

Integrating the Roma into European Society: Time for a New Initiative

I. INTRODUCTION

This article seeks to explore the different avenues which can be followed to improve the situation of the Romani minority under Union law. The importance of the question of the Roma in the enlarged European Union is widely recognized.¹ “Although precise figures are unavailable, there are possibly over ten million Roma in Europe as a whole, a population many times the size of the total population of a number of European Member States. ... Around one and a half million Roma joined the European Union when the ten new member states acceded to the Union in May 2004. Roma are the European Union’s largest minority ethnic community.”² But currently, the Roma are placed in a situation of structural discrimination, being segregated, in particular, in the fields of housing, employment, and education, not only in certain member states of the Union where they are most numerous, such as in the Slovak Republic or Hungary, but also in the ‘older’ member states, where their situation has been ignored for many years.

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1 This article uses the term ‘Roma’ as the plural noun form, as well as to name the group as a whole, and ‘Romani’ as the adjective, in line with emerging and converging uses. The term ‘Roma’ or ‘Romani’ is also used as shorthand for the broad umbrella of groups and individuals. In no way should this choice of terminology be taken as an endorsement of approaches aimed at homogenising Roma and other groups perceived as ‘Gypsies’ in Europe or at eliminating the rich diversity among Roma, Gypsies, Travellers and other groups perceived as ‘Gypsies’.

2 European Commission, DG Employment and Social Affairs, Unit D3, “The Situation of Roma in an Enlarged European Union” (2004), 6, at <http://europa.eu.int/comm/employment_social/fundamental_rights/pdf/pubst/roma04_en.pdf>.

Proposals have been made in order to remedy this, in particular, by the EU Network of Independent Experts on Fundamental Rights, a group of experts which was set up in 2002 by the European Commission, acting upon the request of the European Parliament, in order to monitor the Union and the member states on the basis of the Charter of Fundamental Rights.³ This article proposes to explore these solutions, and more generally, the potential of Union law to address the situation of the Roma.

II. THE CURRENT PROTECTION OF ROMA UNDER EU LAW

A. Equality and Non-Discrimination under EU Law

The principle of equality and non-discrimination under EU law has known an expansive evolution in several ways. First, originally inserted in the EC Treaty in several articles as a market integration tool,⁴ the principle soon fulfilled a social integration objective.⁵ It has obtained the status of general principle of Community law,⁶ and, arguably, has transformed into a human rights standard at the EU level.⁷ Second, apart

3 See in particular the EU Network of Independent Experts on Fundamental Rights (CFR-CDF), "Report on the Situation of Fundamental Rights in the European Union in 2003", (January 2004), 100-105, and the "Synthesis Report: Conclusions and Recommendations on the Situation of Fundamental Rights in the European Union and Its Member States in 2003", (4 February 2004), 64. These reports are available at <http://www.europa.eu.int/comm/justice_home/cfr_cdf/index_en.htm>.

4 See Article 141 EC (equal pay for men and women) and Article 12 EC (non-discrimination on the basis of nationality), in combination with Article 39 EC (free movement of workers), Article 43 EC (freedom of establishment) and Article 49 EC (freedom to provide services). Lisa Waddington, "The Expanding Role of the Equality Principle in European Union Law", European University Institute, RSC Policy Paper No 2003/04, October 2003, 3-6, at <<http://www.iue.it/RSCAS/e-texts/CR2003-04.pdf>>. On the relationship of Article 119 EEC (currently Article 141 EC) to the economic objectives of the common market, see esp. Catherine Barnard, "The Economic Objectives of Article 119", in Tamara Hervey and David O'Keeffe (eds.), *Sex Equality Law in the European Union* (Chichester, Wiley, 1996).

5 See e.g. in the *Deutsche Telecom AG v. Schröder* (case C-50/96, judgment of 10 February 2000, [2000] ECR I-743), the ECJ found that the economic aim pursued by Article 141 – elimination of distortions – is secondary to the social aim of that provision. Sacha Prechal, "Equality of Treatment, Non-discrimination and Social Policy: Achievements in Three Themes", 41 *CMLR* (2004), 533-551, at 548-549; and Waddington, "The Expanding Role ...", 6-11.

