



Report on discrimination of Roma children in education

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Published in October 2014

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Printed in Belgium



Report on discrimination of Roma children in education

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European Commission
Directorate-General for Justice

Manuscript completed in April 2014



This report was financed by and prepared for the use of the European Commission, Directorate-General for Justice. It does not necessarily represent the Commission's official position.

The text of this report was drafted by Lilla Farkas on the authority of the European Network of Legal Experts in the non-discrimination field (on the grounds of Race or Ethnic origin, Age, Disability, Religion or belief and Sexual Orientation), managed by:

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This publication is supported for under the European Union Programme for Employment and Social Solidarity – PROGRESS (2007-2013). This programme is managed by the Directorate-General for Justice, of the European Commission. It was established to financially support the implementation of the objectives of the European Union in the employment and social affairs area, as set out in the Social Agenda, and thereby contribute to the achievement of the Lisbon Strategy goals in these fields.

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Executive summary

In 2000, the United Nations Committee on the Elimination of All Forms of Racial Discrimination described “the place of the Roma communities among those most disadvantaged and most subject to discrimination in the contemporary world”.¹ Over the last decade, international organisations, including the European Parliament and the European Commission have demonstrated a strong commitment to the social inclusion of the Roma as an ethnic minority group in need of protection on account of the extreme poverty, destitution, disenfranchisement and the extreme level of social exclusion they suffer. Discrimination against millions of Roma children in schools is an acute economic, political and social issue as most recently pinpointed by the UNDP and the World Bank. The Council recommendation on effective Roma integration measures in the member states warns that the “situation of Roma children in the Union is particularly worrying, due to a range of factors that may make them especially vulnerable and exposed, inter alia, to poor health, poor housing, poor nutrition, exclusion, discrimination, racism and violence. The social exclusion of Roma children is often linked to the lack of birth registration and identity documents, to low participation in early childhood education and care as well as higher education, and to elevated school drop-out rates. Segregation is a serious barrier preventing access to quality education”.²

Despite the concern voiced at the international and European levels, the most recent survey conducted by the Fundamental Rights Agency in Member States with sizeable Roma populations shows that the situation is more dire now than ever before. Approximately “90 % of the Roma surveyed live in households with an equivalised income below national poverty lines”.³ A more striking result indicates that “on average, around 40 % of Roma live in households where somebody had to go to bed hungry at least once in the last month since they could not afford to buy food”.⁴ How is a child to perform well in school when hungry? The survey compared the schooling of children in segregated areas and found that a greater proportion of Romani children do not attend primary school than similarly situated non-Romani children living in the neighbourhood. At least 10 % of Roma children aged 7 to 15 in Greece, Romania, Bulgaria, France and Italy are identified in the FRA survey as not attending school.⁵

In practice, social exclusion amounts to exclusion from the workplace, segregation in housing and education. “Education is both a human right in itself and an indispensable means of realising other human rights. As an empowerment right, education is the primary vehicle by which economically and socially marginalized adults and children can lift themselves out of poverty and obtain the means to participate fully in their communities.”⁶ Alarming, structural discrimination against Romani children in education is widespread and unyielding to efforts made at dismantling it.

Segregated education may take the form of *intra-school* segregation through the organisation of separate Roma only classes and *intra-class* segregation, where the separate study groups may stem from differing levels of curricular standards within the same class. *Inter-school* segregation may have three separate sources: existing regional or housing segregation between ethnic groups, inappropriate or culturally biased psychological testing leading to the

¹ General Recommendation No. 27: Discrimination against Roma, 2000.08.16., Gen. Rec. No. 27. (General Comments), available at http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=A%2f55%2f18&Lang=en.

² Council Recommendation of 9 December 2013 on effective Roma integration measures in the Member States, OJ C 378, 24.12.2013, p. 1, Preamble indent (8).

³ The Situation of Roma in 11 EU Member States: Survey Results at a Glance, UNDP 2012, European Union Agency for Fundamental Rights 2012, p. 12.

⁴ Ibid.

⁵ Non attendance means „that they are either still in preschool, not yet in education, skipped the year, stopped school completely or are already working. This proportion is highest in Greece with more than 35 % of Roma children not attending school”. Ibid, p. 14.

⁶ United Nations Economic and Social Council, *The right to education (Art.13)*, 08/12/99, E/C.12/1999/10. (General Comments) (hereinafter: ECOSOC Right to Education GC), p. 1.

placement of non-disabled Romani children in remedial special schools for the mentally disabled, and the presence of private, foundation or faith schools that impose extra requirements, such as entrance exams or tuition fees from which Romani children are *de facto* excluded on account of their social disadvantages. *Individual segregation*, in the form of alleged home schooling or a total exclusion from school is also a widespread type of segregation.

Romani children are often concentrated in sub-standard schools or classes that follow substandard curricula, which clearly amounts to direct discrimination. Albeit, as a general rule, the majority of Member States take positive action measures to promote the education of Romani children, education in the minority languages spoken by the Roma is seldom provided due to the lack of teaching materials and teachers proficient in these languages. Pre-school facilities that could successfully bridge the language deficiencies are either non-existent or not available to the Roma most in need of such facilities. In some Member States Roma girls may drop out of school earlier than boys. Throughout their education, a great proportion of Romani children face harassment from their peers, teachers, as well as non-Romani parents, a fact that holds many Roma families back from enrolling their children in integrated schools.⁷

While blatant forms of segregation in new Member States may result from exclusionary policies, issues of early drop-out and underachievement are indicators of structural or institutional discrimination in old ones. The failure of several actors within the school system to provide inclusive education and the lower expectations for Roma children compared to majority students constitute institutional discrimination. This in turn results in absenteeism and early drop out, i.e. an effective exclusion of Roma from school. Even if not a single teacher, social worker or local decision maker engages in an intentionally discriminatory conduct, the end result can still be exclusion. This, of course, does not imply that Roma children and/or parents cannot be liable for underachievement, absenteeism or early drop out. However, their individual liability needs always to be examined in the institutional context.

Even if they finish primary school, very few European Roma make it to secondary or tertiary education. Disadvantage experienced by a vast majority of Romani children may perpetuate the difficult life-circumstances in adulthood. Sub-standard education in and of itself endangers Romani individuals' effective participation in democratic communities and diminishes their prospects on the employment market. Uneducated Roma parents will find it very difficult to provide the assistance to their children to learn and participate in society on a par with their non-Roma counterparts.

For sociologists and policy makers, "segregation amounts to the *involuntary physical separation* between Roma and non-Roma that is manifested in the disproportionate overrepresentation of Roma in educational or housing units (emphasis added). Segregation hinders social integration, reinforces stereotypes and racism among majority and minority communities. Therefore, segregation in and of itself is damaging – both for minority and majority communities."⁸

The present report focuses on the United Kingdom, France, Italy, Spain, Greece, the Czech Republic, Slovakia, Hungary, Romania, Croatia and Bulgaria and on legal issues relevant yet unresolved at the EU level under the Racial Equality Directive. Some of these countries have a large Roma population, some have been found in violation of Romani children's right to equal education by the European Court of Human Rights (ECtHR), while others have been identified in the Fundamental Rights Agency's 2012 survey as having specific problems in the area of Roma education (e.g. very low school attendance rate).

⁷ See parents' accounts in REPORT by Nils Muižnieks Commissioner for Human Rights of the Council of Europe Following his visit to the Czech Republic from 12 to 15 November 2012, CommDH(2013)1.

⁸ The following introduction to the Sociological Interpretation of Segregation is an extract from the paper of Orsolya Szendrey, *Brief summary of the education policy measures promoting equal opportunities for multiple disadvantaged children, especially Roma in Hungary*.

The main legal instruments dealing with racial discrimination at the EU level are the Racial Equality Directive (RED)⁹ and the EU Charter on Fundamental Rights. Member States are also bound by the European Convention on Human Rights and Fundamental Freedoms (ECHR), the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) and the Convention on the Rights of the Child (CRC) that all prohibit discrimination in education, while ICERD specifically bans segregation.

The RED provides that ‘there shall be no direct or indirect discrimination based on racial or ethnic origin.’ (Article 2(1)). The concept of ‘racial or ethnic origin’ is not defined, nevertheless it is central to the definitions of both direct and indirect discrimination. Thus, direct discrimination occurs where ‘one person is treated less favourably than another... on grounds of racial or ethnic origin’ (Article 2(2)(a)) and indirect discrimination occurs 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 it can be justified (Article 2(2)(b)). Pursuant to Article 3.1 (g) RED “Within the limits of the powers conferred upon the Community, this Directive shall apply to all persons, as regards both the public and private sectors, including public bodies, in relation to (...) education”. As is obvious from this provision, the level of education to which the RED applies is neither specified, nor limited.¹⁰ It therefore suffices to say that all types of education are covered, from pre-school to higher education, technical and vocational (explicitly mentioned in Article 3 (1) (b), formal or informal, public or private education.

As recalled in the 2007 Segregation Paper,¹¹ in order to establish segregation under the Racial Equality Directive, the physical separation of Romani children from non-Romani children needs to be shown within or between schools. Clearly, it is not necessary for all children in one pool to be Roma and all those in the comparative pool to be non-Roma for the situation to amount to segregation. It suffices to show that a significant proportion of segregated children are Roma in comparison to a significant proportion of non-Roma in the comparative pool. Given that segregation describes a certain status quo, the conduct leading to it is irrelevant as is whether it was active or intentional, or indeed an entirely circumstantial omission.

As academics recalled in 2007, the key issue relating to segregation is whether (under EU law) the mere fact of segregation amounts to direct discrimination, or is it also necessary to prove that it is coupled with inferior education.¹² This is a key issue for Roma rights advocates who – around the time of the RED’s adoption and transposition – called for a Roma specific directive at the EU level.¹³ The second question is: how to distinguish between involuntary and voluntary segregation? Academics suggest that no simple answer can be given to this question, namely parental

⁹ Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32000L0043:en:HTML>.

¹⁰ Elsewhere EU law expressly limits the scope of education it applies to. For instance, Article 12 of Regulation 1612/68 provides that „the children of a national of a Member State, who is or has been employed in the territory of another Member State, shall be admitted to courses of general education, apprenticeship and vocational training under the same conditions as the nationals of that State, if those children reside in its territory”. The ECJ has interpreted Article 12 generously in the kinds of courses it covers and in relation to the meaning accorded to ‘admitted to courses’, so as to include grants and other facilitative measures. See, P. Craig and G. de Búrca, *EU Law: Text, Cases and Materials*, Oxford, 2003.

¹¹ Segregation of Roma children in education: addressing structural discrimination through the Race Equality Directive’, 2007 (the ‘Segregation Paper’), written by the author of the present report for the European Network of Legal Experts in the Non-discrimination Field, available at http://www.non-discrimination.net/content/media/Segregation%20of%20Roma%20Children%20in%20Education%20_en.pdf.

¹² Cases, Materials and Text on National, Supranational and International Discrimination Law, Dagmar Schiek, Lisa Waddington and Mark Bell (eds), Hart Publishing, 2007, p. 257.

¹³ The EU Network of Independent Experts in Fundamental Rights in the “Report on the Situation of Fundamental Rights in the European Union for 2003” called on the European Union to develop a “Directive specifically aimed at encouraging the integration of Roma”. Olivier De Schutter explained to the European Roma Rights Center why on 11 March 2005 in *EU Roma Integration Directive – Filling the Gap in the Equality Legal Regime*, available at <http://www.errc.org/cikk.php?cikk=2163>.

choice of school does not always amount to voluntary segregation.¹⁴ The truth of this conceptual approach is born out in almost all the ‘Roma education cases’ decided by the European Court of Human Rights over the last seven years.¹⁵ The third question is whether to classify segregation as direct or indirect discrimination and whether to treat it the same way in all contexts, i.e. from education to employment and from the private sphere to the public.¹⁶

In light of the Roma education cases, the lacking definition of segregation as a free standing form of discrimination does not make a difference in judicial practice, but jurisprudence from Member States that do provide for such a definition suggests that definitional clarity is indeed a necessary precondition of providing effective protection against the segregation of Romani children in schools. Moreover, as Sina van den Bogaert warns: “Should the ECtHR continue its incorrect qualification of cases of direct discrimination, this can either lead to inconsistencies between the jurisprudence of [its own and of the Court of Justice of the European Union (CJEU)] or – should the CJEU be inspired by the incorrect qualification of the ECtHR in [the Roma education cases] – to a lower degree of victim protection for the Roma children.”¹⁷

The lack of definition is a grave concern in the field of social and education policy at the EU, as well as the national levels, which has a direct impact on desegregation measures adopted – or not – at the national level. EU policy documents – such as the EU Framework for National Roma Integration Strategies up to 2020 (EURS), the Council conclusions on an EU Framework for National Roma Integration Strategies up to 2020 and the Regulations on Cohesion Policy – use their own (often undefined) concepts relating to segregation, but the boundaries of the sort of interventions and measures that are compatible with EU law are blurred.

According to the 2007 Segregation Paper, segregation in schools amounts to structural and/or institutional discrimination, which may best be characterized as direct discrimination under the Racial Equality Directive and thus be subject to justification based solely on positive action measures as stipulated under Article 5 RED. This provision permits specific measures to ‘prevent or compensate for disadvantage linked to racial or ethnic origin’, which may justify segregation under EU law provided that such specific measures are compliant with Article 5. However, the compliance of positive action measures implemented by Member States in the field of education with Article 5 has yet to be tested before the CJEU.

On the other hand, in the Roma education cases segregation has been conceptualized by the European Court of Human Rights as (indirect) discrimination, albeit one that no State has proven able to justify. More precisely, in the ‘misdiagnosis cases’ (D.H. and Others and Horváth and Kiss) the Court found indirect discrimination, while in the other four cases it established discrimination, which may as well suggest that in its view in the latter cases segregation amounted to direct discrimination. The Court has examined various positive action measures which Respondent States put forward to justify segregation. None of these positive action measures have been found permissible, which raises grave and to date unaddressed concerns on the part of policy makers.

How shall EU law approach structural and/or institutional discrimination, such as segregation against Romani children in schools? Does the RED or national legislation transposing it provide effective protection against structural

¹⁴ Cases, Materials and Text ..., quoted above, footnote 3 p. 258.

¹⁵ D.H. and Others v the Czech Republic, Grand Chamber judgment of 13 November 2007, Sampanis and Others v Greece, judgment of 5 June 2008, Orsus and Others v Croatia, Grand Chamber judgment of 16 March 2010, Sampani and Others v Greece, judgment of 11 December 2012 (the judgment is final), Horváth and Kiss v. Hungary, judgment of 29 January 2013 (the judgment is final), Lavida and Others v Greece, 30 May 2013 (the judgment is final).

¹⁶ Cases, Materials and Text ..., quoted above, p. 259.

¹⁷ Roma Segregation in Education: Direct or Indirect Discrimination? An Analysis of the Parallels and Differences between Council Directive 2000/43/EC and Recent ECtHR Case Law on Roma Educational Matters, Sina van den Bogaert, 2011, Max-Planck-Institut für ausländisches öffentliches Recht und Völkerrecht, p. 720, available at http://www.zaoerv.de/71_2011/71_2011_4_a_719_754.pdf.

discrimination? Academics have argued that through mainly the concept of indirect discrimination and the role accorded to non-governmental organizations in assisting victims of discrimination it does.¹⁸

A decade later, a more acute question is whether or not the concepts of (covert) direct discrimination and harassment (for instance, in relation to stereotypical depictions of the Roma in schoolbooks¹⁹ and/or the harassment and bullying of Romani children by teachers, non-Romani students, etc.) may be better used to fight structural discrimination. A typical example of overt direct racial discrimination was provided at the EU level by the *Firma Feryn* case,²⁰ where the owner of the firm publicly stated that he was not going to employ workers of certain racial or ethnic origins. In many cases, however, discriminators strive to hide their intent or purpose behind conditions, criteria or practice that is apparently race neutral. Thus, a typical case of covert discrimination would occur in a discotheque that requires membership in order to grant entry but membership cards were not given to members of a minority ethnic group.

Providing effective protection against pressure, harassment and bullying is a primary objective as the Roma education cases have constantly proven that such illegal actions act as serious deterrents to Romani parents from sending their children to majority schools, i.e. they lead to involuntary segregation. Moreover, in the context of the recent intensification of hate speech against the Roma across the EU, it appears imperative that schools remain the nurturers of pluralist and diverse societies and for that purpose use materials that do not reinforce stereotypes against the Roma.

Legal disputes relating to the segregation of Romani children in schools commence at the national level, where this issue is covered by an intricate web of international, European and national laws. It is an issue that attaches not only to norms covering non-discrimination, minority rights and education, but also to children's rights – including the principle of the child's best interest. Thus, beyond reading the RED together with ICERD and ECHR, one shall be mindful of Convention Against Discrimination in Education (CADE) and the Convention on the Rights of the Child (CRC) when dealing with the segregation of Romani children. When contemplating, therefore, how segregation is to be conceptualised under RED, the relevant provisions of these instruments – including the definitions and exceptions offered by ICERD and CADE – shall be weighed against the ECtHR jurisprudence. Notably, however, none of the other international instruments define and distinguish from each other key concepts as clearly as does the RED.

The profound change in the ECtHR's approach to imposing positive action measures as a remedy partly results from the political support within the Council of Europe²¹ and provides food for thought in the context of EU law. Given the EU's robust legal and policy measures relating to the Roma, one can expect that the CJEU's approach to imposing positive action measures as effective remedies against school segregation will have an even stronger political support than is the case in the Council of Europe. Moreover, the CJEU has never been known to allow such a wide margin of appreciation to Member States on issues covered by EU law as has the ECtHR. At the heart of resolving the segregation of Romani children in schools therefore lies the following questions. What will the CJEU's approach be to the concern expressed by the ECtHR: while the word 'respect' in relation to the right to education means more than 'acknowledge' or 'take into account', i.e. "it implies some positive obligation on the part of the State", at the same time "the requirements of the notion of 'respect' vary considerably from case to case, given the diversity of the practices followed and the situations obtaining in the Contracting States".²² Given the differences between relevant Council of Europe and European Union legislation, do the Member States "enjoy a wide margin

¹⁸ See, for instance Christopher McCrudden, *National Legal Remedies for Racial Inequality and Chalmers, The Mistakes of the Good European?*, in Fredman, S. and P. Alston (eds.), *Discrimination and Human Rights: The Case of Racism*. Oxford University Press, 2001, pp. 253-259 and 193-249 respectively.

¹⁹ The most recent example of which is *Aksu v Turkey*, judgment of 15 March 2012, available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-109577#%7B%22itemid%22:%5B%22001-109577%22%7D%7D>

²⁰ Case C-54/07, *Firma Feryn NV* [2008] ECR I-5187.

²¹ For an overview, see for instance paras 65-85 in Orsus.

²² *Horváth and Kiss v Hungary*, judgment of 29 January 2013, para. 103. The judgment is final.

of appreciation in determining the steps to be taken” to ensure compliance with the RED as they do under the Convention “with due regard to the needs and resources of the community and of individuals”? These are questions for the CJEU to answer. However, the path may have already been paved by the ECtHR’s take on Greece’s inaction against blatant segregation in the Sampanis case, that led to a repeated finding of violation in Sampani, as well as recommendations for further reaching remedies.²³ In Lavida,²⁴ the Court went even further, examining the minimum requirements of desegregation measures and potentially to shaping a duty to desegregate.

²³ Sampani and Others v Greece, judgment of 11 December 2012. The judgment is final.

²⁴ Lavida et autres c. Grèce, judgment of 30 May 2013, final on 30 August 2013.

