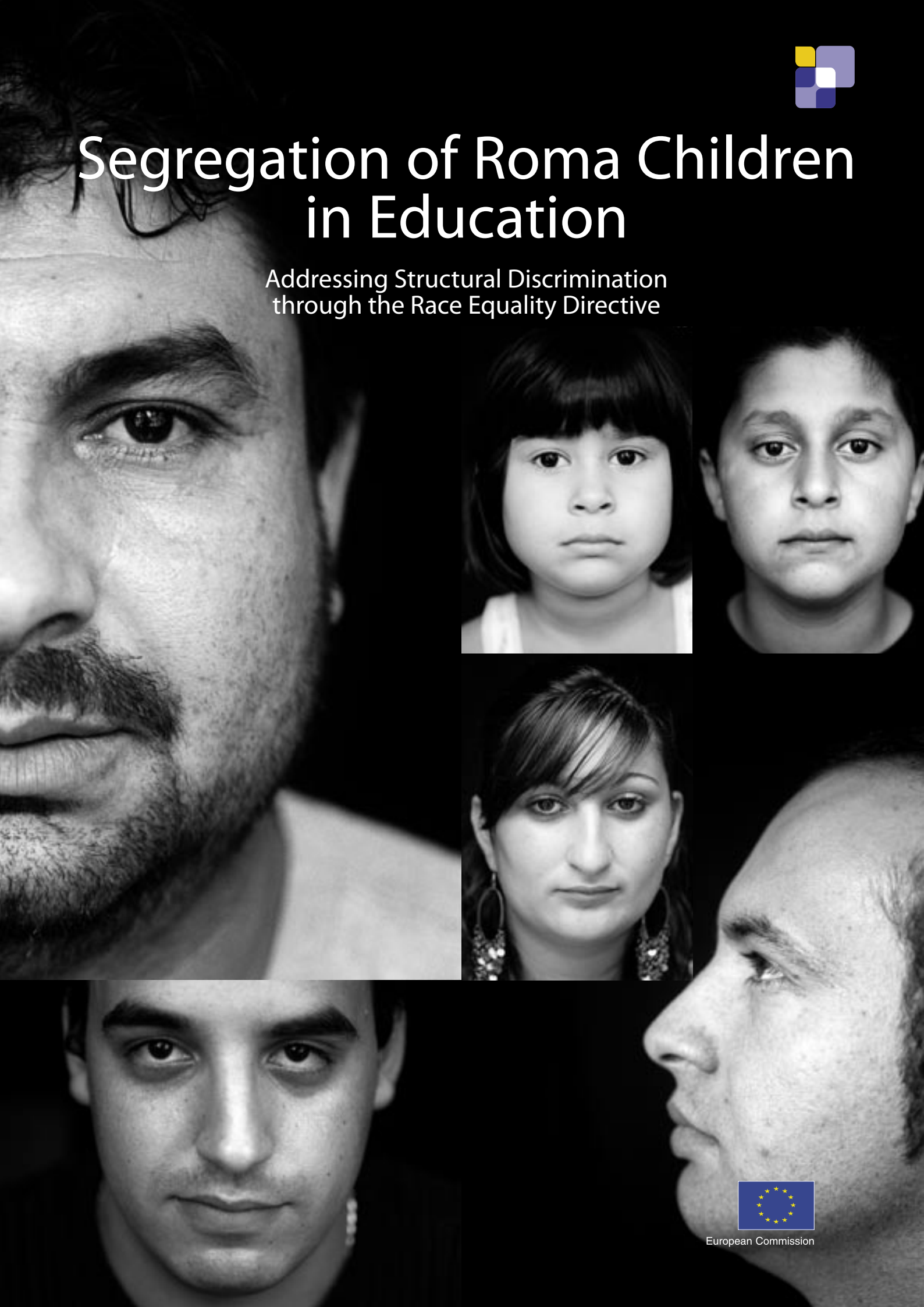




Segregation of Roma Children in Education

Addressing Structural Discrimination
through the Race Equality Directive



European Commission

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through the Race Equality Directive

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Directorate-General for Employment, Social Affairs and Equal Opportunities
Unit G.2

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The Action Programme has three main objectives. These are:

1. To improve the understanding of issues related to discrimination
2. To develop the capacity to tackle discrimination effectively
3. To promote the values underlying the fight against discrimination

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Executive summary

Discrimination against Roma - a truly European minority present in almost all EU Member States - and in particular against approximately three million Roma children in schools across the EU is one of the most pressing political, social and human rights issues we need to tackle. What distinguishes Roma from other protected racial or ethnic minority groups in Europe is the extent of the poverty and deprivation they suffer, as well as the actual proportion of this group living in extreme poverty. This manifests itself in Roma children often going to school unfed and returning to a home without a computer or even a desk. Many Roma live in segregated settlements that one would more readily associate with a developing country than the European Union. 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”.

In the new EU Member States Roma children often suffer segregation in schools. This may take the form of *intra-school* segregation through the organisation of separate Roma classes or *intra-class* segregation which 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 placement of non-disabled 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 Roma children are *de facto* excluded on account of their social disadvantages. *Individual segregation*, in the form of alleged home schooling – in fact amounting to an exclusion order in some old Member States – is also a widespread type of segregation.

While the segregation discourse is strong and generally accepted in new Member States – including Romania and Bulgaria - old ones seem to focus more on absenteeism and drop out, the accommodation of a travelling way of life and on the unintended effects residential segregation has on the situation of Roma in schools. Beyond the abolition of physically segregated education, problems remain in relation to the accommodation of Roma needs in mainstream education – be that education in the minority language or the inclusion of Roma related content in the general curriculum. This report portrays the issues facing Roma children in education across the EU as resulting from structural discrimination warranting solutions that reach beyond the personal level.

It strives to describe differences in the situation of Roma across the EU as representing problems of varying natures while falling into the same legal concept. Thus, while blatant forms of segregation in new Member States may be characteristic of exclusionary policies, issues of early drop-out and underachievement are telling of structural, institutional discrimination in old ones – even if they are not perceived as appropriate for legal categorisation. The common ground is that while partial assimilation in these circumstances tolerates diversity in the private sphere, it expects conformity in the public sphere

This report argues that the Racial Equality Directive (the RED) provides an uniquely high level of protection from structural discrimination in education and that it may become an effective tool to fight against it in domestic courts as well as before the European Court of Justice (ECJ). As a key to ensuring the highest level of protection and thus to re-thinking the RED’s individual justice model it calls for an unified European definition of Roma as a dual racial and ethnic minority. It proposes to create a multi-faceted definition for Roma that can capture all of their relevant social attributes.

The report analyses whether the education covered includes all types and all levels of education along the UN Economic and Social Council’s (ECOSOC) 4A Scheme. The proposed framework of considering Roma minority language education takes into account the evolving concept of discrimination and positive action measures adopted by Member States. Issues, such as harassment and the discriminatory content of curricula are also addressed.

It is proposed that structural discrimination against Roma within the EU – including segregation and institutional discrimination - amounts to direct discrimination, not justifiable under the RED. The failure of Member States to address residential segregation resulting in segregated education amounts to discriminatory conduct. This is a preferable approach to that under the European Convention of Human Rights, where in a recent case, the European Court of Human Rights held that even if segregation constitutes *prima facie* discrimination, it may be justifiable if the parents have tacitly consented to their children being in segregated schools. In proceedings under the Race Equality Directive, direct discrimination cannot generally be justified on the basis of parental consent.

Lack of data does not only seriously hinder the creation of policies or positive action measures, but may pose serious challenges to effective judicial protection from structural discrimination in education. The RED shifts the burden of proof and implies that qualitative data can also form the basis of claims tackling race discrimination. However, Member States may need to amend national rules on data protection and evidence to accelerate the use of statistics.

The majority of Member States maintain positive action measures that address the needs of Roma communities. Given the concerns relating to data protection rules, the outreach and impact of these measures are not entirely known.

Member States have an obligation to establish a body – be that an education inspection or a specialised body - that provides independent assistance to victims, conducts independent surveys, publishes independent reports and makes recommendations on grounds of race and ethnic origin discrimination in the field of education. Sanctions engaging individual liability in criminal, disciplinary and administrative proceedings, as well as those addressing group needs are necessary if Member States' laws are to actually comply with the RED.

Introduction

The Roma population in Europe today is estimated at around ten million people, greater than the total population of a number of the Member States. A recent report¹ published by the European Commission (hereinafter: the Roma Report) described the treatment of Roma as among the most pressing political, social and human rights issues facing Europe. This conclusion is supported by numerous reports by United Nations and Council of Europe bodies, as well as court cases in several member states, together with, most eminently, the *Ostrava* case before the European Court of Human Rights.² The Roma Report concluded that “given the failure of previous and existing policies to remove or significantly reduce discrimination against Roma, Gypsies and Travellers³, and to promote their social inclusion, the EU must take the lead in targeting these groups within existing and new policies.”

“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.”⁴ Alarming, structural discrimination (segregation and institutional discrimination) against Roma children in education is widespread and unyielding to efforts made at dismantling it. The Roma Report found extreme levels of segregation in both old and new Member States. Many are concentrated in sub-standard schools or classes. Equally problematically, due to a lack of proficiency in the majority language or culturally biased psychological testing, disproportionate numbers of Roma children are placed in remedial ‘special’ schools for mentally disabled children. Residential patterns may also lead to a high concentration of Roma in certain schools, often preventing integration into mainstream classes. Whether living in old or new Member States, the path of Roma children through basic education is too often characterised by absenteeism, early drop out and underachievement. In some Member States Roma girls may drop out even earlier than boys.

Even if they finish primary school, very few European Roma make it to secondary or tertiary education. Disadvantage in education is likely to lock Roma children into disadvantage in adulthood, thus perpetuating the difficult life-circumstances already experienced by the vast majority of Roma. Sub-standard education in and of itself endangers their 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.

¹ The Situation of Roma in an Enlarged European Union, European Commission Directorate-General for Employment and Social Affairs Unit D3, European Communities, 2004, report produced by a consortium comprising Focus Consultancy Ltd., the European Roma Rights Center, and the European Roma Information Office.

² *D. H. and others against the Czech Republic*, judgment of 7 February 2006 (hereinafter: the *Ostrava* case).

³ The report follows the ‘definition’ of the Roma population as outlined in the Roma Report, covering groups that identify themselves or are perceived as Roma, Gypsies, Travellers, Manouches, Sinti, as well as other terms. However, this report uses Roma both as the adjective and the noun to depict Roma and Romanes to depict the language most commonly spoken by the group. Roma Report, p. 5 and 6.

⁴ 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.

The major legal instrument to combat discrimination in EU Member States is the Race Equality Directive (Directive 2000/43/EC, hereinafter the "RED"), which all Member States are required to incorporate and implement. Its applicability to the structural discrimination of Roma children in schools is, however, by no means straightforward. The aim of this report is to examine the ways in which the Race Equality Directive can be used to challenge discrimination against Roma children in school. The focus is not just on discrimination by individuals within the system, for example, where in assessing homework an individual teacher would treat a Roma child less favourably than a non-Roma child. The focus is much broader, on 'structural discrimination'. Structural discrimination denotes both segregation and institutional discrimination, as well as the discriminatory impact of organisational procedures, whether in schools, or regional and national administration of education, which may include inequalities of opportunity and a restriction of choice. Segregation refers to the involuntary physical separation between Roma and non-Roma, whereas institutional discrimination describes the collective failure of an organisation to provide an appropriate and professional service to Roma through unwitting prejudice, ignorance, thoughtlessness and racist stereotyping.

Based on information provided in 2006 by the European Network of Independent Experts in the Non-discrimination Field,⁵ the report draws on examples from Member States. It also canvasses information from Bulgaria and Romania, as well as regional and international human rights treaty bodies and monitoring institutions to highlight both problematic situations and good practices.

While Chapter One outlines the context, Chapter Two examines the personal and material scope of the RED as it relates to structural discrimination of Roma children in education and the applicability of the concepts of direct and indirect discrimination – in particular to minority language and integrative education – as well as of harassment and victimisation. It attempts to provide a complex legal definition of Roma as an ethnic and a racial minority group, as well as of segregation and institutional discrimination that Roma experience on a daily basis.

Chapter Three analyses the legal tools available under the RED to fight discrimination, paying particular attention to the use of racial and ethnic data as evidence, the role of specialised bodies and NGOs in tackling segregation, as well as the way in which positive action measures are implemented at Member States level to remedy disadvantages Roma as a group suffer in education.

Finally, Chapter Four draws a number of conclusions, arguing that the RED provides a uniquely high level of protection from structural discrimination in education and that it may become an effective tool to fight segregation in domestic courts as well as before the ECJ.

⁵ In the first half of 2006 experts provided information in country reports in response to a questionnaire relating to the segregation of Roma in education. This report systematically relies on this information, however omitting a reference to the particular page in country reports and questionnaires. These reports can be found in the following web link : http://ec.europa.eu/employment_social/fundamental_rights/policy/aneval/legnet_en.htm#pub

Valerina | 1988

Part I

Context

On account primarily of historic persecution of Roma, state institutions tend not to collect official ethnic data on Roma.⁶ Still, there is a wealth of information on the situation of Roma in general and the disadvantages Roma children suffer in education in particular. Reports differ in their focus: from general human rights to minority rights (such as reports prepared by the Advisory Committee of the Framework Convention on National Minorities of the Council of Europe), anti-discrimination (by the European Commission against Racism and Intolerance also of the Council of Europe) or educational (needs assessments for the Roma Decade of Inclusion).

The Roma Report asserts that the number targets set by the Lisbon European Council “are ambitious targets and their linkage to employment rather than to social justice has meant that there is currently little analysis of the impact of education policies on ethnic minority groups, and specifically the Roma”.⁷ In its comprehensive report on this issue the European Monitoring Centre on Racism and Xenophobia (EUMC) goes as far as to conclude that “in many EU Member States, the Roma/Sinti/Gypsies/Travellers group constitutes the most vulnerable group in education”.⁸ The EUMC Report provides a unified perspective on the education of Roma across the EU and moves from an employment focus towards a social justice and human rights focus, elevating segregation in schools as a key concern. Significantly, it provides a classification of segregation most commonly discerned in Member States.⁹ *Intra-school* segregation may arise from the organisation of separate Roma classes teaching the general curriculum or teaching an inferior, remedial curriculum – whereas non-Roma classes are taught an extra or general curriculum. Beyond differences in teaching staff attitude, *intra-class* segregation may also stem from differing levels of curricular standards within the same class. *Inter-school* segregation, on the other hand, may have three separate sources: existing regional or housing segregation between ethnic groups, inappropriate or culturally biased psychological testing leading to placement in remedial special schools for mentally disabled children, and the presence of private, foundation or faith schools that impose extra requirements, such as entrance exams or tuition fees from which Roma children are de facto excluded on account of their social disadvantages. *Individual segregation*, in the form of alleged home schooling – in fact amounting to an exclusion order in some old Member States – has been identified by Hungarian sociologists as an additional form of segregation.¹⁰ Obviously, in contrast to isolated incidents only situations that are indicative of a trend or practice of individual segregation within the education system are of concern in this report.