6 Christopher McCrudden, "The New Concept of Equality", 3 *ERA-Forum* (2003), 9-29, at 9-11.

7 For example the references to human rights treaties in the preamble of Directives 2000/43/EC and 2000/78/EC, adopted on the basis of Article 13 EC (Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, OJ 2000 L 180, 22; Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, OJ 2000 L 303, 16). See Dagmar Schiek, "A New Framework on Equal Treatment of Persons in EC Law?", 8(2) *European Law Journal* (2002), 290-314, at 295. For a mixed approach and further references, see McCrudden, "The New Concept of ...",

from direct discrimination, also indirect discrimination became prohibited⁸ and this – together with the introduction of positive measures⁹ and the mainstreaming idea¹⁰ – marked an important shift from a formal conception of equality to a more substan-

19; and Prechal, “Equality of Treatment ...”, 547-551. According to Prechal, equality and non-discrimination cannot become an entirely autonomous and all-embracing human right as both Article 13 and the EU Charter of Fundamental Rights are linked to the competence of the EU (at 551). See also Gillian More, “The Principle of Equal Treatment: From Market Unifier to Fundamental Right?”, in Paul Craig and Gráinne de Búrca (eds.), *The Evolution of EU Law* (Oxford University Press, Oxford, 1999), 517-553; and Mark Bell, *Anti-Discrimination Law in the European Union* (Oxford University Press, Oxford, 2002), in particular Chapters 1 and 7.

- 8 The concept of indirect discrimination was first developed with respect to discrimination on grounds of nationality and sex. It was codified in Article 2(1) of Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions: Dir 76/207, OJ 1976 L 39, 40 (now amended by Directive 2002/73/EC of 23 September 2002, OJ 2002 L 269, 15) as well as in the Burden of Proof Directive (Directive 97/80/EC, OJ 1998 L 14, 6), and was further developed by the European Court of Justice (on this case-law, see Olivier De Schutter, “Le concept de discrimination dans la jurisprudence de la Cour de justice des Communautés européennes”, in Emmanuelle Bribosia *et al.* (eds.), *Union européenne et nationalités* (Bruxelles, Bruylant, 1999), 11-44. In 2000 the prohibition of indirect discrimination was included in Directive 2000/43/EC as well as in Directive 2000/78/EC. When Directive 2002/73/EC amended Directive 76/207/EEC, the same prohibition was included in this latter instrument. See Prechal, “Equality of Treatment ...”, 534-537.
- 9 In Union law, positive action was first recognized under Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions (OJ 1976 L 39, 40). Article 2(4) of this Directive provides that the prohibition of discrimination on grounds of sex in its scope of application “shall be without prejudice to measures to promote equal opportunity for men and women, in particular by removing existing inequalities which affect women’s opportunities in the areas to which the directive applies.” This exception to the principle of equal treatment between men and women was later introduced in the Treaty of Rome: The Treaty of Amsterdam, which entered into force on 1 May 1999, introduced in Article 141 EC (ex-Article 119 EEC) a fourth paragraph stating that “[w]ith a view to ensuring full equality in practice between men and women in working life, the principle of equal treatment shall not prevent any Member State from maintaining or adopting measures providing for specific advantages in order to make it easier for the underrepresented sex to pursue a vocational activity or to prevent or compensate for disadvantages in professional careers.” The directives adopted under Article 13 EC in order to implement the principle of equal treatment with regard to the other grounds of discrimination listed in this provision explicitly allow for the adoption of positive action measures: see Article 5 in Directive 2000/43/EC and Article 7 Directive 2000/78/EC.
- 10 See e.g. Article 3(2) EC with regard to gender discrimination. See on this, Jo Shaw, “Mainstreaming Equality in European Union Law and Policymaking”, Report for European Network Against Racism, April 2004, <http://www.enar-eu.org/en/publication/mainstreaming_04_en.pdf>.

tive understanding of equality at EU level.¹¹ However, many authors state that both the European Court of Justice (ECJ) in its case law and EU primary and secondary legislation send out mixed messages as to the nature of equality, which often still appears instrumental to the aims of the internal market or, now, to the objectives of the European Employment Strategy.¹² Third, whereas at the beginning only discrimination on the basis of sex and nationality was prohibited, five more prohibited discrimination grounds were added by Article 13 EC,¹³ and a general prohibition of discrimination not limited to specific grounds was imposed by Article 21 of the EU Charter of Fundamental Rights, with eight supplementary grounds enumerated by way of example.¹⁴ This expansion of the grounds of prohibited discrimination is remarkable, yet each prohibition of discrimination on these different grounds fulfils a different function, and is stipulated under a distinct legal form: the prohibition of discrimination on the basis of sex and nationality is directly imposed by the EC Treaty in the field of application of that Treaty; Article 13 EC empowers the Council to adopt measures combating discrimination on the grounds of sex, race and ethnic origin, religion or belief, age, disability and sexual orientation, but does not in itself create directly applicable rights; and Article 21 of the EU Charter of Fundamental Rights will, upon incorporation in the European Constitution,¹⁵ prohibit all forms of discrimination in the field of application of Union law. However, it shall not expand the powers of the institutions of the Union to combat discrimination, and shall instead operate negatively, as a shield against action by the Union or the member states implementing Union law.