Introduction

The Commissioner for Human Rights of the Council of Europe underlines that there is a “shameful lack of implementation concerning the human rights of Roma, the biggest minority group in Europe, throughout the continent. The Roma population ... is worse off than any other group in Europe when it comes to education, health, employment, housing and political participation. Roma continue to suffer from pervasive discrimination in all fields of life.”²⁵

In 2009, the Committee of Ministers of the Council of Europe adopted Recommendation CM/Rec(2009)4 on the education of Roma and Travellers in Europe “[c]ondemning the existence of situations of *de facto segregation* in schooling, as recalled by recent judgments of the European Court of Human Rights concerning the education of Roma children and [c]onsidering that the disadvantaged position of Roma and Travellers in European societies cannot be overcome unless access to quality education is guaranteed for Roma and Traveller children” (emphasis added).²⁶ The Appendix to this Recommendation dealing with Principles of Policies states the following:

5. Member states should ensure that legal measures are in place to *prohibit segregation* on racial or ethnic grounds in education, with *effective, proportionate and dissuasive sanctions*, and that the law is effectively implemented. Where *de facto segregation* of Roma and Traveller children based on their racial or ethnic origin exists, authorities should implement desegregation measures. (emphasis added)

Beyond the human rights approach, policymakers and economists have advanced arguments against the exclusion of Roma from an economic and wider social context. Particularly in new Member States that are highly developed countries “71% or more of Roma households live in deep poverty” which are “on par with the poorest areas of the world”.²⁷

“The odds of graduating secondary school are 29 percent at the highest, and much lower in some of the countries in the [Central and Eastern European] region, especially among girls. In addition, less than half of all Roma men and a quarter or less of all Roma women can find jobs. At the root of these unequal outcomes lies a fundamentally unfair playing field, starting at birth and continuing throughout the lives of most Roma individuals. This spurs a self-perpetuating cycle of unequal opportunities, ethnic discrimination and stifled aspirations.”²⁸

The World Bank argues that Roma inclusion is a macroeconomic necessity, because while “majority populations are aging and the overall labor force is shrinking, Roma populations are young and growing, already making up to one-fifth of new labor market entrants in some Eastern European countries”. It stresses that there is a great opportunity to close the social gap between the Roma and non-Roma populations. Recent data shows that “the vast majority of Roma parents want their children to go far in school, and want to work in steady jobs, like their non-Roma

²⁵ <http://www.theewc.org/library/category/view/human.rights.of.roma.and.travellers.in.europe/>.

²⁶ Recommendation CM/Rec(2009)4 of the Committee of Ministers to member states on the education of Roma and Travellers in Europe, adopted by the Committee of Ministers on 17 June 2009 at the 1061st meeting of the Ministers' Deputies, available at <https://wcd.coe.int/ViewDoc.jsp?id=1462637&Site=CM&BackColorInternet=C3C3C3&BackColorIntranet=EDB021&BackColorLogged=F5D383>.

²⁷ World Bank, Roma Brief, 5 June 2013, Background, available at <http://www.worldbank.org/en/region/eca/brief/roma>.

²⁸ Ibid.

neighbors”.²⁹ Moreover, there is evidence on what works, including focused efforts to close the pre-school gap.³⁰ Last, Roma integration is considered an integral part of the EU2020 Strategy, and makes considerable resources available for inclusion through the Cohesion Funds.

The European Union has also stepped up in support of the integration of the Roma and now requires all Member States to adopt and implement a National Roma Integration Strategy (NRIS). The European Commission published an EU Framework for National Roma Integration Strategies up to 2020 (EURS) which was followed by Council conclusions on an EU Framework for National Roma Integration Strategies up to 2020. Member States compiled their National Roma Integration Strategies.³¹ In May 2012, the European Commission published an assessment of these strategies, welcoming certain actions.³² In December 2013 the European Council adopted a Recommendation on effective Roma integration measures in the Member States.³³ The Recommendation details effective policy measures that the Council would like to see implemented in relation to access to education.³⁴ It also deals with horizontal policy measures such as anti-discrimination and stresses the need to “[i]mplement, where relevant, desegregation measures concerning Roma both regionally and locally.”³⁵

While international and supranational organisations fully embrace the integration/social inclusion of the Roma and regularly condemn anti-Romani sentiments and exclusionary practices, Member States’ policies and practices have in many cases, reportedly and starkly deviated from this approach. Indeed, some have disregarded not only recommendations and warnings but also scored poorly on the implementation of judgments finding a violation of the non-discrimination principle concerning Roma children and adults.³⁶

Bearing in mind the relevant legal framework at the European Union level,³⁷ taking measures against Member States that fail to properly address discrimination of the Roma in the fields covered by the Racial Equality Directive appears relatively easier than putting an end to anti-Romani stereotypes, hate speech and hate crime. Still, the latter are the cause as well as the result of discrimination of the Roma. This poses serious challenges to the generation of profound changes in societal structures that are the necessary preconditions of social inclusion. However, no

²⁹ Comprehensive data has been collected through a joint effort in 2011 by the European Commission, UNDP, the Fundamental Rights Agency, and the World Bank.

³⁰ For more details, see, specifically on integration in education: Gábor Kézdi and Éva Surányi, A Successful School Integration Program, Roma Education Fund, 2009, available at http://www.romaeducationfund.hu/sites/default/files/documents/ooih_english_kezdi.pdf or in general: Improving the tools for the social inclusion and non-discrimination of Roma in the EU, Report, June 2010, ERRC and REF, available at http://ec.europa.eu/justice/discrimination/files/roma_report2010_en.pdf.

³¹ The final National Roma Integration Strategies are available at <http://www.erionet.eu/national-roma-strategies.htm>.

³² Communication from the Commission to: the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions National Roma Integration Strategies: *A first step in the implementation of the EU Framework*, COM(2012) 226 final, Brussels, 21.5.2012, available here: http://ec.europa.eu/justice/discrimination/files/com2012_226_en.pdf. The European Roma Policy Coalition welcomed the critical tone of the Commission’s assessment and in turn it highlighted various shortcomings it identified in its own assessment of the national strategies http://romapolicy.eu/wp-content/uploads/2012/09/Final-ERPC-Analysis-21-03-12_FINAL.pdf.

³³ Council Recommendation of 9 December 2013 on effective Roma integration measures in the Member States, OJ C 378, 24.12.2013, p.1, , Recital (8).

³⁴ Ibid, point 1.3.

³⁵ Ibid, point 2.2.

³⁶ See for instance the advocacy efforts of human rights NGOs relating to the implementation of the D.H. and Others v Czech Republic judgment, <http://www.errc.org/en-search-results.php?mcountry=56&mtheme=5&marea=1&mkeyword=Enter+keywords+...&ok=OK> and judgments relating to racist violence against Roma in Romania, <http://www.errc.org/en-search-results.php?mcountry=173&mtheme=16&marea>.

³⁷ Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (OJ L 180 of 19/7/2000); Framework Decision 2008/913/JHA of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law (OJ L 328 of 6/12/2008).

international stakeholder other than the European Union has as effective and sophisticated an array of measures – both legal, policy and financial – to meet this challenge.

Inclusion in public education is key to ensuring access to the labour market and more broadly, to social inclusion. In its report 'Segregation of Roma children in education: addressing structural discrimination through the Race Equality Directive' published in 2007 (the 'Segregation Paper'), the European Network of Legal Experts in the Non-Discrimination Field (Legalnet) provided detailed analysis on the ways in which the segregation and structural discrimination of Romani children in European schools can be tackled under EU law.³⁸ The last six years have not borne any preliminary referrals to or judgments rendered by the Court of Justice of the European Union relating to this issue. However, a steady case law is emerging from the European Court of Human Rights, which has delivered six final judgments (the 'Roma education cases') since the publication of the 2007 Segregation Paper and is presently processing one case brought before it against Romania. Under domestic anti-discrimination legislation transposing the Racial Equality Directive, school segregation is also being challenged in Bulgarian, Slovakian and Hungarian courts, as well as before the Romanian Equality Body.

Against this backdrop, the present paper seeks to take stock of recent developments and further investigate as well as analyse case law, education policy papers and scholarly literature on the segregation of Romani children in schools. The analysis will specifically focus on the United Kingdom, France, Italy, Spain, Greece, the Czech Republic, Slovakia, Hungary, Romania, Croatia and Bulgaria and will be conducted from the angle that the Racial Equality Directive provides. Some of these countries have a large Roma population, some have been subject to ECtHR case-law on Roma school discrimination and others have been identified in the 2012 study by the Fundamental Rights Agency as having specific problems in the area of Roma education (e.g. very low school attendance rate)

Following a brief introduction, in Chapter 3 the paper takes stock of the most recent developments at the national level in Member States selected for review. Chapter 4 then analyses from the angle of the Racial Equality Directive the judgments rendered by the European Court of Human Rights in the Roma education cases. It provides an overview of the Court's definition of discrimination and the basic principles it employs when dealing with cases of discrimination. It looks at the evolution of the Court's approach to segregation in education and attempts to identify the pitfalls and strength of its judgments from a comparative approach. In Chapter 5 it then turns to practical issues, such as evidence, including statistical evidence. In Chapter 6 it examines actual and potential justification defences available under the relevant EU and international legal framework, providing an overall assessment of the types of justification defences that appear permissible. In Chapter 7 it looks at the hot topic of remedies that courts may order to rectify segregation in education, closing its analysis in Chapter 8 with dissecting the intricate web of EU and international legal instruments that govern disputes over segregation in education at the national level. Chapter 9 carries the conclusions of the present analysis.

³⁸ The report is available here:

http://www.non-discrimination.net/content/media/Segregation%20of%20Roma%20Children%20in%20Education%20_en.pdf.

1 Recent developments in the Member States selected

The geographical scope of the present report extends to the UK, France, Italy, Spain, Greece, Czech Republic, Slovakia, Hungary, Romania, Croatia and Bulgaria. Except for Croatia, all these Member States have adopted National Roma Integration Strategies (NRIS).

"At least 10% of Roma children aged 7 to 15 in Greece, Romania, Bulgaria, Italy and France were identified in a 2012 survey by the Fundamental Rights Agency as not attending school: they were either still in preschool, not yet in education, skipped the year, stopped school completely or were already working. This proportion is highest in Greece, with more than 35% of Roma children not attending school".³⁹ According to the European Commission's assessment, the EU's goal is to ensure that all Roma children complete at least primary school and have access to quality education.⁴⁰ In the NRISs the selected Member States made the commitments explained in the table below.⁴¹ Out of the eleven Member States under review, only six committed to introduce measures that aim to prevent segregation (CZ, EL, ES, HU, RO, SK), while Croatia has not yet submitted its NRIS. Far more NRISs mention support for the Roma culture and history in mainstream curricula based on the premise that "a better understanding of culture is necessary to fight stereotypes".⁴² However, even in those Member States, which initially made the commitment, it yet needs to be transformed to concrete action and improvement.

Measures required by the EU Framework for National Roma Integration Strategies	Selected Member States that have addressed them
Endorsement of the general goal	BG, CZ, EL, ES, IT, HU, RO, SK, UK
Concrete goals to reduce education gap	BG, CZ, EL, ES, IT, HU, RO, SK, UK
Widening access to quality early childhood education and care	CZ, EL, ES, IT, HU, RO, SK
Measures to ensure that Roma children complete at least primary school	BG, EL, ES, FR, IT, HU, RO, SK, UK
Reducing secondary school leaving	BG, CZ, EL, ES, FR, IT, HU, RO, SK, UK
Increasing tertiary education	CZ, ES, IT, HU
Measures aimed at preventing segregation	CZ, EL, ES, HU, RO, SK
Support measures	CZ, ES, IT, HU, RO, SK, UK

³⁹ *The situation of Roma in 11 EU Member States; Survey results at a glance*. Fundamental Rights Agency, World Bank, United Nations Development Programme, 2012, available at http://fra.europa.eu/sites/default/files/fra_uploads/2099-FRA-2012-Roma-at-a-glance_EN.pdf.

⁴⁰ Communication from the Commission to: the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions National Roma Integration Strategies: *A first step in the implementation of the EU Framework*, COM(2012) 226 final, Brussels, 21.5.2012, p. 5. available here: http://ec.europa.eu/justice/discrimination/files/com2012_226_en.pdf.

⁴¹ Communication from the Commission to: the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions National Roma Integration Strategies: *A first step in the implementation of the EU Framework*, COM(2012) 226 final, Brussels, 21.5.2012, p. 5. available here: http://ec.europa.eu/justice/discrimination/files/com2012_226_en.pdf.

⁴² Ibid. p. 6.

The Commission's assessment underlines that in order to ensure "an integrated approach, Member States should, as a matter of priority in the area of education: (i) *eliminate school segregation and misuse of special needs education*; (ii) enforce full compulsory education and promote vocational training; (iii) increase enrolment in early childhood education and care; (iv) improve teacher training and school mediation; (v) raise parents' awareness of the importance of education" (emphasis added).⁴³

As a structural requirement, "the EU Framework calls on Member States to ensure that Roma are not discriminated against but treated like all other persons with equal access to all fundamental rights as enshrined in the EU Charter of Fundamental Rights". All Member States paid attention to promoting anti-discrimination and to the protection of fundamental rights in their strategies. The assessment warns of the dangers presented by "the lack of registration of Roma in the national population registers and the lack of identity papers" in certain Member States. It stresses that such documentation is "an absolute pre-condition for ensuring equal access to public services" and therefore their lack "should be urgently and properly addressed".⁴⁴ The assessment calls on Member States to strengthen their fight against discrimination as experienced by the Roma under the relevant EU legal framework. Last, it promotes the notion of intercultural encounters as a means to facilitate de-stigmatisation.⁴⁵

The assessment regrets that certain Member States – including the UK and France – do not indicate funding for the measures required by the EU Framework. Moreover, Spain failed to deal with the lack of budget allocations. Bulgaria, Greece, Hungary, Romania and Slovakia indicated the allocation of funding from the national budget, while the Czech Republic, Greece, Hungary, Romania and Slovakia indicated the allocation of EU/international funding. In summary, among the Member States under review, Bulgaria, Greece, Hungary, Romania and Slovakia committed national financial resources to achieving the targets set in the NRISs.⁴⁶ Given that appropriate funding is a necessary precondition of desegregation measures – that are undoubtedly required by the EU Framework as demonstrated above – the compliance of other Member States under review with this Framework as well as with the relevant EU legislation remains an issue of concern as also expressed in the assessment.⁴⁷

While Member States were planning their activities in the framework of NRISs, UNICEF published a vademecum on the integration of Romani children in public education including the tasks of public administration⁴⁸ and the Roma Education Fund has also made a host of reports, research papers and project description – of those funded by the EU and other international donors, such as the World Bank – available on its website, all relating to the integration of Romani children from early childhood care through enrollment in kindergartens to extra-curricular activities.⁴⁹

According to reports by ECRI, the Commissioner for Human Rights of the Council of Europe and Legalnet, the segregation of Romani children in schools persists across the EU. The Commissioner's assessment is the following:

Many thousands of Roma throughout Europe are not or have not been schooled at all, or have left school with limited education results. In some countries, the fact that Roma and Travellers lack personal documents has a

⁴³ Ibid. p. 6.

⁴⁴ Ibid. p. 13.

⁴⁵ Ibid. p. 13.

⁴⁶ Ibid. p. 15.

⁴⁷ Ibid. p. 17.

⁴⁸ The Right of Roma Children to Education: position Paper, UNICEF, 2011, available at http://www.unicef.org/ceecis/UNICEF_ROE_Roma_Position_Paper_Web.pdf.

⁴⁹ REF publications are available at <http://www.romaeducationfund.hu/publications/studies-and-researches>, including "Pitfalls and Bias: Entry testing and the overrepresentation of Roma children in special education that covers the Czech Republic, Hungary, Serbia and Slovakia, Early Childhood Roma Inclusion 2012", "Disbursement of EU Funds for Projects - Increasing the Educational Level of Members of Marginalized Romani Communities from the Standpoint of (De-) Segregation of Romani Children in Education 2012" and "Roma Inclusion in Italy: National education and employment strategies and actions 2012".

negative impact on school enrolment. Lack of public transport or funds for transport, and racist bullying as well as lack of school materials, represent additional obstacles in the way of Roma pupils seeking to go to school. In some countries, Roma children are over-represented in alternative systems such as “home schooling”.

Many Roma children with developmental, intellectual or physical disabilities may not be attending school at all in certain European countries. Roma children also suffer from a lack of pre-school facilities. Policies and practices that separate Roma children from others in education are found in several Council of Europe member states. Educational arrangements are frequently segregated in cases where Roma live in isolated communities – either rural slum settlements or urban ghettos.

The fact that non-Roma parents pull their children out of schools frequented by Roma also results in *de facto* segregation of entire schools. Even in mainstream schools, Roma pupils are often separated from the majority in classrooms, by being in specific areas of the class, or in entirely separate classes. Remedial classes, separate classes and segregation in the classroom have been reported in many European countries. Roma children are also disproportionately streamed into special schools, in particular schools for children with intellectual disabilities”.⁵⁰

A comparative analysis of national case law dealing with segregation in education could not be identified. According to the “Handbook on tackling the segregation of Roma children in nursery and primary schools: From investigation to decision making”, while there is no national jurisprudence in Greece and only one case is reported both from the Czech Republic and Slovakia, jurisprudence from Bulgaria and Hungary are extensive. In Romania, cases are taken before the equality body, therefore the only judgment available relates to the harassment of a Romani girl in school and not segregation.⁵¹

In **Bulgaria**, the most acute concern is that the “definition of racial segregation under the Protection Against Discrimination Act does not appear to be compatible with EU law because it explicitly requires the state of separation to be ‘forced’. It thus implies that segregation may be chosen”.⁵² Patterns of segregation of Romani children include: (i) children at home, or in the street with no access to school at all; (ii) children in separate schools in segregated residential areas (ghettoes); (iii) children in separate classrooms in mainstream schools; (iv) children in remedial schools (disproportionate representation); and (v) children in schools for juvenile delinquents (disproportionate representation).⁵³

Several cases challenged the segregated Romani schools before courts, but the definition of segregation makes legal challenges rather difficult.⁵⁴ In a 2004 case the judge reasoned that the absence of real free choice for Romani students not to study in isolation in the ghetto school constituted compulsion for purposes of the definition of segregation under the Protection Against Discrimination Act. She held that Roma students did not study in the separate school because of their own free will but because they were dispossessed of any real practical alternatives due to external pressures created by omissions on the part of the authorities to act against segregation.⁵⁵ In *European Roma Rights Centre v Ministry of Education et al* the trial court in Sofia held that the situation in one such school

⁵⁰ Human Rights of Roma and Travellers in Europe, Council of Europe, February 2012, p. 18., available at http://www.coe.int/t/commissioner/source/prems/prems79611_GBR_CouvHumanRightsOfRoma_WEB.pdf.

⁵¹ Adél Kegyé and Crina Elena Morteau, Handbook on tackling the segregation of Roma children in nursery and primary schools: From investigation to decision making, 2013, Budapest, Part 2, Chance for Children Foundation, available at http://www.cfcf.hu/images/stories/pdf/Handbook_FINAL_PART%202_2013.11.05.pdf.

⁵² Legalnet, Bulgaria country report 2012.

⁵³ Legalnet, Bulgaria country report 2012.

⁵⁴ Information on Bulgaria is taken from the Legalnet country report 2012.

⁵⁵ Decision of 22.07.2005 of the Sofia District Court, 41 panel, in case N 11630 of 2004.

amounted to segregation.⁵⁶ The appeal court, however, repealed this judgment.⁵⁷ The appeal judgments N 139 of 01.12.2005 of the Blagoevgrad Regional Court in case 1154/2004 and of 16.12.2005 of the Sofia Regional Court in case 871/2005 confirmed negative trial court rulings on appeal. The first case was brought by Roma students studying in exclusively or predominantly Romani classes in school. The courts in effect found that the authorities had done nothing to create this situation, and could do nothing about it because the non-Roma students' right to choice of school was absolute and could not be interfered with. The second case was brought by the European Roma Rights Centre alleging that an all-Roma school was segregated (as well as substandard and ill-adapted to deal with the students' language differences). The courts found that the authorities did not 'force' any of the students to study in that particular school, therefore, there was no segregation, or any other breach of equality law. These judgments are in clear contravention of ICERD and the ECHR.