⁶ “Although Member States provide detailed educational statistics for the general population, there is a marked absence of ethnically differentiated data on Roma and Travellers on basic indicators, such as school enrolment and attendance, as well as on school performance and attainment. The available demographic data may also under-record Roma and Travellers especially when group affiliation is established through ethnic or linguistic self-identification, because the social stigma and negative stereotypes associated with the Roma and Traveller identity can lead to refusal to identify openly with the group. Furthermore, educational statistics are not directly comparable between countries due to the different data collection methodologies employed and given the different structures of the educational systems.” Roma and Travellers in Public Education: An overview of the situation in the EU Member States, European Union Agency for Fundamental Rights, 2006, p. 7, available at http://fra.europa.eu/fra/material/pub/ROMA/roma_report.pdf

⁷ See, Roma Report, p. 1

⁸ European Monitoring Centre on Racism and Xenophobia, Annual Report 2005, Part II (EUMC I), p. 68.

⁹ EUMC I, p. 69.

¹⁰ Parallel to segregation within and outside the primary school system, a substantial number of Roma children are virtually excluded from primary education. According to a comprehensive research in Hungary in 2000, three percent of Roma students were educated at home (*magántanuló*), compared with just 0.4 percent among non-Roma children. Ten percent of Roma students aged 14 and older were educated at home, which in the majority of cases meant no education at all. As parents must request home schooling, primary schools persuaded many Roma parents to do so. See, Gábor Havas, István Kemény and Ilona Liskó, *Cigány gyerekek az általános iskolában (Gypsy Children in Primary School)*, Oktatáskutató Intézet, Új Mandátum Könyvkiadó, Budapest 2002, pp. 163-168.

While the segregation discourse is strong and generally accepted in new Member States, expert reports from old ones focus more on absenteeism and drop out (UK, Ireland, Portugal and Belgium), issues relating to the accommodation of a travelling way of life (France, Ireland and the UK) and on the unintended effects residential segregation has on the situation of Roma in schools (Portugal, Greece and Cyprus). In Germany, Ireland, the UK, Italy and Belgium the accommodation of immigrant Roma children in education poses a challenge.¹¹ Thus, beyond the abolition of physically segregated education problems remain in relation to the accommodation of Roma needs in mainstream education.¹² Differences in the situation of Roma across the EU shall be seen to represent problems of various natures while falling into the same legal concept. Thus, while blatant forms of segregation in new Member States may be characteristic of exclusionary policies, issues of early drop-out and underachievement are telling of structural, institutional discrimination in old ones – even if they are not perceived as “appropriate for legal categorisation”.¹³ Partial assimilation in these circumstances tolerates diversity in the private sphere, but expects conformity in the public sphere.¹⁴

An analysis of the situation in Ireland, where long term efforts have been made at remedying past injustices suffered by Irish Travellers¹⁵ offers an insight into remaining problems. The Irish country report states that the issue of school attendance among Traveller pupils remains a concern. In the *Survey of Traveller Education Provision*¹⁶ it was estimated that Traveller students were absent from primary school for about 20% of the school year. In post-primary schools that figure increased to absenteeism for about 50% of the school year. A number of factors may lead to this level of absenteeism including: parental difficulties where living conditions are unsatisfactory and large numbers of children have to get ready for school, and the fact that parents do not fully value schooling and therefore do not require regular attendance. Visiting teachers report that Travellers in the 13–16 age group are considered adults at home and are allowed to make many of their own decisions, including decisions in respect of school attendance. The report, *Consultations with Traveller Learners and Parents* identifies isolation within the school system as a factor contributing to absenteeism and early drop out. Traveller parents suggest that an intercultural approach is necessary to overcome such negative experiences. Conversely, Traveller parents contend that some

¹¹ See respective country reports of the European Network of Independent Experts in the Anti-discrimination field, quoted above at footnote 5. As the Italian report details, similar to German and Irish law, “Italian law provides free admission to school of immigrant children irrespective of their status. Therefore, also children with illegal immigrant status are admitted in the educational system on the same conditions as Italian citizens. Parents of immigrant Roma children, therefore, do not meet any *legal* obstacle if they want that their children attend school. It is clear that persons with illegal immigrant status tend to keep a low visibility, which can be a deterrent against school attendance. However, with regard to Roma the status of illegal immigrant seems to be a factor of minor importance, compared with other broader social and cultural issues, in keeping children away from school. Welfare authorities (at least where these are not generally ineffective or overburdened) ordinarily pressure also Roma families with illegal immigrant status to have their children attending school”. In some instances immigrant status is coupled with segregated housing conditions.

¹² According to the Italian country report, after the abolition of *Lacio Drom* classes in 1986, cases of “Roma only” education no longer exist. Classes or schools with 50% or more of Roma children are “not known to exist. This notwithstanding, the relation between the Romani population living in Italy and the educational system is full of difficulties, and most Romani children do not attend schools. This is due to a set of interrelated factors partly based on a lack of confidence of the Roma themselves for non-Romani educational institutions, and partly on the difficulty of the educational system to adapt itself to the special needs of Romani children”.

¹³ Similar to many others, the Italian report charges that “The obstacles to the full integration of Romani children in schools, unlike for instance cases of segregation in housing” are not appropriate for legal categorisation.

¹⁴ Fredman provides an inventory of anti-racist policies. Sandra Fredman: Combating racism with Human Rights in Sandra Fredman (ed.) Discrimination and Human Rights: The Case of Racism, Oxford University Press, 2001, p. 13.

¹⁵ Under Irish law Irish Travellers are a distinct ethnic group.

¹⁶ Irish Survey, Inspectorate of the Department of Education and Science, *Survey of Traveller Education Provision*.
http://www.education.ie/servlet/blobServlet/insp_survey_traveller_education_provision.pdf

teachers have very low expectations for their children. The *Survey* further notes that “although irregular school attendance compounds the problem, it does not fully explain why these low levels of achievement exist.”¹⁷

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. Though in a seemingly less malign form, when conceptualised in this manner, the experience of Roma in old Member States seems akin to what is defined above as individual segregation. 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.

It is on account of institutional failures that Roma are underachievers in Austria, Finland, Germany, Greece, Italy, Portugal, Spain and the United Kingdom and many of the new Member States. The same concerns arise in relation to Caravan dwellers in Belgium and the Netherlands, and Travellers in the UK and Ireland. In light of lacking research data what can be said about the reasons for lower academic achievement is that “a history of social exclusion, assimilationist tendencies, and a monocultural orientation in education lead to distrust in the educational system and to low expectations about the benefits of educational attainment.”¹⁸ In many countries, including Slovakia, Hungary and Germany exclusion from normal or higher level education services begins as soon as Roma children start primary school.¹⁹ In lieu of culturally and linguistically neutral psychological testing the majority of Roma children in the Czech Republic cannot even commence their primary education in school classes teaching a normal curriculum.²⁰

Many teachers and school administrators regard Roma as a “disturbance to normal school life.”²¹ The question is of course, what constitutes ‘normal’ school life – whether normality is premised upon majority societal, linguistic and cultural values and whether, indeed, it is a child or an adult centred concept. Criticism relating to *their* perception of the value of education in effect blames Roma for low level school attendance and academic performance. Roma parents generally believe in educating their children in schools,²² though some fear that schools may deprive children of their minority cultural values and norms. “However, such critical attitudes towards school as an institution of the majority society have to be seen within the context of centuries of discrimination, exclusion – including exclusion from education – violent racist persecution by majority societies” and recent assimilationist policies all over the EU.²³

¹⁷ Ibid, p. 74 and Foreword

¹⁸ EUMC, Migrants, Minorities and Education, 2005 (EUMC II), p. 68.

¹⁹ The Second Report Germany submitted under the Framework Convention on the Protection of National Minorities (ACFC/SR/II (2005)002 comments on the Advisory Committee’s previous concern on the overrepresentation of Roma children in special schools. It recalls that statistics do not include Sinti and Roma pupils. “There is therefore no reliable statistical evidence to suggest that this group of pupils has a lower rate of participation in education. This group has access to all school facilities and promotional measures that are available to all other pupils. *However, some Federal Länder have reported that in isolated cases a particularly large number of Sinti and Roma attend general remedial schools.*” (No. 301 – 302).

²⁰ See Cahn, Claude “The Elephant in the Room – On Not Tackling Systematic Racial Discrimination at the European Court of Human Rights” - European Anti-discrimination Law Review, Issue 4, November 2006, p. 13.

²¹ EUMC II, p. 68.

²² Curiously, though data from countries such as Slovakia and Hungary show that lack of education hinders the chances of Roma on the employment market, trends to the contrary are yet to be proven right. Indeed, the Finnish country report highlights that even qualified Roma supported by adequate state services will often fail in finding suitable employment due to employers’ prejudices. Country reports from Spain, Portugal and France indicate fears of failure in transferring results of formal education to the job market. In these countries Roma often pursue professions that provide a living outside of formal employment.

²³ EUMC II, p. 69.

Support programmes unable to accommodate minority culture and tackle institutional discrimination have little chance to end exclusion.²⁴ In fact, exclusionary practices, such as harassment and bullying are common in many Member States, and there is frequently an alarming rate of under-reporting.²⁵ Fear of victimisation may prevent many Roma families from effectively challenging the exclusion and segregation of their children in schools.²⁶ As demonstrated by data on early drop-out, Roma girls in Spain and Portugal may suffer multiple discrimination, whereas in Ireland it is Roma boys who might be withdrawn from school at an early stage to help out at home.²⁷

What distinguishes Roma from other protected groups is the extent of poverty and deprivation they suffer, as well as the proportion within this group living in horrendous conditions. Roma settlements in Greece, Bulgaria, Romania, Hungary, Slovakia, Lithuania, the Czech Republic, Italy, Portugal and Spain are features that one would more readily associate with a developing country than the European Union. It is for these reasons that the United Nations Committee on the Elimination of All Forms of Racial Discrimination (hereinafter: CERD) described “the place of the Roma communities among those most disadvantaged and most subject to discrimination in the contemporary world”.²⁸

²⁴ Ibid, p. 69. “Travellers in Ireland still lag behind in education. Various reasons have been stated as an explanation for this, such as lack of expectations by Traveller parents and teachers, withdrawal of male pupils to help out at home, failure to accommodate Traveller culture, and institutional discrimination.” Another example of struggling support programmes is the Finnish employment programme administered by labour centres.

²⁵ Country reports indicate that harassment is common in Finland, Ireland and Greece. In the latter even public officials are reported to partake in harassment. The Greek report charges that “Despite efforts there have been incidents of Roma exclusion from education, while the state has taken no action against such racist attitudes and exclusion of children from education, often incited or tolerated by local administration officials”. Bullying is a problem in the UK. In Poland a teacher was reported to have called Roma children ‘black dogs’. In the Czech Republic teachers and fellow students harass Roma children. According to the Italian report the picture is very complex: “A problem can certainly be a degree of isolation and lack of communication with other children, but not certainly systematic violence”.

²⁶ According to the Irish report parents are unwilling to challenge racist behaviour because of their “own negative experiences of the Irish education system and the fear that if they complain their children will be victimised”.

²⁷ See respective country reports and EUMC II, p. 69.

²⁸ CERD, General Recommendation No. 27: Discrimination against Roma, 16/08/2000, para. 49.

Stevo | 1979

Part II

Challenging structural discrimination of Roma children in school under the RED

This chapter examines the personal and material scope of the RED as it relates to structural discrimination against Roma children in education and the applicability of the concepts of direct and indirect discrimination – in particular to minority language and integrative education – as well as of harassment and victimisation. While reaffirming that the “right to equality before the law and protection against discrimination for all persons constitutes a universal right” the RED makes reference to a number of international treaties that are binding on all Member States.²⁹ Given the relevance accorded by the ECJ to such reference this chapter revisits these treaties for guidance, while taking note of contemporary jurisprudence relating to rights enshrined in those treaties and expanded in others not referenced by the RED.³⁰

2. 1. ‘Racial or ethnic origin’ under the RED and the multi-faceted nature of Roma identity: who are covered?

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, apart from the declaration in the preamble that the “use of the term ‘racial origin’ in this Directive does not imply an acceptance of theories that “attempt to determine the existence of separate human races”.³¹ Nevertheless, the concept 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)). In addition, Article 4 permits different treatment which is based on a ‘*characteristic related to racial or ethnic origin*’ when such a characteristic is a genuine and determining occupational requirement and is proportional. Similarly, Article 5 permits specific measures to ‘prevent or compensate *for disadvantage linked to racial or ethnic origin*’. Finally, it is clear that nationality is not an automatic part of racial or ethnic origin, in that difference of treatment based on nationality is specifically excluded (Article 3(2)).

There are many definitions of Roma reflecting different statuses in different Member States. “Many EU Member States have ethnic minority groups who are not migrants or descendants of recent migrant populations, but are either indigenous or have settled in the countries a long time ago. At times these groups are referred to as national minorities, at other times as autochthonous minorities, as linguistic minorities, or simply as ethnic minorities. ... The status of these groups varies. Some are officially recognised minority groups with special rights and privileges, some have particular language rights and others do not have special group rights at all. The same minority might officially

²⁹ Recital (3) RED.

