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WS 1.5 Analysis of The Main Trends in the Recent Case Law

LEGAL REPORT - Equalities and exclusion: The EU anti-discrimination framework and trends in jurisprudence, regarding the human rights of Roma in the areas of education and employment

"Fighting discrimination and anti-Gypsyism in education and employment in EU" (PAL)

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Abstract

This report gives a concise overview on the current legal anti-discrimination framework in Europe, with a specific focus on human rights of Roma, in the areas of education and employment. It identifies recent case law at the EU level (ECtHR, CJEU) in this field, and provides an analysis of observable trends in jurisprudence, with a specific focus on new legal developments and potential risk areas.

Executive Summary

In the EU, equality is embedded in the Treaties as one of its fundamental values. The prohibition of discrimination is proclaimed also in the Charter of Fundamental Rights of the European Union. The Roma community is protected as an ethnic minority, both by EU law (primary and secondary through the Racial Equality Directive) and by the European Convention on Human Rights. Under both legal systems, the burden of proof, once a prima facie case of discrimination is established, lies with the respondent.

The European Court of Human Rights has developed rich jurisprudence in the context of discrimination in education on the basis of ethnic origin. With its case law, the Court has condemned national segregational practices which consisted in segregation through misdiagnosis due to unsuitable entrance examinations, segregation within the school through creating Roma-only classes, and 'voluntary' segregation through white flight. More in particular, the Court has repeatedly underlined the special status of Roma people who, due to their vulnerable situation, require special protection; it also recognized segregation as a form of indirect discrimination and accepted that various forms of evidence can be used to establish a discrimination case. It went so far as to accept evidence pointing to structural discrimination. Furthermore, it introduced an obligation on the part of the States to take positive action measures in order to address structural disadvantages caused by past discrimination. When reviewing these measures a strict level of scrutiny is required to make sure that the State has fulfilled its obligations under the Convection. Lastly the Court has repeatedly held that consent (thought the parents' approval) cannot be considered valid if it is perceived as a waiver of the right not to be discriminated against.

As regards the right to employment, although it is also a fundamental right protected in the European legal order, there is no relevant case-law. The report attributes this to unwillingness of victims of discrimination to report alleged infringements and lack of confidence in the legal system set out by the RED and its respective effectiveness.

To date, only one CJEU judgment has been issued concerning specifically Roma population, which, although not related to education or employment is substantial for the defence of Roma rights based on the RED before the European jurisdiction in the future.

Finally, persistent risk areas in Roma-related discrimination can be identified in lack of effective powers by the ECtHR which can only go so far as to provide declaratory relief and maybe general recommendations and a framework of suggested remedies. This points to a systematic risk of unimplemented or ineffectively implemented rulings. A comparable structural gap can be detected with view on the CJEU. Furthermore, the underlying social tenses are a pertinent problem, as coping with ingrained prejudices and reservations, traditional legal instruments are stretched to their limits. Lack of information of Roma people regarding their rights and their mistrust in the educational system, further enhances the systemic discrimination issues.

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1. Status quo: The legal anti-discrimination framework at the EU level

Equality is one of the core values of the European Union (EU). Legal provisions guaranteeing equality or prohibiting discriminatory measures are therefore to be found in Europe's human rights frameworks, as well as EU law. The term "European non-discrimination law", accordingly, encompasses this whole ecosystem of legal protections and guarantees that sometimes have a very general objective, and other times are set in specific contexts of discrimination, e.g. gender-specific anti-discrimination provisions.

1.1 General European human rights frameworks

The European Treaties emphasize equality and non-discrimination as their core values several times. The TFEU states already in its Preambule that the EU is based on universal values of "the inviolable and inalienable rights of the human person, freedom, democracy, equality and the rule of law". This premise is stated again in several principles of the TFEU:

Article 2 TFEU

The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.

Article 3 TFEU

(3) (The EU…) shall combat social exclusion and discrimination, and shall promote social justice and protection, equality between women and men, solidarity between generations and protection of the rights of the child.

Article 8 TFEU

In all its activities, the Union shall aim to eliminate inequalities, and to promote equality, between men and women.

Article 9 TFEU

In defining and implementing its policies and activities, the Union shall take into account requirements linked to the promotion of a high level of employment, the guarantee of adequate social protection, the fight against social exclusion, and a high level of education, training and protection of human health.

Article 10 TFEU

In defining and implementing its policies and activities, the Union shall aim to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.

Article 18 TFEU

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.

The most basic anti-discrimination guarantees in human rights frameworks are to be found in Art. 14 ECHR and Art. 21 EUCFR:

Art. 14 ECHR - Prohibition of discrimination

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

Article 21 EUCFR - Non-discrimination

(1) Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited.
(2) (...)

While both articles (and both legal systems) aim at the same level of protection, and in fact are mutually reinforcing (all EU Member States are signatories to the ECHR), these provisions differ in their territorial validity and in their scope of application:
The ECHR is an international treaty drafted by the Council of Europe (CoE), signed and ratified by 47 nations - the CoE members. Accordingly, the ECHR protects all individuals in its 47 States parties. The judiciary institution watching over the adherence of signatories to the ECHR is the ECtHR.
The CFR had been proclaimed in 2000 by the European Parliament (EP), the Council of Ministers (CoM) and the European Commission (EC). It was the Lisbon Treaty that referenced the CFR as legally binding. Since 2009, the CFR has the same legal value as the EU treaties, binding all EU institutions, bodies established under EU law and all 28 EU member states (as long as they implement the EU law) to adhere to the rights and freedoms proclaimed in the CFR. The CJEU with its task to interpret the EU law and its equal application among EU Member States is the judiciary body that will judge cases that affect the CFR (for more information on legal recourses cf. below).
Starting from the text of the two basic provisions, Art. 14 ECHR prohibits any form of discrimination concerning the "enjoyment of rights and freedoms set forth in this Convention". The limitation of the ECHR's anti-discrimination approach to other rights granted by the treaty has been seen as a flaw, since it would allow discriminative measures in unprotected areas. Against this background, the CoE adopted Protocol 12 to the ECHR in 2000, that inter alia stated:

Article 1 - General prohibition of discrimination

> (1) The enjoyment of any right set forth by law shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.
> (2) (...)

With Protocol 12, the prohibition of discrimination in Art. 14 ECHR becomes free standing, without necessary references to other rights or freedoms granted by the ECHR. This means that any right, even rights granted under national law only, are to be enjoyed without discrimination. However, not all CoE signatories have signed Protocol 12, or they have signed but not ratified it.[1] In these states, Art. 14 ECHR needs to be taken as is, so anti-discrimination recourse will only possible as long as a right or freedom granted by the ECHR is affected.

Regarding EU non-discrimination law, the prohibition of discrimination in Art. 21 EUCFR is free standing as is. All Member States are bound to this principle via Art. 6 TFEU. In this area, the EU has issued Secondary European Law, especially EU Directives that oblige the Member States to create positive legal frameworks and provisions in particular contexts, such as employment. Especially the Racial Equality Directive (Council Directive 2000/43/EUof 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin; Official Journal L 180, 19/07/2000 P. 0022 - 0026) specifies the notion of discrimination and obliges the Member States to provide a positive legal framework that ratifies the Directive. All Member States have successfully adopted the Directive and transferred it into national law. (The Directive had to be transposed by 19 July 2003 by EU-15, by 1 May 2004 by EU-10, by 1 January 2007 by Romania and Bulgaria, and by 1 July 2013 by Croatia).

Under the Race Equality Directive (RED), prohibiting discrimination based on racial or ethnic origin, the notion of discrimination encompasses four different types of unequal treatment:

[1] Council of Europe, Chart of signatures and ratifications of Treaty 177, available at : http://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/177/signatures?p_auth=kGxx59pV

- **Direct discrimination**, i.e. where one person is, has been or would be treated less favourably than another, in a comparable situation on grounds of racial or ethnic origin;
- **Indirect discrimination**, i.e. where an apparently neutral provision, criterion or practice would put persons of a racial or ethnic origin at a particular disadvantage compared with other persons, unless that provision, criterion or practice is objectively justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary;
- **Harassment**, i.e. when an unwanted conduct related to racial or ethnic origin takes place with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment;
- **Instruction to discriminate** against persons on grounds of racial or ethnic origin.

Regarding its scope, the anti-discrimination provisions in the Race Equality Directive apply to

- conditions for access to employment, to self-employment and to occupation, including selection criteria and recruitment;
- access to all types and to all levels of vocational guidance, vocational training, advanced vocational training and retraining, including practical work experience;
- employment and working conditions, including dismissals and pay;
- membership of and involvement in an organisation of workers or employers, or any organisation whose members carry on a particular profession, including the benefits provided for by such organisations;
- social protection, including social security and healthcare;
- social advantages;
- education;
- access to and supply of goods and services which are available to the public, including housing.