According to the latest information issued by the Commissioner for Human Rights of the Council of Europe, it is hoped "that adequate resources will be allocated to ensure that the goals defined in the [2012-2020 National Strategy for Roma Integration of the Republic of Bulgaria] for Roma integration in th[e] area [of education] can be achieved. The disproportionately high school drop-out rate must be combated. The Commissioner strongly recommends that the authorities remove all practical obstacles to free school access and provide for concrete individual support for children who require it. School desegregation projects should be promoted".⁵⁸

In **Croatia**, similar to other minorities, the Roma have the right to mother tongue education, but this minority has not made a request to exercise this right as yet. The Croatian authorities recognise concerns relating to the education of Romani children, which include non-enrollment in primary schools, high drop-out rate and high level of illiteracy among the Roma. Reliable data are still missing. Allegedly, in the school year 2002/2003 one third of Romani children were not attending school at all. In counties with a significant Roma population, Roma children are segregated in Roma-only classes. This practice has reportedly existed for as long as Roma have attended these schools and the authorities invoke the children's poor Croatian as an explanation, as well as the concentration of Roma pupils in schools close to Roma settlements. The latest reports show a dramatic increase of Roma-only classes in spite of the authorities' commitment to reduce the number of classes with Roma pupils only.⁵⁹ The UN Committee on the Elimination of Racial Discrimination has twice expressed its concern at the continued segregation of Roma children within the educational system.⁶⁰ In its third report, ECRI specifically called on Croatia to "make it easier for Roma children to learn Croatian while also allowing those who so wish to be taught their Romani dialect and Roma culture and to conduct an in-depth investigation into the allegations that segregation is practiced between Roma and non-Roma children", swiftly putting an end to such practices. In 2012, ECRI welcomed the National Programme for Roma that deals with education and is "widely seen as representing good efforts to address inequalities in the education of Roma children". The authorities informed ECRI that since 2009, every Roma child has had the possibility of attending a pre-school institution or in certain areas a special one-year programme leading up to primary school. Allegedly, transport and food are provided free of charge. In Međimurje County, all Roma children have been included in this programme. In other counties, the programme is run in response to needs. The authorities have reported good results. While ECRI is pleased with the developments "it is nevertheless aware that many Roma children drop out

⁵⁶ Decision of 27.02.2007 of the Sofia City Court, civil case N 3139 of 2005.

⁵⁷ Decision N 723 of 01.08.2008, civil case N 6402 of 2007.

⁵⁸ Letter to the Bulgarian Minister of Foreign Affairs, para. 14, *CommDH(2012)12*, 24 February 2012, available at <https://wcd.coe.int/ViewDoc.jsp?id=1909473&Site=CommDH&BackColorInternet=FEC65B&BackColorIntranet=FEC65B&BackColorLogged=FFC679>.

⁵⁹ "In 2004 there were 27 Roma-only classes in the whole of Croatia, all of them in Međimurska and Varaždinska counties. In 2008 there were 68 Roma-only classes, and not just in Međimurska county (with 62 Roma-only classes) and Varaždinska county, where the practice had existed before, but also in two other counties." Legalnet report on Croatia 2012, pp. 68-69.

⁶⁰ CERD Concluding Observations on Croatia of 21 May 2002 and of 5 March 2009.

before” finishing primary education.⁶¹ Challenging segregation in schools is rare. The only judgment reported apart from the Orsus case relates to the denial of access to training during vocational education.⁶²

In the **Czech Republic**, no tangible progress has been made at dismantling the segregation of Romani children in schools with substandard education. As the Commissioner for Human Rights of the Council of Europe notes, in this country “segregation persists despite the 2007 ruling of the Strasbourg Court in the matter of *D.H. and Others v. the Czech Republic*, and the enactment of a new Schools Act in 2004 which restructured the provision of special needs education. An estimated 30% of Roma children are still educated in schools designed for pupils with mild mental disabilities, compared to 2% of their non-Roma counterparts”.⁶³ The Commissioner is of the view that ‘practical schools’ in the Czech Republic „perpetuate segregation of Roma children, inequality and racism. They should be phased out and replaced by mainstream schools that need to be properly prepared to host and provide support to all pupils, irrespective of their ethnic origin. There are certain examples in the country that show the feasibility of this necessary paradigm shift, which will require the government’s political will and sustained commitment” as well as the allocation of adequate budgetary resources.⁶⁴

The most recent Legalnet report aptly characterizes stakeholders’ views in the debate over reforms. In 2012, the Czech Ombudsman conducted its own research into the system of ‘concealed special schools’ and found indirect discrimination against Romani pupils. However, the “steps of the Ombudsman and the Czech school inspectorate are regularly criticised by the Association of Special teachers. This association is not a regular professional organization, but a voluntary movement” which was established in order to fight against planned reforms of the special school system and against efforts to stop educating mentally not disabled children in special schools. The association wishes to maintain the current system. It charges that the children transferred from special schools will necessarily fail in mainstream education. The association also regularly criticises the collection of anonymous ethnic data based on third party identification. “Sociologists warn that instead of having Roma children segregated in special schools, the Czech Republic would in the future face segregated primary schools, unless further steps are taken to combat racism in the society” where not only white flight occurs, but Roma parents also take their children away from non-Roma schools. This spontaneous practice can in the future lead to the creation of exclusively Roma and exclusively non-Roma schools, despite the efforts of the Czech authorities.⁶⁵

In **France** “Roma children from other Member States can, theoretically attend school if the conditions of their stay *de facto* allows for school registration”. It is known that due to housing conditions, there is a concentration of migrant children and children of foreign origin in specific schools, where overall educational achievements are lower than in other schools. “The educational system provides for special classes to integrate newly arrived foreign migrant children and travelling children, and the Law no 2000-614 of 5 July, 2000, on the accommodation of travelling people (that covers all travelling populations) provides for a duty to integrate occasional attendance to school of travelling Roma children”. However, some mayors fail to respect the law. “When they are brought before

⁶¹ ECRI Report on Croatia, fourth monitoring cycle, published on 25 September 2012, CRI(2012)45, paras. 59-61. and para. 63.

⁶² Municipal Court in Varaždin, 7 February 2012, L.I. and Ž.B. (both minors) v. Branka d.o.o. and B.J., P817/11. After L.I. and Ž.B., both Roma students of the Commercial school in Varaždin, were denied access to training at the company Branka d.o.o., owned by B.J., the training that is obligatory part of their education, they filed a discrimination claim against Branka d.o.o. and B.J. before Municipal Court in Varaždin. The court found that the applicants were discriminated because they were Roma, forbid Branka d.o.o. and B.J. any further discriminatory actions and awarded compensation of 8.000 HRK (1.066 EUR) to each applicant. The judgment is not final. 2012 Legalnet Report on Croatia.

⁶³ Human Rights of Roma and Travellers in Europe, Council of Europe, February 2012, p. 18.

⁶⁴ Roma segregation remains a serious problem in the Czech Republic, Prague, 15 November 2012, available at <https://wcd.coe.int/ViewDoc.jsp?id=2003631&Site=COE>.

⁶⁵ 1357-CZ-25-TEMPLATE FLASH REPORT-ethnic composition of special school pupils - research of the Czech EB, Source and additional information: <http://www.vlada.cz/cz/ppov/zmocnenec-vlady-pro-lidska-prava/aktuality/monikasimunkova-potrebuje-znat-pocty-romskych-zaku-vzdelavanych-podle-programu-pro-zaky-s-lehkym-mentalnim-postizenim-111477/>.

the courts they are sanctioned, but Traveller parents on the road will often leave without seeking enforcement. Moreover, as recognized in the ESRC decisions of 25 January 2012 *European Roma and Travellers Forum v. France*,⁶⁶ and the decision rendered further to the complaint of *Médecins du Monde v. France*, published on 21 January 2013,⁶⁷ ongoing expulsion of Travelling and Foreign Roma population resulting from government policy against unauthorized occupation of private and public property, significantly hinders de facto access to the education of children. The national parking accommodation scheme aims at stabilising residence and favours school attendance for the children, as all mayors are obliged to accept registration of children in school even for a few days, followed by registration by the school principal (article L131-10 and 131-11 of the Code of Education and 227-17-2 of the penal code). However, when they have been implemented they tend to generate concentration and in some cities (Dijon- Nancy- Toulouse) there are schools that count a majority of children from the travelling community. In 2009, the Defender of the children and the National Consultative Commission on Human Rights have drawn Government and public attention to the difficulties faced by Travelling and Roma children due to the lack of adequate accommodations, and the impact of the precarious means of life of the parents on the quality and means of access to education. This has not yet given rise to general measures, although local initiatives are maintained on the basis of these reports". The by now generalised system of CASNAV, Center for the education of newly arrived foreign language speaking children and Travelling children is to provide support to integration classes and local initiatives. 34 such missions coordinate 104 local networks. Their efficiency depends upon political orientations at the local level.⁶⁸ France is implementing "a systematic policy of expulsions from illegal occupation of land and has not put in place the conditions of humanitarian support of the expelled [Eastern European] Roma families proposed in Ministerial Instruction of 28 August 2012. DIHAL (Inter ministerial Delegate for lodging and access to housing of the Homeless and persons with inadequate housing) was given a mandate to coordinate state policy on the integration of Roma without housing and resources, and to put in place for the spring of 2013 the conditions allowing proper implementation of the Ministerial instruction of 28 August 2012."⁶⁹ Litigation is often related to the refusal by Mayors to register in school children of Traveller and Roma families parked on the town's territory. The National Equality Body, HALDE, received few claims from Roma and Travellers (approximately 200 in 6 years, on a total of 45 530 claims), some of which related to access to registration in public school.⁷⁰

In 2009, in its third report on **Greece**, ECRI notes with concern that Roma remain at a great disadvantage with regard to education. There are cases of schools refusing to register Roma children for attendance, in some instances due to pressure by some non-Roma parents. ECRI is concerned that there are also cases of Roma children being separated from other children within the same school or in the vicinity thereof. The absence of disaggregated data on the situation of Roma pupils makes any in-depth assessment of their situation and the ability to devise specific programmes targeting this group difficult.⁷¹ The Greek Ombudsman has led various investigations into the segregation or lack of access of Romani children to education.

Despite of the detailed legislative framework, the segregation of Roma pupils in different forms is still widespread in **Hungary**.⁷² Three common patterns of segregation prevail: (i) special schools established for children with mental disabilities are often predominantly attended by Roma students; (ii) Roma only schools often reflect segregation in housing and (iii) segregated classes/school buildings within 'mixed' schools, usually of a lower standard in terms of teaching materials and quality and often providing "minority education" (a form of education aimed at assisting minority groups in preserving their cultural traditions).

⁶⁶ Available at http://www.coe.int/t/dghl/monitoring/socialcharter/Complaints/CC64Merits_fr.pdf.

⁶⁷ Available at http://www.coe.int/T/DGHL/Monitoring/SocialCharter/Complaints/CC67Merits_en.pdf.

⁶⁸ Information on France is based on the Legalnet country report on France 2012, pp. 154-157.

⁶⁹ Ibid, p. 17.

⁷⁰ Legalnet report on France, 2012, p. 33.

⁷¹ ECRI's report on Greece is available at <http://www.coe.int/t/dghl/monitoring/ecri/country-by-country/greece/GRC-CbC-IV-2009-031-ENG.pdf>.

⁷² Information on Hungary is based on the Legalnet country report on Hungary 2012, p. 147.

The Hungarian Equal Treatment Act includes the presumption of discrimination which is based on the idea that establishing a protected ground and a disadvantage in itself creates a strong enough suspicion for discrimination for the burden of proof to be shifted (Article 19). This is more advantageous for the victim than the solution contained in RED, because in the Hungarian system the causal link between the protected ground and the disadvantage does not need to be substantiated in any way. The test for the burden of proof thus requires that the victim substantiates rather than proves his/her claims. Substantiation involves a lower level of certainty: if the victim establishes facts from which it may be presumed that: (i) a disadvantage was suffered and that (ii) she has a protected ground (real or assumed) then the burden of proof shifts.

The jurisprudence the Chance for Children Foundation (CFCF) established relates to the illegality of class, building and school level segregation – be that among public or between public and private (foundation) schools – damages caused by segregation, as well as the procedural flaws leading to misdiagnosis. The courts have consistently found that spontaneous segregation is illegal at all levels.⁷³ They have examined the same justification defences as the ECtHR in the Roma education cases and similarly to the Strasbourg Court, found them all wanting. In the cases dealing with school level segregation the courts examined the positive action measures that allegedly consisted of the provision of ethnic minority education to Romani children.⁷⁴ In CFCF v Kaposvár the courts found that the content of ethnic minority education as provided in the segregated school did not justify segregation, even though uniquely in Hungary the school taught Romani children Beash, one of the languages Romani children in Kaposvár speak. It appeared relevant that the minority language was taught for one or two classes per week and that only half of the students in the given school spoke Beash at home, the others' mother tongue being Romanes or Hungarian.

Significantly, CFCF has litigated for court imposed desegregation measures that it views as the only effective, proportionate and dissuasive remedy against segregation in public education. The Supreme Court stated that desegregation can be ordered as long as the pertinent claim is "clear (detailed), realistic and executable" and can therefore be enforced by bailiffs.⁷⁵ Following a change in the composition of the Supreme Court bench that regularly reviews CFCF cases, in CFCF v Győr it retracted from its previous stance and held that desegregation measures cannot effectively lead to the closure of a Roma only school, because such a decision would transgress the defendant local government's public powers. Mindful of the general reluctance of civil courts to impose injunctions on public authorities, CFCF requested the Constitutional Court to review this judgment. However, the CC sidestepped the review, finding that CFCF in its capacity as *actio popularis* plaintiff does not have standing before it. However, during the judicial review of the Equal Treatment Authority's administrative decision CFCF secured a ruling in Tiszavasvári v Equal Treatment Authority (ex parte CFCF) that an administrative order to draft and implement a desegregation plan as a sanction.⁷⁶ In this judgment the Supreme Court found the following: "In order to establish segregation it is not necessary to prove that a certain individual belongs to an ethnic minority. To the contrary, as correctly noted by the defendant ETA, according to the joint recommendations issued on this subject by the parliamentary commissioners for data protection and the rights of national and ethnic minorities, it suffices to establish an assumption [of that person's ethnic origin] if two of the objective ethnic criteria are established".⁷⁷

⁷³ School level segregation was established in CFCF v Kaposvár, Supreme Court judgment No. Pfv.IV.21.568/2010/5. and CFCF v Győr, Supreme Court judgment No. Pfv.IV.20.068/2012/3. Segregation between private and public schools was established in CFCF and Roma Civil Rights Movement in Jászság v Jászládány et al., Supreme Court judgment Pfv.IV.20.037/2011/7. School building level segregation was established in CFCF v Miskolc Debrecen Appeals Court judgment no. Pf.I.20.683/2005/7, while school building and class level segregation was found in CFCF v Hajdúhadház Supreme Court judgment No. Pfv.IV.20.936/2008/4.

⁷⁴ CFCF v Kaposvár, Supreme Court judgment No. Pfv.IV.21.568/2010/5. and CFCF v Győr, Supreme Court judgment No. Pfv.IV.20.068/2012/3.

⁷⁵ Supreme Court judgment No. Pfv.IV.21.568/2010/5. pp. 10-11. CFCF v Kaposvár.

⁷⁶ Supreme Court judgment No. Kfv.VI.39.084/2011/8 Tiszavasvári c ETA.

⁷⁷ Ibid, p. 10.

In **Italy**, discrimination on the ground of ethnicity has not been central to legal or political debate. “Inclusion of Roma children in classes has sometimes caused an overreaction by majority parents, and the current anti-Romani hostility can entail further problems, but there is so far no basis to say that structural discriminatory patterns exist since the limited schooling of Roma derives from factors other than obstacles to their admission to schools. One practical problem can be the impact on the school attendance of children of the frequent eviction of illegal settlements. Since some of the children living in these settlements attend school, the eviction of their camp without attention to their situation can disrupt an otherwise relatively successful educational track.”⁷⁸

In **Romania**, schooling children represents an insurmountable burden for a great proportion of Roma families.⁷⁹ In the most recent study, conducted in 2011 by Agenția de Dezvoltarea Comunitară Împreună for UNICEF, it was found that more than 70 percent of the pupils dropping out from schools are Roma and the causes for their leaving the educational system are poverty as well as the low quality of education and the lack of human and material resources in educational institutions.⁸⁰ Segregation occurs at all levels in primary schools, as well as kindergartens.

In **Slovakia** “Despite the fact that in May 2008 Slovakia adopted a new School Act prohibiting discrimination and segregation in education, the segregation of Roma children in education persists. Approximately 60% of the children in special education in Slovakia during the 2008/2009 academic year were Roma. Roma are reportedly 28 times more likely to be assigned to a special school than non-Roma, up to 50% of them erroneously. The tests for placing children in these schools do not take into account Roma children’s language barriers. The fact that these schools are provided with three times more funding than mainstream schools in direct proportion to the number of registered children is also an incentive for schools to enroll Roma children even when they may not be disabled”.⁸¹ Misdiagnosis in Slovakia has not yet been litigated. The only case – an *actio popularis* action brought by the NGO Poradňa pre občianske a ľudské práva – targeted class level segregation and was successful at all instances, triggering courts to strongly embrace the notion of inclusive education.⁸²

School segregation has become a high profile public issue in **Spain** following a rapid increase “in the number of immigrants and foreigners of school age over the past six years. Foreign children, such as Roma children, are mostly concentrated in state schools”. A key point in the political debate related to the concurring rights of parents to freely choose a school for their children, and the right to education without discrimination. The law seeks to strike a balance between these principles by allowing free choice and creating committees to oversee admission.⁸³ In practice, however, the first research on the segregation of Romani children in schools conducted in 11 neighbourhoods found that in all neighbourhoods visited, there were “schools in which the percentage of Romani students is much higher than the percentage of Roma living in the neighbourhood” and that no “reasonable explanation was found to justify the higher representation of Roma in a specific school, above the percentage of Roma living in the neighbourhood. From this we can conclude that clear examples of school segregation were found in all researched locations”.⁸⁴

⁷⁸ Information on Italy is based on the Legalnet country report on Italy 2012, p. 99-100.

⁷⁹ Legalnet report on Romania, 2012, pp. 115-120.

⁸⁰ Ivasiuc, A, Duminiță, G (2010) *O școală pentru toți? Accesul copiilor romi la o educație de calitate*, A School for Everybody? Access of Roma children to quality education, București, Vanemonde The research used a mixed qualitative and quantitative approach and was carried out in April 2009-May 2010. The report is available at http://www.agentiaimpreuna.ro/files/O_scoala_pentru_toti.pdf (14.06.2011).

⁸¹ Human Rights of the Roma, Council of Europe, p. 128. citing ECRI Fourth report on Slovakia, p. 19.

⁸² See Legalnet flash report on the judgments at http://www.non-discrimination.net/content/media/SK-18-An%20NGO%20winning%20a%20case%20on%20segregation%20of%20Romani%20children%20in%20education_SK_JD%2027052013.pdf.

⁸³ Information on Spain is based on the Legalnet country report on Spain 2012, pp. 101-103.

⁸⁴ School Segregation of Romani Students in Spain, *Research report of a study conducted in four selected locations*, May 2012, Report written by Carmen Santiago and Ostalinda Maya (editor), pp. 4-6., available at http://www.romadecade.org/cms/upload/file/8559_file1_school-segregation-of-romani-students-in-spain.pdf

“There is little caselaw in the **United Kingdom** on discrimination against Roma, and no recent cases regarding travellers. “Equality”, a charity concerned with Roma in the UK, estimate that there are about 300 000 Roma from former Eastern block countries in the UK though many identify themselves by nationality rather than ethnicity with the result that the statistics are uncertain. (...) Concerns also exist as to the lack of facilities for Traveller children. Useful positive action practices exist in the field of education. For example, all Local Authorities have a statutory duty to ensure that education is available for all children of compulsory school age (five to 16 year-olds) in their area. These duties apply to all children residing in the area, whether permanently or temporarily and, therefore, Traveller and Roma children residing with their families on temporary or unauthorised sites are included within this general duty. Most Local Authorities also provide specialist Traveller Education Support Services which help Traveller pupils and parents to access education and provide practical advice and support to schools taking in Traveller pupils. Special provision is made in legislation to protect Traveller parents against criminal convictions for the non-attendance of their children at school. However, despite these useful positive action policies which have been developed over time, many Traveller children still face disruption to their education, often caused by the absence of adequate housing facilities and the risk of eviction. Therefore, the lack of temporary accommodation for Traveller families can have a very negative impact on the education of their children. Concern also exists about the “clustering” of Traveller children in certain poorly-performing schools, especially in Northern Ireland”.⁸⁵

Citing official reports, Helen O’Nions in her research notes that the non-registering of secondary-age Traveller children is still a serious concern as is the high level of exclusion of Gypsy pupils from school.⁸⁶

⁸⁵ Legalnet country report on the United Kingdom, 2012, p. 18 and 110-113.

⁸⁶ Helen O’Nions, Divide and teach: educational inequality and the Roma, *The International Journal of Human Rights*, 14/3, 3 May 2010, p. 465-466.

2 Analysis of ECtHR case law in the context of the Racial Equality Directive

Under Article 2 RED (a) direct discrimination shall be taken to occur where one person is treated less favourably than another is, has been or would be treated in a comparable situation on grounds of racial or ethnic origin; (b) indirect discrimination shall be taken to occur 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. Article 5 defines positive action measures as follows: With a view to ensuring full equality in practice, the principle of equal treatment shall not prevent any Member State from maintaining or adopting specific measures to prevent or compensate for disadvantages linked to racial or ethnic origin.