³⁰ Recently the ECJ reaffirmed that „Fundamental rights form an integral part of the general principles of law the observance of which the Court ensures. For that purpose, the Court draws inspiration from the constitutional traditions common to the Member States and from the guidelines supplied by international instruments for the protection of human rights on which the Member States have collaborated or to which they are signatories.” The European Convention on Human Rights has special significance, while the International Covenant on Civil and Political Rights and the Convention on the Rights of the Child are instruments the ECJ „takes account in applying the general principles of Community law”. The ECJ also observed that the significance of the European Charter of Fundamental Rights lay in its principle aim, i.e. to reaffirm „rights as they result, in particular, from the constitutional traditions and international obligations common to the Member States”. The extent of protection afforded by certain provisions may be subject of review by the ECJ. *European Parliament v Council of the European Union* (Case C-540/03), judgment of the Court of 27 June 2006, paras. 35-39.

³¹ Recital (6) RED.

be recognised in some countries but not in others (e.g. the Roma).³² Still, as the UN Human Rights Committee (HRC) states: “[t]he existence of an ethnic, religious or linguistic minority in a given state party does not depend upon a decision by that State party but requires to be established by objective criteria.”³³

There are several other characteristics that make Roma unique as a minority group and complicate the status of Roma people. Most importantly, the Roma are a people without a motherland, a unified nation state, a unified national language or religion. Furthermore, Roma are a mobile minority. It is exactly this ‘nationhood’ deficit that leads to the unequal status of Roma as compared to other national minorities. It is, however, not only the social vulnerability of Roma that is obvious in comparison to minorities who can count on support from a nation state. In addition, national minorities can also count on a ‘kin’ state, or a State apart from their own, with which they have strong historical ethnic or national ties, to protect and promote their linguistic, religious as well as cultural traditions. For example, German minorities anywhere in the EU can count on Germany as a kin state.

Further divisions have appeared between Roma who are citizens of an EU Member State and those who are not, such as Roma asylum seekers and migrants from outside of the EU. Those born in a certain Member State may now move freely to other Member States. This in turn has highlighted both the uniqueness and complexity of their status. Being a mobile minority, they are more likely to move between States, requiring accommodation in the education system, further complicating this intricate web of statuses.³⁴ This is clearly problematic in countries – such as France – where, instead of recognising Roma as an ethnic minority with distinct minority rights, administrative categories, such as ‘Travelling population’ are created, which may ultimately fail to adequately address the social attributes of all Roma – sedentary and travelling alike.³⁵ Similarly, the Greek and Cypriot legal construction of Roma as members of the Muslim (religious) community may deny equal treatment to Christian and non-Turkish speaking Roma.³⁶ In Slovenia, Roma are not accorded the same rights as other minorities, such as the Italian and Hungarian minorities. Thus while the Strategy for the Education of Roma in Slovenia envisages facilitative minority language classes for Roma, the Italian and Hungarian minorities have the constitutional right to an education in the minority language and the right to adopt and to promote education, both under the Slovenian Constitution and the Act on Special Rights for Members of the Italian and Hungarian National Minorities in the Field of Education.³⁷ In July 2005

³² EUMC I, p. 57.

³³ Human Rights Committee: General Comment 23, HRI/GEN/1/Rev.7 (12 May 2004) para. 5.2. On account of an autonomous definition of ethnic minorities in the anti-discrimination context, this report does not address concerns relating to differences between national and ethnic minorities often arising in the minority rights context.

³⁴ The linguistic and cultural accommodation of migrant Roma from new Member States and Eastern European countries is reported to pose challenges in the UK, Ireland, Belgium, Germany, and Italy.

³⁵ Indeed, by elevating nomadic lifestyle as a the main social attribute, domestic legislation may fail to adequately cater for sedentary Roma or worse, may treat them as if still travelling and unable to adapt to a sedentary lifestyle. The French country report charges that “specific treatment of the Roma population is based on the administrative category of travelling population. Because most social rights are managed on the basis of one’s link to a place of residence, all citizens who have a travelling way of life (including Roma and non-Roma) have a specific administrative status. *Non travelling Roma are melted in the general travelling population, but constitute 80% of this population.*”

³⁶ In Limassol, Cyprus, Roma children speak Turkish – the language of instruction in their school – but they also speak Kurbetcha, a Romany dialect. According to the Cypriot country report, an official of the Ministry of Education stated: “The term Roma is generally acceptable as reference to the special group but may not be the most appropriate one for the gipsies of Cyprus, as far as their language, cultural identity and special tradition are concerned. Turkish classes are offered to them, which is their mother tongue, as well as support Greek classes, in order to improve their standard.” The Constitution does not recognise ‘minorities’, only ‘religious groups’, thus Roma necessarily belong to one of the two ‘communities’: Muslim or Greek.

³⁷ The situation in Slovakia is similar. As opposed to Roma, Hungarians, the largest ethnic minority (Roma are the second largest) have opportunity to study at schools with their language of instruction.

the situation prompted the HRC to express its concern „about the difference in the status between the so-called "autochthonous" (indigenous) and "non-autochthonous" (new) Roma communities".³⁸

This wide array of domestic legal definitions has raised particular problems under the Framework Convention on the Protection of National Minorities (FCNM) – the most recent regional treaty affecting Roma. France, Greece and Cyprus do not recognise the notion of minority. Except for France all Member States have signed the FCNM, though Greece, Belgium and Luxembourg have not ratified it. Luxembourg and Malta simply declared that national minorities were not present on their territories.³⁹ Certain signatory states have given some minority groups advantages over others by designating them 'national minorities'. In such cases, Roma have often been excluded. That minority rights are accorded only to Roma who are citizens of a signatory state is obvious from the Austrian, Estonian, German, Latvian and Polish declarations. Other states – such as Sweden, Germany, Slovenia and arguably Denmark and the Netherlands – provide a list of national minorities that they undertake to protect. The Dutch and Danish lists do not contain Roma, while Slovenia applies the FCNM "to the members of the Roma community, who live" on its territory. Belgium declared that its inter-ministerial conference of foreign policy would define the notion of national minority.⁴⁰ The RED transcends these difficulties, as its application does not allow for simply designating a group, let alone denying its existence as racial or ethnic minority.

There seems to be no doubt that the RED covers Roma *rationae personae*. Given, however, the multi-faceted nature of Roma identity, the lack of Community definition may still give rise to concerns in interpretation. In determining whether direct discrimination has occurred, it is necessary to prove that the distinction is on the ground of racial or ethnic origin. It could be argued that a distinction in the case of Roma is not because of their racial or ethnic origin, but for other reasons – their social class, their nationality, their culture, their language or their area of residence. It could also be argued that Roma are not a single racial or ethnic group, but are segmented into different subgroups – e.g. on the basis of their language or religion – so that discrimination is not on grounds of their Roma identity, but for other reasons unrelated to their race or ethnicity. This is particularly relevant for indirect discrimination, where the designation of groups is often necessary to create a pool for comparison. To counter such arguments, it is crucial that the definition of discrimination on grounds of racial or ethnic origin in the RED encompasses a multi-faceted view, which takes into account the whole range of social attributes constitutive of their identity, including culture, language, area of residence, social class and historical exclusion. This means that discrimination against Roma, whether direct or indirect, will be properly interpreted as discrimination on grounds of racial or ethnic origin for the purposes of RED rather than being considered as discrimination on grounds not covered by it.

This multi-faceted view takes into account all aspects of Roma identity. Particularly important to this identity is the historic discrimination suffered by Roma. "The socio-economic differences between many national minorities and the majority of the population in the Member States are still considerable. This creates not only problems relating to education, but also to other aspects such as employment and housing, which in turn negatively influence the educational situation of these groups".⁴¹ The role socio-economic differences play in underpinning and perpetuating racial segregation cannot be overemphasised. Indeed, in European societies, the image

³⁸ The HRC recommended that „The State party should consider eliminating discrimination on the basis of status within the Roma minority and provide to the whole Roma community a status free of discrimination". Concluding observations of the Human Rights Committee: Slovenia. 25/07/2005, CCPR/CO/84/SVN, p. 16.

³⁹ [http://www.coe.int/t/e/human_rights/minorities/2_FRAMEWORK_CONVENTION_\(MONITORING\)/2_Monitoring_mechanism/Chart_sigs_rats.asp#TopOfPage](http://www.coe.int/t/e/human_rights/minorities/2_FRAMEWORK_CONVENTION_(MONITORING)/2_Monitoring_mechanism/Chart_sigs_rats.asp#TopOfPage)

⁴⁰ List of declarations made with respect to treaty No. 157, Status as of: 3/7/2006.
<http://conventions.coe.int/Treaty/Commun/ListeDeclarations.asp?NT=157&CM=8&DF=08/02/05&CL=ENG&VL=1>

⁴¹ EUMC II, p. 68.

of Roma is inseparably intertwined with that of poverty, demonstrating that class is an integral part of racial discrimination against Roma.⁴²

Just as the social and cultural aspects of Roma need to be taken into account in the definition for the purposes of RED, so the close interaction between ethnic origin and race must be recognised. In fact, Roma are distinct from other minorities in Europe coming under the RED, on account of their 'dual protection status' as both a racial and ethnic group. Treating Roma simply as a racial minority on account of their skin colour would deny their historical presence in and ties to Member States, and with this, their protection as an ethnic minority. Conversely, treating them only as an ethnic minority would deny protection on account of their skin colour, which distinguishes them from the majority of ethnic minorities indigenous in Member States and which is a characteristic that may exaggerate the extent of discrimination they suffer. Treating all social attributes as part and parcel of Roma as a racial group is imperative in light of arguments that may lead to downplaying discrimination by allowing a wider scope of justification on grounds that are not perceived as ascribed characteristics.⁴³ Instead, the Community definition should follow domestic law, such as the definition given by the House of Lords in the UK in *Mandla v Lee*⁴⁴ or indeed similar definitions in Member States' statutory law, such as Poland, Germany and Latvia, which highlight that a long shared history, cultural tradition, common geographic origin or descent, common language and common religion etc. are all *essential* characteristics of an ethnic group – including Roma.

Some recognition of this multi-faceted definition is manifested in the decision by the European Court of Human Rights (ECtHR) in *Beard v. the United Kingdom*, where it made the following observation. "The Court considers that the applicants' occupation of their caravan is an integral part of their ethnic identity as gypsies, reflecting the long tradition of that minority of following a travelling lifestyle. This is the case even though, under the pressure of development and diverse policies or from their own volition, many gypsies no longer live a wholly nomadic existence and increasingly settle for long periods in one place in order to facilitate, for example, the education of their children. Measures which affected the applicants' stationing of their caravan had therefore a wider impact than on the right to respect for home. *They also affected their ability to maintain their identity as gypsies* and to lead their private and family life in accordance with that tradition".⁴⁵

The multi-faceted definition argued for here is particularly important in addressing possible differences between autochthonous and non-autochthonous Roma flowing from domestic legislation. Where Roma are citizens of other EU countries, they are protected from discrimination when moving within the EU for purposes of employment, service provision, etc. Thus, if a certain Member State provides minority language instruction only to Roma who are its citizens, under Community law it shall accord the same treatment to Roma coming from other Member States. But Roma who are not EU citizens are still protected under RED. This is because, although discrimination based on nationality is a legitimate exception under Article 3(2) RED, it is argued here that denying minority rights such as language instruction to non-citizen Roma constitutes discrimination on grounds of their ethnicity, not their nationality.

⁴² This has most clearly been borne out by sociologists e.g. in Hungary, where the segregation of Roma children in primary education is frequently studied on a national scale. See, *Gypsy Children in Primary Schools*, p. 80. In Italy, Greece and Cyprus Roma receive extra financial support for schooling, whereas elsewhere, such as in Hungary, anecdotal evidence shows that sometime even buying shoes and clothes for Roma children to attend school poses insurmountable challenge to parents.

⁴³ As Schiek argues, "If there are different categories of characteristics, discrimination on grounds of which is forbidden, this may justify differences between different prohibitions to discriminate. It appears logical that differentiations on grounds of ascribed otherness are not very easy to justify. Thus, direct discrimination on grounds of race or gender cannot be justified except" for the purpose of positive action. "If suspect criteria are linked to *real differences*, things are different.", Dagmar Schiek *A new framework on equal treatment of persons in EC law?*, 8/2002 E. L. J., p. 304, p. 310.

⁴⁴ *Mandla v. Lee*, [1983] IRLR 209.

⁴⁵ *Beard v. the United Kingdom*, Application No. 24882/94, para 84.

Speaking the minority language is a key aspect of Roma ethnicity and therefore within the definition of 'racial and ethnic origin' for the purposes of RED. This is particularly so in light of the fact that, in contrast to many other national and ethnic minorities, Roma do not have their own nation state which could ensure their right to education in their mother tongue. Because the ground of discrimination is ethnicity and not nationality, the relevant comparison should not be between citizens – comprising citizen Roma – and non-citizens – comprising non-citizen Roma –, but between Roma and non-Roma – the latter also including majority language speaking non-citizens. It cannot therefore be argued that non-autochthonous Roma are not being discriminated against just because other non-nationals are denied benefits such as minority language instruction. If other national or ethnic minorities could show that their language is part of their ethnicity and not their nationality, then they too could bring a claim of discrimination on grounds of racial and ethnic origin.

This shows that the wider definition is also important for the correct determination of the relevant comparator. The comparator need not only be a member of the dominant group. The relevant comparator might also be a member of another national minority, which is similarly defined in term of the full range of social attributes. This means that, where a Member State accords specific positive treatment to a national minority, Roma could claim to have been less favourably treated than an appropriate comparator if they are not afforded similar provision. Therefore, if a Member State provides measures for the cultural, social and linguistic needs of other minorities, it shall equally do so for Roma.

This multi-faceted definition also has important consequences for the definition of equal treatment itself. It shows that the equal treatment of Roma on a par with the majority population should pertain to all aspects of a perceived or self-identity encompassing all relevant 'social attributes'. Given the argument that "race is itself a social construct, reflecting ideological attempts to legitimate domination, and heavily based on social and historical context", the equality of treatment for Roma cannot be equated to the sameness of treatment, for the latter elevates the majority culture by assuming it to be universal and neutral.⁴⁶ Unless Roma are defined in a manner that takes into account their 'social attributes', the "central assumption of equality as a human right, that all humans are equal despite their differences" cannot be fulfilled.⁴⁷ Indeed, in the case of sex discrimination, for example, the perception of equality as sameness has been held to institutionalise the male norm.⁴⁸ "As regards ethnic discrimination, the tendency of formal equality principles to further assimilation" is emphasised. A definition of Roma taking due account of all their 'social attributes' could clearly counter these tendencies and open the way to the application of a substantive equality principle leading to an inclusive society.⁴⁹ The need to ensure that the application of the RED encompasses all 'social attributes' in the term 'racial or ethnic origin' is paramount in education, where without respect for minority language and culture, as well as the social situation of Roma children their segregation will not end. Were the RED interpreted to allow for the application of a maimed definition of Roma, this would seriously hinder its potential.