However, the Directive states exceptions to these rules with regard to genuine and determining occupational requirements: In this field, Member States may provide rules stating race- or ethnicity-based differences in treatment where a specific characteristic

constitutes a genuine and determining occupational requirement, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out. These possible limitations of the national legal frameworks are limited in themselves, as their objective has to be legitimate, and the otherwise discriminating requirement, to be proportionate. The EC is actively supervising the implementation of the Directive in all Member States, and regularly monitors the adherence of the provisions.[2]

1.2 Roma as a protected minority within the scope of anti-discrimination provisions

As regards the circumstance that Art. 14 ECHR in contrast to Art. 21 EUCFR does not name ethnicity as a protected ground, the ECtHR states:

> "Ethnicity and race are related and overlapping concepts. Whereas the notion of race is rooted in the idea of biological classification of human beings into subspecies according to morphological features such as skin colour or facial characteristics, ethnicity has its origin in the idea of societal groups marked by common nationality, tribal affiliation, religious faith, shared language, or cultural and traditional origins and backgrounds."
>
> **ECtHR, Timishev v. Russia (Nos. 55762/00 and 55974/00), 13 December 2005, para. 55.**

Since Roma are considered ethnic minorities, both Art. 21 EUCFR and the provisions of the Race Equality Directive apply. However, since many of the national laws implementing the Race Equality Directive only apply to EU citizens, they provide legal recourse only for Roma people with a respective national passport (or comparable recognition), from any EU country.

[2] Last time 2014: Report from the Commission to the European Parliament and the Council, Joint Report on the application of Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin ('Racial Equality Directive') and of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation ('Employment Equality Directive'), COM(2014) 2 final, http://ec.europa.eu/justice/discrimination/files/com_2014_2_en.pdf

In contrast to this, the ECHR's rights are granted to all individuals within the jurisdiction of a Member State - nationality does not make a difference in the application of the ECHR guarantees (unless their background leads to a situation that excludes a necessary comparator; cf. below). Moreover, the ECHR names "other status" as an additional protected ground for discrimination, that might apply to differences in linguistic, social or economic statuses.

1.3 Burden of proof in anti-discrimination claims

In a report of 2012 related to access to justice in discrimination cases in the EU, the Fundamental Rights Agency (FRA) underlined that the right to fair proceedings was restricted because of an unsatisfactory application of the EU law on shifting the burden of proof to the respondent in discrimination proceedings. This insufficient application of law might be due namely to the lack of awareness of the specific concept from the judges, or to the fact that the national law was unclear about the necessary conditions for such a reversal.

The need for a reversal of the burden of proof was originally recognized by the European Court of Justice (CJEU). The CJEU considered indeed that the approach in the civil systems of law of the Member States imposing to the claimant the burden to prove the facts upon which his/her claim is based was an inadequate approach in the area of discrimination. The CJEU began to develop a jurisprudence[3] in the sense of a shifting burden of proof by recognizing that under certain circumstances, it was not right to expect the claimant to continue to bear the burden of proving the case. This approach was also adopted by the European Court of Human Rights[4] (ECtHR).

The reversal of the burden of proof was then codified in the Directive governing the burden of proof in cases of gender discrimination[5] but was also included in subsequent European legislation.

[3] Judgment of the Court of 17 October 1989**,** *Handels- og Kontorfunktionærernes Forbund I Danmark v Dansk Arbejdsgiverforening, acting on behalf of Danfoss*, Case 109/88 and Judgment of the Court of 27 October 1993, *Dr. Pamela Mary Enderby v Frenchay Health Authority and Secretary of State for Health*, Case C-127/92.
[4] Judgment of the ECtHR of the 06 July 2005, Nachova and Others v. Bulgaria.
[5] Council Directive 97/80/EC of 15 December 1997 on the burden of proof in cases of discrimination based on sex.

The Racial and Employment Equality Directives[6] followed indeed the path drawn by the CJEU. According to those Directives "Member States shall take such measures as are necessary, in accordance with their national judicial systems, to ensure that, when persons who consider themselves wronged because the principle of equal treatment has not been applied to them establish, before a court or other competent authority, facts from which it may be presumed that there has been direct or indirect discrimination, it shall be for the respondent to prove that there has been no breach of the principle of equal treatment".

The CJEU confirmed this principle in its subsequent case-law[7]. In the case *Feryn* namely, the President of the Labour Court of Brussels referred to the Court of Justice questions for a preliminary ruling concerning the terms 'discrimination', 'presumption of discrimination' and 'sanctions', within the meaning of Directive 2000/43/EC for a finding that the company *Feryn* applied a discriminatory recruitment policy. The Court observed that the fact that an employer declares publicly that it will not recruit employees of a certain ethnic or racial origin constitutes itself direct discrimination in respect of recruitment, since such statements are likely to strongly dissuade certain candidates from submitting their candidature and, accordingly, to hinder their access to the labour market. The Court went on to state that a presumption of discrimination may be found to exist if it is based on facts, such as statements giving rise to a presumption of a discriminatory recruitment policy. In such a situation, it is for the employer to adduce evidence that it has not breached the principle of equal treatment, which it can do, inter alia, by showing that the actual recruitment practice does not correspond to those statements.

Such reversal of the burden of proof does however not imply an exemption for the plaintiffs from convincing a Court that they are suffering a case of discrimination. The burden of the proof moves to the defendant to prove the treatment is based on discrimination. It is

[6] Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, *Official Journal L 180 , 19/07/2000 P. 0022 – 0026 and* Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, *OJ L 303, 2.12.2000, p. 16–22.*

[7] Judgment of 10 July 2008, *Centrum voor gelijkheid van kansen en voor racismebestrijding v Firma Feryn NV*, C-54/07; Judgment of the Court (Second Chamber) of 21 July 2011, *Patrick Kelly v National University of Ireland (University College, Dublin),* Case C-104/10; Judgment of the Court (Second Chamber) of 19 April 2012, *Galina Meister v. Speech Design Carrier Systems GmbH,* Case C-415/10.

important to note, however, that the plaintiff still has the burden to establish a causal link between the deplored behavior and the harm.

From the foregoing, it can be concluded that the rules on the burden of proof need to be adapted and reversed when there is a prima facie case of discrimination. However, it is not for the respondent to prove that the plaintiff adheres to a particular religion or belief, has a particular disability, is of a particular age or has a particular sexual orientation. Finally, for the principle of equal treatment to be applied effectively, the burden of proof must shift back to the respondent when evidence of such discrimination is brought.

1.4 Options for legal remedies in cases of discrimination

In case someone feels discriminated he or she can seek legal remedies. In case of potential infringements of European anti-discrimination law by national legal provisions individuals have to make a complaint before the national courts first; usually, the complaintant will aim at annulling a specific administrative act.

In case the national court doubts the consistency of the national law with the RED, it can refer the case to the CJEU through the preliminary reference procedure. If all remedies under national legislation are exhausted, the person affected is allowed to file a complaint at the ECtHR.

Moreover, inidivuals can report alleged infringements of the RED by national legislations to the Commission, who then may examine the provisions in question and take legal actions against the State in the CJEU. In both cases, the CJEU will check the national legal framework against the RED provisions. However, the European Commission is not entitled to decide on individual cases.

1.5 Other key documents

Since equality is seen as one of the basic fundamental freedoms by both the EU and the CoE, there are several additional key texts that reiterate the objective of anti-discrimination, inter alia:

- European Social Charter (right to equal opportunities and equal treatment in matters of employment and occupation, protecting against discrimination on the grounds of sex)
- Framework Convention for the Protection of National Minorities
- CoE Convention on Action Against Trafficking in Human Beings
- CoE Convention on the Access to Official Documents
- Additional Protocol to the Convention on Cybercrime
- EU Framework Decision on combating certain forms and expressions or racism and xenophobia
- Council conclusion of 19 May 2011 on an EU Framework for National Roma Integration Strategies up to 2020
- Council conclusion of 27 May 2010 on advancing Roma inclusion
- Council conclusion of 28 May 2009 on the inclusion of Roma
- Communication of 17 June 2015 on the implementation of the EU Framework for National Roma Integration Strategies
- Communication of 2 April 2014 on the implementation of the EU Framework for National Roma Integration Strategies
- Communication of 26 June 2013 on Steps forward in implementing National Roma Integration Strategies
- Communication of 21 May 2012 on National Roma Integration Strategies: A first step in the implementation of the EU Framework
- Communication of 5 April 2011 on a EU Framework for National Roma Integration Strategies up to 2020
- Communication of 15 November 2010 on a European Disability Strategy 2010-2020: A Renewed Commitment to a Barrier-Free Europe
- Communication of 7 April 2010 on the social and economic integration of the Roma in Europe
- Communication of 2 July 2008 on non-discrimination and equal opportunities: A renewed commitment

- Communication of 1 June 2005 on non-discrimination and equal opportunities for all: A framework strategy

These documents, however, do not carry enforceable obligations for the EU bodies or the Member States.

2. ECtHR and CJEU case law regarding Roma's education and employment

2.1 The right to education in the European Union

The right to education is considered a fundamental right safeguarded by all international systems of human rights protection. More than that, it is often viewed as both a human right in itself and an indispensable means of realising other human rights.[8] In other words, education is considered an instrument essential in achieving social and economic inclusion. In the European legal order, the right to education, including the right to receive compulsory education is prescribed in the Charter of Fundamental Rights of the European Union.

> **Article 14 EU Charter of Fundamental Rights**
>
> 1. Everyone has the right to education and to have access to vocational and continuing training.
>
> 2. This right includes the possibility to receive free compulsory education.
>
> 3. The freedom to found educational establishments with due respect for democratic principles and the right of parents to ensure the education and teaching of their children in conformity with their religious, philosophical and pedagogical convictions shall be respected, in accordance with the national laws governing the exercise of such freedom and right.

Under the ECHR, the right to education is guaranteed by Article 2 of Protocol No.1 which provides that:

> No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and teaching, the State shall respect the right

[8] Guide for documenting and monitoring school segregation in Hungary', Romani CRISS, in partnership with the FXB Center for Health and Human Rights at Harvard University, ANTIGONE, the European Roma Rights Centre (ERRC), Life Together and Integro Association Bulgaria developed and implemented the DARE-Net project: Desegregation and Action for Roma in Education-Network. Available at: http://www.dare-net.eu/cms/upload/file/guide-for-monitoring-and-documenting-school-segregation-hungary-english-2014.pdf, p. 42.

of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.