For the protection of the Roma in the European Union, Article 13 EC and Directive 2000/43/EC adopted on the basis of Article 13 EC and implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (hereinafter “the Racial Equality Directive”) represent the single most important of these developments. Initially inserted into the EC Treaty by the Intergovernmental Conference of 1996-1997, which led to the adoption of the Treaty of Amsterdam, in force since 1 May 1999,

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- 11 Prechal, “Equality of Treatment ...”, 537-542. For an examination of this shift in the case law of the European Court of Justice in the areas of nationality- and gender-based discrimination, see De Schutter, “Le concept de discrimination ...”.
 - 12 For a reading in this light of Directives 2000/43/EC and 2000/78/EC, see Olivier De Schutter, *Discriminations et marché du travail. Liberté et égalité dans les rapports d'emploi* (P.I.E. Peter Lang, Bruxelles, Bern, Berlin, Frankfurt/M., New York, Oxford, Wien, 2001); Prechal, “Equality of Treatment ...”, 538; Waddington, “The Expanding Role ...”, 25-26; and Schiek, “A New Framework ...?”, 305-308.
 - 13 Apart from discrimination on the basis of sex, Article 13 EC also mentions discrimination on the basis of racial or ethnic origin, religion or belief, disability, age and sexual orientation.
 - 14 Apart from discrimination on the basis of sex, racial or ethnic origin, religion or belief, disability, age and sexual orientation, Article 21 of the Charter of Fundamental Rights also prohibits discrimination on the basis of colour, social origin, genetic features, language, political or any other opinion, membership of a national minority, property and birth.
 - 15 Article 21 of the Charter of Fundamental Rights appears as Article II-81 of the Treaty establishing a Constitution for Europe currently submitted for ratification by the EU member states. See OJ 2004 C 310, 1.

Article 13 EC was further enriched by the addition of a second paragraph by the Treaty of Nice,¹⁶ which entered into force on 1 February 2003. Article 13 EC now reads:

1. Without prejudice to the other provisions of this Treaty and within the limits of the powers conferred by it upon the Community, the Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.
2. By way of derogation from paragraph 1, when the Council adopts Community incentive measures, excluding any harmonisation of the laws and regulations of the Member States, to support action taken by the Member States in order to contribute to the achievement of the objectives referred to in paragraph 1, it shall act in accordance with the procedure referred to in Article 251.

Article 13 EC only provides a legal basis, rather than a self-executing prohibition or a freestanding principle.¹⁷ It was carefully worded so as to ensure that it would not have direct effect.¹⁸ The initial scepticism regarding the political support needed to adopt legislation proved incorrect, however,¹⁹ and in 2000 the Council adopted two directives designed to combat discrimination, the already mentioned Racial Equality Directive and Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation (hereafter “the Framework Employment Directive”), as well as a programme of action for 2001–2006 to combat discrimination.²⁰ The change to the legal basis in Article 13 EC through the Nice Treaty, which introduces a qualified majority voting in the Council for programmatic actions should preclude any future programmes after 2006 (which is the date of expiry of the existing action plan) being held hostage by one or two hostile governments.²¹ However, the potentialities of Article 13 EC remain to a certain extent uncertain, because both its mandate – does it limit itself to empowering the Council to adopt measures fighting discrimination or may such measures include provisions which seek to affirmatively enhance equality? – and the concept of equality on which it is based²² – the article does not expressly aim at the establishment of substantive equality²³ – remain a subject of debate.

Before examining the Racial Equality Directive in further detail in the next section, a brief comment of the significance of the constitutionalisation of fundamental

16 OJ 2001 C 180.

17 Shaw, “Mainstreaming Equality ...”, 6.

18 Waddington, “The Expanding Role ...”, 13; *id.*, “Testing the Limits of the EC Treaty Article on Non-Discrimination”, 28(2) *Industrial Law Journal* (1999), 133–152, at 138; and Gabriel Toggenburg, “The Race Directive: A New Dimension in the Fight against Ethnic Discrimination in Europe”, 1 *EYMI* (2001/2), 231–244, at 234.

19 Waddington, “The Expanding Role ...”, 13.

20 Council Decision 2000/750 establishing a Community action programme to combat discrimination (2001–2006), OJ 2000 L 303, 23.

21 Shaw, “Mainstreaming Equality ...”, 23.

22 Prechal, “Equality of Treatment ...”, 541.

23 Toggenburg, “The Race Directive ...”, 234.

rights in the legal order of the European Union through the adoption of the Charter of Fundamental Rights is discussed. Article 21 of the Charter of Fundamental Rights (Article II-81 of the Treaty establishing a Constitution for Europe) prohibits discrimination on the basis of, amongst others, membership of a national minority, in the scope of application of Union law, and Article 22 of the Charter (Article II-82 of the Constitution) provides that the Union is to respect cultural, religious and linguistic diversity. These two articles are of interest to Roma. These provisions are located in Chapter III, "Equality", of the Charter. The very title of this chapter might be significant. It suggests a shift from a focus on negative rights not to be treated differently without a justification, towards a positive right to equal opportunity and status.²⁴ However, the seven articles of this chapter reveal a diverse approach to equality. Some rights adopt a traditional justiciable and constitutional form, whilst others are more inspirational. The five articles addressing specific grounds of discrimination adopt different forms and perhaps even different models of equality. Whereas one could criticize the Charter's failure to embrace a single concept of equality, Lisa Waddington nevertheless argues that this diverse approach