It would undoubtedly be more difficult for a Roma who retains certain cultural traditions, speaks Romanes and leads a Travelling way of life than for one who has only kept certain cultural traditions but speaks the majority language and is settled to fit in to majority institutional structures. This means that the more social attributes Roma retain, the

⁴⁶ Sandra Fredman: Combating racism with Human Rights in Sandra Fredman (ed.) *Discrimination and Human Rights: The Case of Racism*, Oxford University Press, 2001, pp.9-12. Significantly, Fredman makes this point in relation to the present interpretation of *Brown v. Board of Education*.

⁴⁷ Schiek, p. 304

⁴⁸ Sandra Fredman, *Women and the Law*, Clarendon Press, 1997, pp. 183-197.

⁴⁹ Schiek, pp. 304-305.

more profoundly affected they are by structural discrimination and by assimilationist policies.⁵⁰ Public education premised on majority culture and attitude harbours institutionally in-built failure for Roma. The use of the multi-faceted definition of Roma makes it possible to demonstrate that attempts to assimilate Roma to the majority norm are themselves discriminatory on grounds of race and ethnic origin in that they treat Roma less favourably on grounds of their social and cultural attributes. This interconnection has bearing not only on the treatment of Roma from a minority rights perspective – i.e. distinguishing them from other national and ethnic minorities whose social attributes and social class more easily fit the majority norm – but also from a pedagogical perspective.

Similarly, it is crucial to ensure that the treatment of Roma in schools is appropriate to the multi-faceted nature of the definition, including their ethnic, their racial and their socio-economic characteristics. It is doubtful whether race based programmes tackling segregation in education can prove successful without a social element, suggesting therefore that the accommodation of social attributes should play a key role in fighting racial differences.⁵¹ Many of the concerns relating to the education of Roma are such that typically attach to children of the poor. Consequently, methodologies including only multiculturalism and/or elements of the Roma culture may fail to address the needs of the majority of Roma and open the way for integrative education.⁵² Thus treating Roma as primarily belonging to a social class will not ensure to them equal treatment on the basis of racial or ethnic origin, while their treatment focussing on the latter characteristic sidesteps the severe obstacles they face as members of a certain social class.⁵³ Further, unless both ethnicity and race are included in the definition, measures aimed at the promotion of ethnic minority rights may easily conflict with the racial equality rationale.⁵⁴ Given that none of these issues can be resolved through a simple state refrain, Member States from Ireland through Sweden to Slovakia have for some time been locked in the laborious process of devising positive action measures that address the needs of Roma at as many distinct levels as possible.

Also important in developing a definition of Roma for the purposes of Community law are international treaties ratified and pronounced by Member States, such as the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD). The ICERD definition of racial discrimination includes “any distinction, exclusion, restriction or preference based on *race, colour, descent, or national or ethnic origin* which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life”. This is significant not only because the definition makes it unnecessary to distinguish between discrimination based on nationality, ethnicity or race. In addition, the fact that the definition explicitly refers to the effect of any relevant distinction on the equal enjoyment of human rights in the political, social, cultural or any other field of public life means

⁵⁰ Though Romanes is a widely spoken minority language in Europe, the number of Roma not speaking it any longer is substantial. In certain countries Roma speak minority languages other than Romanes, (Russian, Turkish and an archaic form of Romanian) such as in the Baltic states, Cyprus, Greece, Bulgaria and Hungary. On the other hand, in Cyprus, Greece and Bulgaria many Roma are Muslim.

⁵¹ See above, fn. 43.

⁵² Judit Szóke, A hátrányos helyzetű tanulók integrációját támogató HEFOP 2.1., A központi program: A fejlesztés alapvetései, irányultsága (Human Resource Operational Program 2.1 in Support of the Integration of Socially Disadvantaged Students, The Central Program: Basics and Objectives of Development)

⁵³ Though legislation in all Member States address these considerations, certain measures attach more to social, while others to racial and ethnic origin based needs. For instance, in France non-travelling Roma are melted in the general travelling population, though they constitute 80% of this population. Treating Roma as a social class and refusing to provide minority language instruction to them might have an effect on their academic performance. In Greece “Roma pupils are not recorded systematically in school registers and some schools have reported that they enrol simply in order to collect a 300 euro annual education benefit”. However, their minority culture and language is not guaranteed on a par with the Turkish minority.

⁵⁴ Such as Irish Traveller classes in Ireland or zero grade classes reportedly set up to cater for minority language needs in Slovakia and Bulgaria.

that it is capable of encompassing all the 'social attributes' of Roma, making it imperative to apply the principle of substantive equality. The definition is also significant because it recognises that the categories of colour and descent are not in themselves socially relevant; it is the majority perception which makes them so. Race is recognised as a category that is applied to "individuals according to their outer appearance, skin colour being an important, but *not the only* distinguishing feature".⁵⁵ Thus, while defining Roma as a racial minority stresses their obvious difference from majority Europeans in their physical appearance, conceptualising their difference as ultimately perception-based reveals their social attributes as being beyond their control. In contrast to a definition which focuses on the individual's choice in belonging to a national and ethnic minority, this definition encapsulates Roma language, culture etc. as ascriptions. Indeed, it is questionable whether individual Roma have a choice as to whether to abandon these social attributes.⁵⁶ The same would surely not be asked of majority children across Europe. There are arguments that the "inextricable connection between the concept of race and structures of domination is particularly clear in the use of ethnicity as exclusively attached to minorities. The dominant group does not see itself as an ethnic group, but as the embodiment of universal values. All other groups can therefore be described as different, where different means deviant and therefore justifies inferior treatment."⁵⁷ Differentiating between race, religion, language and cultural traditions has not always been a legal automatism, while in essence race has not been automatically taken to denote skin colour.⁵⁸

Few attempts have been made in Member States to encompass the multi-faceted nature of the Roma. While in France various efforts aim at providing education to the 'Travelling population' – 80% of whom are sedentary Roma - no special measures are made to accommodate the minority language they speak.⁵⁹ Before winning in English courts, over decades Travellers in the UK fought for maintaining their travelling way of life. The refusal to accommodate this inherent characteristic had an effect on the education of their children. In addition the ECtHR repeatedly⁶⁰ declined to find a connection between the refusal of planning permission and the denial of the right to access education facilities.

⁵⁵ Schiek, p. 309.

⁵⁶ For some Roma and Travellers "nomadism is a way of life, for others it is a state of mind". Sarah Spencer, *Gypsies and Travellers: Britain's forgotten minority*, 4/2005 EHRLR. When contemplating whether travelling is indeed a chosen characteristic, one might bear in mind that when describing the prospect of living in a house one Traveller said: "It's like catching a wild bird off a tree and putting him in a cage – it's not your life". P. Niner, *The Provision and Condition of Local Authority Gypsy and Traveller Sites in England* (ODPM, 2002).

⁵⁷ Sandra Fredman: *Combating racism with Human Rights* in Sandra Fredman (ed.) *Discrimination and Human Rights: The Case of Racism*, Oxford University Press, 2001, p. 11.

⁵⁸ In its Advisory Opinion of July 31st 1930 concerning the Greco-Bulgarian Communities (Opinion No. 17) the Permanent Court of International Justice stated that a (minority) community is a group of persons living in a given country or locality, having a race, religion, language and traditions of their own and united by this identity of race, religion, language and traditions in a sentiment of solidarity, with a view to preserving their traditions, maintaining their form of worship, ensuring the instruction and upbringing of their children in accordance with the spirit and traditions of their race and rendering mutual assistance to each other".

⁵⁹ According to the French country report: "Because most social rights are managed on the basis of one's link to a place of residence, all citizens who have a travelling way of life (including Roma and non-Roma) have a specific administrative status. Non travelling Roma are melted in the general travelling population, but constitute 80% of this population. In order to accommodate their travelling way of life the National Education in France has put in place a number of targeted actions that in fact, generate concentration of travelling children."

⁶⁰ *Buckley v. the United Kingdom*, judgment of 25 September 1996, Chapman, Coster, Lee, and Jane Smith, judgments of 18 January 2001.

This makes it all the more important for RED to endorse a fully multi-faceted definition. This would then lay the ground for an ‘autonomous and uniform interpretation’ of racial and ethnic origin for Roma and other minority groups throughout the EU, as supported by a recent ruling in *Chacón Navas*.⁶¹ Here, in essence the ECJ was called upon by the referring Spanish court to interpret the concept of disability. Similar to racial and ethnic origin in the RED, disability is not defined in the Framework Employment Directive⁶², nor is there reference in there to the definition of disability in the laws of Member States. The ECJ held:

“It follows from the need for uniform application of Community law and the principle of equality that the terms of a provision of Community law which makes no express reference to the law of the Member States for the purpose of determining its meaning and scope must normally be given an autonomous and uniform interpretation throughout the Community, having regard to the context of the provision and the objective pursued by the legislation in question (see, inter alia, Case 327/82 *Ekro* [1984] ECR 107, paragraph 11, and Case C-323/03 *Commission v Spain* [2006] ECR I-2161, paragraph 32).”⁶³

2.2. Material scope

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.⁶⁴ 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. The latter is particularly borne out by the reference in Article 3 to “both the public as well as the private sector”. That the private sector is covered might be significant for new Member States, where the protection system of human rights established after the political changeover heavily focuses on public institutions.

In lieu of detailed normative rules in the RED, the provisions and jurisprudence of international treaties ratified by Member States and invoked in the preamble⁶⁵, such as the International Covenant on Economic, Social and Cultural Rights (hereinafter: ICESCR), may provide guidance as to the meaning and content of ‘education’ for the purposes of Article 3.1(g) of RED. Article 13 (2) ICESCR is taken to guarantee the right to receive an education that in all its forms and at all levels shall exhibit the following interrelated and essential features (the 4A Scheme):⁶⁶

- (a) Availability - Functioning educational institutions and programmes have to be available in sufficient quantity having the necessary material conditions, trained teachers receiving domestically competitive salaries, teaching materials, and in general facilities such as a library, computer facilities and information technology.

⁶¹ Case C-13/05, *Sonia Chacón Navas v Eurest Colectividades SA*, judgment of 11 July 2006.

⁶² Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation.

⁶³ Case C-13/05, para 40.

⁶⁴ Elsewhere Community 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.

⁶⁵ Recital (3) RED.

⁶⁶ ECOSOC, *The right to education GC* (quoted above, in footnote 4), p. 6.

- (b) Accessibility - Educational institutions and programmes have to be accessible to everyone, without discrimination. Accessibility has three overlapping dimensions: non-discrimination, physical accessibility and economic accessibility, i.e. education does not only have to be within safe physical reach or via modern technology, it has to be *affordable* to all.⁶⁷
- (c) Acceptability - The form and substance of education, including curricula and teaching methods, have to be acceptable (e.g. relevant, culturally appropriate and of good quality) to students and, in appropriate cases, parents.
- (d) Adaptability - Education has to be flexible, in adapting to the needs of changing societies and responding to students' needs within diverse social and cultural settings.

Crucially, the 4A Scheme requires that equal treatment be ensured in relation to material conditions, but also in content, i.e. in the provision of culturally appropriate curriculum and teaching methods, that need to be flexible to meet diverse cultural and social needs. This is analogous to the right to effective education, which, the ECtHR has held, comprises the right to education under Article 2 Protocol I of the European Convention on Human Rights (ECHR).⁶⁸ Once a certain content – such as minority language education – is provided in primary (and possibly pre) schools, the failure to make continuing provisions “at the secondary school level must be considered in effect to be a denial of the substance” of the right to education.⁶⁹

2.3. Meaning of discrimination

The RED conceptualises discrimination as direct or indirect discrimination. It regulates some specific forms, such as harassment, instruction to discriminate and victimisation but does not specifically address structural discrimination (segregation and institutional discrimination) based on racial or ethnic origin. 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 ground of racial or ethnic origin.⁷⁰ Indirect discrimination, on the other hand, 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.⁷¹

It is argued here that, although segregation may seem to pose challenges for the application of the concept of direct discrimination in the RED, educational segregation as experienced by European Roma can only be construed as direct discrimination. In 1955, when black children in the United States were plainly denied admission to public

⁶⁷ This dimension of accessibility is subject to the differential wording of article 13 (2) in relation to primary, secondary and higher education: whereas primary education shall be available “free to all”, States parties are required to progressively introduce free secondary and higher education

⁶⁸ The first sentence of Article 2 Protocol I ECHR provides that “No person shall be denied the right to education.” Belgian Linguistic Case (No. 2) (1968) 1 EHRR 252.

⁶⁹ *Cyprus v. Turkey*, judgment of 10 May 2001, paras 273-280. The ECtHR dealt with complaints alleging that “the children of Greek Cypriots living in northern Cyprus were denied secondary-education facilities and that Greek-Cypriot parents of children of secondary-school age were in consequence denied the right to ensure their children’s education in conformity with their religious and philosophical convictions”. It found that there has been a violation of Article 2 of Protocol No. 1 ECHR in respect of Greek Cypriots living in northern Cyprus in so far as no appropriate secondary-school facilities were available to them. The ECtHR also dealt with complaints relating to the alleged discriminatory administrative practice against the Turkish-Cypriot Gypsy community living in northern Cyprus, paras. 349-353.

⁷⁰ Article 2.2 (a) RED.

⁷¹ Article 2.2 (b) RED.

schools attended by white children under laws requiring or permitting racial segregation, the US Supreme Court in *Brown v. Board of Education*⁷² found that segregation was a breach of the Equal Protection Clause in the US Constitution. The Court rejected the argument that segregation could be non-discriminatory on the grounds of a principle of 'separate but equal'. The stigma attached to black children forced to attend segregated schools was itself a form of discrimination.