The ECtHR has clarified that under the Convention, the right to education is not an absolute right, but a subject to limitations; those limitations must be foreseeable for those concerned, and must pursue a legitimate aim.[9] Furthermore, the Convention does not oblige states to make education available[10] but rather it aims at guaranteeing non-discriminatory access to the existing public educational facilities. According to this interpretation, the right to education, understood as a right of equal access, necessarily implies the existence and maintenance of a minimum of education provided by the State, since otherwise that right would be rendered illusionary, in particular for those who have insufficient means to maintain their own institutions.[11]

2.2 Discrimination of Roma in education: Segregation cases

Discrimination in relation to education largely takes the form of segregation; according to a 2007 report by the Migration Policy Group[12] segregation is a form of structural discrimination often confronted by Roma children in the EU Member States; it can take the form of intra-school segregation which amounts to the organisation of separate classes for Roma children within the same school or intra-class segregation, which amounts to different study groups within the same class. On the other hand, segregation between different educational facilities, i.e. inter-school segregation may stem either from existing regional, or housing separation among ethnic groups (segregationally settlements), inappropriate or culturally biased testing methods which lead to misplacements of non-disabled children to

[9] Handbook on European Law relating to the rights f the child, European Union Agency for Fundamental Rights and Council of Europe, June 2015, available at: http://www.echr.coe.int/Documents/Handbook_rights_child_ENG.PDF, p. 143.
[10] Ibid.
[11] Pieter van Dijk, Fried van Hoof, Arjen van Rijn, Leo Zwaak, Theory and Practice of the European Convention on Human Rights, Fourh Edition, Intersentia, Antwerpen-Oxford, 2006, p. 899, as found in *Guide for documenting and monitoring school segregation in Hungary*, supra note 3, p. 43.
[12] Lilla Farkas, *"SEGREGATION OF ROMA CHILDREN IN EDUCATION: ADDRESSING STRUCTURAL DISCRIMINATION THROUGH THE RACE EQUALITY DIRECTIVE"*, Thematic report by the European network of legal experts in the non-discrimination field, Migration Policy Group, available at: http://www.migpolgroup.com/portfolio/segregation-of-roma-children-in-education-addressing-structural-discrimination-through-the-race-equality-directive/

special schools for mentally disabled children or the existence of private establishments which pose requirements that *de facto* Roma children cannot satisfy.

The ECtHR has had a chance to deal with discrimination against Roma, and particularly, whether the right of Romani children that enjoy equal access to education was hindered by a number of national segregationally practices. The Court has thus developed a line of jurisprudence regarding segregation phenomena taking place in Europe, particularly in Hungary, Greece, Croatia and the Czech Republic.

2.2.1 Segregation by entrance examinations

Its first ruling came in relation to an application lodged against the Czech Republic, in the case of D.H. and Others v. CZ - the so called *Ostrava* case.[13]

D.H. and Others v. CZ - Ostrava

Facts

The application was lodged by 18 children of Roma origin residing in the town of Ostrava. They sought legal redress against their placement in special schools for children with mental disabilities; the decision to place them in these schools was taken by the head teacher on the basis of a psychological examination, aimed at determining the child's intellectual capacity, with the consent of the child's parent or guardian.

The children decided to challenge the placements before administrative authorities and domestic courts, arguing that they had not been properly informed of the consequences of the placement, and that, as a result of the placement, they had received an inadequate education; moreover, they argued that the system of placement in "special schools" was discriminatory, resulting in *de facto* segregation of the school system and racial discrimination through the coexistence of two autonomous educational systems: one for Roma pupils attending separate

[13] OSTRAVA CASE: D.H. and Others v. The Czech Republic, European Roma Rights Centre, 12 March 2008 available at: http://www.errc.org/article/ostrava-case-dh-and-others-v-the-czech-republic/2945

special schools and one for non-minority students attending ordinary schools[14]. After their claims were rejected, the applicants decided to bring the case before the ECtHR, represented by the ERRC[15] and largely supported by a significant number of NGOs and human rights bodies' claiming that their quasi-automatic placement to special schools interfered with their right to education as prescribed in Article 2 of Protocol No 1 taken in conjunction with Article 14.

Initially, the Chamber dismissed the application, *inter alia*, accepting the argument of the Czech authorities, that the schools were neither designed nor established only for Roma children[16]; in other words, that the practice was not intended to be discriminatory.

Upon appeal, the Grand Chamber overturned the initial conclusions and found that Czech Republic had violated the applicants' right to education by putting in place a placement system of allocating children to different schools that was significantly prejudicial against Roma pupils.

Judgment

General principles

The Court established or reaffirmed in a clear manner a set of general principles; firstly, that discrimination on account of, *inter alia*, a person's ethnic origin is a form of racial discrimination. Racial discrimination is a particularly invidious kind of discrimination, and in view of its perilous consequences it requires from the authorities special vigilance and a vigorous reaction.[17] Especially as regards the Roma community the Court underlined their particularly vulnerable position, which meant that special consideration should be given to

[14]Supra note 8, p.52.
[15] The European Roma Rights Centre, is a leading international NGO, working on Roma rights in Europe. For more information, see : http://www.errc.org/about-us-overview
[16] Jennifer Devroye, The Case of D.H. and Others v. the Czeh Republic, Northwestern Journal of International Human Rights, Volume 7/Issue1/Article 3, Spring 2009, available at: http://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=1084&context=njihr, p. 89.
[17] Case *D.H. and Others v. The Czech Republic*, (Application no. 57325/00) , Grand Chamber Judgment of 13 November 2007, available at: http://hudoc.echr.coe.int/eng?i=001-83256 . Par. 176.

their needs and their different lifestyle both in the relevant regulatory framework and in reaching decisions in particular cases.[18]

Furthermore, the Court reiterated its view on indirect discrimination taking into account the relevant definition of the RED, which was that a difference in treatment may take the form of disproportionately prejudicial effects of a general policy or measure which, though couched in neutral terms, discriminates against a group in particular.[19] Consequently, the Court identified segregation as a form of indirect discrimination.

Evidence

In this case, the Court took into account statistical evidence submitted by a large number of third party interveners which showed that over half of the students in "special schools" were Roma, and that any randomly chosen Roma child was more than 27 times more likely to be placed in a "special school" than a non-minority child. Thus, it reaffirmed its case law that statistical evidence can be used to make a *prima facie* case of discrimination, and shift the burden of proof to the respondent state.

The testing methods

Although it was not for the Court to decide on the validity of the testing methods used, which were the subject of an on-going scientific debate at the time, it was nonetheless held that the results of these tests cannot constitute objective justification for the difference in treatment between Roma and non-Roma children pursuant to Article 14 of the Convention. The relevant legislation as applied in practice, i.e. the testing method prescribed by law, had disproportionately prejudicial effects on the children of the Roma community.

Procedural safeguards: When regulating the right to access to education, the states enjoy a certain margin of discretion; however, when exercising this discretion, the States should take into account the special needs of the particular vulnerable groups such as the Roma community, which was not the case in this instance.

[18] Ibid, par. 181.
[19] Ibid, par. 184.

Difference in treatment: Despite being couched in neutral terms, the relevant statutory provisions therefore had considerably more impact in practice on Roma children than on non-Roma children and resulted in statistically disproportionate number of placements of the former in special schools. As a result of the disproportionate placement of Romani children in special schools for mentally disabled pupils the applicants –and the children of Roma origin in general- were receiving sub -standard education following a more basic curriculum, in comparison to ordinary schools. Thus, they were hindered from further developing skills that would enable their social inclusion to the majority of the population.

Key findings[20]

- The Court recognized segregation –by misdiagnosis –as a form of indirect discrimination
- The judgment underlined the special status of Roma people who, due to their particularly vulnerable situation, require special protection
- The Court clarified how evidence should be treated in order to establish a discrimination case
- The Court shifted the focus during its taking of evidence away from the particular facts of the individual cases. Instead, it identified structural discrimination through highlighting the patterns of discrimination evident from examining all applications together as a collective complaint. It has been argued that this is an undoubtedly positive step: '*Dealing with structural discrimination, such as the segregation of Romani children in (special) schools through the prism of collective complaints - or action popularis litigation in the domestic context – is undoubtedly a progressive approach which bears positive results. However, transforming a petition brought by individual applicants into a group action carries certain risks and dangers as well. Arguably, in D.H. such a move has caused difficulties in two ways: first, in the proper appreciation of the case of the actual applicants and second, in the subsequent judgments rendered in the Roma education cases. The procedural flop must have been noticed by the Court itself as in the other*

[20] Supra note 13.

Roma education cases it went out of its way to assess the individual circumstances of the applicants. However, the argument designed to fit this group claim remained intact in the other Roma education cases as well, which arguably blurred the grievances suffered by the individual applicants'[21]

However, the Court did not go so far as to give the Committee of Ministers the mandate to monitor specific amendments in the national legislation in order to remedy the systemic discrimination entrenched in CZ' schooling arrangement methods. It is worth noting that this is one significant point of difference when comparing the Court's judgment in *D.H.* with the subsequent case that came against Hungary, and dealt also with misdiagnosis.

Horvath and Kiss v Hungary[22]

The case concerned the misdiagnosis of two Romani children as mentally disabled and their relevant placement in special remedial schools.