could be seen as a move towards a new kind of constitutionalism which recognizes that, because of different histories and origins of disadvantages and discrimination, vulnerable groups need targeted and diverse approaches to achieve the goal of equality. Taking the equality principle seriously may therefore require different policy responses in order to accommodate diversity.²⁵

Yet another source to the benefit of Roma is the Commission's commitment to mainstreaming race issues²⁶ in its report of January 2000 on the implementation of the action plan against racism "Mainstreaming the Fight Against Racism". Mainstreaming involves the integration of equality and non-discrimination goals into all phases of law and policy formulation and implementation. It involves "the recognition of, and appropriate response to, the fact that ... minority groups will be unable or less able to access certain policy areas unless specific account is taken of their particular needs."²⁷ At times, the provision of targeted financial support will be sufficient to meet the demands of mainstreaming. However, on occasions, a specific additional policy element, which 'reaches out' to an otherwise excluded group, will be needed.

The rhetoric of anti-racism mainstreaming has gradually infiltrated into a number of EU initiatives. These include Commission funding for a project to raise awareness of science and technology amongst ethnic minority groups across the EU, to stimu-

24 Mark Bell, "The Right to Equality and Non-Discrimination", paper presented to the Conference on Economic and Social Rights and the EU Charter of Fundamental Rights, University of Nottingham, 28-29 June 2002, as cited by Waddington, "The Expanding Role ...", 22.

25 Waddington, "The Expanding Role ...", 23.

26 See Shaw, "Mainstreaming Equality ...", 5: The language of mainstreaming has entered into EU anti-racism policy since the 1998 Action Plan against Racism.

27 Waddington, "The Expanding Role ...", 15.

late access to science careers,²⁸ and the creation of a special unit on anti-racism within the Directorate General on Education and Culture concerned with Youth Affairs. Promoting diversity and in particular reducing all forms of racism and xenophobia was one of five priorities for action on youth matters in 2004 and has been one of the priorities since 2002.²⁹ This priority allows for anti-racism networking projects to be supported with funding. However, these have been small and isolated steps only.³⁰

Contrary to gender mainstreaming, which has had a treaty basis in Article 3(2) EC since the Treaty of Amsterdam, anti-racism mainstreaming has no constitutional basis yet. The Treaty establishing a Constitution for Europe provides in Article III-118 that:

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

The provision might offer the platform for an integrated constitutional foundation for equality 'mainstreaming' and could, plausibly, constitute the basic framework for a positive duty on Community institutions and EU member states.³¹ A crucial element of effective mainstreaming strategies is moreover the principle of participatory democracy: stakeholders – in this case the Roma – should be consulted throughout into all phases of law and policy formulation and implementation. This principle again is included in the Treaty establishing a Constitution for Europe in Articles I-47.³² Whether these developments shall take place depends, of course, on the fate of the text proposed for ratification by the member states.

B. Directive 2000/43/EC: The Racial Equality Directive

As stated above, the Racial Equality Directive, which implements the principle of equal treatment of all persons irrespective of racial or ethnic origin, currently offers Roma the best opportunities to combat discrimination against them. This Directive, adopted by the EU Council of Ministers at the end of June 2000, establishes a "framework for combating discrimination on the grounds of racial or ethnic origin, with a view to putting into effect in the Member States the principle of equal treatment" (Article 1). The deadline for the transposition of the Directive was 19 July 2003.³³

28 See Euractiv Report, "EU stimulates science careers for ethnic minority groups", 29 July 2003, at <<http://www.euractiv.com>>.

29 For details on how this priority was pursued in 2003, see <http://europa.int.eu/comm/youth/priorities/racism_xenophobia_2003_en.htm>.

30 Shaw, "Mainstreaming Equality ...", 23.

31 *Ibid.*, at 35. See also Prechal, "Equality of Treatment ...", footnote 30 at 541; and Olivier De Schutter, "Mainstreaming Fundamental Rights in the Union", in Philip Alston and Olivier De Schutter (eds.), *Monitoring Fundamental Rights in the EU: The Role of the EU Fundamental Rights Agency* (Hart Publishers, Oxford, 2005), 37-72.