At first sight, situations that arise as segregation in today's Europe seem less straightforward as that experienced in *Brown*. Still, the establishment or maintenance of homogenous or majority Roma schools or classes where the only difference between Roma and non-Roma students is their race clearly amounts to direct discrimination. That this may not be sanctioned by laws but national or local practice is in fact irrelevant, for it is not the source of segregation, but the consequence that makes it illegal under the RED. Similar to *Brown*, it is also irrelevant whether facilities in homogenous or majority Roma schools and classes are not in any way inferior. At the bottom line segregation itself constitutes less favourable treatment, symbolising inequalities in human dignity that flow from a denial of free and informed choice in education, including the ultimate choice not to be segregated. This formulation of less favourable treatment forecloses suggestions that separate but equal facilities could be in compliance with the RED, unless based on free and informed choice and specifically requested by Roma.

In order to establish segregation under the RED, the physical separation of Roma children from non-Roma 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 the proposed concept of segregation focuses on a certain *status quo*, the conduct leading to it is irrelevant. Moreover, under the RED, it is of no relevance whether an active and intentional act, or an entirely circumstantial omission resulted in segregation. Segregation is a grave violation of human dignity, which should never be presumed to be voluntary.

Once facilities and teaching are inferior, these add up to less favourable treatment. Obviously, if Roma children have the same intellectual abilities as majority children attending comparable classes or schools, the provision of superior facilities to majority children makes the showing of less favourable treatment straightforward. Often, in new Member States alleged differences in intellectual capacities between intellectually sound majority and Roma children are said to justify curricular and related material differences. However, an abundance of pedagogical and methodological arguments⁷³ prove otherwise, showing that such treatment in effect denies that Roma children are equally as 'normal' as their majority counterparts. Thus, these situations too amount to direct discrimination based on race and not disability.

Certainly, it could be argued that segregation is a result of residential patterns, social class, language, cultural traditions, a travelling way of life and religion as opposed to race. It is argued here that the application of the definition suggested for Roma can successfully counter these arguments. As demonstrated above, from the Permanent International Court of Justice (ICJ) through the ECtHR to domestic courts of Member States, there is

⁷² *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954).

⁷³ In essence these arguments boil down to a reluctance of teachers to adopt integrative methodologies, such as Step by Step. The International Step by Step Association for instance provides hands-on guides as "resources for teachers, carers and parents and other early childhood professionals ... which provide practical applications on how to implement child-centered, community-based philosophies in early childhood programmes". Available at <http://www.issa.nl/resources.html>. ISSA also co-authored on teaching methodologies for an *amicus curiae* brief in the case of *D. H. and Others v. the Czech Republic*, currently pending before the ECtHR Grand Chamber. Available at http://www.justiceinitiative.org/db/resource2?res_id=102627

judicial authority to show that language, cultural traditions, a travelling way of life and religion are all essential characteristics of this ethnic group. Just as it would deny the essence of protection on the ground of race to say that skin colour is not a part of racial origin, so would it deny the essence of legal protection from Roma to argue that other essential characteristics do not form part of their racial or ethnic origin.

In practice one of the most common arguments for separate (be that equal or inferior) education is not free and informed parental choice, but often tacit parental consent. However, there is a significant distinction between choice and consent, as the former denotes a free-standing parental decision, whereas the latter more often than not attaches to a recommendation from teachers, psychologists etc. Parental consent cannot *generally* be construed as a legitimate justification under RED, because direct discrimination cannot be justified under RED (except potentially under the provisions for a genuine occupational qualification or positive measures). As the FCNM Advisory Committee has highlighted, the issue of consent should be very carefully examined.

Positive action measures aimed at e.g. the promotion of minority language rights should only be admitted as justification for segregation, if indeed genuinely serving the interests of minority children. In certain Swedish municipalities measures taken in relation to Roma school children resulted in the establishment of separate classes for Roma. These measures were often supported by a number of Roma parents. The Advisory Committee of the FCNM considered that “even when such initiatives are designed as a way to provide additional support for the pupils concerned, specific classes devoted to one national minority as such (rather than for example, to the teaching of their language and of their culture) risks placing the children concerned at a disadvantage and harming the implementation of Article 12 and the principle of intercultural dialogue contained in Article 6 of the FCNM”. In other cases, however, separate teaching in whole or in part may be more appropriate, or even the only possible solution.” To illustrate when this may arise the Advisory Committee referred to a scenario where Maronite community leaders in Cyprus repeatedly requested separate schools to foster the preservation of their culture. Even in those circumstances the Advisory Committee stressed the need for the “promotion of intercultural dialogue and contact”.

Unfortunately, in the context of the placement of Roma children misdiagnosed as intellectually disabled into special schools, the ECtHR was prepared to accept tacit parental consent as a potential justification for segregated education. In the *Ostrava* case a group of Roma children attending school in the Czech town of Ostrava complained of *de facto* racial segregation, direct and indirect discrimination that resulted from the implementation of statutory rules, which allowed for the establishment of two independent educational systems. The applicants alleged that while special schools catering for the mentally disabled in effect enrolled a disproportionately high number of Roma, ordinary primary schools taught mainly non-Roma. The ECtHR held that the “needs and aptitudes or disabilities of the children” themselves, and *parental behaviour* justified difference in treatment.⁷⁴ Regrettably, it chose not to address issues advanced by the complainants, such as the extent to which parental consent was ‘informed consent’, instead taking the perspective of the average majority person, who is familiar with her rights, has not experienced pressure from public authorities and has access to relevant information to make informed decisions on her own. Only from this perspective could factors such as lack of parental appeal against placement decisions be considered as evidence of genuine parental will. Notwithstanding the issue of misdiagnoses, the permissibility of segregated schooling on the basis of ‘needs and aptitudes’ as a positive action measure would be far from straightforward under the RED.

⁷⁴ Para 49 and para. 10-11 and 49-51 respectively.

This is not to say that integrated education is inevitably a better option. Where integrated education fails to accommodate Roma, therefore requiring assimilation to the majority norm, it is arguable that this constitutes direct discrimination on grounds of racial and ethnic origin contrary to RED. As Fredman recalls, an unfortunate implication of the Brown decision was that, if segregation were equated with inequality, then integration must mean equality. Under the mask of colour blindness, “anything that is predominantly black” is perceived of as being inferior.⁷⁵ Notably, the concept of direct discrimination under the RED that takes due account of the essential characteristics of the segregated group may offer more flexibility while avoiding an investigation into the value of majority and minority cultures. Thus there is room to make use of the positive action provisions in the RED. The Directive recognises the historic dimensions of disadvantages suffered by racial and ethnic minorities and allows the adoption of measures that “compensate for disadvantages”⁷⁶ linked to the racial or ethnic origin of Roma. Compensatory measures may, and in the majority of Member States do in fact address disadvantages relating to the social status of Roma.⁷⁷ Member States report to regional monitoring bodies from ECRI to EUMC on the vulnerable situation of Roma and measures they adopt to eradicate problems.

Segregation may only be justified if it meets the following criteria, i.e. if it (i) serves the best interests of the child, (ii) is based on the free and informed consent of parents/students, (iii) aims at preserving religious, linguistic or cultural traditions, and (iv) if it provides the same standard of education. Under the Convention on the Rights of the Child (CRC) the best interests of the child makes it imperative that the curriculum she is taught shall be “of direct relevance to the child's social, cultural, environmental and economic context and to his or her present and future needs”.⁷⁸ The UNESCO Convention against Discrimination in Education of 1960⁷⁹ may also provide guidance regarding situations in which separate education may be justified. Article 2 of the UNESCO Convention permits separation in education with respect to religion and language, where separate education shall be “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”.

Significantly, as the RED focuses on less favourable treatment without further specifying what treatment means, further maintenance in the face of actual segregation could be classified as direct discrimination. Moreover, given that under the RED definition it is not necessary to prove discriminatory intent, as under Article 1 ICERD and Article

⁷⁵ In the USA, Supreme Court judge C. J. Warren opined: “In *Sweatt v. Painter*, supra, in finding that a segregated law school for Negroes could not provide them equal educational opportunities, this Court relied in large part on “those qualities which are incapable of objective measurement but which make for greatness in a law school.” In *McLaurin v. Oklahoma State Regents*, supra, the Court, in requiring that a Negro admitted to a white graduate school be treated like all other students, again resorted to intangible considerations: “... his ability to study, to engage in discussions and exchange views with other students, and, in general, to learn his profession.” Such considerations apply with added force to children in grade and high schools. To separate them from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.” Friedman, Brown in Context, in A. Sarat (ed.), *Race, Law and Culture* (1997), 3.

⁷⁶ Recital (17) and Article 5 RED.

⁷⁷ In some Member States social provisions are specifically made for Roma, such as in Greece, Italy and Cyprus, whereas in others, such as Spain, France and Hungary they are targeted as part of a social class.

⁷⁸ Committee on the Rights of the Child, *The Aims of Education*, 17/04/2001, CRC/GC/2001/1. (General Comment), para. 9. Article 29 (1)1(c) CRC reads: States Parties agree that the education of the child shall be directed to the development of respect for the child's parents, his or her own cultural identity, language and values, for the national values of the country in which the child is living, the country from which he or she may originate, and for civilizations different from his or her own.

⁷⁹ Except Belgium, Greece, Austria, Ireland, Estonia, Lithuania and Latvia all Member States have ratified the UNESCO Convention.

14 ECHR.⁸⁰ It suffices to show that either *purpose or effect* of treatment was discriminatory. It then follows, that if the establishment or maintenance of Roma classes or schools reflects segregated residential patterns, the situation could still amount to direct racial discrimination in education for which the RED offers no justification. This has been recently affirmed by the Debrecen Appeals Court in Hungary in a case brought against a municipality found to have segregated Roma children when at the time of school mergers it omitted to end segregation by also merging catchment areas reflecting residential segregation.⁸¹

The use of direct rather than indirect discrimination is crucial in this context since it precludes the possibility of ‘justification defences’, such as parental consent, lower educational ability or other commonly used factors. Although a court faced with such a justification might recognise that the justifications are themselves grounded in racial stereotypes, the case-law in other jurisdictions, such as the ECtHR Ostrava decision above, suggests otherwise. An indirect discrimination claim also fails to recognise the multi-faceted definition of Roma. For example, it may be possible to argue that exclusion of Roma from majority schools is not on grounds of race, but is based on the application of a condition, such as residential proximity, which has the effect of disproportionately excluding Roma because they live in segregated residential areas. This is *prima facie* indirectly discriminatory unless it can be justified. But it may be plausible to argue that it is indeed justified, on the grounds that zoning of schools for locally resident children is a widely accepted practice and is desirable for many reasons. In the case of Roma, however, it skates over the fact that residential segregation is itself a result of structural discrimination.⁸² Thus the justification is itself based on racial grounds. It is argued here that it is preferable, both in principle and strategically, to conceptualise educational segregation as direct discrimination, since direct discrimination captures the multi-faceted definition of Roma and the whole range of discriminatory institutions and practices ranged against them and precludes the possibility of justificatory defences which are themselves a part of those structures.

Segregation in education is sometimes concomitant to residential segregation. In many instances, the bussing of children to non-segregated schools can resolve the issue, and in many other cases not even bussing is required, because non-segregated schools are in the close vicinity of segregated schools.⁸³ However, there may be situations where the geographical distance between segregated and non-segregated schools does not make bussing possible. The liability for segregation then needs to be examined in the light of the Roma population’s choice to move or stay. Obviously, if Roma genuinely do not wish to move, their separation is not involuntary. In this scenario, they are unlikely to make a claim of segregation anyway. However, if they wish to move but are unable to do so on account of their (extreme) poverty, the liability of state authorities for maintaining the situation, for failing to facilitate access

⁸⁰ In *Hugh Jordan v. the UK* (judgment of 4 May 2001) the ECtHR held that “Where a general policy or measure has disproportionately prejudicial effects on a particular group, it is not excluded that this may be considered as discriminatory notwithstanding that it is not specifically aimed or directed at that group”, at para. 154.

⁸¹ Judgment of 9 June 2006, *Debreceni Ítéltábla* (Debrecen Appeals Court) No. Pf.I.20.683/2005.

⁸² An illustration of this can be found in the European Roma Rights Center’s report ‘*Stigmata: Segregated Schooling of Roma in Central and Eastern Europe, a survey of patterns of segregated education of Roma in Bulgaria, the Czech Republic, Hungary, Romania, and Slovakia*’, at p. 67. “The emergence of segregated schools based on residential segregation dates back to the years of the Communist regime in Central and Eastern Europe. In Bulgaria, for example, alongside the formation of the Romani urban ghettos in the 1950s, a system of segregated schools was developed as a result of the school-districting system which made the free choice of school impossible.”, available at www.errc.org/db/00/04/m000000004.pdf.

⁸³ This is borne out by the most recent data on residential and school segregation published by EUMAP, in *Equal access to quality education for Roma (Bulgaria, Hungary, Romania and Serbia)*, 2007, see chapters 4.4. on Residential Segregation, available at http://www.eumap.org/topics/minority/reports/roma_education.

to non-segregated education and housing is engaged. For instance, it is in severely deprived Eastern Slovakian, North-Eastern Hungarian and Southern Bulgarian villages, that are either solely inhabited by Roma, or in which white flight left only Roma children in the local school.⁸⁴

International law supports the view that segregation is direct discrimination. Beyond Article 1 ICERD that lists exclusion as a distinct form of discrimination, Article 3 elevates racial segregation on a par with apartheid for international condemnation.⁸⁵ There is no indication in ICERD that segregation could be justified. CERD has held that segregation “may also arise as an unintended by-product of the actions of private persons.”⁸⁶ As to residential patterns, that frequently arise as a justification for segregation, CERD said that these “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.”⁸⁷ Significantly, under Article 3 ICERD Member States do not only undertake to prohibit, but also to prevent and eradicate all practices of segregation.