Facts

The applicants, István Horváth and András Kiss, were Hungarian nationals of Roma origin. Mr Horváth started elementary education in a remedial primary and vocational school, after the examination of an expert panel, upon the request of the nursery he had been attending. The panel diagnosed him with a "mild mental disability" after conducting a number of tests, including different types of IQ tests, which led to disparate results, indicating that he had an IQ between 64 and 83. Mr Horváth's parents were told by the expert panel that he would be placed in a remedial school, and were asked to sign the expert's opinion before the examination took place.

[21] Lilla Farkas, European Network of Legal Experts in the Non-Discrimination Field, Report on discrimination of Roma children in education, Published in October 2014, available at: http://ec.europa.eu/justice/discrimination/files/roma_childdiscrimination_en.pdf, p. 29-30.

[22] European Court of Human Rights, *case of Horváth and Kiss v Hungary*, Chamber Judgment of 29 January 2013, , (Application no. 11146/11), available at : http://hudoc.echr.coe.int/eng#{"fulltext":["Horvath"],"documentcollectionid2":["GRANDCHAMBER","CHAMBER"],"itemid":["001-116124"]}.

Mr Kiss was placed in a remedial primary school, after having started elementary education in a mainstream primary school. The school requested his examination by an expert panel which diagnosed him with a "mild mental disability". He was found to have an IQ between 63 and 83, following the test. Mr Kiss was then placed in a remedial primary and vocational school despite his parents' objection.

As a result of this placement, they received poor education: the curriculum was underdeveloped, their schooling failed to give them access to employment, and they ended up *de facto* segregated from the wider population.[23]

After a partially successful domestic civil litigation, the applicants further addressed the ECtHR supported by the ERRC and the CFCF (Chance for Children Foundation). They argued that they had been discriminated against due to their ethnic origin as the tests used to determine their placement to the remedial primary and vocational schools for children with mental disabilities, were knowledge-based and discriminatory in nature, as they put Roma children in a particular disadvantage. They claimed that the notion of familial disability, although apparently neutral in nature, in fact represented social deprivation and the non-mainstream minority cultural background of Roma families and children, and therefore formed the basis of stereotypes against the Roma.[24] In consequence, based on the RED, they claimed their misdiagnosis amounted to direct discrimination because 'this discriminatory practice had been shown to have a disproportionate effect on one group'– in this case the Romani children.[25]

Judgment

The Court, although it did not examine this claim, accepted that the contested notion in effect had a similar impact with that of the semi-automatic placement of Romani children in Czech remedial schools, largely due to language differences between them and the majority of the population, as in the D.H. case, described above.

[23]Alexandra Timmer, *"Horváth and Kiss v. Hungary: a strong new Roma school segregation case"*, Strasbourg Observers, 6 February 2013, available at: https://strasbourgobservers.com/2013/02/06/horvath-and-kiss-v-hungary-a-strong-new-roma-school-segregation-case/#more-2000

[24] Supra note 25, p. 31.

[25] Ibid.

Instead, the Court took note of a large amount of sociological evidence and found that in Hungary there was a widespread phenomenon of systematic misdiagnosis of mental disability which led to overrepresentation of Romani children to remedial schools[26]. It underlined that there was a long history of misplacements of Romani children in special schools across Europe[27]. Therefore, it found there was ground for a *prima facie* case of indirect discrimination which shifted the burden of proof to the Hungarian government to prove that the difference in treatment did not have disproportionate prejudicial effects on Romani children.

Objective and reasonable justification

Although there had been progress and positive steps to amend, the national legislation in accordance to the findings of the Strasbourg Court in *D.H.* and introduce measures that would help tackle the problem of misdiagnosis in school placements, Hungary remained firm in its position to maintain the existence of special schools. The Hungarian government put forward that such choice was not of discriminatory intent, but rather it was a policy decision aimed to properly address the special educational needs of mentally disabled children.

However, as the Court stressed, 'as a result of their turbulent history and constant uprooting, the Roma have become a specific type of disadvantaged and vulnerable minority, [..] and therefore, special consideration should be given to their needs in view of protecting their rights. More than that, in light of the recognized bias in past placement decisions, the state has specific positive obligations to avoid the perpetuation of past discrimination. Special safeguards should be applied so as to allow the competent authorities to take into account the Roma particularities when reaching a placement decision.[28] Similarly to *D.H.*, the Court could not assess the validity of the tests applied, but took note of the controversy around them and the fact that when assessing the mental disability, the Hungarian authorities had departed from the international standards, as prescribed by the World Health Organization (WHO) making it 'easier' to identify someone as mentally disabled. *In concretu*, it found that the

[26] Ibid.
[27] Case *Horvath* and Kiss, p.117.
[28] Supra note 8, p. 48.

schooling arrangements for Roma applicants with allegedly mild mental disability or learning disability were not attended by the above mentioned adequate safeguards. Therefore, the Court ruled in favour of the applicants, finding that they had been victims of a difference in treatment that had disproportionately prejudicial effects on them namely isolation, sub-standard education and compromise of their personal development.

Key findings

- The doctrine on parental consent is once again repeated.

- Indisputably, the most important development was that the Court introduced an obligation on the part of the States to take positive action measures in order to address structural disadvantages caused by past discrimination.

- In Horvath, the Court evidently followed up and reaffirmed its previous decision in D.H. as regards misdiagnosis and further consolidated the its case law on segregation29

- Misdiagnosis in effect amounts to segregation30

- The Court again appeared open in the type of evidence that could be accepted in order to come to an informed analysis on the effects of the impugned national practice.

Follow-up on the case

While on the one hand, the issue of systemic discrimination of Roma children in education was voiced, the Court failed to give a specific mandate to Hungary to introduce a plan that would enable desegregation to work in practice let alone to establish more detailed targets that would push the state to realize the necessary changes.[31] However, as a positive development, particularly in comparison with *D.H.* the supervision of the implementation of the judgment was entrusted to the Committee of Ministers, the CoE body competent to supervise the execution of ECtHR judgments.

[29]FXB Center for Health and Human Rights, *"Strategies and Tactics to Combat Segregation of Roma Children in Schools: Case studies from Romania, Croatia, Hungary, Czech Republic, Bulgaria, and Greece*", Harvard University 2015, available at: https://cdn2.sph.harvard.edu/wp-content/uploads/sites/5/2015/05/Roma-Segregation-full-final.pdf , p. 68.
[30] Supra note 23, p. 32.
[31]Supra note 25, p. 67.

In this case, the Committee is responsible for monitoring the implementation of both individual measures (e.g. costs and expenses) and general measures, which refer mainly to the testing methods applicable for determining the learning abilities of Roma children, as well as to the inclusiveness of the education policy for children with special education needs.[32] In addition, the Committee oversees the legislative changes and the training activities.[33]

In order to address the judgment's concerns, Hungary has fulfilled the individual measures and introduced the following general measures:

- The testing methods in dispute were replaced by the Wechsler Intelligence Scale for Children (WISC-IV Child Intelligence Test) which was standardised in Hungary; also a child's learning abilities are assessed through a series of complex examinations instead of a single test;

- Hungary introduced legislative amendments in order to ensure that the diagnosis of mental disability of children, preceding the decision on their placement in special schools, is based on strict criteria and accompanied with special safeguards.

Upon its last evaluation in December 2015, the Committee noted that the Hungarian authorities have taken a number of measures, and invited the Hungarian authorities to provide further information particularly as regards the concrete impact of the measures taken.

Other human rights bodies have criticized the Hungarian stance as inadequate and inefficient to address the systemic challenges of Roma children. As noted in the 2015 FXB report 'In Hungary, the EU anti-discrimination framework operates *de jure*, but *de facto*, it is often just symbolic and there is ample evidence of its limited application. There is not enough political will at the international level to put pressure on states like Hungary to respect the anti-

[32] Ibid.
[33] For more information: http://www.coe.int/t/dghl/monitoring/execution/Reports/pendingCases_en.asp?CaseTitleOrNumber=11146%2F11&StateCode=&SectionCode

discrimination mechanisms in place, and put an end to institutional discrimination or segregation.'[34]

The EC infringement proceedings: Only recently, the EC decided to open infringement proceedings against Hungary for not bringing its legislation and administrative practices in line with the high level of protection required by the Racial Equality Directive as regards the right to education of Roma children: "The European Commission is requesting **Hungary**[35] to ensure that Roma children enjoy access to quality education on the same terms as all other children, and urges the government to bring its national laws on equal treatment, as well as on education and the practical implementation of its educational policies into line with the Racial Equality Directive."

Similarly, to the cases brought previously against Slovakia and Czech Republic, the EU sought to address the continuous national practices that fell short of the standards that the RED put forward. This is welcomed as a positive development, namely because the EC appears set on not letting Member States undermine the effectiveness of the Racial Equality Directive and endanger the enjoyment of fundamental rights in the EU, by recognized vulnerable groups; it also puts pressure on Hungary to upgrade its efforts on eliminating national discriminatory policies and practices and finally it may give the Court of Justice the chance to reach a ruling as regards the validity of said national practices.