Under Article 14 of the European Convention on human rights and fundamental freedoms: 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. Under Protocol I Article 2: No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religions and philosophical convictions.

3 Overview of principles and definitions

The ECtHR has a unified concept of discrimination that applies across all fields and grounds, whereby ‘discrimination means treating differently, without an objective and reasonable justification, persons in relevantly similar situations’.⁸⁷ Under this definition a protected ground, less favourable treatment and a comparator (in a relevantly similar situation) need to be shown to trigger a justification defence. Different treatment for the purposes of correcting ‘factual inequalities’ is allowed where a failure to treat differently would breach the principle of non-discrimination.⁸⁸ The Court has elevated various protected grounds/groups for protection. Its level of scrutiny in relation to ethnic origin (including the Roma) is high, because it perceives the Roma as a vulnerable group.⁸⁹ In its recent case law the Court has also found indirect discrimination, whereby indirect discrimination occurs when ‘a general policy or measure which is apparently neutral has disproportionately prejudicial effects on persons or groups of persons’, notwithstanding that such policy or measure ‘is not specifically aimed at that group’.⁹⁰ Discrimination ‘potentially contrary to the Convention may also result from a de facto situation’.⁹¹ It is not clear whether the latter consideration pertains to cases of indirect discrimination only, such as in *Zarb Adami* that challenged the overrepresentation of men among jury members, or to structural discrimination that may amount to direct discrimination in certain instances.

As Samantha Besson points out, in “principle, the ECtHR requires proof of discriminatory intent”, while in “certain exceptional cases the Court is satisfied with mere evidence of practical discrimination”.⁹² In line with its general practice, in the Roma education cases the Court assesses whether or not intent to discriminate can be found on the part of the respondent State.⁹³ Whether it results from the fact that the ECtHR first encountered discrimination claims from the Roma in the context of racially motivated crimes, it is alarming that also in the context of public education the showing of intent matters, suggesting that the Court will not give in writing that it found direct discrimination unless an intention on the part of the respondent State to segregate Romani children is proven. However, unlike in the Roma education cases, in relation to hate crimes, at some point, criminal liability covering also the racist intent needs to be proven beyond reasonable doubt in relation to the right to life and the right not to be tortured.

It is questionable why then the Court treats (violent) incidents whereby non-Romani parents demonstrate against the access of Romani children to schools⁹⁴ as if these were not an expression of intent to segregate. Do States have obligation to stem such psychological or physical threat and ensure peaceful coexistence at least in schools? Arguably, by failing to deal with such incidents properly, States assume liability for direct discrimination.

⁸⁷ *Okpiz v Germany*, judgment of 25 October 2005.

⁸⁸ *Thlimmenos v Greece*, judgment of 6 April 2000, available at <http://hudoc.echr.coe.int/web/services/content/pdf/001-58561?TID=dwietmowkk>.

⁸⁹ *Timishev v Russia*, judgment of 13 December 2005, available at <http://hudoc.echr.coe.int/web/services/content/pdf/001-71627?TID=pfsssfmvp> and for the Roma see all the Roma education cases.

⁹⁰ *Hoogendijk v the Netherlands*, Application no. 58641/00, decision as to the admissibility of 6 January 2005, available at <http://echr.ketse.com/doc/58641.00-en-20050106/view/>.

⁹¹ *Zarb Adami v Malta*, judgment of 20 June 2006, available at [http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-75934#\[{"itemid":\["001-75934"\]}\]](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-75934#[{).

⁹² Besson 2012, p. 168.

⁹³ For instance, in *Orsus* it found that while the Croatian authorities *cannot be held to be the only ones responsible for the fact* that so many pupils failed to complete primary education (emphasis added, para. 177.), in *Horváth and Kiss* the Court noted that “the policy and the testing in question have not been argued to aim specifically at” the Roma (emphasis added, para. 111.). In *Lavida* it found discrimination “in the absence of any discriminatory intent on the part of the State” (emphasis added, para. 73.).

⁹⁴ For instance in *Orsus*, *Sampanis*, *Sampani* and *Lavida*.

In the context of EU anti-discrimination law, the above considerations raise various concerns of compatibility. First and foremost, in EU law no intent needs to be established to prove any form or type of discrimination. Secondly, direct and indirect discrimination are distinguished, and depending on the protected ground and field, the justifications available in the case of direct discrimination may be rather limited. This is the case with relation to race and ethnic origin in the field of education, where arguably only positive action measures taken in compliance with Article 5 RED are capable of justifying direct discrimination.

Thirdly, EU law does not define *de facto* discrimination, nor has the CJEU ever established such discrimination. Consequently, *de facto* discrimination based on race or ethnic origin must fit one of the key concepts enumerated in RED. Fourthly, there are key concepts that are defined in RED but not clarified or applied by the ECtHR. These include harassment, victimization and the instruction to discriminate. Alarming, their definition lacks the element of comparison, which is inherently included in the Court's unified approach to discrimination. Arguably, therefore, if the harassment of Romani children in schools or through school materials carrying stereotypical and demeaning content occurred, that would not amount to harassment or discrimination before the ECtHR.⁹⁵

There is progressive jurisprudence emerging from the CJEU that deals with the distinction between direct and indirect discrimination and that is relevant in relation to the Roma education cases.

According to Maruko, if an apparently neutral criterion effects only one group, then direct, rather than indirect discrimination needs to be established.⁹⁶ Arguably (covert) direct, rather than indirect discrimination shall be established if a perpetrator of discrimination relies on an allegedly neutral criterion to disguise practices that are known to him or her as being discriminatory. A typical scenario would be when a bar owner maintains an entrance policy that allows members only and as a general practice, persons of Roma ethnic origin are not provided with membership.

Another criticism voiced is that the ECtHR has not been principled enough when applying its own test of discrimination – especially in relation to indirect discrimination.⁹⁷ Below this paper supports this view and seeks to remedy analytical shortcomings. This exercise seems necessary, because as a result of the RED's transposition into the national laws of Member States, all legal disputes relating to the segregation of Romani children in schools shall be argued along these key concepts, whereas such cases will only reach the ECtHR if effective domestic remedies are exhausted.

⁹⁵ Which may explain the finding of no violation in *Aksu v Turkey*, judgment of 15 March 2012, available at <http://hudoc.echr.coe.int/webservices/content/pdf/001-109577?TID=rocvolumeai>.

⁹⁶ Case C-267/06, *Tadao Maruko v Versorgungsanstalt der deutschen Bühnen*, paras. 67-72. For an analysis see Christa Tobler, *Limits and potential of the concept of indirect discrimination*, 2008, available at http://www.non-discrimination.net/content/media/limpot08_en.pdf At p. 50. Tobler notes that „It would seem that the Court has shifted its focus away from form to substance. It is a move away from an approach under which only measures that are explicitly based on the prohibited criterion or that are by nature indissociably linked to it (such as pregnancy in the case of sex as only women can be pregnant; *Dekker*, para. 12) amount to direct discrimination. Instead, direct discrimination now also includes measures that are formally neutral but have, due to legislative provisions of the Member State in question or due to rules of the employer that have the force of law, *the same effect as would have had a direct reliance on the prohibited criterion*. This means that direct discrimination now *includes cases where reliance on a formally neutral criterion in fact affects one group only*, be it by nature or on the basis of a rule that has the force of law (Waldijk/Tobler 2008). In contrast, indirect discrimination relates to cases where an apparently neutral criterion has as an effect that is less far-reaching but still reaches a certain level.” (emphasis added).

⁹⁷ Van den Bogaert 2011 *supra* 8 and more recently, Samantha Besson, *Evolutions in Antidiscrimination law in Europe and North America: Evolutions in Non-Discrimination Law within the ECtHR and the ESC Systems: it Takes Two to Tango in the Council of Europe*, *The American Journal of Comparative Law*, Winter 2012, pp. 147-180, especially at pp. 168-169, and most recently Etinski, Rodoljub. “Emerging Indirect Discrimination under Article 14 of the ECtHR.” *Noua Revistă de Drepturile Omului* 1 (2013), pp. 26-34.

Therefore, in legal disputes arising in EU Member States, the Court's case law cannot be relied upon without taking due account of the RED.

Another instrument that may influence how segregation is conceptualized in Europe is ICERD. It approaches the definition of race or ethnic origin based discrimination from an angle uncommon both under RED as well as the Convention, namely from 'the purpose or effect of distinction', etc.⁹⁸ While the former formulation may at first appear to amount to direct discrimination which is necessarily intentional and the latter to indirect discrimination, where intent is irrelevant, this needs to be read in the light of key concepts within RED, which, again, do not require the showing of intent with relation to any form of discrimination. Nor does the Convention, if one is to believe what the Court established in D.H.

In summary, allegedly, the ECtHR has been influenced by developments in EU law – eminently the adoption and transposition of the Racial Equality Directive – when establishing (indirect) discrimination, and also when referring to statistical evidence and reversing the burden of proof.⁹⁹ However, within the remit of its own, uniform concept of discrimination the ECtHR may possibly have been guided by the European Commission against Racism and Intolerance (ECRI), which defines segregation as “the act by which a (natural or legal) person separates other persons” on the basis of a ground such as race, colour, language, religion, nationality or national or ethnic origin, “without an objective and reasonable justification, in conformity with the proposed definition of discrimination”.¹⁰⁰ Both the Court's definition of discrimination and ECRI's definition of segregation allow for a wide range of justifications. In theory, this is the most significant difference between the RED's proposed and the Convention's actual regimes pertaining to segregation. In practice, however, up to the present point the ECtHR's jurisprudence has rendered this difference non-existent.

⁹⁸ Article 1 ICERD.

⁹⁹ van den Bogaert, 2011, *supra* 8.

¹⁰⁰ Explanatory Memorandum, General Policy Recommendation N°7: National legislation to combat racism and racial discrimination, adopted by ECRI on 13 December 2002.

4 The ‘Roma education cases’

The ECtHR has so far delivered judgments in six ‘Roma education cases’, which concern the Czech Republic, Hungary, Croatia and Greece – all related to different forms of segregation – and is dealing with one application against Romania.¹⁰¹ Besides finding (indirect) discrimination (in certain cases not specifying what type of discrimination, in others obiter dicta establishing segregation), the ECtHR has also found that the level of education provided to Roma children is inferior. When translating the types of segregations the Court has dealt with over the last decade into the language used by monitoring bodies from ECRI to the Fundamental Rights Agency, the following can be noticed. The Court has dealt with two cases that relate to the segregation of Romani children in special schools (the misdiagnosis cases: D.H. concerning the Czech Republic and Horváth and Kiss concerning Hungary), two cases that indicate class level segregation – one within the same school building (Orsus concerning Croatia) and one in different buildings (Sampani concerning Greece), and two more cases where segregation occurred at school level, i.e. between Roma only and integrated schools (Sampani and Lavida concerning Greece). While examining these cases, the Court has reflected on white flight/spontaneous segregation (Sampani), resistance from non-Romani parents to integrated education (all except for the misdiagnosis cases), and an array of measures needed to bring about integration (Orsus, Horváth and Kiss, Sampani and Lavida). Except for D.H. and Orsus, all cases were decided by unanimous vote and became final without appeal.

A minority rights approach by the ECtHR in the final D.H. judgment, wherein it had gone out of its way not to give ground to claims of positive action measures and remain within its well-rehearsed ‘special measures’ approach, promoted a solution that resembled the duty to accommodate certain ethnic minority needs. Here, it repeated its approach established in the Traveller accommodation cases:¹⁰² “the vulnerable position of Roma/Gypsies means that special consideration should be given to their needs and their different lifestyle both in the relevant regulatory framework and in reaching decisions in particular cases”.¹⁰³

However, in the final Orsus judgment the Court was forced to reflect on scenarios where ethnic minority needs could not be accommodated without actively taking social policy measures to facilitate the education of Romani children in primary schools in order to avoid early dropout – which is a reading that also fits the Court’s approach of a State’s ‘respect for Convention rights’, such as education.¹⁰⁴ Then, in Horváth and Kiss the ECtHR unanimously and in general backed what it had only with the slightest majority stated in Orsus in only one aspect of the case: “In the context of the right to education of members of groups which suffered past discrimination in education with continuing effects, *structural deficiencies call for the implementation of positive measures* in order, *inter alia*, to assist the applicants with any difficulties they encountered in following the school curriculum. These obligations are particularly stringent where there is an actual history of direct discrimination.” (emphasis added).¹⁰⁵

¹⁰¹ Cazacliu v Romania, information obtained from <http://www.interights.org/cazacliu-v-romania/index.html>. According to Interights the case was brought by 75 Romanian Roma “living in the town of Tulcea in Romania. In October 2006, the applicants, including around 30 children and young people, were evicted from a building in which they had been living for many years. The majority of the applicants were relocated by local authorities to a former army barracks building. Between 2007 and 2008, the bus routes connecting the relocation site to the town were cancelled, which prevented the children and young people from attending school. This led to them being either expelled or abandoning school.”

¹⁰² Developed in UK Traveller cases: Beard v. the United Kingdom, Application No. 24882/94; Buckley v. the United Kingdom, judgment of 25 September 1996; Chapman v. the United Kingdom, judgment of 18 January 2001; Connors v. the United Kingdom, judgment of 27 May 2004.

¹⁰³ DH para 201.

¹⁰⁴ Horváth and Kiss v Hungary, judgment of 29 January 2013, para. 103, the judgment is final.

¹⁰⁵ Horváth and Kiss v Hungary, judgment of 29 January 2013, para. 104, the judgment is final.

Only Orsus and Horváth and Kiss were litigated as civil cases – alleging discrimination in education – in domestic courts. Orsus was litigated prior to the transposition of the RED into Croatian law, while Horváth and Kiss was litigated on the basis of the RED compliant Hungarian Act on equal treatment and the promotion of equal opportunities. D.H. went through domestic proceedings prior to the adoption of the Czech anti-discrimination law. No domestic legal challenges were brought in any of the Greek cases (Sampanis, Sampani and Lavida).

The Roma education cases have been heralded by academics as shaping the Court's jurisprudence on indirect discrimination. Although criticism has occasionally been voiced as to how principled the Court's approach to indirect discrimination is, no attempt has been made so far to run the Court's own test of (indirect) discrimination properly along the facts of all the cases or to investigate how these cases would have been examined under the RED.¹⁰⁶ The section below sets out to provide this missing analysis.

4.1 Segregation in special schools: the 'misdiagnosis cases'

In **D.H. and Others v the Czech Republic** (Grand Chamber judgment of 13 November 2007)¹⁰⁷ 18 Roma children complained of direct, alternatively of indirect discrimination due to their placement in special schools.¹⁰⁸ They claimed that even though they were not mentally disabled, they were placed into special schools that had been established to teach children with mental deficiencies (para. 16.). Information supplied by the Czech Government also showed a clear pattern of structural discrimination. Special schools were established in the former Czechoslovakia to serve children "suffering from a *mental or social handicap*" and while the total number of children placed in these schools continued to rise, "prior to 1989 most Roma children attended special schools" (emphasis added, para. 15.). Special schools that the case revolved around "were intended for children with *mental deficiencies*", i.e. not for children with social handicap or other special education needs (emphasis added, para. 16.).

The Court did not examine the applicants' individual circumstances. However, it noted that the applicants were placed into special schools "either directly or *after a spell in an ordinary primary school*" (emphasis added, para. 19.). As the final judgment recalls, during the domestic proceedings "the applicants received a letter from the school authorities informing them of the possibilities available for transferring from a special school to a primary school". Four applicants successfully passed the aptitude tests "and thereafter attended ordinary schools" (para. 21.). In other words, four applicants had at some point certainly been misdiagnosed as mentally disabled, while the others may or may not have been misdiagnosed.

The Court found that procedural safeguards relating to the schooling arrangements of the applicants had not been respected and that consequently they "were placed in schools for children with mental disabilities where a more basic curriculum was followed than in ordinary schools and where they were *isolated from pupils from the wider population*" (emphasis added, para. 207.). Beyond the violation of both the procedural as well as the substantive aspects of the right to education the applicants appeared to have suffered discrimination on three counts: (i) being treated as mentally disabled when in fact not mentally disabled, (ii) being isolated (segregated) in special schools and (iii) being taught an inferior curriculum. The Court, however, did not examine these details in depth. It appears however that the less favourable treatment under (ii) and (iii) result from the actual misdiagnosis under (i).

¹⁰⁶ Albeit a close examination has been conducted by van den Bogaert in relation to D.H., Sampanis and Orsus. Her analysis also includes an assessment of dissenting opinions and international law pertaining to segregation. Overall, she criticizes the judgment for failing to establish direct discrimination – at least *expressis verbis*. Roma Segregation in Education: Direct or Indirect Discrimination? An Analysis of the Parallels and Differences between Council Directive 2000/43/EC and Recent ECtHR Case Law on Roma Educational Matters, *van den Bogaert*, 2011, *supra* 8, p. 720.

¹⁰⁷ The Grand Chamber judgment is available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-83256#%22itemid%22:%22001-83256%22>.

¹⁰⁸ All submissions are available at <http://www.errc.org/cikk.php?cikk=3559>.

Consequently, under a proper construction of arguments, the type of discrimination established under (ii) and (iii) shall be identical to that established under (i).

In the context of discrimination, the Court was “not satisfied that the difference in treatment *between Roma children and non-Roma children* was objectively and reasonably justified and that there existed a reasonable relationship of proportionality between the means used and the aim pursued” (emphasis added, para. 208.). The aim was to provide education to mentally disabled children. The means used were: diagnosing their IQs (Not their mental abilities and disabilities) and providing education to them in segregated special schools. The judgment does not provide an analysis of proportionality. For such an analysis, the first two obvious questions must be: is diagnosing the IQs the best way to gain information about the aptitudes and needs of the children and is it necessary to segregate all mentally disabled children, regardless of the extent and nature of their disability?

The Court noted that “at the very least, there is a *danger that the tests were biased* and that the results were not analysed in the light of the particularities and special characteristics of the Roma children who sat them” (emphasis added, para. 201.) Therefore, “the tests in question cannot serve as justification for the impugned difference in treatment” (para. 201.). Finally, the Court observed that “the relevant legislation as applied in practice at the material time had a *disproportionately prejudicial effect on the Roma community*” (emphasis added, para. 209.). Therefore, the applicants as members of the Roma community “necessarily suffered the same discriminatory treatment”, for which reason it was *not necessary* “to examine their individual cases” (emphasis added, para. 209.).

In the Court’s view the applicants suffered indirect discrimination based on race (ethnic origin). To establish indirect discrimination under the Court’s case law the applicants needed to show that there was a criterion or practice that was neutral in terms of their protected ground, i.e. race and ethnic origin and that it had a disproportionately prejudicial effect on them. The neutral criterion or practice at hand appears to have been the national legislation on special education which comprised IQ testing and the individual assessment of children. The disproportionately prejudicial effect consisted of the disproportionate placement of Romani children – including the applicants – in special schools. The groups whom the Court compared with a view to establishing disproportionate effect were the Roma and the non-Roma communities.

Four applicants were educated in special schools even though, as it later transpired, they had no ‘mental deficiencies’. The question then becomes: is the bias inherent in the tests and the assessment procedure, the data on the overrepresentation of Romani children in special schools and the fact that four applicants had been transferred to ordinary schools enough to establish facts from which it may be presumed that direct discrimination had taken place against these four applicants? Were these applicants simply treated less favourably than non-Romani children with the same mental abilities? And if so, what were the individual circumstances of the other applicants? Were they misdiagnosed and did they suffer isolation etc. as a result? This question was, however, not asked, because the Court resolved to deal with the applications as a group claim or rather, as a collective complaint.

Dealing with structural discrimination, such as the segregation of Romani children in (special) schools through the prism of collective complaints – or *actio popularis* litigation in the domestic context – is undoubtedly a progressive approach which bears positive results.

Domestic case law from Bulgaria, Romania, Slovakia and Hungary bear witness to the benefits of such a procedural approach, as do the activities of the European Committee on Social Rights.¹⁰⁹ However, transforming a petition

¹⁰⁹ See the chapter below on domestic jurisprudence. The relevance of the European Social Charter is explained in detail in The Prohibition of Discrimination under European Human Rights Law: Relevance for the EU non-discrimination directives – an update, Olivier de Schutter, 2011, pp. 40-50. As de Schutter points out, in relation to devising social policies, the Committee has developed ‘the due diligence obligation to target the vulnerable groups’, which also pertains to the Roma. Also see Besson 2012.

