 5).

A perfect parallel can hardly be identified in the case law of the Court, but it can be found arguments validated by the Court for the possible support of such an approach. Access to public resources and discrimination in obtaining a benefit is in the center of the discussion in *Maria Mihalache v. Romania* (2020) and *Konstantin Markin v. Russia* (2012), while in *Ádám and others v. Romania* (2020), the ethnic Hungarian complainants complained about the proposed timetable for the baccalaureate exam, which would not have given them enough time to rest between exams, having to face two additional exams, and the fact that the Romanian language and literature test was too difficult for Hungarian graduates anyway. In assessing the difficulty of the examination, the Court appreciated the efforts of the Romanian state to come up with a differentiated curriculum and textbooks to help national minorities, while in the case of the funding programme, the statistics give a clear picture of the access to quality education and digital literacy, and the simplification

of procedures and the many tutorials, some of them official⁸, could not make up for this systemic failure. In the eventuality of a complaint on such governmental funding programmes, remains to be established whether the system for allocating financial resources “imposed an excessive burden on the applicants” and whether the “inconvenience suffered by the applicants had been so significant as to reach the threshold of Article 1 of Protocol No 12 to the Convention” as considered by the Court in *Ádám and others v. Romania* (2020).

Conclusions

Looking back, we can see that the programme has achieved its goal: 66,666 (sic!) applications were registered in the 2024 session, which will benefit from state funding, joining the thousands of applications registered in previous years. The ordering system used, however, has backfired precisely against its own purpose, and instead of levelling the playing field, has turned the programme into a contest of skill and IT knowledge, “a victim of its own success” as concluded the Minister of the Environment (Mora, 2024). Bona fide, and sometimes naive applicants have invested their trust and financial resources in various solutions to cope with the competition, leaving their personal data uncovered, entered dozens of times in online simulators, browser extensions for keyboard shortcuts or making them available to other individuals or organizations with the promise of a quick upload of their application. Thus, funding was for many eligible people only available, not accessible, and it remained the privilege of those in possession of the know-how, no matter on whose behalf they were acting. However, it is clear from the regulatory acts governing the system for accessing the funds, and from the official communication from the funding authority, that it was designed to be accessed individually, not through intermediaries or technical “gimmicks”.

From the point of view of the funding authority everything went perfectly, the computer application developed on public money coped with the enormous interest, and ordered the applications for funding in fractions of a seconds. The digital skills required for a successful application exceeded by far the current average digital literacy level, as reported by Eurostat, and being a global problem, the leveling up of the digital literacy is one of the key commitments for 2030 in the Global Digital Compact, an Annex of the UN Pact for the Future (United Nations, 2024), as well as in the EU’s Digital Decade Policy Programme 2030. Till the digital education strategies – be it national, European or international – produce the expected results, the founding authorities should take measures not to turn the funding process into a competition the competitors cannot handle or cope with, especially without turning

⁸ Tutorials are available on the Environment Fund Administration's social media accounts: https://www.facebook.com/100064892042624/videos/1071040288358619?locale=ro_RO, https://www.facebook.com/100064892042624/videos/165480649555125?locale=ro_RO [Accessed: 12.12.2024]

to technical solutions, they cannot fully understand, or speculators form which they didn't get any personal data security assurances.

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