2.2.2 Segregation within the school: Roma-only classes

As mentioned before, segregation can also occur within the same school, by creating separate classes for Roma pupils. There is a number of factors that may lead to such a situation; by way of example in Croatia, the school authorities claim that separation is necessary due to the limited grasp of the Croatian language; enrolment in the first grade can be delayed – due to the poor tests results of Roma pupils linked to their language shortcomings- or even declined due to external pressure by parents of non – Roma pupils that do not want their children to

[34] Supra note 29, p. 70.
[35] "Commission requests HUNGARY to put an end to the discrimination of Roma children in education", European Commission - Fact Sheet, May infringements' package: key decisions, Point 5 Justice, Consumers and Gender Equality, 26 May 2016, available at: http://europa.eu/rapid/press-release_MEMO-16-1823_en.htm

attend mixed classes. Therefore, while segregation is forbidden by law, it persists on a *de facto* basis.[36]

The ECtHR has ruled on cases of intra-school segregation on two instances: in the case of Oršuš and Others v. Croatia[37] and in the case of Sampanis and Others v. Greece.

Oršuš & others v Croatia: segregation of Roma children to separate classes based on their language

Facts

The case was brought by 15 Croatian nationals of Roma origin, who attended primary school in the broader region of Nothern Croatia; the applicants brought a claim against the primary schools claiming that the curriculum in their Roma-only classes had 30% less content than the official national curriculum. They alleged that that situation was racially discriminating and violated their right to education as well as their right to freedom from inhuman and degrading treatment. In the domestic proceedings, they submitted a psychological study of Roma children who attended Roma-only classes in their region, which reported that segregated education produced emotional and psychological harm in Roma children, both, in terms of self-esteem and development of their identity.[38] The domestic courts rejected their actions on all jurisdictional levels, thus accepting the defendant State's argument that the decision for their placement in separate classes was based on their language level in Croatian. Subsequently, the case was brought before the ECtHR, with the support of the ERRC.

Judgment

[36]Supra note 29, p. 38.
[37] Decision of EctHR, case Oršuš and Others v. Croatia, *(Application no. 15766/03)*,Chamber Judgment of 16 March 2010, available at: http://hudoc.echr.coe.int/eng#{"fulltext":["orsus"],"documentcollectionid2":["GRANDCHAMBER","CHAMBER"],"itemid":["001-97689"]}
[38] Supra note 23, p.56.

In its assessment, the Court firstly reiterated once again the specific position of the Roma as a protected minority[39] therefore establishing that the applicants' protected ground was their ethnic origin.[40] It proceeded to examine whether there was a difference in treatment; on that note, it found that even though there was no general policy of placing Romani children in separate Roma-only classes, in effect the contested measure was applied only in respect to Romani children: only Roma pupils had been placed in such classes[41] and therefore there was a difference in treatment. Even though the practice was not discriminatory in intent, still, it affected exclusively the members of a singular ethnic group[42]; in consequence, the State would have to prove that practice in question was objectively justified by a legitimate aim and that the means of achieving that aim were appropriate, necessary and proportionate.

Upon further analysis, the Court examined the measure of temporary placement of children in separate classes due to their insufficient command of the Croatian language, concluding that it was not in itself discriminatory if it was aimed at adapting the educational system to the children's special needs; however, given the aforementioned effect of such practice solely to Roma pupils, it should be examined whether adequate safeguards were in place at each stage of the implementation of such measures[43].

In this case, the Croatian Government failed to put in place adequate safeguards which would ensure a reasonable relationship of proportionality between the means used and the legitimate aim to be achieved: namely because the placement procedure was not provided by law at the time, and could not be considered part of a general and common practice designed to address the linguistic problems of pupils, in general.[44] In addition, the test used to determine the assignment was not designed to assess their command of Croatian, but rather tested their general psycho-physical condition. Furthermore, the school programme was not designed to address the alleged language difficulties, nor were there transparent and clear criteria, or a

[39] Idaver Memedov, *"European Court Denounces Segregated Education Again: Oršuš and Others v Croatia"*, Roma Rights 1, 2010: Implementation of Judgments, European Roma Rights Centre, 26 July 2010, available at: http://www.errc.org/article/roma-rights-1-2010-implementation-of-judgments/3613/10

[40] Supra note 23.

[41] Supra note 39.

[42] Supra note 37, par. 155.

[43] Supra note 39.

[44] Decision of the ECtHR in "Oršuš and Others v. Croatia", Application no.15766/03, par. 158.

monitoring mechanism for reviewing the duration of the placement of children to Roma only classes, leaving room for arbitrary decisions in that regard.[45] Taking into account the high dropout rates of Roma pupils in the region, there was evidence if a failure in the part of the State to implement positive measures appropriate to raise awareness for the importance of education among Roma; lastly, parental consent in this case could not be deemed informed, and, in no way, could that amount to a waiver of the right not to be subjected to racial discrimination.

Accordingly, the Court found a violation of Article 14 in conjunction with Article 2 of Protocol No.1.

Key Findings

- After the Orsus ruling, language deficiency cannot serve as pretext for racial segregation both in Croatia as well as in other EU countries

- However, the Court did not address the issue of pressure exerted by the non Roma parents' demonstrations when it came to the desegregation initiatives of the State- which would have weighted in in the review of the justification

Follow up

While the Court did not order the Croatian government to undertake specific action, the judgment laid out a framework of priorities that would enable Croatia to streamline its legislation and administrative practice, according to the necessary level of protection prescribed by the Court; these priorities included: development of a legal framework and procedures for initial placement in separate classes, a language-specific curriculum, a transferring and monitoring procedure, and measures to address poor school attendance and high dropout rates.[46] Experts claim that in fact the judgment led to positive changes such as enhancing the legal discourse around segregation at the EU and national level, stimulating legislative and policy changes aiming to achieve inclusive education, introducing or

[45] Ibid, par. 158- 172.
[46] Supra note 39, p. 45.

enhancing preschool education programmes and extracurricular language support, and providing some limited remedies to the plaintiffs.[47]

Changes at the regional and policy levels: Following the judgment, management and teaching staff of the primary schools asked the municipal authorities and the Ministry of Education to introduce free pre-school programmes for Roma children to address language barriers[48] which were not adequately addressed in the first two years of primary schooling. Due to this mobilisation, there is now free preschool education for all children in Međimurje County; also, children with an inadequate grasp of the Croatian language can now benefit from preschool activities throughout the school year. These activities now take place for longer hours and provide free transportation and meals to students.[49]

However, Croatia has yet to include bilingual teaching methods, particularly in preschool, when they would have the greatest benefit for achieving Romani children inclusion.

In light of the *Orcus* judgment, Croatia presented a revised Action Plan aimed at addressing the Court's concerns; the plan included the abolition of separate classes for Roma children, with the aim of integrating them into mainstream education, and monitoring concrete results; introducing supplementary classes and specific programs to help raise the language competence of Roma children. Finally, it provided for a number of measures to improve school participation, including the active involvement of social services in ensuring school attendance of Roma children.

At the legislative level, the Croatian government has amended national legislation aiming to provide Roma children with targeted, language specific support in integrated environments.[50]

[47] Ibid, p.46.
[48] T. Bass, Oršuš and Desegregation in Međimurje County, REF, 2013 as found in FXB Center for Health and Human Rights, *"Strategies and Tactics to Combat Segregation of Roma Children in Schools: Case studies from Romania, Croatia, Hungary, Czech Republic, Bulgaria, and Greece"*, Harvard University 2015, available at: https://cdn2.sph.harvard.edu/wp-content/uploads/sites/5/2015/05/Roma-Segregation-full-final.pdf , p.48.
[49] Supra note 39, p. 48.
[50] Ibid., p.49.

Sampanis & others v Greece[51]

The Sampanis case[52] concerned Greece's failure to provide the applicants' with schooling during the 2004-2005 school year, and the subsequent placement of Roma children in segregated facilities.

Facts

The applicants (11 children, Greek nationals of Roma origin) visited the local primary school wishing to enroll, but got denied, and were placed to Roma-only preparatory classes in the subsequent year. The Greek government put forward that the failure to enroll the children was due to the lack of appropriate documentation on the part of the parents. Furthermore, the parents had consented to the placement of their children in special classes separate from the main primary school, a measure justified in view of the children's inadequate command of the Greek language[53];in particular, they signed a statement drafted by the primary school teachers that they wanted their children to be transferred to a building separate from the school; this was done after a series of protests by other parents, who objected to their children being educated in the same school with Roma students, and attempted to block their entrance to the main school building with blockages. On the basis of this document, the Roma students were transferred to an annex, separate from the main primary school.

Judgment

The Court found that while the racist incidents could not be attributed to the Greek authorities, there was a strong presumption of discrimination that would require that the Greek state to prove that the difference in treatment could be objectively justified. Although the difference in treatment could, under certain circumstances, be considered necessary in view of correcting certain factual inequalities, in particular, that was not the case; Greek legislation acknowledged the special situation of Roma people, and allowed their enrolment to schools via a simple declaration on the part of the parents; consequently, the Greek

[51] Decision of EctHR, Sampanis and others v Greece, application No *no 32526/05*, chamber judgment of 5 June 2008, available in French at http://hudoc.echr.coe.int/eng#{"itemid":["001-86797"]}

[52] For a detailed summary of the case, see: https://www.opensocietyfoundations.org/sites/default/files/briefing-paper-sampanis-20101008.pdf

[53] Supra note 25, p. 34.

authorities failed to undertake the necessary positive measures prescribed by domestic law in order to facilitate enrolment.[54] Once again, in view of the particular situation of Roma and the importance of protecting children of ethnic minorities, the Court stressed the need to have in place pedagogically sound diagnostic tools for assessing the learning capabilities of children with learning needs[55], based on non-discriminatory criteria. However, the competent authorities had not adopted a single, clear criterion, when they made the decision to place, or not, a child in special preparatory classes. Moreso, while the objective of putting children in preparatory classes was – allegedly – to prepare them for the transition to ordinary classes, this transition never happened, which would lead to the conclusion that the placement in preparatory classes was permanent, rather than temporary.[56]

Key findings

- The Court's analysis follows the same lines as in *Orsus;* (see above)
- A strict level of scrutiny is appropriate when examining the State's positive action measures or absence thereof
- The Court repeated its doctrine on consent

2.2.3 Roma-only schools and white flight

Another persistent pattern of segregation is segregation of students in separate schools, which often reflects segregation in housing, but also the marginalisation that occurs as a result of the unwillingness of non- Romp parents to have their children attend 'mixed' schools (white flight), i.e. spontaneous segregation.