Furthermore, the special education of intellectually sound Roma children that accidentally results from the lack of race neutral psychological testing is also direct discrimination. Psychological tests or any other method of pre-school screening that fail to accommodate the racial differences that arise from the social attributes of Roma, in fact do not impose apparently neutral criteria. Similar to laws found directly discriminatory in *Brown*, these tests and screening methods treat Roma less favourably than majority children on account of failing even to provide an equal starting line to measure their intellectual abilities. Thus it is direct, rather than indirect discrimination, and is not subject to a justification defence. Indeed, racially biased testing only works to the detriment of Roma children, treating Roma children with normal intellectual abilities as if they were disabled. The same mechanism has never been detected in the case of majority children. The fact that the bias in tests and screening methods is not expressly based on ‘race’, but arises on account of various essential characteristics, such as culture, history and social status does not mean that it is not racial bias, since all these characteristics – as demonstrated – fall neatly under the notion of race. Clearly, a Roma child who fails a test administered in the majority language because she/he speaks her/his minority language is being treated less favourably than a majority child speaking the majority language. Again, it is preferable to conceptualise this as direct discrimination based on race, rather than indirect discrimination based on the application of an exclusionary condition, namely the majority language, which disproportionately discriminates against Roma and is unjustifiable. This is because, firstly, language is part of the definition of Roma, and therefore discrimination on grounds of their language is nothing less than discrimination on grounds of their race and ethnicity. Secondly, the justification for the majority language might appear plausible unless it is accepted that language is one of the many elements of Roma identity. The same holds true to Roma children whose parents pursue a travelling way of life: a test or screening method which is based on local culture, local educational achievements and the assumptions of a settled way of life would amount to less favourable treatment of Roma children on account of their racial and ethnic origin. There may well be situations outside of the field of educational segregation where indirect discrimination is an appropriate tool, but it is argued here that direct discrimination is the most appropriate way of understanding school segregation.

⁸⁴ For a summary on ghetto schools see, European Roma Rights Center, *Stigmata: Segregated Schooling of Roma in Central and Eastern Europe*, a survey of patterns of segregated education of Roma in Bulgaria, the Czech Republic, Hungary, Romania, and Slovakia, pp. 67-75. The geographical examples are based on the author’s fact finding visits in Hungary and on information from Margarita Iljeva and Zuzana Dlugosova, practicing human rights lawyers in Bulgaria and Slovakia respectively.

⁸⁵ Article 3 ICERD stipulates 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.”

⁸⁶ CERD, General Recommendation No. 19: Racial segregation and apartheid (Art. 3), 18/08/95, p. 3.

⁸⁷ Ibid.

The categorisation of segregation as direct discrimination is supported by domestic legal provisions specifically addressing racial segregation. In the UK segregation on racial grounds is a form of direct discrimination⁸⁸, whereas in Hungary it is a specific form of discrimination that on racial grounds cannot be justified, unless resulting from the free choice of parents to provide ethnic or national minority education to their children.⁸⁹ Bulgarian law also prohibits racial segregation, defining it as forced division, separation or isolation.⁹⁰ Clearly, in order to ensure compliance with the RED 'forced' shall be taken to denote the lack of informed consent.⁹¹

Institutional discrimination could be direct discrimination too as it "consists of the collective failure of an organisation to provide an appropriate and professional service to people because of their colour, culture or ethnic origin. It can be seen or detected in processes, attitudes, and behaviour which amount to discrimination through unwitting prejudice, ignorance, thoughtlessness and racist stereotyping which disadvantage minority ethnic people."⁹² Institutional discrimination adds up from individual acts that do in fact differentiate between Roma and non-Roma on the basis of racial stereotypes – even if such stereotyping is concealed as applying the 'majority' norm. In actions involving schools, the argument that Roma children are lazy, that they have lower expectations, that Roma girls fall pregnant at an earlier age, that Roma families are not supportive enough are commonplace. Such arguments in fact conceal teachers' and education decision-makers' attitudes that are based on racial grounds. As the UK House of Lords held in the *Prague Airport Case*⁹³, acting or stereotyping on racial grounds is wrong, not only if it is untrue – otherwise it would imply that direct discrimination can be justified.

⁸⁸ "The Race Relations Act 1976 (section (2)) (RRA) and the Race Relations (Northern Ireland) Order 1997 (Art. 3(2)) (RRO) make segregation on racial grounds a form of direct discrimination, which means that it is prohibited: "... for the purposes of this Act/Order, segregating a person from other persons on racial grounds is treating him less favourably than they are treated." The RRA and RRO have always included within their scope all forms and all levels of education, including all educational institutions, publicly and privately maintained." Like the RED, UK law does not require intention to establish direct discrimination.

⁸⁹ As of 1 January 2007 Article 7 Paragraph (1) of Act CXXV of 2003 on Equal Treatment and the Promotion of the Equality of Opportunities (ETA) defines segregation as a breach of the requirement of equal treatment. Under Article 7(3) taken in conjunction with Article 28(2) segregation based on race and ethnicity cannot be justified, unless it is the result of ethnic minority education freely chosen by parents, justified by the objectives and the curriculum of such education, given that such ethnic minority education cannot disadvantage students. Article 10 (2) ETA stipulates that "segregation is a conduct aimed at separating individual persons or a group of persons from others based on e.g. race or ethnic origin, without an express permission included in an Act of Parliament". The provision clearly deems "equal but separate" education unlawful. If separation also entails some disadvantage (e.g. substandard education) it then amounts to direct discrimination. If however it is difficult to prove that a racial group suffers disadvantages other than that stemming from the nature of such a separation, segregation may be established. This rule exempts the victims from proving that segregation is in itself a disadvantage.

⁹⁰ Protection against Discrimination Act, Additional Provisions § 1. 5. "Racial segregation" shall mean the issuing of an act, the commission of an action, or an omission leading to forced division, separation, or isolation of persons on grounds of their race, ethnicity or skin colour.

⁹¹ Alarming, the judgment handed down in February 2007 by the Sofia District Court, Civil College, IV B Division in the case of the ERRC v. the Bulgarian Ministry of Education and Science, the 103rd Secondary School and Sofia Municipality argued to the contrary. The court found that "In the instant case since all students of the 103rd school are of Romany origin, there exists such a separation on the basis of ethnic origin. It is not, however coercive in the meaning of [Art.6 Supplementary Provision of the Protection against Discrimination Act]. It is so since the separation is not a consequence of circumstances beyond the will of the students, respectively – their parents or guardians and is not entirely against their will – it does not follow a normative or administrative act, containing an obligation to enroll the students of Romany origin in a specific school, therefore it does not obstruct their education in other schools." Judgment is available on request from the ERRC, www.errc.org.

⁹² The Stephen Lawrence Inquiry. Report of an inquiry by Sir William Macpherson of Cluny. CM4262-I, para 6.34. The report concluded an investigation into police practices in the UK following a racist murder of a black teenager.

⁹³ R. V. Immigration Officer at Prague Airport and Anor ex parte ERRC and others, [2004]UKHL 55.

On account of its clear conceptual framework the RED has unprecedented potential in providing firm protection against the segregation of and institutional discrimination against Roma children in education. The concepts of discrimination under the RED and the ECHR respectively are such that make rights protection under the former more attractive.⁹⁴ Furthermore, the ECJ seems uniquely well placed to consider cases arising in this field. First, education is a social right. As opposed to the ECtHR the ECJ has had ample opportunity to deal with economic and social rights as well as with non-discrimination, though until recently confined to gender and nationality. The latter permits the use of evidence, such as statistics and has extensive experience in assessing such evidence.⁹⁵ Second, not only are there differences between the conceptual frameworks, but the ECJ seems more principled in putting theory into practice.⁹⁶ It has also seemed more active in providing effective judicial protection for victims of discrimination through e.g. allowing a shift of the burden of proof in indirect gender discrimination cases.⁹⁷ Third, while the ECtHR's mandate is to establish state liability under international law once domestic proceedings are over, through preliminary referrals the ECJ has 'powers' over all entities and individuals standing before domestic courts. In such situations an ECJ ruling would directly affect those responsible for segregation, as well as Roma children who could immediately benefit from such a ruling.

⁹⁴ Not only is the concept of indirect discrimination blurred under ECHR as demonstrated in the Ostrava case, but the test under its Article 14 suggests that there is a broad scope of justification for direct discrimination. Discrimination for the purposes of Article 14 occurs where (i) there is differential treatment in analogous or relevantly similar situations and (ii) that difference in treatment has no objective and reasonable justification. Such justification succeeds if the measure in question has a legitimate aim and there is a reasonable relationship of proportionality between the means employed and the aim sought to be realised. It is noted that the state's margin of appreciation will often work against applicants who bear the burden to prove disproportionality in the state's choice of means employed. D J Harris, M O'Boyle, C Warbrick: *Law of the European Convention on Human Rights*, London 1995, pp. 470-485.

⁹⁵ This is not the case before the ECtHR as borne out in its *Hugh Jordan* judgment and reinforced in the Ostrava case. In the former the ECtHR held that „Where a general policy or measure has disproportionately prejudicial effects on a particular group, it is not excluded that this may be considered as discriminatory notwithstanding that it is not specifically aimed or directed at that group. However, even though statistically it appears that the majority of people shot by the security forces were from the Catholic or nationalist community, the Court does not consider that statistics can in themselves disclose a practice which could be classified as discriminatory within the meaning of Article 14. There is no evidence before the Court which would entitle it to conclude that any of those killings, save the four which resulted in convictions, involved the unlawful or excessive use of force by members of the security forces.” *Hugh Jordan v. the United Kingdom*, judgment of 4 May 2001, para. 154.

⁹⁶ As the examination of discrimination in *Mangold* and the Ostrava case respectively shows. Case C-144/04, *Werner Mangold v Rüdiger Helm*, judgment of 22 November 2005, para. 58-78. and *D. H. and others against the Czech Republic*, judgment of 7 February 2006, para. 44-53.

⁹⁷ As the ECJ explained in *Enderby*: „Where there is a *prima facie* case of discrimination, it is for the employer to show that there are objective reasons for the difference in pay. Workers would be unable to enforce the principle of equal pay before national court if evidence of a *prima facie* case of discrimination did not shift to the employer the onus of showing that the pay differential is not in fact discriminatory.” Case 127/92, *Enderby v. Frechay Health Authority* and the secretary of State for Health, judgment of the Court of 27 October 1993, para. 18.

2. 4. Victimisation and harassment of children

Reports from Ireland, Finland, the Czech Republic and Greece are telling of harassment of Roma children by teachers and fellow students. Bullying is a serious problem in the UK.⁹⁸ Parents may not complain against such behaviour for fear of victimisation. This fear is alleged to be reinforced by parents' own experiences in school.⁹⁹ In other Member States only anecdotal evidence exists.¹⁰⁰ Severe forms of harassment and victimisation evoke and strengthen generations old memories of persecution Roma across the EU experienced and in some instances they are but a thread away from racist crime. It is thus imperative that national laws transposing the RED provide adequate sanctions not only at the level of institutions but also against individual perpetrators, be them teachers or fellow students.

As a form of discrimination the RED defines harassment as follows: "when an unwanted conduct related to racial or ethnic origin takes place with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment".¹⁰¹ Verbal or physical abuse does not have to be explicitly racist to amount to harassment from teachers and students alike. If harassment is inflicted upon Roma children by underage students, the failure of the school to stop harassment and - if necessary - discipline perpetrators amounts to discrimination. Non-Roma parents may also partake in the harassment of Roma pupils inside and outside school. Victimisation amounts to "adverse treatment or adverse consequence as a reaction to a complaint or to proceedings aimed at enforcing compliance with the principle of equal treatment".¹⁰² Thus, giving lower marks or extra homework to a student because she or her parents instituted proceedings for any kind of discrimination she had suffered is victimisation. Similarly, if a disciplinary action is taken against a teacher because following her advice Roma students or parents make a complaint, she suffers victimisation. In countries where local governments maintain schools, Roma may be victimised in the provision of e.g. social services for their actions relating to the segregation of their children in school. Significantly, neither harassment, nor victimisation requires a comparator.

2. 5. Discriminatory curriculum

From ECOSOC to the FCNM Advisory Committee, various international bodies call attention to the discriminatory effects of the failure to provide non-discriminatory content in the general curriculum.¹⁰³ In some Member States, Roma in this respect are not only treated less favourably than the majority, but also suffer disadvantages as compared to other minorities.¹⁰⁴ It is straightforward that information included in the general curriculum about

⁹⁸ Sarah Spencer, *Gypsies and Travellers: Britain's Forgotten Minority*, in *European Human Rights Law Review*, 4/2005, p. 339.

⁹⁹ Members of the Irish Traveller Community have expressed a number of concerns relating to Traveller education. These concerns include the negative treatment received and the discrimination against Travellers within the education system. A further concern expressed by parents is their unwillingness to challenge this behaviour due to their own negative experiences of the Irish education system and the fear that if they complain their children will be victimised. <http://www.itmtrav.com/education01.html>

¹⁰⁰ See above, footnote 25.

¹⁰¹ Article 2.3 RED.

¹⁰² Article 9 RED.

¹⁰³ Under the CRC it was held that "there are many ways in which failure to comply with the principles contained in its article 29(1) can have a similar effect. To take an extreme example, gender discrimination can be reinforced by practices such as a curriculum which is inconsistent with the principles of gender equality, by arrangements which limit the benefits girls can obtain from the educational opportunities offered, and by unsafe or unfriendly environments which discourage girls' participation". *The Aims of Education* (General Comment), para. 10.

¹⁰⁴ In Greece "What seems to significantly differentiate these two types of cultural minority-focused projects is their distinct methodology and aims. The choice of using and preserving the mother tongue (Turkish) of the Thrace Muslim minority has led to bilingual and bi/multicultural educational program content (also on the basis of international treaty provisions). However, the Roma mother tongue has been left outside the school, as the project's educational content aimed mainly at assimilation and mainstreaming of Roma education."

Roma should be correct and unbiased. Germany, for instance, made efforts at including information in the general curriculum about the treatment of Roma during the Holocaust.¹⁰⁵ Fostering intercultural dialogue and the provision of knowledge about minorities is an objective pursued by the FCNM. Under the RED, however, the lack of correct information in the general curriculum about Roma as a racial and ethnic group amounts to direct discrimination, given of course that information about the majority population is included in the curriculum and it is correct.

¹⁰⁵ In Germany it is reported that "Sinti and Roma were the victims of Nazism and the extermination policy of the Third Reich. The estimates vary, but about 500.000 of European Sinti and Roma have been killed during this time. Only in 1982 did Chancellor Schmidt officially acknowledge the prosecution. Today, the prosecution of Sinti and Roma forms part of the curriculum of history in German schools dealing with the Nazi-period." In Hungary, where students are acquainted with minority culture in the framework of "Man and Society", a book published in 1998 to serve as material in these classes was found to violate the human dignity of Roma children. It contained the following statement: "Life for a part of Gypsies has been marked by crime". In 2002 the same publishing house published a textbook of ethics which contained the following: "Due to the lack of education and frequent indifference of Gypsy parents, many Gypsy children deserving better finish primary school with inadequate knowledge or do not even finish it at all. Thus, a multitude of uneducated, unskilled Roma children is reproduced." It also opined that if "Gypsies do not have enough money to make a living, subsistence crime becomes a temptation that many cannot resist" and finished off by stating that: "If a Roma is offered a job, they should accept it with understanding. They should take advantage of the opportunity and should work, and should not want to be supported by the state and the tax-payers." Available at <http://www.neki.hu/indexeng.htm>

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Part III

Legal tools to fight discrimination

Bearing in mind that ‘effective judicial protection’ should be accorded to Roma victims of segregation in education this chapter analyses the enforcement mechanism under the RED, paying particular attention to the use of racial and ethnic data as evidence, the role of specialised bodies and NGOs in tackling segregation, as well as the way in which positive action measures are implemented at Member States level to remedy disadvantages Roma as a group suffer in education.