32 Shaw, "Mainstreaming Equality ...", 8.

33 Regarding the implementation of the Racial Equality Directive, see the comparative EUMC report "Migrants, Minorities and Legislation: Documenting Legal Measures and

1. *The Directive and the Concepts of Equality and Discrimination*

The notions of direct and indirect discrimination and harassment are defined in Article 2 of the Directive. It is for the first time that a legislative definition is provided of the concept of direct discrimination. Indirect discrimination, in contrast, was defined in sex equality legislation, although only as late as 1997 under the Burden of Proof Directive (97/80/EC). As a consequence, the ECJ was initially called upon to develop and interpret the concepts of direct and indirect discrimination in sex discrimination cases.³⁴

Direct discrimination is defined in Article 2(2)(a) as follows: “direct discrimination shall be taken to occur where one person is treated less favourably than another is, has been or would be treated in a comparable situation on grounds of racial or ethnic origin”. Crucial for the application of this definition is the identification of a “comparable situation”, and no legislative guidance is given on this matter. The identification of a suitable comparator has proved vital, and at times problematic, under sex discrimination law. Whereas the ECJ previously rejected reference to hypothetical comparators outside the scope of discrimination on the grounds of pregnancy, the reference in the new legislative definition to one person being treated less favourably than “another ... would be” arguably suggests that references to hypothetical comparators is allowed.³⁵

According to Article 2(2)(b), indirect discrimination occurs “where an apparent 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.” This definition differs from the one in the Burden of Proof Directive, which requires that “the apparently neutral provision ... disadvantage a substantially higher proportion of the members of one sex”. This reference to proportionality was often understood as requiring the production of statistical evidence.³⁶ If statistical evidence were necessary to prove racial or ethnic discrimination, the burden of proof would be very weighty. As is known, statistical data seldom refer to racial or ethnic origin,³⁷ let alone to Romani origin.³⁸ Moreover, in several member

Remedies against Discrimination in 15 member states of the European Union” (December 2004), online retrievable at EUMC at <<http://www.eumc.eu.int>>, and the Migration Policy Group’s “Country Reports on European Anti-Discrimination Law”, online retrievable at the Migration Policy Group at <<http://www.migpolgroup.com>>. In September 2003, DG Employment and Social Affairs (Unit Fundamental Rights & Anti-Discrimination) published the report “Equality, Diversity and Enlargement. Report on measures to combat discrimination in acceding and candidate countries”, providing a first appraisal of the transposition of the directive by the new member states and the candidate states.

34 Lisa Waddington and Mark Bell, “More Equal Than Others: Distinguishing European Union Equality Directives”, 38 *CMLR* (2001), 587-611, at 590-591.

35 *Ibid.*, 591-592. For critical observations on the comparability test as being non-transparent and its reasoning often difficult to follow, see Prechal, “Equality of Treatment ...”, 543-544.

36 Prechal, “Equality of Treatment ...”, 542.

37 Toggenburg, “The Race Directive ...”, 235; and Shaw, “Mainstreaming Equality ...”, 23.

38 European Commission, DG Employment and Social Affairs, Unit D3, “The Situation of Roma ...”, 37-39.

states, including Sweden and Denmark, data protection legislation prevents the collection of data about an individual's ethnic origin.³⁹ Odile Quintin, the Director-General for Employment and Social Affairs at the Commission, defended the new definition on the grounds that it removed the need to demonstrate statistically that indirect discrimination had in fact occurred. According to her, "statistical assessment is something which is extremely complicated to develop for other areas of discrimination [than sex discrimination]." ⁴⁰ However, the Preamble states that member states are permitted to utilise tests for identification of indirect discrimination in accordance with national law and practice. Such tests may include the examination of statistical evidence.⁴¹ The use of evidence may therefore remain an element of case law⁴² and the burden of proof may differ between the member states.⁴³ Although the Commission has been presented with a study on the collection of data to measure discrimination,⁴⁴ which shows a willingness on its part to explore whether the EU member states should better monitor the existence of discrimination through statistical means, the question whether or not to use such indicators in order to identify discrimination still is left to the choice of each national constituency.

In addition to the prohibition of direct and indirect acts of discrimination, the Directive also forbids acts of racial harassment. Article 2(3) states that harassment: "shall be deemed to be discrimination within the meaning of paragraph 1, 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 creating an intimidating, hostile, degrading, humiliating or offensive environment. In this context, the concept of harassment may be defined in accordance with national laws and practice of the Member States." That harassment also covers actions which do not directly intend to cause racial harassment (as indicated by the use of the expression "purpose *or effect*") imposes an obligation on the member states to ensure a wide protection against such harassment.⁴⁵ However, of concern is the reference to national law and practice in the last sentence. On the one hand, this should not take away from those elements of harassment already defined in Article 2(3). On the other, it would logically imply that those aspects of harassment not

39 McCrudden, "The New Concept of ...", 24.

40 Waddington and Bell, "More Equal Than Others ...", 594.

41 Recital 15 of the Preamble. It has been noted that this constitutes progress if compared with the wording of the Burden of Proof Directive, as the production of statistical evidence is not necessarily required in order to prove indirect discrimination. See Schiek, "A New Framework ...", 296. On the other hand, to the extent the member states are allowed, but not obliged to, provide for the possibility of statistical proof of discrimination, disparate impact discrimination may not be prohibited with the same level of efficacy throughout the Union.