Sampan & others v Greece[57]

Greece failed to remedy the structural deficiencies, which resulted in a discriminating educational system, placing Romani children to special schools, leading to them having

[54] Ibid.
[55] Supra note 8, p. 56.
[56] Supra note 48, p. 34.
[57] ECtHR, decision of Sampani and others v Greece, application no 59608/09, Chamber judgment of 11 December 2012, available at: http://hudoc.echr.coe.int/eng#{"itemid":["001-115169"]}

substandard education and not being able to avail themselves of the right to develop personally, and integrate into the society. As a follow up to *Sampanis*, the Court was seized again, so as to rule on the application of 140 Greek nationals of Roma origin, who claimed that Greek authorities have failed to ensure inclusive education for the Roma children in ordinary integrated classes; instead, they institutionalised the discriminatory pattern by turning the school annex of *Sampanis* into an independent primary school[58] attended only by Roma pupils, even though in the surrounding region resided both, Roma and non Roma.

On its part, the Greek government claimed that the school belonged to the national educational system, and in no way differed from other primary schools. The unwillingness of the parents to register their children to school could not be considered imputable to the State.

Judgment

The Court firstly took note of the fact the several European States had difficulties offering their Romani population adequate education, and it was difficult in these cases to find an appropriate testing method for children who were not fluent in the language of instruction. Nonetheless, it underlined that the situation of Roma children in Greece had not changed from *Sampanis*, and therefore its findings in that case were also relevant in the context of *Sampani*. Taking into account that only Roma pupils attended the 12th primary school notwithstanding the fact that non Roma pupils resided in the respective catchment area, and that racist statements/reactions by local officials had overturned the proposed merging of the school with another mainstream school, i.e. the proposed desegregation measures pointed to discrimination. The Greek state had failed to take the necessary special measures to address Romani children's special needs.

The Court recommended that Greece takes specific measures under Article 46 – to transfer those students to a non-segregated school.

Follow-up

[58] Ibid, p. 35.

The *Sampani* judgment is quite important in terms of impact; the Court chose an innovative way of 'use' of Article 46, by suggesting a concrete measure for the State to take, thus enhancing the likelihood that such a measure will be adopted; a government administrative order actioning the Court's suggestion, followed[59]. On its part, Greece has shown willingness to substantially address the problem by having national and regional authorities to take not only soft measures, but binding administrative acts, as well. Initially, it was proclaimed that "for the reasons mentioned in the *Sampan* Judgment" the 12th primary school would not accept new students, and eventually the Ministry of Education took the decision to include the 12th School in the list of schools that would close down.[60]

Lavida and Others v. Greece[61]

The third case resulting in a conviction for Greece, came due to its failure to take appropriate anti-segregation measures, for Roma children who were restricted to attending a primary school in which the only other pupils were Roma children. Such failure implied discrimination and a breach of the applicants' right to education.

Facts

The applicants were 23 Greek nationals, who were represented by the Greek Helsinki Monitor (GHM), a non-governmental organisation active in advocating for Roma rights in Greece. At the time of the application, in the area of So fades, which was an area largely populated by Roma, 4 primary schools existed. One of them, primary school no. 4, had been built on the old estate occupied by the Roma community and near the new estate, which was accordingly attached to that school's catchment area as defined in the official zoning maps.[62]

On 21 May 2009 a delegation from the GHM visited the new Roma estate and school no. 4. The delegation sent a letter to the Ministry of Education, pointing out that the children from the new Sofades estate were attending primary school no. 4 in the old Roma estate, which had only Roma pupils, rather than primary school no. 1, closest to their homes. The delegation

[59] Adriána Zimová, *"Strategic Litigation Impacts: Roma School Segregation"*, Open Society Foundations 2016, available at: https://www.opensocietyfoundations.org/sites/default/files/strategic-litigation-impacts-roma-school-desegration-20160407.pdf , p.71.
[60] Ibid, p. 41.
[61] Decision of the ECtHR in "*Lavida and Others v. Greece"*, Application no. 7973/10.
[62] Press release available at: http://hudoc.echr.coe.int/eng-press#{"fulltext":["Lavida"]}

criticised "a clear ethnic segregation, which violates both, Greek law and international human rights norms, and, in particular, the European Convention on Human Rights as interpreted in the case of *Sampanis v. Greece*". No reply was received to the latter.

On 26 January 2012, the Minister of Education, the Special Secretary for Inter-Cultural Education, the mayor of Sofades, elected representative and representatives of parents' associations, held a meeting, and decided to take a number of measures. On 13 February 2012, in response to a question asked by a Greek MEP at the EP, Commissioner Viviane Reding emphasised that the EC considered that those measures were not sufficient to put a stop to the racial segregation, although they did reflect a willingness to tackle the problem.

Judgment

The Court observed that primary school No 4 in Sofades was attended solely by Roma pupils; even though under Greek legislation pupils were to be educated in schools situated near their homes, no non Roma child who lived in the district attended that school. More than that, the school operated as an ordinary school and did not include preparatory or support classes for Roma children wishing to transfer to an ordinary school, after having reached a sufficient educational level.[63] In other words, school N. 4 did not provide for positive traction measures to the Roma children educated there.

The Court took note of the fact that the relevant authorities had been informed about the existence of ethnic segregation in the education of Roma children in So fades by, among others, a report by the Regional Education Department, that recommended that the competent authorities avoid placing Roma children in schools attended solely by children belonging to the Roma community, in order to end social exclusion and promote Roma integration. The report suggested building new schools, and re-drawing the school catchment map. It noted that the education of Roma children in the existing schools in Sofades was impractical, given the large number of pupils and lack of infrastructure. The report also noted the municipal council's refusal to close down school no. 4 as well as the hostile reactions of the parents of non-Roma pupils when Roma children were enrolled in the other schools, in Sofades.

[63] Supra note 8, p. 61.

The Court observed that the relevant authorities had officially recognised the existence of segregation in the school in question, and the need to correct it. It could not subscribe to the Government's argument that for the 2009-2010 academic year it would have sufficed for the applicant parents to request the transfer of their children to another ordinary school in order to end the feeling of discrimination. Even in the absence of any discriminatory intention on the State's part, the Court held that a position which consisted in continuing the education of Roma children in a state school attended exclusively by children belonging to the Roma community, and deciding against effective anti-segregation measures, which could not be considered as objectively justified by a legitimate aim. The situation complained about by the applicants for the 2009- 2010 academic year had lasted until the 2012-2013 academic year. There had therefore been a violation of Article 14, together with Article 2 of Protocol No. 1.

Key findings

- The Court in this case took note of the pressure exerted by the opposition of non Roma parents and the role that played in reversing the decision to take desegregation measures, when it reviewed the state's justification

- The Court stated that Greece had "a legal obligation" to adopt "general and/or, if appropriate, individual measures" but it remained free to choose the means through which to put an end to the violation

Follow up

Similarly to what had happened with *Sampanis,* the Greek government had made some effort to encourage the transfer of Roma pupils from the Roma-only 4th School of Sofades to regular schools in the area. However, these efforts were limited to meetings with stakeholders and proclamations that in reality never came to materialize. In the end, after the ECtHR handed down its judgment in *Lavida,* the competent administrative authority at the regional level proclaimed the immediate implementation of the Court's decision. To that end, it issued

an order authorizing transfers of Roma pupils from the 4th School to the regular schools if their legal guardians requested it. Unfortunately, these efforts did not go so far as to order the automatic transferring of Roma pupils to other integrated schools, or the redrawing of the catchment area.[64]

2.3 Discrimination of Roma in employment

Like education, the right to work is considered as a fundamental right. It is safeguarded by the Universal Declaration of Human Rights, which establishes in its Article 23 that:

> **Art. 23 UDHR**
>
> (1) Everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment;
>
> (2) Everyone, without any discrimination, has the right to equal pay for equal work;
>
> (3) Everyone who works has the right to just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection.
>
> (4) Everyone has the right to form and to join trade unions for the protection of his interests.

The European Convention on Human Rights (ECHR) on its side, does not explicitly protect the right to work. However, given the importance of such right from a social and economic perspective, some aspects of the right to work are protected through the case law of the ECtHR, permitting to extract certain principles which may then be used as guidance in the interpretation of existing provisions of the Convention. Article 8 ECHR may for instance be used to protect the right to seek employment, while Articles 6 and 8 ECHR can be used to fight unfair dismissals. In addition, Article 14 which prohibits discrimination (see above) can be used to contest different situations of discrimination in the field of employment.

[64] Adriána Zimová, "Strategic Litigation Impacts: Roma School Segregation", Open Society Foundations 2016, available at: https://www.opensocietyfoundations.org/sites/default/files/strategic-litigation-impacts-roma-school-desegration-20160407.pdf, p. 43.