3.1. Data collection

The relevant provisions in the RED are deliberately worded so that data are in principle not necessary to prove a breach. However, statistical evidence may be used and will in practice often be a crucial element in proving discrimination or resisting a justification defence. There is a striking lack of race based statistics at either macro or micro levels. Nevertheless, as transpires from country reports, each Member State collects data relating to Roma in some form for the purposes of devising policies and strategies aimed at Roma in the field of education. However, instead of collecting data at the national level, they are accumulated through proxies to ethnicity, such as place of residence, participation in ethnic minority education, or through individual local projects relating to e.g. employment.

Data collection is a highly sensitive issue, given the potential for misuse in order to further invidious discrimination. At the same time, it is crucial that data are gathered for the purposes of detecting discrimination and monitoring measures to rectify it. Concerns relating to the need for data collection and the right to the protection of sensitive data such as racial and ethnic origin are summarised by a recent study (hereinafter: the Data Collection Study) as follows: “It is widely believed that international, European and national laws on data protection and the right to privacy categorically prohibit the collection of sensitive data. This is not the case. The pertinent laws only set out the legal framework and the qualitative conditions within which any processing must take place. Processing of sensitive data is in the overwhelming majority of EU Member States allowed on the condition that the *data subject gives her consent* thereto. Processing is allowed even without consent where it is necessary in the context of legal proceedings or in the course of the activities that public authorities take to ensure the realization of the principle of equal treatment in practice. Many member states also expressly and separately authorize the collection and processing of sensitive data for statistical and scientific purposes, rendering most forms of data collection lawful also on that ground. States are also at a liberty to introduce legislation that further expands the possibilities to engage in data collection without this infringing their international obligations, provided that the necessary safeguards are in place. In addition, there are forms of collecting data on discrimination that do not involve at any stage the processing of personal or sensitive data on individuals identified or identifiable directly or indirectly, and which thus do not engage the data protection laws in the first place.”¹⁰⁶

As the Data Collection Study emphasises, data will likely be collected upon individual consent, which makes the cooperation of data subjects indispensable and in turn requires a legislative environment that promotes voluntarism in this area. There are also further concerns to consider. First, Member States should not be at the entire liberty to construct the category they use for data collection. That objective criteria are needed for such categorisation is obvious from the discussion of controversies relating to the definition of Roma. The Data Protection Study posits that the need for objectivity is even more paramount once “data collection is linked to the distribution of rights and obligations, resources and burdens”.¹⁰⁷ Equally important is to ensure the principle of self-identification. “An individual however does not have a subjective right to declare to belong to any group whatsoever where this is in

¹⁰⁶ Timo Makkonen, *Measuring Discrimination - Data collection and EU Equality Law*, p. 85.

http://ec.europa.eu/employment_social/fundamental_rights/pdf/legnet/07measdis_en.pdf

¹⁰⁷ *Ibid*, p. 81.

manifest conflict with the objective facts.”¹⁰⁸ Indeed, there have been isolated incidents in which majority members have declared themselves Roma in order to counter arguments of segregation¹⁰⁹ whereas Roma may hide their racial or ethnic origin for fear of victimisation.¹¹⁰

Pursuant to the Data Protection Directive¹¹¹ Member States may prohibit the collection of *nominative* information on race on a voluntary basis, because of the risks involved.¹¹² Collection of data that does not allow for the identification of individuals should still be possible without consent, mainly in two circumstances: (i) where necessary for the establishment, exercise or defence of legal claims, and (ii) where it is otherwise provided for in national law or by the decision of the national supervisory authority.¹¹³ This is significant, because the reason why in contrast to sex discrimination cases statistical evidence is hardly ever used in relation to race is the lack of statistical evidence and not legal or technical barriers.¹¹⁴ Obviously, discrimination based on racial origin is driven by perception and takes little notice of self-identification, whereas discrimination Roma may suffer on account of some of their ethnic characteristics – such as language, culture and tradition – may only be tackled once group members self-identify. Member States, however, may legitimately expect self-identification in the latter case and if group members collect data on a voluntary basis in that regard, that data should be admissible in some form even if national law does not allow the collection of sensitive data at all.

Litigation experience in Hungary shows that respondents merrily invoke data protection provisions in an attempt to defend their refusal to furnish even school or grade level aggregate data on Roma. Courts play a crucial role in ensuring that the protection of sensitive data does not prevent victims from vindicating their rights under the RED. For instance, in the Miskolc Desegregation Case, the first instance court agreed with the appellant foundation that segregation was based on perception. Therefore the respondent’s refusal to furnish aggregate data for the number of Roma children studying in certain schools could not be sustained under the data protection rules requiring consent to handle data based on self-identification.¹¹⁵ In another action against the village of Hajdúhadház the court appointed a forensic education expert to collect school level data in collaboration with members of the Hajdúhadház Roma Minority Self-government (hereinafter: HRMSG), based on membership of the local Roma minority community, perception thereof, and place of residence as proxies for the racial and ethnic origin of Roma children.¹¹⁶ The opinion prepared by the forensic public education expert established that in certain buildings and classes the percentage of Roma children was around 95-99 % as opposed to 0-25% in other classes and buildings. Based on their knowledge accumulated in the local Roma community the HRMSG representatives counted all Roma students at class and building level. In case of disagreement about a child’s ethnicity, they registered him as belonging to the majority population. The expert then provided a statement signed by the HRMSG representatives on the numbers and percentages for Roma and non-Roma students at class, building and school levels.

¹⁰⁸ Ibid, p. 81.

¹⁰⁹ In Jászladány, Hungary, the wife of the mayor, who initiated the segregation of Roma primary school children from non-Roma is the president of the local Roma minority self-government. In 2002 non-Roma parents in the village signed a petition claiming that they were Roma in order to legitimize segregation. For a detailed case description see, Roma Rights 2003/1-2, pp. 107-108.

¹¹⁰ See for instance witness testimonies in the so called Gyüre case, available at www.neki.hu.

¹¹¹ Council Directive 95/46/EC on the Protection of Individuals with Regard to the Processing of Personal Data and on the Free Movement of Such Data

¹¹² Processing is allowed pursuant to consent "except where the laws of the Member State provide that the prohibition referred to in paragraph 1 may not be lifted by the data subject giving his consent".

¹¹³ Data Collection Study, p. 72.

¹¹⁴ Ibid, pp. 26-27.

¹¹⁵ See trial records in case No. BAZ Megyei Bíróság, 13.P.21.660/2005.

¹¹⁶ See trial records in case No. Hajdú-Bihar Megyei Bíróság, 6.P.20.341/2006.

The expert opinion was the most crucial piece of evidence in the proceedings, in which the defendant local government and its two schools could not justify the ethnic disparities. In May 2007 the court found that the defendants segregated Roma children in buildings other than the main school buildings, and provided them with inferior physical conditions (number of books, computers, the state of furniture and building etc.). The court ordered the local government to publish an apology through the Hungarian Press Agency, ordered the schools to end segregation by 1 September 2007, and the local government – the maintainer of the two schools – to refrain from interference with desegregation.¹¹⁷ The case is now pending appeal before the Debrecen Appeals Court.

Certainly, through guidance to domestic courts, the ECJ may facilitate the use of statistics in cases of discrimination based on racial or ethnic origin and flesh out the procedural framework for requiring from respondents and assessing such evidence. Given that Member States have a duty to provide effective remedies under RED, it may be arguable that a Member State which does not collect such data is precluding its citizens from proving their case and therefore barring them from a collective remedy. Member States' failure to collect data on the extent of structural discrimination against Roma children in schools or failure to amend rules of evidence so as to enable the use of statistics in legal proceedings could potentially hinder or bar potential Roma applicants from seeking remedy against such discrimination in judicial or other proceedings.

It remains to be seen, whether e.g. the maintenance of national data protection rules, that exclude the collection of aggregated ethnic data or proxy data for ethnicity to prove discrimination in legal proceedings could be a ground for preliminary referral to the ECJ. Similarly, a *Francovich* type of claim against a Member State that fails to facilitate the collection of data on racial or ethnic minorities – including in legal proceedings – or hinders access to existing data could also be brought in domestic courts, given that the conditions required by the ECJ in *Francovich* are met.¹¹⁸

That some sort of state action is necessary to have data enabling minority group members pursue their rights has been recognised elsewhere. In *Arsenault-Cameron* the Supreme Court of Canada stated that “the province cannot avoid its constitutional demand to actively promote educational services in the minority language by citing insufficient proof of numbers, especially where it is not prepared to conduct its own studies or to obtain and present other evidence of known and potential demand”.¹¹⁹

3.2. Positive action

With a view to ensuring full equality in practice the RED permits specific measures “to prevent or compensate for disadvantages linked to racial or ethnic origin”. Article 5 is viewed as concentrating on the outcomes of the decision making process with a redistributive angle. Thus, its main preoccupation is with the “relative position of groups and classes”.¹²⁰ Positive action cannot, however, go so far as to constitute strict quotas or reverse discrimination. Plain race based quota systems are likely to fail if challenged before the ECJ. Only if the candidates are of equal merit,

¹¹⁷ Hajdú-Bihar Megyei Bíróság, judgement No. 6.P.20.341/2006/50.

¹¹⁸ Three conditions must be met in order to trigger state liability for damages. The result, as required by the directive, must include the conferring of rights on individuals. The breach must be sufficiently serious and there must be a causal link between the state's breach of obligation and the damage suffered by the individual. See, the joined cases C-6/90 and C-9/90, *Francovich and Bonifaci v Italian Republic*, [1991] ECR I-5357.

¹¹⁹ *Arsenault-Cameron v. Prince Edward Island*, 2000 SCC 1, para. 34.

¹²⁰ C. McCrudden, National Legal Remedies for Racial Inequality in S Fredman (ed) *Discrimination and Human Rights: The Case of Racism* (OUP 2001), at pp. 253-259.

and there is a 'savings clause' requiring consideration of the individual merits of candidates of the over-represented group will quotas be permissible in EC law. The ECJ's approach is borne out by a series of cases concerning sex discrimination from *Kalanke* to *Griesmar*.¹²¹

Article 5 RED holds out the possibility of taking a substantive view of equality. It states that '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'. Such an approach is crucial to address educational segregation of Roma children. As the Permanent International Court of Justice observed in 1935 in its advisory opinion on *Minority Schools in Albania*, "Equality in law precludes discrimination of any kind; whereas equality in fact may involve the necessity of different treatment in order to attain a result which establishes an equilibrium between different situations."¹²² Deprivation of the minority community from institutions that ensure the preservation of minority 'peculiarities' would render minority rights protection 'illusory' as it could compel the minority "to renounce that which constitutes the very essence of its being a minority".¹²³ Without ensuring that Roma children are treated as essentially different from the majority population and therefore requiring measures of substantive equality, they will most certainly continue to suffer discrimination in education. For instance, equal opportunities are needed in relation to minority language needs. Certain Member States require Roma children to adapt to the majority language, many of whom thus fail to minimise the risk these children run in being diverted into special education or performing poorly on account of their 'language deficiency' as compared to majority children. At the same time, great care must be taken to ensure that 'special treatment' is not a guise for further discrimination. Thus several Member States provide some sort of extra classes for minority language education, but the efficiency of these provisions is simply not known and fear of segregation on account of minority language education is reported.

Although the RED is only permissive of positive measures, Member States already have in place various programmes and policies that in general facilitate solutions. They have mixed focuses from addressing needs for minority language instruction to the provision of extra social support for Roma. Apart from a quota system for undergraduate university admissions in Romania and Hungary these measures may all pass the ECJ test of a flexible quota system as not creating situations whereby an 'innocent third party' would automatically have to bear the consequences of measures aimed at remedying past injustices.¹²⁴

The following components of positive action can be found in national or regional programmes promoting the education of Roma – children and adults alike:

1. Programmes addressing minority language speakers - zero grade classes facilitating language adaptation prior to the beginning of primary education in Slovakia, the Czech Republic and Bulgaria; majority language

¹²¹ In *Kalanke* (Case C-450/93) the ECJ struck down a regulation that provided priority for a female over a male candidate equally qualified. In *Marschall* (Case C-490/95), however, the ECJ upheld a policy, that differed from *Kalanke* in its "savings clause", according to which exceptions from giving priority to women candidates are allowed if reasons specific to others predominate. In *Badeck* (Case C-158/97) a policy that did not automatically and unconditionally give priority to women over men of equal qualification, and that ensured an objective assessment of candidates taking account of specific personal situations was found compatible with Community law. In *Abrahamsson* (Case C-407/98) a national rule struck down by the ECJ automatically gave priority to a member of the under-represented sex who had adequate qualifications, being however, inferior in minor respects in comparison with the other candidate. In *Lommers* (Case C-476/99) a Ministry scheme of child day-care available to female officials alone, whilst allowing access to male officials in cases of emergency was again upheld. Last, in *Griesmar* (Case C-366/99) a national regulation that automatically excluded male civil servants from a credit introduced for the calculation of retirement pensions was struck down.

¹²² *Minority Schools in Albania*, ICJ, A/B. 64. 6 April 1935, p. 19.

¹²³ *Ibid*, p.17.

¹²⁴ On account of which the US Supreme Court struck down a positive action plan in *Bakke*, *University of California Regents v. Bakke*, 438 U.S. 265 (1978).