42 Waddington and Bell, "More Equal Than Others ...", 594.

43 Toggenburg, "The Race Directive ...", 235.

44 Comparative study on the collection of data to measure the extent and impact of discrimination within the United States, Canada, Australia, Great Britain and the Netherlands, December 2004 (available on the website of the European Commission, DG Employment and Social Affairs).

45 Toggenburg, "The Race Directive ...", 235.

defined in Article 2(3) remain a matter for national law; for example, the liability of employers, schools, universities, hospitals, landlords for failing to prevent harassment.⁴⁶

Article 2(4), finally, forbids the act of incitement to discriminate against persons on grounds of racial or ethnic origin. It is argued that such provision should cover not only explicit, but also implicit acts of incitement.⁴⁷

2. Scope of Application

Article 3 of the Directive establishes a particularly far-reaching material scope of application for the Directive.⁴⁸ In addition to the four employment related areas covered by the Framework Employment Directive (employment, occupation, vocational training and professional organizations), the Racial Equality Directive also covers social protection, including social security and health care; social advantages; education; and access to and supply of goods and services which are available to the public, including housing.⁴⁹ With the exception of some aspects of social security provisions, none of these areas are covered with regard the other grounds of discrimination mentioned in Article 13 EC; and it is only recently that the principle of equal treatment between men and women has received in its turn such an expanded scope of application.⁵⁰ As a result, victims of race discrimination have achieved the greatest level of protection available under Community law, far exceeding the level of protection offered under the other grounds of Article 13 EC.⁵¹ That the Directive also covers the supply of goods and services – however, limited to those “which are available to the public”⁵² and which certain member states seek to understand narrowly as limited to the economic relationships falling under the remit of European Community law – is particularly significant, as much discrimination against Roma appears to occur on a daily basis in the process of, for example, renting accommodation, in restaurants, bars, shops and swimming pools.⁵³

46 Waddington and Bell, “More Equal Than Others ...”, 595.

47 Adam Tyson, “The Negotiation of the European Community Directive on Racial Discrimination”, 4(2) *EJML* (2001), 199-229, at 207.

48 Waddington and Bell, “More Equal Than Others ...”, 595; Toggenburg, “The Race Directive ...”, 236-237.

49 Articles 3(1)(e)-(h).

50 On 13 December 2004, Council Directive 2004/113/EC implementing the principle of equal treatment between men and women in the access to and supply of goods and services was adopted, on the basis of Article 13 EC (OJ 2004 L 373, 37).

51 Waddington and Bell, “More Equal Than Others ...”, 590 and 610; and Leo Flynn, “The Implication of Article 13 EC Treaty – After Amsterdam, Will Some Forms of Discrimination Be More Equal Than Others?”, 36(6) *CMLR* (1999), 1127-1152. Of course, other hierarchies between the different grounds could be established, using other criteria than the scope of application *ratione materiae* of the protection from discrimination under EC Law: see Schiek, “A New Framework ...”, 299-302 (for an evaluation: 308-312).

52 This is a compromise position emerged from the drafting process; see Tyson, “The Negotiation of ...”, 208.

53 See for example the five Bulgarian landmark cases regarding discrimination against Roma in access to services by a clothing shop and an electricity provider and regarding employ-

Despite the fact that the Directive also applies to third-country nationals,⁵⁴ it does not expressly prohibit differential treatment on the basis of nationality. Article 3(2) states:

This Directive does not cover difference of treatment based on nationality and is without prejudice to provisions and conditions relating to the entry into and residence of third-country nationals and stateless persons on the territory of the Member States, and to any treatment which arises from the legal status of the third-country nationals and stateless persons concerned.

In the eyes of some member states, an extension of the prohibition against discrimination to include differential treatment on the basis of nationality would have meant that sovereignty and flexibility in the fields of immigration, asylum and (more plausibly) social welfare systems would be placed at risk.⁵⁵ The sensitivity of this issue also explains why, in the Charter of Fundamental Rights, discrimination on grounds of nationality is dealt with separately in Article 21(2) and is explicitly restricted in scope.⁵⁶