In addition, the legislative framework prohibiting the racial discrimination and promoting the equality in employment, has increased the protection of access to employment, especially after the transposition into national legislation of the two EU Council Directives, Race Equality Directive[65] and Employment Equality Directive[66].

Looking for anti-discrimination case law in the field of Roma employment will render nothing. It seems that the option to defend the employment rights of its members before the European jurisdictions is not taken into consideration by Roma community. This is surprising and difficult to understand, the massive exclusion of Roma from employment being an undisputed reality in many countries where many Roma are forced to be self-employed or to have irregular jobs. Some even say that the principal reason of unemployment for Roma is the discrimination towards them. The failure of governments to erase racial discrimination in employment and to adopt instead proactive measures to confront disadvantages facing by Roma in employment is a uncontestable fact. And yet, the applications before the competent European Courts are limited, almost inexistant. One of the very few examples of discriminatory situations towards Roma is the following: A shopping centre situated in F.Y.R.O.M., Skopje City Mall, instructed the agency which provides it with cleaning staff to remove all Romani staff who worked in the food section. Skopje City Mall sent an email making the request on 9 January 2013, and requested that the Romani workers were removed by 20 January, 2013. The cleaning agency, Land Service, rejected the request. It seems that the shopping centre made the request following food thefts from the centre. The agency engages Roma and non-Roma workers in this section – only the Roma were targeted on the basis of their ethnicity. And while the specific action of the managers of City Mall seems to violate the national constitution, as well as anti-discrimination and labour codes in the country and the action being a breach of international human rights standards, the equality body of F.Y.R.O.M. has not brought the case to the relevant EU institutions to highlight the incident.

[65] Supra Note 6.
[66] Supra note 6.

Regarding employment of Roma the strong relation between education and access to the job market has to be empasized: Another reason of unemployment apart from discrimination is that in some countries of Central and Eastern Europe, although governments admit that education and lack of qualification place Roma in disadvantaged position, measures undertaken to mitigate the effects of lower education are almost inexistent. In most cases, the so callled "active labour market programmes" do not involve specific trainings and re-qualification of Roma. An additional reason leading to exclusion of Roma from employment is the wrong conviction that employment opportunities are equally accessible for everyone, and if Roma are not taking advantage of these it is due to objective reasons – low education as well as limited knowledge of the language, which constitue a barrier to employment, as well as subjective reasons – conscious choices to live from state support rather than work. Moreover, many employers have a negative attitude towards the Roma and tend to resent employing them, because prejudices about Roma being unwilling to work are widespread. It is important to note that those Roma who have a job "are usually low-skilled workers" and mainly find employment in cleaning, housekeeping, dishwashing, building or the collection of scrap metal.[67]

The lack of case law regarding Roma employment cases on the European level may come as a surprise, but there is a line of arguments why no case of Art. 14 ECHR complaint regarding Roma employment made it to the ECtHR, and why no preliminary ruling on the interpretation of the RED provision has been made in Roma-specific employment cases:

First of all, the unwillingness to report alleged infringements of anti-discrimination provisions is still high, though still better than before the RED came into force. Main reason for Roma people not to report potential discrimination is the lack of confidence in the respective legal system, both, with regard to its ability to solve a problem quickly, and in an effective manner. If a complaint is made, it usually is a law case on grounds of the national Equality Act, implementing the RED in national law. Here, the case before the national court is either closed, settled or decided; in cases where discrimination has been proved by the

[67] Romldent Working papers, Paper N°20, Roma and Romani in Lithuania in the 21st century, 2013, http://romani.humanities.manchester.ac.uk/virtuallibrary/librarydb/web/files/pdfs/375/Paper20.pdf

national court the judgment is in favour of the claimant, rendering any further legal remedies obsolete. Before this background, it obviously has not come to a situation where a national court asks the CJEU for a preliminary ruling in a Roma-specific discrimination case in the area of employment.

There has been one recent CJEU case regarding discrimination of Roma on grounds of the RED provisions, but not in the field of employment. Nevertheless, many of the arguments in this judgment will have an impact on how some of the RED provisions will be interpreted in future Roma employment cases. Hence, the report shortly presents some of the conceptual contributions of the ruling to the RED interpretation later on (see below pg. 44).

In summary, there is specific European Union legislation prohibiting race discrimination in the field of employment. This legislation as well as the principles drawn from the fundamental rights could help to tackle the problematic discrimination situation constantly facing by Roma who are victims of different acts against them – and maybe they do so, on a national level. To bring uncertainties regarding the consistency of national anti-discrimination laws with the RED to European Courts, questions might be referred to the Court of Justice of the European Union by the national courts. The national judges however are usually not required to refer cases and seem to be reluctant to do it on their own initiative. The only obligation of national supreme Courts against which there is no further judicial remedy is to make a reference to a potential EU law related question that it is "necessary" to resolve. Challenging a Supreme Court for failing to make such a reference is possible, but unusual because expensive and time consuming. In any case, it seems that the majority of the cases fall apart or are being settled before they reach the last instance.

3. Developments and trends in European anti-discrimination jurisprudence as regards Roma education and employment

Analysing the ECtHR cases together, several interesting insights occur, shedding some light on the trends especially in education-related anti-discrimination jurisdiction:

- The ECtHR is **highly consistent in its interpretation** of Art. 14 ECHR, especially with regard to the following:
  - Consent in the segregation cases cannot be considered valid if it is perceived as a waiver of the right not to be discriminated against.
  - Given the vulnerable position of Roma as a minority with a long history of discrimination, in particular as regards the right to education of Roma children, and their special needs, it is incumbent upon the states to fight structural discrimination through introducing positive counter-measures.
  - When it comes to indirect discrimination it is not necessary to prove discriminatory intent; in fact, State intent is not relevant at all when assessing the effects of the contested practice/ provision. Any discriminatory effect as a result of State measures is sufficient for an infringement of Art. 14 ECHR, regardless whether the State aimed at such an outcome or this is a mere side-effect.
  - The Court stresses that where the difference in treatment is based on race, colour or ethnic origin, the notion of objective and reasonable justification must be interpreted as strictly as possible.

Moreover, there are some **underlying developments** to be found:

- Consequences of specific vulnerability: The Court has based its decisions regularly on the specific vulnerability of Roma people to discriminatory measures and practices,

and even more so, in cases where Roma children were involved. The century-long social exclusion of Roma, predispose this minority to all kinds of direct and indirect discrimination, according to the Court. This vulnerability leads to a very thorough scrutiny in assessing the existence of any discriminatory practices or factual consequences.

- Obligation by the court to implement counter-measures: The Court does not confine itself to prohibitory injunctions to have the state "just" turn off the infringing procedures or legal provisions, the judges also oblige the respective state to positive actions and measures that re-enable equality. In a strict sense, the Court orders the defendants to treat Roma with special care - to "discriminate" them in a positive manner - to ensure they can be treated equal again. The States' leeway of decision-making is significantly bound by such Court decisions with a view to solving the issue.

- Consideration of discriminatory context factors: The court regularly considers the practice of parental consent in alleged school segregation cases as an important aspect in its assessment. Where parents are forced into agreeing to the allegedly discriminatory practices, or where they lack foresight regarding the consequences of their consent, the Court does not only consider these declarations of will invalid. The judges also incorporate such practices in the actual legal examination of a potential discriminatory practice. By doing so, the Court actively considers context factors that are not discriminatory in itself, but may amplify practices of factual segregation.

- Burden of proof and openness regarding types of proof: In several recent decisions, the Court made use of its own right to take evidence; it asked for additional information beyond the written pleadings, it assessed results of the state measures in question from very different perspectives and it used expert witness in court to get the full view. It showed its openness to a variety of types of proof and its requests for more insight, usually were directed at the State, not the complainant.

As the case law has shown, there is no actual CJEU jurisdiction regarding Roma education and employment; potential reasons for this circumstance are given in Chapter 2.2. However, speaking of recent trends and important cases regarding CJEU jurisdiction, there has been a Roma-specific discrimination case where the European Court of Justice has advanced the interpretation of the RED provisions to a significant degree, especially regarding the notion of "ethnic origin" as well as the material scope of the Directive.

On 16 July 2015, the Court of Justice of the European Union (CJEU) delivered its judgment in

CHEZ Razpredelenie Bulgaria AD v Komisia za zashtita ot diskriminatsia[68].

The judgment in case CHEZ v. Nikolova offers new perspectives on the interpretation of Directive 2000/43/EC3. By outlining the Directive's personal scope of application, clarifying certain aspects of its material scope, the CJEU had the opportunity to make progress the fight of Roma communities against discrimination by Governments and companies.

Facts

In the context of national judicial proceedings, a Bulgarian court decided to submit some questions to the CJEU through a preliminary ruling request as provided under Article 267 of the Treaty on the Functioning of the European Union (TFEU). The case pending before the national court concerned the practice of an Energy company of placing electricity meters used for the commercial measurement of electricity consumption at a height of 7m in a predominantly Roma-populated urban area, making it impossible for people living in the area to read them, while meters were positioned lower than 2m above ground in non-Roma districts. According to the company, this practice was necessary because of the large number of instances of tampering with the commercial measuring instruments and of unlawful connections to the electricity network in the district.

Ms Nikolova, a local non-Roma shopkeeper, who lived in the district and was unable to check her electricity consumption herself, issued legal proceedings and prompted the national

[68] Judgment of the 16 July 2015, CHEZ Razpredelenie Bulgaria AD v Komisia za zashtita ot diskriminatsia, C-83/14.

judge to refer a long list of questions to the CJEU for preliminary ruling, which can be summarized as follows:

- Could the expression "ethnic origin" used in Directive 2000/43/EC be interpreted as covering a homogeneous group of Bulgarian citizens of Roma origin such as those living in the concerned district?