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 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.

In D.H., therefore, the students of ordinary schools should have been compared to those in special schools and it should have been shown that the overwhelming majority in each group compared differed from each other in one relevant aspect only, i.e. in their race (ethnic origin). However, as soon as it is shown that in special schools one finds Romani children with and without mental disabilities, the comparison fails, because the apparently neutral criterion is mental disability itself and along that criterion it is impossible to properly distinguish the groups compared. This issue lies at the heart of misdiagnosis cases: that a great proportion of Romani children do not belong in special schools.

In light of the foregoing, if misdiagnosis is direct discrimination, then its direct consequence, the isolation (segregation) of mentally not disabled Romani children shall also amount to direct discrimination. Teaching mentally non-disabled Romani children a curriculum substandard in comparison to that taught to non-disabled non-Romani children is also direct discrimination.

Notably, however, the misdiagnosis cases can only accord protection to mentally not disabled Romani children. This means that mentally disabled children (Romani or not-Romani) cannot be protected against segregation under this framework. This is not to say that they do not potentially suffer discrimination. They potentially do, by being segregated from non-disabled children on the basis of their mental disability.

Clearly, the segregation of children with mental disabilities in special schools – whatever their race or ethnic origin – is the necessary condition for the segregation of mentally non-disabled Romani children in special schools. If special schools were closed down and inclusive education was achieved in the Czech Republic, this form of segregation against Romani children would stop. As the Commissioner for Human Rights of the Council of Europe has pinpointed, indeed the greater, more laborious reform of the total school system is the desirable solution. A word of caution is due here, however, because the stereotype that underlines the misdiagnosis of Romani children is prevalent in ordinary schools as well. It portrays Romani children as mentally less capable and content with a reduced curriculum. Thus, putting an end to the segregation of mentally disabled children or mentally sound Romani children in special schools represents only the first step in the right direction.

It is on this score as well that discussing **Horváth and Kiss v. Hungary** (judgment of 29 January 2013, final on 29 April 2013)¹¹⁰ at this point is preferable. This case concerned the misdiagnosis of two Romani children as mentally disabled. Mr. Horváth was transferred to a special primary school after finishing kindergarten education, while Mr. Kiss finished his first year in an ethnically segregated mainstream primary school and was thereafter transferred to a special school. In this case the Court indicated that it would be willing to examine with the level of scrutiny employed in Roma cases claims against segregated education brought by persons with mental disabilities as well (para. 128.). Clearly, Romani children – misdiagnosed or placed in special schools because of their intellectual disabilities – would also benefit from such a challenge.

¹¹⁰ The Chamber judgment is available at [http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-116124#{"itemid":\["001-116124"\]}](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-116124#{).

Horváth and Kiss grew out of a deliberate effort to follow up on D.H.¹¹¹ It was different in the sense that by the time the Hungarian cases started the RED had been transposed into national law, therefore unlike in D.H. civil law litigation had to be undertaken at the domestic level. The case started before the final judgment in D.H. came out, but its findings were later incorporated into the arguments. These were primarily seeking to establish direct discrimination and alternatively, indirect discrimination. The case was won at the trial level, lost on appeal and partially won on the procedural aspects of the right to education on judicial review. However, the Hungarian Supreme Court noted the structural flaws targeted by the case and referred the applicants to the Constitutional Court or the ECtHR, depending on their choice. Curiously, the ECtHR refused to deal with the structural flaws relating to the ‘test battery’ directly (para. 87.).

Five arguments brought before the Court merit closer inspection.

1. The applicants based their claims on the RED – as domestic law governing the dispute had been in compliance with it. Invoking *Maruko* they argued that misdiagnosis amounted to direct discrimination, because this discriminatory practice had been shown to have a disproportionate effect solely on one group, i.e. Romani children (para. 91.).
2. They also shaped their claim as *overt direct discrimination* and pinpointed that the notion of familial disability was invented in the 1970s to justify the placement of higher proportions of Romani children into special schools. In other words, the apparently neutral criterion was invented to disguise the real ground of discrimination, i.e. race and ethnic origin. Contemporary research shows that “*familial disability* could not amount to any type or form of mental disability, as it was in essence based on the social deprivation and the non-mainstream, minority cultural background of Roma families and children. The definition of mental disability as comprising social deprivation and/or having a minority culture amounted to bias and prejudice” against the Roma (emphasis added, para. 91.).
3. They requested the court to find that mandatory positive action measures constituted the only effective, proportionate and dissuasive remedy against segregation.
4. The applicants heavily relied on sociological data, because the segregation of Romani children in Hungary had been widely researched since the early 1970s. It is in this context that the judgment recalls the following: “Scholarly literature suggests that the *systemic misdiagnosis* of Roma children as mentally disabled has been a *tool to segregate Roma children* from non-Roma children in the Hungarian public school system since at least the 1970s” (emphasis added, para. 9.).
5. They proved how WHO standards were not followed in order to keep Romani children in special schools (para.10.) and that these standards were not followed in the case of the applicants either (para 17-22. and paras 25-30.).

The Court reacted to all the concerns raised above.

1. In relation to *Maruko*, without reference to statistical or research data to corroborate its standpoint it found that it “cannot accept the applicants’ argument that the different treatment as such resulted from a *de facto* situation that affected only the Roma”, even if the disproportionate effect on the Roma is not contested (para. 110.).
2. While it recognized that the concept of ‘familial disability’ played the same role in the Hungarian context as the quasi-automatic placement of Romani children into Czech remedial schools “[owing] to real or perceived language and cultural differences between Roma and the majority” (para. 115.), it did not investigate whether or not these factors were neutral vis-à-vis Roma ethnic identity. Had it done so, it could have found that they in fact represented the essence of Romani ethnic identity and therefore formed the basis of stereotypes against the Roma. However, as shown in para. 116, the Court took note of the fact that the impugned practice was “disguised in allegedly neutral tests”.

¹¹¹ On the background of the case, see the comments at <http://strasbourgobservers.com/2013/02/06/horvath-and-kiss-v-hungary-a-strong-new-roma-school-segregation-case/>.

3. As a commentator noted, the case brought home a real victory regarding positive action measures. The “judgment, amongst others, established that states need to address structural disadvantages caused by past discrimination through positive measures (para. 104.).¹¹² In this context, the Court considered that “the State has specific positive obligations to avoid the perpetuation of past discrimination or discriminative practices disguised in allegedly neutral tests” (emphasis added, para. 116).
4. As is shown above, the emphasis on past discrimination bore its fruits in the deliberations of the Court.
5. The Court found it “troubling that the national authorities significantly departed from the WHO standards” (para. 118.) and also found it difficult to conceive that “there was adequate protection in place safeguarding the applicants’ proper placement” in special school (para. 123.).
6. An additional development in the judgment was the Court’s engagement with the applicants’ assertion that misdiagnosis in effect amounted to segregation (paras. 113. & 127).

Beyond the Court’s view pertaining to positive action measures and its reflections on arguments relating to covert direct discrimination, there were other significant differences between D.H. and the present case. Horváth and Kiss was examined by the Court as individual applications in the context of past discrimination affecting the Roma in Hungary. Findings as to the applicants’ individual circumstances, mental abilities and placement in special school were made. More importantly, however, the judgment in Horváth and Kiss was unanimous and was not appealed by either party, which indicates that this case managed to consolidate jurisprudence on misdiagnosis.

There were further, more structural differences. By the time Horváth and Kiss reached the Court, the Hungarian context had undergone dramatic changes. Most of the measures relating to the transfer of non-disabled Romani children to ordinary schools as recommended by the Commissioner for Human Rights in relation to the Czech Republic had been introduced, although remained only temporary. The inclusive education of mildly mentally disabled children had also gained ground. Regrettably, special schools still exist and there are reports that Romani children, if mildly mentally disabled, may be transferred to segregated ordinary schools. However, the key stereotype on which misdiagnosis is based, that being a poor Romani child equals to having a mild mental disability has not vanished from wider societal or from professional approaches.

The Court took the same approach to identifying indirect discrimination in Horváth and Kiss (para. 106.) as it did in D.H. Therefore, the test it ran is analogous, albeit taking into account the individual circumstances of the applicants. To underline that it found indirect discrimination owing to lack of evidence that could prove intent on the part of the State to discriminate against the applicants, the Court noted that “the policy and the testing in question have not been argued to aim specifically at” the Roma (emphasis added, para. 111.). Beyond what has been said in relation to D.H. about the Court’ test, the most significant shortcoming that needs to be addressed in subsequent cases is the lack of an in depth investigation into how covert direct discrimination operates in relation to misdiagnosis.

4.2 Intra school segregation: Roma-only classes

In **Orsus and Others v Croatia** (Grand Chamber judgment of 16 March 2010)¹¹³ the Court found discrimination, without specifying its type. It was the press release issued by the Registrar that proudly carried the lead: “Segregating Roma children in Croatian primary schools discriminatory”.¹¹⁴ In this case, the 14 applicants remaining at appeal level at times attended separate classes with only Roma pupils, where the curriculum was reduced up to 30% (para. 10.). They were educated in segregated classes for considerable periods of their time in school, allegedly to receive catch-

¹¹² Misdiagnosis of Roma children in Hungarian public education is found to amount to discrimination, Renáta Uitz, available at <http://echrblog.blogspot.hu/2013/02/horvath-and-kiss-judgment-on-roma.html>.

¹¹³ The Grand Chamber judgment is available at [http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-97689#\[%22itemid%22:\[%22001-97689%22\]\]](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-97689#[%22itemid%22:[%22001-97689%22]]).

¹¹⁴ Press release issued by the Registrar, No. 217, 16.03.2010.

up education in the majority language, some being transferred to these separate classes after a spell in ordinary classes. The applicants claimed direct ethnic origin based discrimination on account of their placement in segregated classes and the inferior quality of education, while the Croatian Government sought to justify the placement of the applicants with their inadequate command of the Croatian language and lack of involvement of the parents (paras 145. & 178.).

Different from the misdiagnosis cases, the Court assessed Orsus on the basis of its original, uniform discrimination test. After establishing that the applicants' protected ground was their ethnic origin (paras 147-148.) it set out to examine 'whether there was a difference in treatment'. It found that the applicants "attended regular primary schools and that the Roma-only classes were situated in the same premises as other classes", while the available statistics suggested that "it was not a general policy to automatically place Roma pupils in separate classes in both schools at issue" (para. 152.). However, "the measure of placing children in separate classes on the basis of their insufficient command of the Croatian language was applied only in respect of Roma children" (para. 153.). Moreover, evidence from ECRI suggested that when the authorities tried to introduce mixed classes "they came up against *opposition from the non-Roma parents*, who apparently signed petitions against this measure, with the result that the separate classes were maintained". According to the Commissioner for Human Rights, at the a certain point "non-Roma parents went so far as to stage a *demonstration in front of the school ... denying entry to the Roma children*" (emphasis added, para. 154.). While emphasizing the lack of intent on the part of the relevant authorities, the Court found that the impugned *measure* "was applied **exclusively** to the members of a singular ethnic group", i.e. *the Roma* (emphasis added, para. 155.).

Arguably, under RED the above facts would reveal two counts of direct ethnic origin based discrimination: segregation at class level and the provision of lower quality education. True, not all Romani children were segregated at class level in all the schools under review, but the applicants had been. The measure on the basis of which they suffered segregation was their minority language. Thus, it did not appear to be neutral vis-à-vis their ethnic origin. Moreover, the measure was exclusively applied to them. As the CJEU found in *Maruko*, even if the measures seem to be apparently neutral, if they disproportionately affect one group only, then direct, rather than indirect discrimination shall be established.

Under RED, one justification defence would be available to the State: to argue that placement in the impugned classes amounted to positive action measures. Then, the positive action measures would have to be assessed in light of the definition included in Article 5 RED. It shall be noted here that the lower quality of education due to the inferior curriculum followed in the segregated classes seems to undermine this justification defence straight away.

However, the most significant factor in the case is the "hostility on the part of the parents of non-Roma children" that thwarted desegregation measures planned by the authorities. This factor is telling of psychological, as well as some form of physical pressure (demonstration to deny the access of the Romani children to the school building) that simply cannot be justified under RED. Curiously, the Court did not pay due regard to this episode in its assessment of justifications.

The Court's assessment in Orsus did not follow the proposed approach, but in essence did not trail far away from it either. Under its own case law, it could have relied on two principles: (i) that different treatment for the purposes of correcting 'factual inequalities' is allowed where a failure to treat differently would breach the principle of non-discrimination, or (ii) that the specificities of the Roma applicants in the present case required special considerations to which the impugned measure amounted. However, it did something else in its quest for potential objective and reasonable justification: it examined whether appropriate safeguards existed during the temporary placement of children in the segregated classes. It assessed the initial placement of the applicants in these classes, the curriculum taught there, the transfer and monitoring procedure, the poor school attendance and high drop-out rate, as well as the involvement of the parents.

Some of these factors would be relevant for an assessment under Article 5 RED, namely those assessing the applicants' needs as they relate to the design of positive action measures, those ensuring that segregation lasts only as long as is absolutely necessary (transfer and monitoring procedures) and those that attest to the adequacy of the measures. The rest of the evidence would need to be considered during the rebuttal.

In **Sampanis and Others v Greece** (judgment of 5 June 2008)¹¹⁵ the Court found discrimination according to its original, unified test. The 11 applicants were Greek nationals of Roma origin who complained about the non-enrolment of their primary school aged children at the local primary school for the year 2004-2005 and their assignment to Roma-only preparatory classes in the subsequent school year. The respondent Government submitted that in 2004 the parents had merely enquired about enrolment and their children's non-enrolment was due to their failure to submit the requisite documents. The Government also argued that the applicants had consented to the placement of their children in the special classes, a measure that was justified by the children's inadequate knowledge of the Greek language.

Regarding the complaint relating to the denial of access to school, the Court held that although the school authorities had not expressly refused to enroll the Romani children, they failed to take a series of positive measures provided under domestic law (such as procuring the necessary documents of their own motion or enrolling children on the basis of declarations signed by parents, which was allowed under Greek law) in order to facilitate enrolment. Regarding the assignment of the Romani children to special, Roma-only classes located at a considerable distance from the main school building the following school year in inferior material conditions, the Court noted that the authorities had failed to provide a single, clear criterion by reference to which children were to be placed in these classes. Similarly, there was no evidence that pedagogically suitable assessment tests had been employed to ascertain which pupils were to attend the special classes and which pupils could return to the ordinary, mainstream classes.

Two other factors were crucial in the Court's assessment. First, the Court noted that no Romani child had been transferred from a special to an ordinary class, suggesting that the placement in the special class was in fact **permanent** and did not serve the objective of providing additional education with a view to allowing the Romani children to transfer to the mainstream classes. Second, the Court considered that the racist incidents staged by non-Roma parents "could be presumed" to have "influenced the decision" of the school authorities to assign the Romani pupils to the special classes. These classes were attended exclusively by Romani children.

In September and October 2005 non-Roma parents blocked the Romani children's entrance to the main school building, demanding that the latter be transferred to another building. The police had to intervene several times to maintain order and prevent illegal acts being committed against pupils of Roma origin. It is in this context that the applicant parents signed a statement prepared by teachers in which they requested that their children be transferred to a separate school building. The blockade was lifted on 31 October 2005, when the Romani children's education commenced in that building.

The Court stressed the importance of introducing, especially in the case of children from ethnic minorities, pedagogically sound diagnostic tools for assessing the aptitudes of children with learning needs and monitoring their progress, in order to provide for their possible placement in special classes on the basis of non-discriminatory criteria. The application of such an objective testing system would dispel any suspicions by the Roma that they were discriminated against and would ultimately assist them to integrate into ordinary schools and into local society.

¹¹⁵ The case summary above is based on the summary provided by dr Theodoros Alexandridis (counsel for the applicants and the Greek Helsinki Monitor) and the Information Note on the Court's case-law No. 109, June 2008, the judgment is available in French only at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-86798>.

In relation to the alleged consent of the Roma parents to the transfer of their children into the special, Roma only classes, the Court reiterated its doctrine established in D.H, according to which no waiver of the right not to be discriminated against could be considered valid and that the applicants' consent could not be considered as an informed one. In light of the above, the Court held that the Government had not demonstrated that the difference in treatment was the result of objective factors, unrelated to the ethnic origin of the persons concerned, and found discrimination.

The facts of Sampanis are rather similar to those in Orsus, the differences that may explain why Sampanis won on a unanimous vote in 2008, while Orsus had to go on appeal and win on a very tight vote in 2010 are threefold. First, in Sampanis the Romani children were completely denied access to education for an entire school year. Second, the Roma-only classes they were placed in were situated in a separate building as opposed to a separate class within the same school building as in Orsus. Third, in Sampanis no Romani child was educated in parallel, overwhelmingly non-Romani classes, i.e. segregation was absolute. This comparison shows that making courts understand that examining the level (class, building, school) and degree (51-100%) of segregation is important and also, that segregation may occur even if it is not absolute, i.e. if certain Romani children have access to integrated education. From the viewpoint of the Romani children who are educated in a wholly or overwhelmingly Romani class with little or no interaction with non-Romani children, segregation occurs despite the fact that other, more fortunate Romani children are not segregated in another class of the same school.

4.3 Inter school segregation and white flight: Roma only schools

Sampani and Others v Greece (judgment of 11 December 2012)¹¹⁶ was a follow-up on Sampanis, because the Greek authorities failed to take adequate steps to eradicate segregation between classes/school buildings (including bridging gaps in language proficiency). The applicants are 140 Greek nationals (parents and their children) of Roma ethnic origin. Some of them were applicants also in Sampanis. The applicants complained that despite the Court's findings in Sampanis, the authorities had failed to ensure inclusive education to the Roma pupils in ordinary, mainstream classes. They charged that the authorities institutionalized their segregation by turning the school annex where they attended classes into an independent primary school (No. 12.) that educated only Roma pupils. This occurred despite the fact that both Roma and non-Roma children resided in school No. 12's catchment area. In other words, the authorities failed to take measures against 'white flight', i.e. spontaneous segregation.

The applicants also complained about the lack of appropriate infrastructure (which was inadequate and also damaged during a series of attacks by unknown perpetrators) and teaching materials. Lastly, the applicants complained that the authorities had refused to abide by the judgment in Sampanis, thereby violating Article 46 of the Convention. The Government contested the facts presented by the applicants, noting that school No. 12. was not a "ghetto" school as the applicants and the Greek Ombudsman had characterized it but an ordinary, primary school, fully integrated into the national educational system. The refusal of non-Roma parents to register their children in that school could not be imputed to the state while in any case, the Roma pupils themselves did not show evidence that they wanted to be educated as the majority of them dropped out of school.

The Court held that there had been no significant changes to the situation as described in the Sampanis judgment and consequently its findings in that case were also relevant in the context of Sampani. The above, coupled with the fact that the school in question was attended only by Roma students, notwithstanding the fact that non-Roma

¹¹⁶ The Chamber judgment of 11 December 2012 *affaire Sampani et autres c. Grèce* is available in French only at [http://hudoc.echr.coe.int/sites/fra/pages/search.aspx?i=001-115169#{%22itemid%22:\[%22001-115169%22\]}](http://hudoc.echr.coe.int/sites/fra/pages/search.aspx?i=001-115169#{%22itemid%22:[%22001-115169%22]}) The analysis is based on a case summary provided by counsel for the applicants and the Greek Helsinki Monitor, dr. Theodoros Alexandridis as well as on Information Note on the Court's case-law No. 158. December 2012, available at http://www.echr.coe.int/Documents/CLIN_2012_12_158_ENG.pdf.

children lived in its catchment area, constituted evidence of discrimination. In this context the Court noted “the attitude of the municipal authorities and the prefect’s office, which, fearing renewed incidents on the part of local residents who were hostile towards Roma, had failed to respond to calls by the head teacher and the Ombudsman to integrate Roma pupils into ordinary schools and to provide them with lessons appropriate to their level of education and linguistic ability”. In relation to white flight, “the Court was compelled to note that the Government had not given any convincing explanation of why there had been no non-Roma pupils at the 12th school, apart from making a vague reference to their being ‘enrolled elsewhere’.”

Moreover, there was evidence relating to a series of racist statements made by local officials and the continuing material problems faced by the school’s administration, problems that the Court considered as contributing to the Roma pupils’ dropping out. The Court found that the Government had not provided an objective and reasonable justification for the difference in treatment and the continuing school segregation of the Roma, nor any special measures relevant to Roma pupils specific educational needs, prompting.