In its Written Comments to the European Commission's Green Paper "Equality and Non-Discrimination in an Enlarged European Union",⁵⁷ the European Roma Rights Center (ERRC) reacted fiercely against this nationality-exclusion. The ERRC argues that this partial and insufficient definition of discrimination on grounds of racial or ethnic origin thus introduced into EU law by the Directive is discordant with international law and will create dilemmas for member states due to divergent approaches between the EU *acquis* and the international law *acquis* in this matter. Moreover, according to the ERRC, the nationality exclusion and the limited guidance provided by the EU institutions as to how to regulate the ban on discrimination on grounds of nationality has had a pernicious impact, as it opened, amongst others, the possibility for discrimination on racial or ethnic grounds under the pretext that such discrimination is on grounds of nationality.⁵⁸ In the light of the precarious situation of many non-nationals

ment, based on the newly adopted Bulgarian anti-discrimination legislation which entered into force on 1 January 2004, enacted pursuant to the requirements of the Racial Equality Directive (European Roma Rights Center Press Release, <<http://www.errc.org/cikk.php?cikk=2022>>).

54 Toggenburg, "The Race Directive ...", 237.

55 *Ibid.*, 238.

56 Shaw, "Mainstreaming Equality ...", 22. See also criticism by Waddington, "The Expanding Role ...", 23.

57 COM(2004)379 final, Brussels, 28 May 2004.

58 Referring to Article 3(1) and 3(2) of the Racial Equality Directive, which respectively ban discrimination, direct and indirect, on grounds of race and ethnic origin, and exempt differences of treatment on grounds of nationality from that prohibition, the report on "The Situation of Roma in an Enlarged European Union", 44, states that "[t]he friction between these two provisions gives rise to the concern that individuals may suffer racial discrimination and not have any recourse if the discriminator justifies the action on grounds that the person concerned is a third-country national".

in Europe – including in particular dark-skinned and Romani nationals – the nationality exclusion is currently contributing significantly to social exclusion in Europe.⁵⁹

The EU Network of Independent Experts on Fundamental Rights has taken the position, however, that although the prohibition of all direct or indirect discrimination on grounds of racial or ethnic origin, while benefiting also third-country nationals, does not concern differences in treatment on grounds of nationality – this, which is explicitly stated by Article 3(2) of the Racial Equality Directive, is further confirmed by Recital 13 of its Preamble – it cannot be ruled out that the very conditions for granting nationality constitute a form of discrimination prohibited by the Directive: Indeed, where they create differences in treatment between certain categories of persons, the conditions for granting nationality do not create a difference in treatment between nationals and non-nationals, but between different categories of foreigners, which makes those differentiations come under Directive 2000/43/EC.⁶⁰ Toggenburg has further argued that differences in treatment based on nationality could result in indirect discrimination on grounds of race or ethnic origin, and thus fall under the prohibition of the Directive to the extent that they are imposed by private persons: indeed, the exception of Article 3(2) of the Directive, which exempts nationality-based differences of treatment from the scope of the prohibition, should be read narrowly in accordance with its status as an exception, and would therefore only apply to nationality-based differences established by law or, at least, by the public authorities, without exempting those differences in treatment from the prohibition of indirect discrimination on grounds on race or ethnic origin when adopted by private parties.⁶¹

Moreover, although EU law has traditionally drawn sharp delimitations between EU citizens and third-country nationals, it has been noted that the distinction is progressively blurring.⁶² Categories of ‘semi-privileged’ third-country nationals exist; for example, those who are members of the family of an EU citizen or Turkish nationals already resident in one of the member states, enjoying protection by virtue of the Association Agreement between the EU, its member states and Turkey. Furthermore, the recently adopted Directive on long-term resident third-country nationals,⁶³ to be transposed by 23 January 2006, provides a generalized protection against discrimination on grounds of nationality for all third-country nationals enjoying long-term legal residence in one of the member states.⁶⁴

Despite that the distinction between EU citizens and third-country nationals is blurring, Romani non-nationals do not benefit from it, as they in general do not belong

59 Written Comments of the European Roma Rights Centre to European Commission “Green Paper: Equality and Non-Discrimination in an Enlarged European Union”, 16 August 2004, <<http://www.errc.org/db/00/C7/m000000C7.doc>>.

60 EU Network of Independent Experts on Fundamental Rights, Thematic Comment No. 3: “The Rights of Minorities in the European Union”, March 2005, para. 3.1.2. This question will be addressed again later in the article.

61 Toggenburg, “The Race Directive ...”, 238.

62 Shaw, “Mainstreaming Equality ...”, 22–23.

63 Council Directive 2003/109, OJ 2004 L 16, 44.

64 This directive, however, does not apply to students, those taking vocational training, refugees or those enjoying temporary protection under international law.

to the categories of 'semi-privileged' third-country nationals. Indeed, the status of long-term legal resident is often difficult to obtain by virtue of a lack of personal documents or because of living in informal settlements.⁶⁵ The obstacles the Roma face in access to nationality or to the status of long-term legal resident are in that respect representative, more generally, of the precariousness of their administrative situation, which has an impact in a number of fields, including access to public services or social benefits.⁶⁶ It is clear that, in order to fully tackle the question of the integration of the Roma, the situation of *de facto* or *de jure* statelessness of many members of this community needs to be addressed, and solutions ought to be found to the difficulties they face in establishing their nationality or in acquiring a nationality, as well as simply in being afforded an administrative status.