- Was the practice of the company a form of direct or indirect discrimination within the meaning of Article 2(2)(a) and (b) of Directive 2000/43/EC?

- Should Article 2(2)(b) of Directive 2000/43, defining indirect discrimination, be interpreted as meaning that the practice of the electricity company in relation to the security of the electricity network and the correct recording of electricity consumption was objectively justified?

- Was that practice necessary when there were other technically and financially feasible means of securing the commercial measuring instruments?

Personal Scope of Directive 2000/43/EC - The Term "Ethnic Origin"

The referring court asked whether the term "ethnic origin" used in Directive 2000/43/ EC should be interpreted as covering a homogenous group of Bulgarians of Roma origin such as those living in the concerned district. The answer from the CJEU was unsurprisingly positive. It is important to note that Directive 2000/43/EC does not define the concept of racial or ethnic origin and leaves to Member States to decide whether and how they will define these concepts in their national law. For this reason, the interpretation of the term "ethnic origin" by the CJEU allows delimiting the scope of application of the Directive. It is therefore not surprising that the CJEU gave a positive answer to this question, since a narrow interpretation of "ethnic origin" would restrict the application of the Directive and thus decrease the level of protection against discrimination. According to the Court, the principle of equal treatment contained in the Directive protects not only persons who are themselves a member of a particular race or ethnic group, but also those who are *not* members of such a group, but suffer a particular disadvantage or less favourable treatment on racial or ethnic grounds. This

CJEU's approach has the advantage of not restricting or pre-determining the development of any future jurisprudence on the thorny issue of less favourable treatment based on ethnic origin.

According to the Court, Directive 2000/43/EC does not appear to require that the alleged victim possess the protected characteristic. If it were to be interpreted otherwise, it would only privilege a certain category of human beings with protection from discrimination. In the CHEZ case, Ms Nikolova was a victim of discrimination by her association with Roma people. She experienced treatment which was less favourable compared to people living in other districts without a majority Roma population, because she tried to develop her business in a Roma district. However, Directive 2000/78/EC and Directive 2000/43/EC purpose is to stop discrimination on grounds of racial and ethnic origin and not only to protect individuals who are members of groups targeted by discrimination. Therefore, according to the reasoning of the CJEU in the CHEZ case, it could be concluded that the principle of equal treatment enshrined in Directive 2000/43/EC applied not to a particular category of persons but by reference to the ground of racial or ethnic origin in general.

Material Scope of Directive 2000/43/EC

The Notion of "Apparently Neutral Provision, Criterion or Practice" (Article 2(2)(b) of Directive 2000/43/EC) has also been interpreted in the ruling: The referring court sought clarity on the interpretation of the notion of "apparently neutral practice" in the definition of indirect discrimination in the Directive, according to which indirect discrimination is taking place when "an apparently neutral provision, criterion or practice would put persons of a racial or ethnic origin at a particular disadvantage compared with other persons".

With the CHEZ judgment, the CJEU added a new perspective to the "neutrality" notion. The concept of indirect discrimination is based on the perception that some provision, criterion or practice, which would appear neutral, is actually not, because the effects it produces on different groups of persons are deeply diverging. In its judgment, the CJEU interpreted directly the notion of "apparently neutral practice", choosing between a practice whose neutrality is particularly "obvious" and a practice that is neutral "at first glance". In this respect, the Advocate General concluded that the term "apparently" in Article 2(2)(b) of

Directive 2000/43/EC must be understood as referring to an ostensibly or prima facie neutral measure. The term is not restricted to provisions or practices which are only manifestly neutral. Otherwise, a situation preventing any finding of indirect discrimination if the contested practice or measure, proves to be less neutral than it might seem during its initial assessment. The CJEU consideres the notion of "apparently neutral practice" as a practice that is neutral "ostensibly" or "at first glance".

That perception was considered by the Court as required in light of its established jurisprudence on the concept of indirect discrimination, according to which, unlike direct discrimination, indirect discrimination might be the consequence of a measure which, although neutrally formulated, produces however the result that mainly individuals possessing the specific characteristic find themselves in a disadvantaged position. Assuming that a measure, such as that described does not amount to direct discrimination within the meaning of Article 2(2)(a) of the directive, such a measure is then, in principle, liable to constitute an apparently neutral practice putting persons of a given ethnic origin at a particular disadvantage compared with other persons, within the meaning of Article 2(2)(b).

Another important element of this judgment is the justified character of a measure. The Court considered in the case at hand that that even if racial elements were no decisive factors in the decision of the Company, its practice was perceived by thirds to stigmatize the Roma community, as thieves. Such a measure could be objectively justified by the intention of the company to ensure the security of the electricity transmission network, and the due recording of electricity consumption only if that measure was proportionate to achieve those legitimate aims, and the disadvantages caused were not disproportionate to the pursued objectives. That is not the case in situations where it is found, that "*other appropriate and less restrictive means enabling those aims to be achieved exist or, in the absence of such other means, that that practice prejudices excessively the legitimate interest of the final consumers of electricity inhabiting the district concerned, mainly lived in by inhabitants of Roma origin, in having*

access to the supply of electricity in conditions which are not of an offensive or stigmatising nature and which enable them to monitor their electricity consumption regularly". [69]

Conclusion

This judgment is highly important, since it is the first judgement concerning specifically Roma population, which has been treated by the Court on the level of substance, and further developed the division between direct and indirect discrimination. As Roma cases are notoriously difficult to get to the European Courts (see above), this judgment paves the way to the defense of Roma rights before the European jurisdiction – the CJEU's interpretation of the RED provisions will shape future anti-discrimination cases to a significant degree.

[69] Ibid., par. 128.

4. Persistent risk areas for anti-discrimination legislation and jurisdiction

As mentioned above, the ECtHR has the power to provide declaratory relief by finding a violation of an individual's rights under the Convention, and award damages. This contributes to the relief of the victim having suffered a violation, but for systemic problems the Court must enhance the awarded protection. Therefore, in some instances, it indicates the specific measures that are needed to remedy the situation, be it individual measures or general measures, such as those indicated in the recent Roma eviction cases not to execute eviction and to provide housing. Some judgments may also contain additional recommendations, without a strict obligation of the respective State. The execution of the judgments is entrusted to the Committee of Ministers. However, it is usually the case that the Court will only provide a general framework of remedies leaving to the State to decide the specific means that it will put in place in the concrete case in order to satisfy the judgment. Systematic case-law based national measures are not within the scope of the jurisdictional power of European Courts.

So, though the legal frameworks exist and are interpreted in a broad sense and though the presented relevant case law strengthens the rights of Roma affected by discriminatory provisions, the analysis made clear that jurisdiction is only as effective as the measures implementing the decisions. Here, activities monitoring the implementation of the Courts' rulings are structurally lacking. With the latest infringement procedures of the European Commission this deficit is seemingly getting lessworse, but the systematic risk of unimplemented or ineffectively implemented rulings, remain.

A comparable structural gap can be detected with view on the CJEU. On its part, the CJEU's power is limited in relation to the way the Court was seized; in other words, in the context of a preliminary ruling the Court can only interpret EU law, so as to help domestic courts rule on the validity of national provisions or practices - as it happened in the CHEZ case. For the Court to decisively rule on the validity of a national provisions it needs to be seized in the

context of an action for annulment or a referral by the European Commission in the context of an infringement procedure, for failure to fulfill an obligation under EU law. On the latter case, the execution of its judgements which may impose penalties is ensured at the domestic level according to the rules of domestic civil procedures.

In this context, the role of the EC is very important as it can ensure that through infringement proceedings the Member States will implement in full EU anti-discrimination law, and the highest level of protection will be guaranteed throughout the EU.

Besides the potential optimisations in implementing court decisions, the permanence and strength of underlying social tenses are issues that legal provisions are challenged with. Coping with ingrained prejudices and reservations, traditional legal instruments are stretched to their limits. Where legal provisions are either not understood or not accepted on a societal level, law has difficulties to change attitudes in the long run. For instance, a significant factor that obstructs desegregation is the support of the current systems by the public and – partly – education professionals. Anti-discrimination measure might even lead to a vicious circle here, when non-Roma parents withdraw their children from integrated schools thus re-rendering them segregated.

Moreover, the systemic discrimination is enhanced, to a certain extent, due to inadequate information of Roma people regarding their rights and their mistrust in the educational system, which is warranted, given the hostility Roma children receive in mixed schools and the natural desire of parents wanting to protect their children from such hostility. Consequently, educational reforms, albeit necessary, are not adequate in itself to fight established segregational patterns; also, the implementation of profound, long-term, effective measures aimed at combating institutionalised anti-Gypsyism, poverty and social exclusion, as well as at overcoming the resistance to change by various stakeholders, is necessary. Here, legislation needs to be combined with policy measures, incentives, counter-narratives and

financial measures.[70] Basic education, provision of public fora for balanced and informed debate and dialogue and relevant community institutions are potential additional measures.[71]

[70] 2014 REPORT FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT AND THE COUNCIL, Joint Report on the application of Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin ('Racial Equality Directive') and of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation ('Employment Equality Directive'), COM(2014) 2 final, http://ec.europa.eu/justice/discrimination/files/com_2014_2_en.pdf

[71] http://fra.europa.eu/sites/default/files/fra_uploads/1916-FRA-RED-synthesis-report_EN.pdf