The Court’s finding under Article 46 can be perceived as a breakthrough. The Court acknowledged that the Committee of Ministers had closed the examination of Sampanis and recognized the respondent State’s competence to choose the adequate measures to meet its obligations under the judgment. The Court indicated, however that “Certain specific measures – which had been recommended not only by the applicants but also by the Government in their observations in reply – were likely to put an end to the violation found by the Court. For example, those of the *applicants who were still of school age could be enrolled at another State school* by the West Attica Primary Education Department and *those who had reached the age of majority could enroll at ‘second chance schools’ or adult education institutes* set up by the Ministry of Education under the Lifelong Learning Programme” (emphasis added).

Lavida and Others v Greece (judgment of 30 May 2013)¹¹⁷ concerned the education of Roma children who were restricted to attending a primary school in which the only pupils were other Roma children. The Court found that the continuing nature of this situation and the State’s refusal to take anti-segregation measures implied discrimination and a breach of the right to education. The press release was more forthcoming, stating that “School placements for Roma children must not amount to ethnic or racial segregation”.

The applicants are 23 Greek nationals, who – similar to Sampanis and Sampani – were represented by the Greek Helsinki Monitor (GHM).

Half of the population of Sofades, a town located in Thessaly, in the western part of central Greece, is made up of persons of Roma origin, who live in a district known as the new Roma housing estate. According to the applicants, 84 families live in the new housing estate, and 300 families continue to live in an older estate. At the relevant time, 4 primary schools existed in Sofades. 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. Fifteen of the applicants are children who were of compulsory school age in 2009- 2010. Twelve of them were educated in school no. 4.

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

¹¹⁷ Lavida et autres c. Grèce, judgment of 30 May 2013, final on 30 August 2013, available in French only at [http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-119974#{"itemid":\["001-119974"\]}](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-119974#{). The assessment is based on the author’s own translation and the press release issued by the Registrar of the Court on 30 May 2013, ECHR 163 (2013), available at http://www.google.co.uk/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=OCCMQFjAA&url=http%3A%2F%2Fhudoc.echr.coe.int%2Fwebsites%2Fcontent%2Fpdf%2F003-4378378-5255719&ei=M1ZPVMPjGsrWasfUgBg&usg=AFQjCNHF565XF-uGKhfP2BbrZB_ZHpZdZQ&bvm=bv.77880786,d.d2s.

primary school no. 4 in the old Roma estate, which had only Roma pupils, rather than primary school no. 1, the closest to their homes. The delegation criticised “a clear ethnic segregation”. No reply was received to the letter.

In September 2009 the applicant parents allegedly asked the headmaster of primary school no. 1 to agree to enroll their children. He refused, stating that the authorities considered that those children ought to continue to attend school no. 4. On 29 September 2009 the Regional Education Department sent a report to the Ministry of Education on the functioning of the Sofades schools and the education of Roma children. On 25 November 2009 the GHM sent another letter to the Special Secretary for Inter-Cultural Education, to which no reply was received. On 15 December 2009 the Ombudsman informed the GHM that he too had written to the Special Secretary in order to inform himself of the Minister of Education’s position on this matter. On 26 January 2012 a meeting brought together the Minister of Education, the Special Secretary for Inter-Cultural Education, the mayor of Sofades, elected representative and the representatives of parents’ associations, and it was decided to take a number of measures. On 13 February 2012, in response to a question asked by a Greek MEP at the European Parliament, Commissioner Viviane Reding emphasised that the European Commission 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* (emphasis added).

The Court observed that primary school no. 4 in Sofades was a school attended solely by Roma children. In spite of the rule that pupils were to be educated in schools situated near their homes, no non-Roma child who lived in the district attached to school no. 4 was educated in that school (para. 65.). The Court further noted that school no. 4 had not been set up as a school intended exclusively for Roma children and did not include preparatory or support classes for Roma children who wished to move to an ordinary state school after having reached a sufficient educational level. School no. 4 was an ordinary school which offered a similar programme to that in other state primary schools (para. 66.). In other words, school no. 4. did not provide positive action measures to the Roma children educated in it.

The Court noted that the relevant authorities had been informed about the existence of ethnic segregation in the education of Roma children in Sofades, including in a report by the Regional Education Department. The report had drawn attention to the existing situation and recommended that the authorities avoid placing Roma children in schools attended exclusively by children belonging to the Roma community, in order to end social exclusion and promote Roma integration. It 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 and the hostile reactions of the parents of non-Roma pupils when Roma children were enrolled in the other schools in Sofades* (emphasis added). The Court noted that “*the proposals adopted in 2010 did not materialize, because of the hostility of the parents of non-Roma children*. Thus, on 26 January 2012, it was decided to take the following steps: a) maintain the fourth school and provide more equipment and teachers b) build a new school for Roma children; c) register, if their parents wished nine students at the beginning of school year in premises attended only by Roma children; d) from the 2012-2013 school year, students enter different primary schools in the city of Sofades ensuring that their number did not exceed 20% of students in each school” (emphasis added, para. 70.).

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* (emphasis added). 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 (para. 69.).

“In view of the foregoing, and in the absence of any discriminatory intent on the part of the State, the Court considers that the continuation of the education of Roma children in a public school attended exclusively by Roma and the decision against effective desegregation measures - for example, dividing the Roma in mixed classes in other schools or redrawing catchment areas – due in particular to the opposition of parents of non-Roma pupils, cannot be regarded as objectively justified by a legitimate aim” (emphasis added, para. 73.).

Arguably, in *Lavida*, the Court established a duty to desegregate inherent in the right to education without racial or ethnic origin based discrimination (Article 1 Protocol read in conjunction with Article 14), subject to certain conditions.

5 Is any type of segregation indirect discrimination?

Does segregation amount to indirect discrimination under any and all circumstances? Even the ECtHR seems uncertain. Apart from the misdiagnosis cases it did not run the indirect discrimination test in the Roma education cases, but rather its original unified test, suggesting that it may have viewed them as cases of direct rather than indirect discrimination. It simply refrains from writing down the words direct discrimination in its judgments. It finds discrimination instead and obiter dicta mentions segregation or isolation. This approach may result from the politically sensitive nature of a finding of direct discrimination, from the fact that the Court does not differentiate in relation to justifications between the two types of discrimination, and last but not least, it may also result from the misunderstanding that in order to establish direct discrimination, discriminatory intent must be proven, and that the psychological as well as physical pressure of non-Roma parents is insufficient to prove discriminatory intent on the part of the State – as if it was not the State's duty to ensure that non-Roma parents act in accordance with the law. What is perplexing in this context is that even if States give in to such parental pressure and stop desegregation measures, their intent to segregate will not be established (Lavida).

6 Evidence and burden of proof

Statistical evidence lies at the heart of cases dealing with segregation, because without establishing ethnic proportions in different units of the same level of schooling, applicants cannot make out a *prima facie* case. Thus, ethnic statistics were presented by applicants as well as Governments and rightly analysed by the Court. The only exception is Orsus (para. 152.). In this case and when looking at class level segregation in general, the proportion of Romani children in parallel classes in the same year need to be compared, as opposed to school level statistics, because the violation alleged takes place at class and not at school level.

The EU data protection law does not prevent ethnic data collection provided that the safeguards set in law are respected.¹¹⁸ However, across the EU many believe that collecting ethnic data is either prohibited or is a very cumbersome process not often undertaken, because of the safeguards that need to be respected. Curiously, however, it is precisely perception based ethnic data that can be useful in establishing a case of discrimination, because discrimination as a general rule is based on perception, not self-identification. The Migration Policy Group has canvassed ethnic data collection practices in seven EU Member States and found that “Debate over methodological issues relating to ethnic data collection is lacking, except for in France and Hungary. However, nothing stops the collection of ethnic data in practice by way of proxies (objective criteria) and/or third-party identification. As a general rule, *indirect ethnic data collection* is based on proxies and is conducted in every Member State under review. Alarming, ethnic data based on self-identification are not collected in the field of public education/employment in the countries under review”.¹¹⁹

Where does the data come from in the Roma education cases? It comes from domestic NGOs, sociologists and ombudspersons as a general rule. Reports from Council of Europe monitoring bodies played a crucial role in shaping the Court’s approach to the Roma education cases. They included statistical evidence, testimonies from domestic stakeholders, domestic research data on trends and patterns and comparative data at the Council of Europe level. Statistical data submitted by the applicants is as a general rule collected by NGOs representing them. In the context of education, the data is usually gathered from schools and parents.

In essence, the Governments have either not questioned or not succeeded in questioning the data presented by the applicants. Moreover, they regularly submitted their own data either in the course of the proceedings before the Court, or during the reporting process before other Council of Europe bodies. This is relevant in light of a general misconception relating to the use of ethnic data in the context of litigation.

What is ethnic data worth in establishing discrimination in the Roma education cases? Having data on the ethnic disproportions in parallel educational units – be them class, building or school level – is crucial when establishing a *prima facie* case of segregation. Such data and only such data allows for a comparison between the *educational units* that may or may not show *physical separation*, which is the harm or disadvantage that needs to be established in relation to segregation. This physical separation must be *based on race and/or ethnic origin* between the Roma and non-Roma students. The fact that this physical separation is *involuntary* is partly established by the applicants and partly by the respondent Governments in their justification defence. Arguably, the nature of the physical separation, i.e. whether or not it is voluntary signifies the causal link between the disadvantage (physical separation) and the protected ground (race/ethnic origin). If the physical separation is not voluntary, the causal link is established and so is segregation.

¹¹⁸ See, in particular Article 8.4. of Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data.

¹¹⁹ Open Society Foundations Equality Data Initiative, Collection of data on race, ethnicity and disability in the field of public education in Bulgaria, Germany, Hungary, Ireland, Romania and Sweden, and public employment in France: What are the possibilities?, Isabelle Chopin, Lilla Farkas and Catharina Germaine-Sahl, Migration Policy Group, July 2013, manuscript, p. 5.

In the Roma education cases, applicants furnished ethnic data in relation to their own specific circumstances as well as in the general context of education. This suggests that establishing facts from which a general trend or pattern of segregation in schools can be discerned is a significant element of establishing a *prima facie* case before the Court. However, it is not known whether or not it is being followed by other courts.

In the four cases Orsus, Sampanis, Sampani and Lavida, the Court found that in a set of educational units there were exclusively Roma children placed, whereas in the comparable, parallel units there were either no Roma children (in the Greek cases: class/building level in Sampanis, then school level in Sampani and Lavida) or they were grossly underrepresented (Orsus: class level in the same school building).

In the misdiagnosis cases, what caused difficulties was that in special schools one could not find exclusively Roma children, while mainstream schools educated Roma children as well. However, as transpires from Horváth and Kiss, the disadvantage the Romani children suffered could impeccably be shown at the level of individual children. What is also significant in this case is the fact that while around 50% of the students in the special school that existed at the material time in the town of Nyíregyháza were of Roma origin, there existed a Roma only mainstream school in the town's Roma settlement. This fact, presented by the Hungarian Government could have steered the Court away from finding segregation in two ways. First, the special school in question did not seem segregated in absolute, nor in fact in relative terms. In any case, the ethnic disproportions in Nyíregyháza were far from being as stark as in Ostrava in the Czech D.H. case. Second, the Court could have given in to the flawed comparison suggested by the Hungarian Government, i.e. a comparison between the Roma only mainstream school and the 50% Roma special school. However, in the case of special schools the Court has never compared one special school to a random mainstream school. This shows the strength of its approach from the wider social context and also shows that such an approach may be necessary if a court is to uncover the structural causes of discrimination.

In her analysis, Samantha Besson finds it troubling that the Court has not yet properly accommodated the burden of proof model used in European non-discrimination law in its case-law on direct discrimination. She warns that the “exact role of statistical evidence and a clarification of the distribution of the burden of proof remain to be provided by the Court”.¹²⁰ While at the level of theory and principles one cannot dispute this observation, as shown above, in practice the Court's approach yields more or less satisfactory results.

Finally, it is important to note that a misunderstanding seems to flow from the use of ethnic statistics in relation to the segregation of Romani children in schools. Arguably, statistics are not only useful in the context of indirect discrimination to prove disparate impact, but they constitute the only or in the least the prime evidence in establishing structural discrimination – including segregation – in the field of education. How else to prove that the Romani and non-Romani students are not mixed, that they study in separate classes, school buildings or schools (be them normal or special schools) if not with statistics uncovering ethnic dis/proportions at the level of these educational units? Can the fact that segregation is established on the basis of ethnic statistics lead to its amounting to indirect discrimination? Clearly, statistical evidence can be used to establish any type or form of discrimination, including direct discrimination.

¹²⁰ Besson, 2012, p. 169.

7 Justification defenses

Jurisprudence is needed to clarify whether and to what extent segregation can be justified under the Racial Equality Directive. This appears to be a relatively easy nut to crack as the ECtHR in the Roma education cases has already examined various justification defences brought up by States, finding them all wanting. Therefore, at the moment, it is of little practical significance whether or not one comprehends the segregation of Romani children in schools as direct or indirect race or ethnic origin based discrimination, as yet there is no justification defence that has succeeded at the regional level, which reaches well beyond the boundaries of EU Member States. With the exception of Bulgaria, the same can be said about national jurisprudence.¹²¹ However, a lot is at stake – bearing in mind especially Member States' unwillingness or inability to end segregation, or the newly emerging trends of re-segregating Romani children in schools.¹²² Despite the extent of the problem, which is shown by the number of judgments rendered by the ECtHR since 2007, no segregation case has been referred to the CJEU, and only one case relating to discrimination against the Roma has reached it so far – albeit focusing on procedural issues in the context of equal access to services in a Roma neighbourhood.¹²³

The following justification defences have been advanced by Respondent States in the Roma education cases, none of which the Court found admissible:

- neutral criterion, no intention to discriminate (mental disability in D.H. and familial disability in Horváth and Kiss);
- **permanent** placement in additional education needed to improve children's knowledge of the majority language (Croatian in Orsus and Greek in Sampanis);
- preparatory classes needed to enable children to follow curriculum in integrated school/class (Sampanis);
- white flight (Sampani);
- Roma parents consented to segregated placement (D.H. and Sampani).

If segregation is interpreted by the CJEU as direct discrimination, then the central question becomes: what are the permissible positive action measures with reference to which segregation can be justified under Article 5 RED? A corollary of this question after the ECtHR's judgment in Horváth and Kiss and under Article 2.2. ICERD is: what are the positive action measures that will be imposed to remedy segregation? Will they be different or broader than the positive action measures permitted as justifications to segregation?

The Migration Policy Group has investigated the potential boundaries of permissible positive action measures.¹²⁴ The analysis is reproduced here with slight modifications. Under Article 5 RED it appears probable that any type of segregation that is not provisional, or that lasts throughout the entire length of primary education, would be deemed unlawful. It is likely that the CJEU will take account of ECtHR case law and the provisions of international treaties such as ICERD and CADE when interpreting national provisions in light of Article 5 RED. Under Article 3 ICERD, Member States should conduct a thorough assessment of situations where segregation occurs with a view to taking desegregation measures. In national practice, the following situations are often viewed as permitting segregation:

- Provision of Roma minority education (including language);
- Provision of catch-up/remedial/competence development education to bridge the gap;

¹²¹ Here, jurisprudence is based on a definition of segregation, which is arguably not in compliance with either ICERD or RED, as it requires plaintiffs to demonstrate a coercive element on the part of the defendants.

¹²² See media reports from Hungary and Romania on recent school segregation 'techniques'.

¹²³ Case C-394/11 (Valeri Belov case) equality body is not court or tribunal – Art 267 TFEU. The case related to equal access to electricity in a predominantly Roma neighbourhood.

¹²⁴ Promoting the implementation of European Union equality and non-discrimination standards in the programming and implementation of structural funds, Isabelle Chopin, Uyen Do and Lilla Farkas, Migration Policy Group, Brussels and Budapest, August 2012, pp. 40-41, available at www.migpolgroup.com.

- Provision of education that enables Roma children to master the majority language;
- Parental choice (including fear of harassment in integrated schools);
- Religious education;
- Incidental segregation resulting from white flight etc;
- Residential segregation.

Positive action is defined under the relevant instrument as follows.

Article 5 RED: With a view to ensuring full equality in practice, the principle of equal treatment shall not prevent any Member State from maintaining or adopting specific measures to prevent or compensate for disadvantages linked to racial or ethnic origin.

ICERD 2.2. States Parties shall, when the circumstances so warrant, take, in the social, economic, cultural and other fields, special and concrete measures to ensure the adequate development and protection of certain racial groups or individuals belonging to them, for the purpose of guaranteeing them the full and equal enjoyment of human rights and fundamental freedoms. These measures shall *in no case entail* as a consequence the *maintenance* of unequal or separate rights for different racial groups *after the objectives for which they were taken have been achieved* (emphasis added).

CADE defines “discrimination” in Article 1 as including any distinction, exclusion, limitation or preference which, being based on race, colour, sex, language, religion, political or other opinion, national or social origin, economic condition or birth, which has the purpose or effect of nullifying or impairing equality of treatment in education and in particular:

- (a) Of depriving any person or group of persons of access to education of any type or at any level;
- (b) Of limiting any person or group of persons to education of an inferior standard;
- (c) Subject to the provisions of Article 2 of this Convention, of establishing or maintaining separate educational systems or institutions for persons or groups of persons; or
- (d) Of inflicting on any person or group of persons conditions which are incompatible with the dignity of man.

Moreover, the term “education is also defined” as to include all types and levels of education, and includes access to education, the standard and quality of education, and the conditions under which it is given. Article 2 of the Convention, expressly elaborates on the accepted situations when the right to education may be limited or restricted, including¹²⁵:

- (b) The establishment or maintenance, for religious or linguistic reasons, of separate educational systems or institutions offering an education which is in keeping with the wishes of the pupil’s parents or legal guardians, if participation in such systems or attendance at such institutions is optional and if the education provided conforms to such standards as may be laid down or approved by the competent authorities, in particular for education of the same level (emphasis added);
- (c) The establishment or maintenance of private educational institutions, if the object of the institutions is not to secure the exclusion of any group but to provide educational facilities in addition to those provided by the public authorities, if the institutions are conducted in accordance with that object, and if the education provided conforms with such standards as may be laid down or approved by the competent authorities, in particular for education of the same level (emphasis added).

¹²⁵ Convention against Discrimination in Education (CDE) (1960), art. 2, available at http://portal.unesco.org/en/ev.php-URL_ID=12949&URL_DO=DO_TOPIC&URL_SECTION=201.html.

A combined approach applied to common justification defences may yield the following results, when taking into account the Court's refusal of positive action measures that lead to permanent physical separation (Orsus).

Law/justification defence	ICERD	CADE	ECHR	CRC	RED	Combined
Residential segregation	Article 2.2. and 3 test	Not covered	Not tested, but will be in Cobrazu v Romania.	Child's best interest	Not tested	No
Roma minority education	Article 2.2.	Article 2 b,	Not tested	Child's best interest	Article 5 test	Yes, if in compliance with Art 2.2. ICERD, Art. 2. b, CADE and Art 5 RED
Catch-up education	Article 2.2.	Not covered	No (DH and Others, Horváth and Kiss)	Child's best interest	Article 5 test	No
Mastering majority language	Article 2.2.: provisionally	Not covered	No, or only provisionally (Orsus, Sampanis, Lavidá)	Child's best interest	Article 5 test	No or only provisionally
Parental choice		Article 2. b, c,	generally no as right not to be discriminated cannot be waived (D.H., Lavidá)	Child's best interest		Only for purposes of minority language/ minority religious education
Religious education		Article 2. b.; if minority ethnic origin and minority religion overlap	Not tested	Child's best interest	Art. 5. if minority religion and ethnic origin overlap	If minority ethnic origin and minority religion overlap
Incidental segregation	Article 3: No	Not covered	No: Lavidá	Child's best interest		No

8 Remedies

The ECtHR has the power to provide declaratory relief by finding a violation of an individual's rights under the Convention and award damages. In rare instances it indicates the specific measures that are needed to remedy the situation. Specific measures may be individual measures which may be required to remedy the violation of an individual's rights – including the enrolment of thus far segregated Romani children in second chance schools in Sampani – or general measures, such as those indicated in the recent Roma eviction cases not to execute eviction and to provide housing.¹²⁶ The judgments may also contain additional recommendations. The execution of judgments is supervised by the Committee of Ministers of the Council of Europe made up by government representatives. The Respondent States have a legal obligation to remedy the violations found but enjoy a margin of appreciation when selecting the means to be used.¹²⁷ They draw up action plans that contain measures to be taken and submit action reports to the Committee of Ministers. Most cases follow a standard procedure, while cases requiring urgent action or the remedying of structural problems are dealt with in the framework of enhanced procedures.¹²⁸

Non-governmental organisations may engage in the supervision of the ECtHR's judgments. Various NGOs have been closely following the execution of the Roma education cases – in particular of *D.H. and Others v the Czech Republic* – and voiced the need to see tangible changes on the ground.¹²⁹ Council of Europe monitoring bodies – such as ECRI and the Commissioner for Human Rights – also engage in urging governments to implement structural changes required for the full implementation of judgments.