- adaptation classes in Ireland, France and Belgium and minority language teaching in Sweden, Italy, Germany, Estonia, Lithuania, Poland, Finland and Hungary,
2. Teachers assisting in maintaining contact with the community and families - assistant teachers in Poland, Slovakia, Bulgaria, Finland and Hungary, visiting teacher in Ireland,
 3. Return programs from special to mainstream education in Slovakia and Hungary,
 4. Curriculum and/or teacher training on Roma language and culture in Slovakia, the UK, Hungary and Ireland,
 5. Programs to access secondary or university education - tutors, scholarships in Ireland, Slovakia and Hungary,
 6. Inclusion of Roma community members in education provision,
 7. Pre-school provision in Hungary and Slovenia,
 8. Extra teacher for Roma in Ireland¹²⁵, Sweden, Germany and Italy,
 9. Mainstreaming and inspecting Roma needs within national education - officers in France, UK and Ireland,
 10. Enhanced per capita support or other financial support for Roma students in Ireland, Cyprus, Italy, Greece and Hungary,
 11. Training centres for adult Roma in Ireland,
 12. Reach-out for early school leavers in Ireland,
 13. Distance learning and dual registration in the UK to accommodate Traveller needs,
 14. Cohabitation programs in Spain and Hungary.

There is further precedent from the ECtHR in *Thlimmenos* that “The right not to be discriminated against in the enjoyment of the rights guaranteed under the Convention is also violated when States without an objective and reasonable justification fail to treat differently persons whose situations are significantly different.”¹²⁶

Existing measures reflect the reality that by treating everybody the same equality is unlikely to be achieved. Reality, in some national settings, runs counter to official rhetoric that does not allow for race based special measures or devises class based measures so as to reach Roma at a higher rate.¹²⁷ That practice is more advanced than theory is promising for those who believe that “the traditional model of discrimination law ... is insufficient to drive forward the changes in society that are necessary if all people ... are to realise their potential and make a full contribution to a wider society”¹²⁸ In fact, important advances are being made to reshape the traditional model, from an individualised, retrospective, fault oriented focus to a proactive, group based and social justice approach.¹²⁹

¹²⁵ “Traveller organisations have expressed some concerns with how the Resource Teachers for Travellers (RTT) works, including: not requesting parental consent prior to sending children to the RTT ; children being removed from class for what should be intensive tuition but being assigned ‘low level tasks,’ such as drawing; due to removal from class, missing out on portions of the curriculum; children who do not require additional learning supports being sent to the RTT because of their ethnic identity.”

¹²⁶ *Thlimmenos v. Greece*, judgment of 6 April 2000, para.44. Thlimmenos suffered less favourable treatment apparently based on a neutral criterion not protected under the ECHR, i.e. his previous criminal conviction resulting from an objection to serve in the military. However, this objection was related to his religious belief as a Jehova’s witness, a right protected under Article 9 ECHR.

¹²⁷ Though the Slovak Constitutional Court has recently struck down anti-discrimination provisions allowing for race based positive action, apparently class based measures, such as assistant teachers and zero grade classes still exist and primarily cater for Roma. In Hungary, enhanced per capita support for integrative education is due to socially disadvantaged children defined in a manner that ensures a high representation of Roma among those eligible.

¹²⁸ Deliver Equality for Disabled People, Department for Work and Pensions, July 2004, Cm 6255, p. 17.

¹²⁹ S. Fredman “Changing the Norm: Positive Duties in Equal Treatment Legislation” (2005) 12 Maastricht Journal of European and Comparative Law 369 - 398

One example is in the UK anti-discrimination legislation, which imposes a positive duty to promote race equality. This duty extends to publicly maintained schools, colleges and universities. Although not based on a statutory duty the Finnish model of provincial advisory boards on Roma has the same objective.¹³⁰ Shifting the focus from result to process and mainstreaming positive measures in the general education system could better serve aims of a new concept of equality such as breaking the cycle of disadvantage associated with membership of a particular group and the facilitation of full participation in society.¹³¹

3.3. Enforcement

McCrudden argues that the RED adopts an approach which, although recognising some of its limitations (broader standing, shifted burden of proof and protection from victimisation) is fundamentally based on the individual justice model.¹³² Similarly, Bell and Waddington recognise aspiration within the RED “to mend and improve the individual justice model”; still they doubt that this route can prove effective, especially in respect of structural and institutional forms of discrimination.¹³³ Given that structural discrimination (segregation and institutional discrimination) affects the majority of Roma throughout the EU, creativity is indispensable in devising sanctions under the RED’s system of remedies. The focus on groups has in some countries led to allowing standing without an identifiable individual victim to institutional plaintiffs, such as to NGOs in Belgium, Hungary and Bulgaria. This is important, because individual Roma may often refuse to vindicate their rights for fear of harassment and victimisation.¹³⁴ Also, action by groups highlights the need for group based remedies, for sanctions that address systemic failures and change the situation without each group member having to be involved in the proceedings. The power of the French departmental administration of the Rectorate to redistribute Roma children after observing a high concentration in a school¹³⁵ demonstrates the paramount importance of far-reaching sanctioning powers in the hands of educational administration.

¹³⁰ The Finnish report recalls the positive impact of the establishment of four provincial Advisory Boards on Roma Issues. These bodies are able to tackle discrimination at a grass-roots level. “They act as inter-administrative bodies for the Romani population and the authorities on the provincial and local level. The government made the provincial boards a permanent fixture in 2004. They have been really an asset in improving the economic, educational, social and cultural conditions of the Roma people and promoting the education of the Roma at local level in a concrete fashion. The Parliament of Finland empowered the provincial boards by admitting resources to the permanent secretarial post and finances in the state budget in 2006.”

¹³¹ This new concept of equality should include two further central aims: the promotion of respect for equal dignity and worth of all persons, redressing stigma, stereotyping, humiliation based on membership of the group and the provision of positive affirmation of individuals as members of the group. See, S. Fredman, “The Future of Equality in Britain”, Equal opportunities Commission Working Paper, No. 5, Autumn 2002, pp.10-16

¹³² C. McCrudden, National Legal Remedies for Racial Inequality in S Fredman (ed) *Discrimination and Human Rights: The Case of Racism* (OUP 2001), pp. 294-297.

¹³³ M Bell and L Waddington, Reflecting on inequalities in European Equality law in (2003) 28 *European Law Review* June, p. 352.

¹³⁴ The Swedish report summarises it as follows: “Contacts with state and municipal authorities are characterized by dependency, vulnerability and a long standing distrust. Distrust is said to be based on the limitations of the legislation and on the limited possibilities for acting of the specialised body as many Romanies perceive it. ‘Hence the focussing on the individual, which is the body’s normal way of working, proves insufficient both for a description of discrimination of Romanies and for counteracting and forestalling discrimination.”

¹³⁵ According to the French report “there have been instances where the Rectorate departmental administration of the national education system has taken measures to redistribute the children over all nearby schools of the area after observing concentration” .

Establishing the liability of individuals in disciplinary or criminal proceedings, withdrawal of state subsidies¹³⁶ and seeking injunctive relief in the form of desegregation plans comprising a whole set of orders from teacher training to the redrawing of catchment areas are sanctions that are more likely to prove “effective, proportionate and dissuasive” in education. Significantly, in Italy, Cyprus, Slovakia, Hungary and arguably in Finland courts can make orders to terminate discrimination by desegregating. In the UK injunctive relief is available but has not been used so far. In Ireland, courts would first grant an order declaring a segregationist policy unconstitutional and if the state failed to change its policy, then the courts would mandate compliance to ensure mainstreaming. When ruling on the termination of structural discrimination, and most significantly segregation European courts will face problems relating to school administration, physical conditions, the school transportation system, school personnel, revision of school districts and most important, educational content.¹³⁷

Bulgarian and Hungarian litigation strategies based on *actio popularis* are fundamentally different from high profile cases brought before the transposition of the RED. Significantly, this type of action has only been made available through the transposition of the RED into both domestic legal regimes. In pre-RED cases, such as the Ostrava case enormous energy was invested in identifying individual clients, collecting evidence and maintaining the clients’ trust throughout the proceedings. Prior to lodging a claim on behalf of 29 Roma children against Sofia’s Todor Tableshko v Primary School No. 75 all children were tested by forensic experts.¹³⁸ It is obvious from this summary that domestic NGOs are not in a position to provide services in a similar manner. At present, information on the cost of cases, as well as on the maintenance of victim assistance services that can help individual complainants and of advocacy that is indispensable when seeking an impact - indeed effective remedies after litigation - is not generally available.

Specialised bodies established under the RED and school inspectorates with field specific expertise and powers, on the other hand, may tackle structural discrimination in education more effectively – mainly through investigatory powers and in assisting victims of discrimination. Pursuant to Article 13 RED ‘Member States shall designate a body or *bodies* for the promotion of equal treatment of all persons without discrimination on the grounds of racial or ethnic origin’ (emphasis added). Under the ICESCR Member States “are also obliged to establish and maintain a transparent and effective system which monitors whether or not education is, in fact, directed to the educational objectives set out in article 13(1).”¹³⁹ The potential of a domestic enforcement mechanism in the field of anti-discrimination is substantially strengthened by the presence of a professional body charged with inspection in the field of education.

¹³⁶ In public schools in Spain the school inspectorate may request the start of disciplinary proceedings against the person responsible. These proceedings may include penalties. In state-subsidised private schools the inspectorate may ask for the decision to be overturned. If this does not occur and an agreement between the public authority and the school cannot be brokered, the agreement by which the school receives a public subsidy may be revoked. Meanwhile, in Portugal racial discrimination in general is a summary administrative offence punishable by a fine, without prejudice to civil liability or the application of other established sanctions. The fines may vary from 400 to 2,000 Euros and are doubled for legal persons. If the offence results from the omission of a duty, the application of the sanction does not prevent the offender from carrying out this duty if it is still possible. The High Commissioner for Immigration and Ethnic Minorities may apply ancillary sanctions, including a prohibition of the exercise of a profession or activity which involves a public capacity or depends on authorisation or official approval by public authorities; removal of the right to the benefits granted by public bodies or services. Furthermore if the individual perpetrator is a public officer, he is also subject to disciplinary proceedings and sanctions including compulsory dismissal.

¹³⁷ As components of desegregation plans outlined by the USA Supreme Court in *Brown v. Board of Education II*, 349 U.S. 294 (1955).

¹³⁸ <http://www.errc.org/cikk.php?cikk=2055&archiv=1>

¹³⁹ ECOSOC Right to Education GC, para. 59. “By way of illustration, violations of article 13 include: ... the failure to take measures which address de facto educational discrimination; the use of curricula inconsistent with the educational objectives set out in article 13 (1); the failure to maintain a transparent and effective system to monitor conformity with article 13 (1) ...”

The RED refers to various international treaties, including the ICESCR, to which all Member States are signatories.¹⁴⁰ Compliance with the RED in terms of the competences of bodies established for the promotion of equal treatment in the field of education shall therefore also be examined in light of the obligations under the ICESCR. If specialised bodies established under the RED do not have monitoring and investigatory powers as required under the ICESCR, if they cannot provide assistance to victims and issue recommendations in the field of education, then it shall fall on field specific inspections to fulfil this role. If such field specific bodies do not exist or do not have powers required under Article 13 RED and Article 13 ICESCR, then compliance is questionable. In fact the lack of such a field specific body may raise issues of improper transposition of the RED in Greece, Hungary, the Czech Republic, and possibly in Lithuania and Estonia.

Thus, similar to specialised bodies, state reports under Article 17 RED shall also cover the activities of field specific inspections in relation to discrimination against Roma.¹⁴¹ In cooperation with specialised bodies under Article 13 these field specific inspections shall take part in 'providing independent assistance to victims of discrimination in pursuing their complaints about discrimination', in 'conducting independent surveys concerning discrimination', and in 'publishing independent reports and making recommendations' on the structural discrimination against Roma children in education.

In Sweden and Slovakia specialised bodies have reported on the segregation of Roma children in education, whereas in Ireland, Hungary, Cyprus and Greece they have investigated individual cases. There is, however, no analysis on their interpretation of the RED's concepts and the kinds of sanctions they apply. None of the specialised bodies have so far imposed sanctions suggested here. Clearly, there is great need for action by specialised bodies in the field of education. Waiting for individual complainants to come forward may not prove the best strategy in tackling structural discrimination, eminently segregation. Indeed, Article 13 RED allows for thematic reports to be published and recommendations to be put forward. There are, of course many specialised bodies whose powers go beyond what is provided in the RED. They would be well advised to use their sanctioning powers to facilitate changes. Notably, cooperation through Equinet, the network of specialised bodies, could provide the opportunity for concerted efforts to be taken.

¹⁴⁰ Recital (3) RED.

¹⁴¹ Particularly because there are concerns regarding these inspections' activities in this area, e.g. in Spain and Slovakia.

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Part IV

Conclusions

This report has argued that the RED provides a uniquely high level of protection from structural discrimination (segregation and institutional discrimination) in education and that it may become an effective tool to fight such discrimination in domestic courts as well as before the ECJ. Promises held out by the RED's enforcement mechanism shall be reinforced by judicial activism to put an end to blatant forms of segregation and formulate less obvious forms of exclusion as legal issues, thus enabling the participation of Roma as children in education and consequently as adults in employment.

A unified European definition of Roma as a dual racial and ethnic minority should be constructed to ensure the highest possible level of protection the RED can offer. For this international treaties referenced by the RED should be taken into account and an 'autonomous and uniform' interpretation of racial and ethnic origin can be provided by the ECJ and consequently applied by national courts.

Education covered includes all types and all levels of education along ECOSOC's 4A Scheme. The proposed framework of considering Roma minority language education takes into account the evolving concept of discrimination and positive action measures adopted by Member States.

Segregation and institutional racism prevalent in schools throughout Europe amount to direct discrimination, not justifiable under the RED. Parental consent generally cannot constitute justification for these purposes, contrary to the position under the ECHR, whereas the best interest of the child is an overriding principal in proceedings against structural discrimination.

Lack of data does not only seriously hinder the creation of policies or positive action measures, but may pose serious challenges to effective judicial protection from structural discrimination in education. The RED shifts the burden of proof and implies that qualitative data can also form the basis of claims tackling race discrimination. However, Member States may need to amend national rules on data protection and evidence to accelerate the use of statistics.

Member States have an obligation to establish a body – be that an education inspection or a specialised body - that provides independent assistance to victims, conducts independent surveys, publishes independent reports and makes recommendations in the field of education. Sanctions engaging individual liability in criminal, disciplinary and administrative proceedings, as well as those addressing group needs are necessary if Member States' laws are to comply with the RED.

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