In relation to the execution of the *D.H. and Others v Czech Republic* judgment the Commissioner stresses the necessity of a paradigm shift in education policy that would put emphasis not on perfecting pupils' capacity tests but on the inclusion of all [including special education needs] pupils in mainstream education and the provision to them of appropriate support, if necessary. The government is urged to commit itself to the phasing out of "practical schools".¹³⁰ The Commissioner supports the major measures planned. He believes, however that the "Consolidated Action Plan needs to be accompanied by a detailed schedule including clear targets and indicators for monitoring the desegregation process, as well as the funding required for this purpose". Regrettably, "the current segregated system has significant support from the public and a number of education professionals". Some stakeholders believe that "integration leads to disintegration" – that is, to white flight (the withdrawal of non-Roma children by their parents from schools attended by Roma children) and the consequent transformation of those schools into Roma-only

¹²⁶ *Yordanova and Others v. Bulgaria* (brought on behalf of 23 applicants), judgment of 24 April 2012, available at [http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-110449#{"itemid":\["001-110449"\]}](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-110449#{). Margarita Iljeva, counsel for the applicants summarized the case for Legalnet, "the European Court of Human Rights ruled that Bulgaria would breach Article 8 of the European Convention on Human Rights if a Roma community is evicted from illegally occupied municipal land without being guaranteed against homelessness. The Court required Bulgaria to amend its faulty legislation allowing summary arbitrary evictions, and to abolish the local government order to vacate the applicants' families from the land they lived on for several decades. In 2008, the ECtHR provided interim relief, staying the execution of the eviction order. The Court ruled no separate issue of discrimination arose, even though the applicants asserted a non-Roma community in a comparable situation would not have been treated with such brutal disregard by the authorities." Similarly, in *Winterstein et Autres c France*, judgment of 17 October 2013 the Court found a violation of the right to family life. It further developed its approach used in *Yordanova* and with reference to other Council of Europe bodies' recommendations it found that a positive obligation to provide rehousing (relogement) in case of forced evictions existed, except in cases of force majeure (para. 159.). available at [http://hudoc.echr.coe.int/sites/fra/pages/search.aspx?i=001-126910#{"itemid":\["001-126910"\]}](http://hudoc.echr.coe.int/sites/fra/pages/search.aspx?i=001-126910#{)

¹²⁷ See Article 46 of the European Convention on human rights and fundamental freedoms.

¹²⁸ Further practical information relating to the execution of judgments is available at http://www.coe.int/t/dghl/monitoring/execution/Presentation/Pres_Exec_en.asp.

¹²⁹ For more details see <http://www.errc.org/article/errc-submission-to-the-council-of-europe-on-implementation-of-human-rights-judgments-in-the-czech-republic/4076>.

¹³⁰ REPORT by Nils Muižnieks Commissioner for Human Rights of the Council of Europe Following his visit to the Czech Republic from 12 to 15 November 2012, CommDH(2013)1, pp. 3-4.

schools functioning at a fraction of their capacity. However, the lack of adequate information given to Roma parents regarding the nature of “practical schools” also sustains the system. The territorial segregation of Roma further compounds segregation, because high percentages of Roma children are enrolled in schools located in their excluded communities. The wish of Roma parents to protect their children from hostility by non-Roma peers and educators and the low number of Roma children attending preschool education (around 30%) also contribute to segregation. As the Commissioner recalls “the complexity of this problem demands not only a reform of the education system, but 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”.¹³¹

In contrast to the Council of Europe system, the execution of judgments rendered by the Court of Justice of the European Union is directly ensured at the domestic level according to the rules of domestic civil procedure.¹³² Among others, the CJEU gives rulings in relation to requests for a preliminary ruling and actions for failure to fulfil an obligation. In the latter cases the failure of national governments to take the necessary measures to apply EU law leads to the imposition of a penalty payment.¹³³ However, judgments delivered in response to requests for a preliminary ruling on the interpretation of EU law may lead to the imposition of a wide variety of sanctions available under domestic law by domestic courts.¹³⁴

The Court provided just satisfaction to the applicants in the Roma education cases by way of damages ranging between 1.000 and 6.500 Euros. Action taken in at the domestic level prior, during or after the judgments and the Court’s statements made first obiter dicta, then in a more straightforward manner in relation to Article 46 in the Greek cases (that indicated unwillingness or inability on the part of Greece to end segregation) demonstrate the wide range of remedies that are available in practice against segregation. To what extent can and should they be included in judgments brought under RED?

D.H. was criticized as a missed opportunity to specify “the deficiencies in the School Act” and give “specific instructions regarding the changes to be encouraged in the domestic legal order”.¹³⁵ One of the outcomes of the D.H. judgment was that in the months following, pressure was put on the Czech legislature to pass an antidiscrimination law to bring the law into compliance with the RED.¹³⁶ The applicants sought individual remedies for themselves and collective remedies for all Roma students in the Czech Republic. They relied on *Broniowski v. Poland*¹³⁷ and *Hutten-Czapska v. Poland*¹³⁸ to show that individuals may request the redress of wrongs suffered by an entire group of people if they also suffered the wrong and are a member of that group. They asked that hindrances be removed. Beyond ruling that a violation of the applicants’ rights had occurred, the applicants were awarded 4,000 Euros each. In the foregoing, it has been shown that in the Czech Republic Roma children are still overrepresented in special education and that although the necessary steps have been planned, their implementation is far from view. The

¹³¹ Ibid, paras. 56. &58-60.

¹³² Article 299 TFEU.

¹³³ Article 260 TFEU.

¹³⁴ For a recent example see Case C-81/12, *Asociația Accept v Consiliul Național pentru Combaterea Discriminării*.

¹³⁵ Jennifer Devroye, *The Case of D.H. and Others v the Czech Republic*, Note and Comment, in *Northwestern University Journal of International Human Rights*, Spring 2009, paras 55. and 58.

¹³⁶ Jennifer Devroye, *The Case of D.H. and Others v. the Czech Republic*, *Northwestern Journal of International Human Rights* (Volume 7, Issue 1 (Spring 2009)), available at <http://www.law.northwestern.edu/journals/jihr/v7/n1/3/Devroye.pdf>.

¹³⁷ Case of *Broniowski v. Poland*, application no. 31443/96, Grand Chamber judgment of 22 June 2004, available at http://www.ioktn.org/image/users/169138/ftp/my_files/Docs/Case-of-Broniowski-v-Poland-31443-96.pdf?id=7990145.

¹³⁸ Case of *Hutten-Czapska v. Poland*, application no. 35014/97, Grand Chamber judgment of 19 June 2006, available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-75882>.

judgment is still under the implementation process, the latest government implementation report was submitted to the Committee of Ministers in April 2013.¹³⁹

In Orsus, the Court found a violation and ordered the payment of just satisfaction: 4500 Euros to each applicant. The Court indicated that certain positive measures (including in the field of social services) needed to be made. The judgment is still under the implementation process with a status of standard type supervision.¹⁴⁰

In Sampanis, the Court found a violation and awarded each applicant 6000 Euros. Under the execution of judgment system of the Council of Europe, the case appears as having been fully implemented although in reality the Roma children continue to study in a segregated school.

In the 2012 follow-up case Sampani to the 2008 Sampanis-case mentioned above, the Court found a violation and awarded each applicant 1000 Euros. The Court indicated that "Certain specific measures [recommended by the parties] were likely to put an end to the violation found by the Court. For example, those of the *applicants who were still of school age could be enrolled at another State school* by the West Attica Primary Education Department and *those who had reached the age of majority could enrol at 'second chance schools' or adult education institutes*" (emphasis added).

In Lavidia, each applicant family was awarded the sum of EUR 1 000 for non-pecuniary damage. However, the Court had this to say to Greece, which it had found liable for segregating Romani children in schools for the third time in a row: "In addition, with regard to the application submitted under Article 46 of the Convention, the Court reiterates that a judgment finding a breach imposes on the respondent State a legal obligation to put an end to the breach and make reparation for the consequences so as to restore as far as possible, the status quo obtaining prior to the breach. It follows in particular that the respondent state is not just to pay the applicants the sums awarded by way of just satisfaction, but also to choose, subject to the control of the Committee of Ministers, the *general and / or, as the case may be, individual measures to adopt in its domestic legal order* (Ilaşcu et al. Moldova and Russia [GC], no 48787/99, § 487, ECHR 2004 -VII, and Assanidze c. Georgia [GC], no 71503 /01, § 198, ECHR 2004 -II). In addition, it follows from Article 1 of the Convention that by ratifying it the Contracting States undertake to ensure that their domestic law is compatible with it. Therefore, *in this case, it is up to the defendant to eliminate in its national law any obstacles that would prevent it from adequately redressing the situation of the applicants in relation to the findings of the present judgment* (Dimitras et al. Greece (no. 2), nos 34207 /08 and No. 6365 /09 , § 43, 3 November 2011)" (emphasis added, para. 82.).

In Horváth and Kiss, the Court found a violation, noted the structural problems relating to testing and said that positive action measures targeting the Roma need to be put in place to remedy the situation. The sanction imposed at national level was non-pecuniary damage in the sum of HUF one million, approximately EUR 3.400.¹⁴¹

Significantly, the Greek cases show that continued non-compliance with the Convention, i.e. the continued breach of Romani children's right to education without racial or ethnic origin based discrimination propelled the Court to impose more structural remedies within its rather limited mandate.

¹³⁹ Report on implementation of the Action Plan for the execution of the judgment of the European Court of Human Rights in the case of D.H. and Others v the Czech Republic, "Equal Opportunities", 25 April 2014, available at <https://wcd.coe.int/com.intranet.InstraServlet?command=com.intranet.CmdBlobGet&IntranetImage=2514955&SecMode=1&DocId=2135608&Usage=2>.

¹⁴⁰ Orsus and Others v. Croatia, Execution of Judgment, available at http://www.coe.int/t/dghl/monitoring/execution/Reports/pendingCases_en.asp?CaseTitleOrNumber=orsus+and+others+&StateCode=CRO&SectionCode.

¹⁴¹ Case of Horvath and Kiss v. Hungary, application no. 11146/11, Final judgment of Second Section, 29 January 2013, available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-116124>.

Has it imposed a duty on Member States to desegregate? The combination of positive obligations stemming from the right to education and the duty to take positive action measures may amount to such a duty under its case-law. Arguably, in *Lavida*, the Court established a duty to desegregate inherent in the right to education without racial or ethnic origin based discrimination (Article 1 Protocol read in conjunction with Article 14), subject to the following conditions: (i) that segregation represents a continued violation; (ii) that the relevant authorities are aware of it and (iii) that they fail to take measures to correct it – regardless of whether this failure is due to the opposition of the parents of non-Roma pupils. The breach of the duty to desegregate amounts to discrimination. This is very strong wording indeed and hits the public debates in various Member States spot on: non-Roma children's right to education cannot under any circumstances override the right of Romani children not to be discriminated against in school. States cannot use the resistance of non-Romani parents as an ultimate justification for segregation. Significantly, the finding in *Lavida* reiterates the wording found in Article 3 ICERD that not only prohibits States to segregate, but 'to prevent and eradicate' such practices.

Is there a duty on the Member States to desegregate under the Racial Equality Directive? It can be argued that there is indeed such a duty under the intricate web of international and European legal instruments regulating Roma children's right to non-discrimination education. Three important instruments will need to be taken into account when answering this dilemma: (i) ICERD that makes it mandatory for Member States to take positive action measures if and when necessary in the field of education, and (ii) the National Roma Integration Strategies, which comprise Member States own commitments as to remedying present injustices¹⁴² and (iii) the 2013 Council Recommendation on effective Roma integration, the first legal document at the EU level dealing, among others, with ensuring equal treatment of Romani children "by eliminating any school segregation and by putting an end to any inappropriate placement of Roma pupils in special needs schools".¹⁴³ In the context of legal challenges, can or shall it be taken into account if a Member State fails to enumerate – let alone plan, budget for and implement – such commitments in the field of education despite a clear need? These are questions for the CJEU to answer. However, the path may have already been paved by the ECtHR's take on Greece's inaction against blatant segregation in the *Sampani* case, that led to a repeated finding of violation in *Sampani*, as well as recommendations for further reaching remedies.¹⁴⁴ In *Lavida*, the Court went even further, examining the minimum requirements of desegregation measures and potentially to shaping a duty to desegregate. The contours of the same duty emerge from the Council conclusions¹⁴⁵ which extensively deal with desegregation, the elimination of segregation and the avoidance of the reproduction of segregation".¹⁴⁶ This may be instructive in the EU context as well, when it comes to legislative amendments long overdue or even decision on placement to special or otherwise segregated ordinary schools.

What is the effective remedy against segregation or the breach of the duty to desegregate? Does it matter in what terms the violation is couched? What is it that the ECtHR has not done in the Roma education cases? It has not found what the Commissioner for Human Rights of the Council of Europe has been advocating for, that there was a need for profound educational policy change, which uses testing to map the areas where children need additional assistance in preferably inclusive settings. The *Pitfalls and Bias* report published by the Roma Education Fund (REF) identifies two main types of positive action measures that can curtail misdiagnosis and thus provide effective remedies against misdiagnosis: 1. if the special school – mainstream school divide stays in place, reassessment

¹⁴² A more in depth analysis is provided in *Promoting the Implementation of European Union Equality and Non-discrimination Standards in the Programming and Implementation of Structural Funds*, Isabelle Chopin, Uyen Do and Lilla Farkas, Migration Policy Group, Brussels and Budapest, November 2013, to be published on <http://www.migpolgroup.com>.

¹⁴³ Council Recommendation of 9 December 2013 on effective Roma integration measures in the Member States, OJ C 378, 24.12.2013, pp. 5-6.

¹⁴⁴ *Sampani and Others v Greece*, judgment of 11 December 2012. The judgment is final.

¹⁴⁵ Council conclusions indents 21, 26 and 32.

¹⁴⁶ *Promoting the Implementation of European Union Equality and Non-discrimination Standards in the Programming and Implementation of Structural Funds*, Isabelle Chopin, Uyen Do and Lilla Farkas, Migration Policy Group, Brussels and Budapest, November 2013, p.5. to be published on <http://www.migpolgroup.com>.

must be regular and the tests need to be reformed to be less culturally biased, 2. if the government is prepared to shut down special schools – and thus stop the segregation of all disabled children as well as misdiagnosed Roma children – then individual assessment must serve the purpose of finding out what needs students have. REF is also recommending that while a decision is taken, entry testing should be suspended altogether. The report makes a series of recommendations for an interim period leading up to structural reforms.¹⁴⁷

In response to States' non-compliance with the ECtHR judgments the Organization for Security and Cooperation in Europe (OSCE) assembled a list of measures that national governments should take in order to end school segregation, the most prominent being the imposition of a duty to integrate Romani children into mainstream schools and the provision of early childhood education.¹⁴⁸

Desegregation orders imposed by courts

In *Sampani* and *Lavida* the ECtHR arguably imposed specific desegregation measures on Greece, which measures had either been initiated or started by the applicants, but mainly by the Respondent Government. In the domestic context, the Hungarian Supreme Court has dealt with the issue in two of its judgments. As noted above, in *Lavida* the Court may have gone as far as imposing a duty on States to desegregate. In *CFCF v Győr*, the Supreme Court dismissed CFCF's claim and stressed that a civil court cannot order the respondent local government to prohibit enrolment in a class in which the Roma and socially disadvantaged children would be overrepresented.¹⁴⁹ The Supreme Court feared that such a judgment would lead to closing down the school, a consequence that would extend beyond the competence of a civil court. This judgment was challenged before the Constitutional Court, which dismissed the claim on procedural grounds, namely that an NGO bringing an *actio popularis* claim had no standing before it.¹⁵⁰ However, in an earlier judgment rendered in *CFCF v Kaposvár*, the Supreme Court stated that desegregation can be ordered as long as the pertinent claim is "clear (detailed), realistic and executable" and can therefore be enforced by bailiffs.¹⁵¹

Bussing

Ordering the bussing of children has been a contentious issue in the US and reportedly has not been ordered by courts in the EU. What merits attention in relation to bussing orders is that in the EU student numbers are rapidly decreasing, which makes the closure of schools and the bussing of remaining children necessary.¹⁵² It is not known whether data available about Roma settlements is being used by Member States to design bussing programs where

¹⁴⁷ Roma Education Fund (REF), *Pitfalls and Bias: Entry Testing and the Overrepresentation of Romani Children in Special Education* (2012), p. 96-97, available at http://www.romaeducationfund.hu/sites/default/files/publications/pitfalls-and-bias-screen_singlepages.pdf.

¹⁴⁸ OSCE Review Conference Warsaw, 6 October 2010, *Implementation of Judgments of the European Court of Human Rights in Discrimination of Romani Children in Education* (Croatia, Greece, Czech Republic), available at <http://www.osce.org/home/71928>.

¹⁴⁹ Case No. Pfv.IV.20.068/2012/3.

¹⁵⁰ Case No. IV/3311/2012. For a description of the litigation see, Part 2 Handbook pp. 16-28, available at http://www.cfcf.hu/images/stories/pdf/Handbook_FINAL_PART%20_2013.11.05.pdf.

¹⁵¹ Supreme Court judgment No. Pfv.IV.21.568/2010/5. pp. 10-11. *CFCF v Kaposvár*.

¹⁵² See for instance the Commissioner's report on the Czech Republic. He mentions a school that runs at a fraction of its capacity and educates Roma children only. Hungarian research from 2010 shows that Roma only schools tend to be overrepresented among schools with the lowest number of students. Gábor Havas and János Zolnay, *Sziszifusz számvetése* (Counting for nothing), available at <http://beszelo.c3.hu/cikkek/sziszifusz-szamvetese>.

practicable, i.e. where Roma settlements are situated in the proximity of non-Roma schools.¹⁵³ It is probable that in many Member States bussing would not place an insurmountable burden on children and that bussing Roma children only would be a feasible solution. Bussing programs have been introduced by NGOs in Bulgaria (the Vidin project)¹⁵⁴ and by few local governments in Hungary (Szeged and Nyíregyháza – the latter introduced bussing as a result of litigation and stopped bussing as the composition of the city council changed in 2010).

Redistricting

Redrawing the boundaries of school districts may also serve as a remedy against segregation as it creates a right for Roma students to enroll in integrated schools. No such measures are known to have been imposed by courts in the EU. In some Hungarian cases, the respondent local governments voluntarily redrew the boundaries of school districts to allow access for Roma children to integrated schools.

Measures assisting teachers

(Re)training teachers in differentiated and cooperative teaching techniques, in curricular innovations, the employment of Roma teaching assistants and other soft measures have been introduced across the Member States by governments and NGOs alike. The 2007 Segregation report summarises such initiatives and many are available in Member States' reports to international monitoring bodies. However, no case law has been reported in relation to the imposition by courts of such measures on schools or education authorities.

¹⁵³ For instance, while Bulgaria appears to have the highest level of housing segregation of the Roma, Daniela Mihaylova, counsel for the Equal Opportunities Project charges that in Sofia alone Roma children from the settlement Fakulteta could easily attend non-segregated schools within the very close vicinity of their homes. In Hungary, on the other hand, the general rule in towns and most of the micro-regions is that Romani children could easily be integrated in schools not situated far from their homes. See, Equal Access to Quality Education for Roma, OSI EU Monitoring and Advocacy Program (EUMAP), 2007, Volume 1, pp. 91-93. and p. 259.

¹⁵⁴ For more details see, <http://drom-vidin.org/images/webpics/final.eng.version.pdf>.

9 Remedies imposed by equality bodies

A recent report published by the European Network of Equality Bodies (EQUINET) assessed the practice of the equality bodies in Europe on dealing with racial discrimination based on a detailed survey.¹⁵⁵ According to EQUINET's report, a number of equality bodies indicated the need for improving the existing provisions on sanctions including setting out a diversity of sanctions that could be applied to achieve systemic change.¹⁵⁶ Although this is not required by the EU Racial Equality Directive, the effectiveness of equality bodies would be considerably enhanced if they were entitled to impose sanctions.

The Hungarian Equal Treatment Authority in the case of Tiszavasvári ordered the municipality to elaborate a desegregation plan with the assistance of an expert in public education. Following judicial review, and appeal and retrial, the order is now final.¹⁵⁷ The Bulgarian Equal Treatment Commission has similar powers, but it has not used it yet.

Individual v group action and remedies

Does it affect the type of remedies whether a case is brought by individual applicants or by organizations in the context of *actio popularis* action? How many applicants are needed to succeed with a claim for desegregation that would affect entire school districts or the education system? The Strasbourg Court remains resilient to claims for educational reforms, regardless the number of applicants bringing a claim. However, it has more and more to say on the specific or general measures that States should take to end segregation.

Arguably, however, the sheer number of applicants in the Roma education cases has its impact on the Court's rulings, as does the fact that, for instance, Greece keeps being brought back before it for its failure to end segregation or at least improve the situation. Academics have argued that in the European context collective claims would be more beneficial in seeking remedies against structural discrimination.¹⁵⁸

¹⁵⁵ European Network of Equality Bodies (EQUINET), Equality Bodies Combating Discrimination on the Ground of Racial or Ethnic Origin, An Equinet Perspective (2012), available at http://www.equineteurope.org/IMG/pdf/Race_Perspective_MERGED_-_EN.pdf.

¹⁵⁶ Ibid p. 24.

¹⁵⁷ Part 3 Handbook pp. 29-30, available at http://www.cfcf.hu/images/stories/pdf/Handbook_FINAL_PART%203_2013.11.05.pdf.

¹⁵⁸ M. Dawson, Elise Muir, M. Claes, Enforcing the EU's rights revolution: the case of equality, in European Human Rights Law Review, 2012/3, pp. 276-291.

10 Segregation under the Racial Equality Directive and International Law

Legal disputes relating to the segregation of Romani children in schools commence at the national level, where this issue is covered by an intricate web of international, European and national laws.¹⁵⁹ It is an issue that attaches not only to norms covering non-discrimination, minority rights and education, but also to children's rights – including the principle of the child's best interest. Thus, beyond reading the Racial Equality Directive together with International Convention on the Elimination of All Forms of Racial Discrimination and European Convention on human rights and fundamental freedoms, one shall be mindful of the UNESCO Convention Against Discrimination in Education and the Convention on the Rights of the Child when dealing with the segregation of Romani children. The ICERD specifically prohibits racial segregation.¹⁶⁰ It forms part of Member States' legal orders and its implementation thus shall be ensured at the domestic level. It is specifically invoked in the Preamble of the RED.

Article 3 of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) provides that: "States parties particularly condemn racial segregation and apartheid and undertake to prevent, prohibit and eradicate all practices of this nature in territories under their jurisdiction." In its General Recommendation XIX (1995), the Committee on the Elimination of Racial Discrimination stipulated that "the obligation to eradicate all practices of this nature includes the obligation to eradicate the consequences of such practices undertaken or tolerated by previous Governments in the State or imposed by forces outside the State." The Committee further observed that "while conditions of complete or partial racial segregation may in some countries have been created by governmental policies, a condition of partial segregation may also arise as an unintended by-product of the actions of private persons." The case of residential segregation of Roma in Europe falls within the sphere of prohibited discrimination as interpreted by the Committee: "In many cities residential patterns are influenced by group differences in income, which are sometimes combined with differences of race, colour, descent and national or ethnic origin, so that inhabitants can be stigmatized and individuals suffer a form of discrimination in which racial grounds are mixed with other grounds." Significantly, under Article 3 ICERD Member States do not only undertake to prohibit, but also to *prevent and eradicate all practices of segregation* (emphasis added).

Given that the RED—which Member States shall also transpose into national law—regulates equal treatment in terms strikingly similar to those enshrined in the ICERD, the two instruments inevitably interplay at the domestic level. In other words, when implementing the RED or providing protection against segregation, one must be mindful of the ICERD. The UNESCO Convention Against Discrimination in Education (CADE) 1960 prohibits segregation in education with certain exceptions – among them for linguistic reasons.¹⁶¹ Six Member States are not parties to CADE: Belgium, Estonia, *Greece*, Ireland, Lithuania and *Spain*.¹⁶² The UN Convention on the Rights of the Child is ratified by all Member States and provides for the right to education and the use of minority languages in general.¹⁶³ However,

¹⁵⁹ The intricate web of legal instruments dealing with race and ethnic origin based discrimination in the field of education is rehearsed in Orsus at paras. 87–97.

¹⁶⁰ Under Article 3 the ICERD States Parties particularly condemn racial segregation and apartheid and undertake to prevent, prohibit and eradicate all practices of this nature in territories under their jurisdiction.

¹⁶¹ CADE, Articles 1 and 2.

¹⁶² UNESCO Convention against Discrimination in Education (1960) and Articles 13 and 14 (Right to Education) of the International Covenant on Economic, Social and Cultural Rights: A comparative analysis, 2006, available at <http://unesdoc.unesco.org/images/0014/001459/145922e.pdf>. The list of ratifications is available at <http://www.unesco.org/eri/la/convention.asp?KO=12949&language=E&order=alpha>.

¹⁶³ Articles 28 and 30 CRC.

the most important contribution from the CRC may be the horizontal principle to safeguard the best interests of the child.¹⁶⁴

Discrimination based on race and ethnic origin is in general prohibited by the EU Charter of Fundamental Rights. It is illegal under the ECHR as well. Going beyond ICERD, CADE specifically prohibits segregation (separation) in general – meaning on all grounds – allowing only few exceptions to this rule, linguistic reasons being the most relevant in relation to Romani children. As a corollary, the CRC ensures a right to education in minority languages. As the Court of Justice of the European Union has stated, the principle of non-discrimination not only constitutes an important part of various binding international instruments *vis-à-vis* Member States, but it is also regarded as a general principle of Community law.¹⁶⁵

Given that the segregation of Romani children in schools is a form of discrimination based on race and ethnic origin, it must be tackled by Member States with a view to this intricate web of international and domestic legal provisions. ICERD and CADE specifically prohibit segregation in schools, i.e. segregation under these instruments is a free standing form of discrimination that can be justified under very strict conditions. Under ICERD, spontaneous segregation is also illegal. CADE's exception relating to linguistic reasons pertains to Romani children inasmuch Member States provide for their education in their mother tongue (Romanes, Beash, Carpathian, etc.). Clearly, such provisions, being positive action measures, fall under Article 5 RED and Article 2.2. ICERD and are subject to the tests formulated by these instruments for the maintenance of such measures – first and foremost that they shall be provisional.

When contemplating, therefore, how segregation is to be conceptualized under RED, the relevant provisions of these instruments – including the definitions and exceptions offered by ICERD and CADE – shall be weighed against the ECtHR jurisprudence. Notably, however, none of the other international instruments define and distinguish from each other key concepts as clearly as does the RED. Bearing in mind CJEU case law on the differences between direct and indirect discrimination, most notably those spelt out in the *Maruko* case, it is imperative to make a proper legal analysis at the EU level of segregation in the field of education. Concepts, such as covert direct discrimination in which the practice on closer inspection proves in the end not to be neutral *vis-à-vis* the protected ground¹⁶⁶ and situations such as in *Maruko*, where an apparently neutral criterion or practice only effects one group need to be further clarified. Last, in *Lavida* the ECtHR appears to have established a duty to desegregate, which appears to be in compliance with Article 3 ICERD.

¹⁶⁴ Note. However, that Roma rights advocates may differ in their views on what constitutes the best interest of Romani children from what the ECtHR articulated in *D. H.* and upheld in subsequent cases, namely that no waiver of the right not to be discriminated against can validly be given by parents. See, for instance, *Ten Years After: A History of Roma School Desegregation in Central and Eastern Europe*, Iulius Rostas (ed), CEU Press, 2012, p. 100. Rostas asserts that the results of the ECtHR's approach in *D.H.* is a representation of Roma parents “as incapable of deciding for their children”, which is fundamentally a “paternalistic measure”.

¹⁶⁵ *European Parliament v Council of the European Union*, (Case C-540/03), judgment of 27 June 2006, paras. 35-39. See also *Werner Mangold v Rüdiger Helm*, (Case C-144/04), judgment of 22 November 2005, paras. 74-75. in which the CJEU found that the principle of non-discrimination is a ‘general principle of Community law’.

¹⁶⁶ Significantly, the ECtHR noted in *D.H.* that “at the very least, there is a *danger that the tests were biased* and that the results were not analysed in the light of the particularities and special characteristics of the Roma children who sat them” (emphasis added, para. 201.). Arguably, if the tests were biased, they must have been biased on the basis of ethnic origin, in which case they could not be facially neutral in the context of ethnic origin.

11 Conclusions

Regardless of its shape or form, the segregation of Romani children amounts at least to indirect discrimination under the European Convention on human rights and fundamental freedoms. So far, no justification offered by States has been accepted by the European Court of Human Rights to justify it. There is no reason to doubt this structural discrimination would amount to discrimination under the Racial Equality Directive as well.

Practice has shown that it is not so much the finding of (indirect) discrimination that poses challenges, but the tailoring and enforcement of effective, proportionate and dissuasive remedies. In its progressive case law, the ECtHR has ruled that positive action measures may be required to remedy segregation in schools (Orsus and Others, Horváth and Kiss) and more recently, that if desegregation measures are planned, they shall also be implemented (Lavida). However, despite the fact that it also includes monitoring mechanisms requiring States Parties to report on progress made and the supervision of the implementation of judgments, the Strasbourg mechanism has only been partially successful in putting an end to segregation.

Arguably, the naming and shaming effect of pending procedures or fresh judgments from a regional judicial forum – especially during the process of EU accession – compelled the Czech Republic and Croatia to take measures. Before the ECtHR Grand Chamber judgment was delivered in *D. H. and Others* the Czech School Act had been amended with a view to make changes in the special education system, while the Anti-discrimination Act was voted for in the aftermath of the judgment. However, since those historic moments significant changes have not materialised. One should, however, bear in mind that the lack of changes on the ground form part of a general unwillingness to drive home educational reforms and that they affect not only Romani children but also children with special education needs, including children with mental/ intellectual disabilities.

In Croatia, while *Orsus and Others* was pending, the government provided the possibility of further education for Roma children who failed to complete primary education by the age of fifteen.¹⁶⁷ Since then, partially successful policy changes remained at the local level, driven mainly by regional stakeholders, such as the Roma Education Fund. It is noteworthy that in the Croatian context, where the number of Romani children in public education is low in regional comparison, few committed individuals could make a difference in certain locations.¹⁶⁸

Notwithstanding the differences in national anti-discrimination laws and education policies, changes on the ground have been slow in coming even in countries where litigation has been used to speed up reforms. Similar to what occurred in the Roma education cases – that revealed severe societal tensions underlying the issue of school segregation and resistance from non-Romani/majority parents to desegregation and social inclusion, other domestic litigation has ignited as much contempt as compassion towards individual Romani children. In Hungary, where over the last decade successive governments have implemented desegregation policies both for Roma/impoverished and special education needs children, the domestic litigation leading up to the *Horváth and Kiss* judgment was well covered in the press and allegedly used by the ministry of education as a whip. Unlike in other domestic settings, for financial and other professional reasons successive Hungarian governments have been committed to promoting the inclusive education of special education needs children. The litigation pertaining to the misdiagnosis of Romani children as mentally disabled fed into this policy process, contributing to the increasing number of special education needs children educated in inclusive settings. Notably, however, in its judgment rendered in *Horváth and Kiss* the Hungarian Supreme Court imposed severe limitations upon itself in relation to its role in bringing about systemic

¹⁶⁷ Orsus, para. 183.

¹⁶⁸ Recent information is available here <http://www.errc.org/article/ngos-visit-croatia-to-find-successful-practices-on-roma-education-and-desegregation/4197> and here <http://www.opendemocracy.net/tom-bass/desegregating-roma-and-croat-schoolchildren-what-has-been-done>.

changes, a limitation that is familiar from the judgments rendered by the European Court of Human Rights in the Roma education cases. The Hungarian Supreme Court stated that “the creation of an appropriate professional protocol which considers the special disadvantaged situation of Romani children and alleviates the systemic errors of the diagnostic system is a duty of the state.”¹⁶⁹ It noted, however that “the failure of the state to create such a professional protocol and the human rights violations of the applicants as a result of these systematic errors exceed the competence of the Supreme Court”, therefore “the applicants may seek to establish such a violation of their human rights at the European Court of Human Rights. Therefore the Supreme Court did not decide on the merit of this issue.”¹⁷⁰

In Slovakia, on the other hand, a single *actio popularis* case challenging class level segregation was enough to generate meaningful public debate, first because the judges engaged with the case seemed open to discussing the overall societal significance of segregation versus integration. Another reason may be that other key stakeholders had not yet started up the debate, while thirdly, the NGO Poradna engaged in the legal challenge cleverly used the media coverage to start up the debate.¹⁷¹ In any case, the follow up activities, i.e. working with the defendant school and the village have been left to other NGOs as the state has not taken measures in the case.¹⁷²

The approach of the Romanian and the Bulgarian equality bodies towards the segregation of Romani children also seems to differ. The Romanian National Council for Combating Discrimination has been rather lenient in imposing sanctions, basically limiting itself to declaratory findings. On the other hand, in a case concerning the disproportionate representation of Roma children in special schools instituted *ex officio*, the Bulgarian Commission for Protection Against Discrimination “instructed the Minister of Education to plan concrete measures to abort the admission of healthy children in those schools, as well as to stop the educational authorities’ practice of determining the ethnicity of children based on officials’ perception rather than on the children’s and their families’ own self-determination”.¹⁷³

Grainne De Burca notes the differences in the political and institutional systems of the EU and the US, including the role of the judiciary.¹⁷⁴ While in general remaining optimistic, she warns that within the EU political support for non-discrimination is diminishing and that the pushback against the antidiscrimination regime comes from political as well as societal forces. She cautions that the European model maintains a top down approach, which echoes concerns emerging within the Roma rights movement as well: that more often than not the rights for the Roma are not being vindicated by a wide social movement organizing from bottom up in Roma communities, but by Roma

¹⁶⁹ Hungarian Supreme Court (Magyar Köztársaság Legfelsőbb Bírósága), judgment, Pfv.IV.20.215/2010/3., p.10.

¹⁷⁰ Ibid. page 11.

¹⁷¹ This information is based on the author’s interview with counsel Vanda Durbakova and her colleague Stefan Ivanco, 27 February 2013, Budapest.

¹⁷² This information is based on interviews conducted by the author at the conference Inclusive Education – Possibility or Necessity?, Bratislava, 21 May 2013.

¹⁷³ Legalnet Report on Bulgaria, 2012, p. 52. Decision N 80 of 16.10.2007 of the Commission for Protection Against Discrimination. „The rationale would be that mistakes are made when officials decide for themselves what the ethnicity of other people is without consulting them and, no less important, that it is disrespectful to assume a determining role with respect to another’s identity rather than leave this to them”.

¹⁷⁴ De Burca, 2012, pp. 5-9.

rights NGOs leading legal and advocacy battles.¹⁷⁵ This is obviously not to say that the Roma do not support or rely on such NGOs for assistance. Indeed, the number of Romani children and families involved in litigation before the ECtHR and domestic courts – in the field of education and beyond – is significant. Last, the lack of mass social movements vindicating their rights is not a Roma specific phenomenon within the EU – other protected grounds/groups need empowerment too.

Some argue that beyond or instead of legal challenges, the segregation of Romani children in schools should first and foremost be dismantled through ‘non-court-centered means’, including strong policy measures and positive duties that can ensure that justice is ‘transformative’, ‘deliberative’ and ‘reflexive’.¹⁷⁶ Human rights advocates too ask themselves whether it is worth litigating on behalf of the Roma if changes on the ground remain minimal.¹⁷⁷

Legal and social policy measures are not exclusive of each other. Moreover, legal challenges may be necessary to provide impetus for the adoption of social policy measures and to show the need for political commitment, which is a necessary precondition of measures that allow for the involvement of protected groups and reflect their needs. In general, the lesson learnt from the Roma education cases is that they generated and kept the need for policy change on the agenda. However, as eminently borne out by the yet unsuccessful struggle of various NGOs, Council of Europe and other regional bodies in ensuring that the D. H. and Others judgment is implemented, without governmental commitment changes will remain minimal and depend on the good will of individuals. One may perhaps also wonder whether without these cases the peer pressure within the Council of Europe’s Parliamentary Assembly, Committee of Ministers – with delegates from national governments – or within the EU could have been built and/or sustained.

The most worrying feature of the Roma education cases is their depiction of pressure from the part of the non-Roma/majority community vis-à-vis the Roma to stay put in segregated schools or settlements. When coupled with anti-Romani statements by some politicians at the national as well as the EU level, fighting back such pressure for social exclusion seems an insurmountable task. It is of equally grave concern that some Member States simply defy the implementation of judgments rendered by the ECtHR or domestic courts, and stop the funding of desegregation projects, while supporting (re)segregation.

The social inclusion of the Roma cannot be attained without integrated education. Schools are the venues where children learn to coexist in pluralist societies and acquire the skills and knowledge needed to succeed on the labour market. It is against this backdrop that domestic, European and international stakeholders need to unite forces and among so many other tools use, if necessary, legal challenges to frame the public discourse, pave the way for the adoption of positive action measures as well as long overdue educational reforms and last but not least

¹⁷⁵ The differences between the Roma rights movement in Europe and the civil rights movement in the US, as well as the underlying structural causes have been summarised by Jack Greenberg in his Report on Roma Education Today: From Slavery to Segregation and Beyond, Columbia Law Review 110/4 (May 2010) pp. 988-999, available at <http://heinonline.org/HOL/LandingPage?handle=hein.journals/clr110&div=30&id=&page=>. As Greenberg notes, the Roma in Central and Eastern Europe are not organised around a single religion with preachers from their own community, neither are they supported by minority or majority politics. The lack of their own institutional support results in a very low number of Roma intellectuals who are in turn dependent on majority structures for a living. As REF director, Judit Szira notes, another major difference is that for centuries the Roma had been physically excluded from majority society, while since at least the political changeover in the late 1980s they have been losing their jobs, which provided the only meaningful adult venue for social inclusion. She recalls that while prior to the emergence of the civil rights movement, even in the Southern States of the US African Americans were employed in majority households, even today this is far from being the case in the European Union. Interview with Ms Szira, 5 May 2013.

¹⁷⁶ Morag Goodwin *supra* pp. 154-156 and Sandra Fredman, Evolutions in Antidiscrimination Law in Europe and North America: Breaking the Mold: Equality as a Proactive Duty, The American Journal of Comparative Law, Winter 2012, pp. 265-287.

¹⁷⁷ James A. Goldston, 2010, Struggle for Roma Rights: Arguments that Have Worked, Human Rights Quarterly, Volume 32 No. 2, pp 311-325, at pp. 311-312.

facilitate the exchange of best practice examples. The Roma rights movement is the forerunner in seeking equality in education within the framework of the Racial Equality Directive and the European Convention on human rights and fundamental freedoms. Undoubtedly, other groups suffering discrimination – eminently children with disabilities – will follow in their footsteps. Their legal claims will have the same target, so should have government policies.

It is undisputable that the segregation of Romani children cannot be dismantled without positive action measures. However, the Roma education cases show that none of the supposed “positive action measures” under scrutiny has been compatible with the European Convention on human rights and fundamental freedoms, because they have either led to or maintained segregation.

The Roma education cases have also demonstrated the difficulties relating to the implementation of judgments finding liable for segregation states that are unwilling or unable to integrate Romani children. The greatest challenges for the legal profession in the next decades will therefore be to tailor-make proper positive action measures and ensure that they are fully implemented. The path is paved by various policy documents, including the most recent EU Council Recommendation on effective Roma integration measures in the member states.¹⁷⁸ The legal profession needs to be engaged in translating from policy into legal terms effective policy measures as well as horizontal policy measures relating to anti-discrimination, most eminently the implementation “where relevant [of] desegregation measures concerning Roma both regionally and locally”.¹⁷⁹

¹⁷⁸ Council Recommendation of 9 December 2013 on effective Roma integration measures in the Member States, OJ C 378, 24.12.2013, p. 1.

¹⁷⁹ Ibid, point 1.3. and 2.2.

European Commission

Report on discrimination of Roma children in education

2014 — 62 pp. — 21 × 29,7 cm