3. Positive Action

The Racial Equality Directive establishes minimum requirements in the field of anti-discrimination: the member states may introduce or maintain more favourable provisions to the protection of the principle of equal treatment than those laid down in the Directive (Article 6). Article 5 in particular allows the member states to introduce measures of positive action, without imposing on them an obligation to do so:

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.⁶⁷

65 European Commission, DG Employment and Social Affairs, Unit D3, "The Situation of Roma ...", 31.

66 Referring to the concerns expressed by the European Roma Rights Centre at the hearing of 16 October 2003, the EU Network of Independent Experts on Fundamental Rights noted in its "Report on the Situation of Fundamental Rights ...", 105, that the exclusion of Roma from a number of public services and essential social goods "is the result of their precarious administrative situation, their statelessness and, worst of all, the total lack of administrative documents attesting their legal status. These documents are often expensive to obtain for a highly impoverished people. A specific obstacle to their obtaining these documents is also the requirement to furnish proof of a fixed address to which social benefits can be paid, which *de facto* has the effect of excluding Roma/Gypsies who lead an itinerant or semi-itinerant life". This is also noted in the report "Breaking the Barriers – Romani Women and Access to Public Health Care" published by the Council of Europe with the collaboration of the OSCE High Commissioner on National Minorities, the Office for Democratic Institutions and Human Rights (ODIHR) and the EU Monitoring Centre on Racism and Xenophobia (September 2003), 12: "Many Roma lack identity cards, birth certificates and other official documentation of their legal status. Such documents are often required to access public services. Statelessness, and the lack of status within the State of residence, as well as problems with documentation impede access to a range of rights including access to health care."

67 This formulation is almost identical to the analogous one for affirmative action regarding sex discrimination in Article 141(4) EC: "With a view to ensuring full equality in practice between men and women in working life, the principle of equal treatment shall not prevent any Member State from maintaining or adopting measures providing for specific advantages in order to make it easier for the under-represented sex to pursue a vocational activ-

The purpose of ensuring full equality in practice implies a notion of substantive equality. However, as affirmative action is permitted and not required, Barnard observes that the Racial Equality Directive does “not focus on the achievement of equality in the broader, more results-oriented, redistributive sense”.⁶⁸ Moreover, it remains to be seen how the ECJ will react when the first cases concerning racial and ethnic affirmative action are brought before the Court. In the context of positive action measures favouring the professional integration of women, which both Directive 76/207/EC and Article 141(4) EC authorize the member states to adopt,⁶⁹ the ECJ has emphasized that such measures – insofar as they afford preferential treatment to women – should be seen derogating from the individual right of equal treatment of men and women laid down in Community law. It has therefore taken the view that such measures were only acceptable to the extent that they comply with the principle of proportionality, and thus remain within the limits of what is appropriate and necessary in order to achieve the aim in view. This aim is to eliminate or reduce actual instances of inequality which may exist in the reality of social life. Any measure which guarantees an equality of result, and does not restrict itself to equalizing opportunities, is considered disproportionate: Thus, all schemes which establish an automatic and absolute preference in favour of women are considered in violation of the principle of equal treatment, and incompatible with the requirements of Community law.⁷⁰ In sum, positive measures appear to be acceptable to the extent only that they ensure an improved functioning of a system based on an objective appreciation of the situation of each individual – including the need to facilitate

ity or to prevent or compensate for disadvantages in professional careers.” Article 5 of the Racial Equality Directive omits the positive element of this article, notably the possibility of conferring “specific advantages in order to make it easier for the under-represented sex to pursue a vocational activity”. According to Waddington and Bell, Article 5 of the Racial Equality Directive is more restrictive than Article 141(4) EC. Waddington and Bell, “More Equal Than Others ...”, 601.

- 68 Catherine Barnard, “The Changing Scope of the Fundamental Principle of Equality”, 46(4) *McGill Law Journal* (2001), 955-977, at 976. See also McCrudden, “The New Concept of ...”, 21.
- 69 Article 141(4) EC provides: “With a view to ensuring full equality in practice between men and women in working life, the principle of equal treatment shall not prevent any Member State from maintaining or adopting measures providing for specific advantages in order to make it easier for the underrepresented sex to pursue a vocational activity or to prevent or compensate for disadvantages in professional careers”. Since the amendment of Directive 76/207/EEC by Directive 2002/73/EC, the wording in that directive is similar: see Article 2(8) of Directive 76/207/EEC, as amended.
- 70 Although we believe that this is a fair summary, we may not here offer a detailed discussion of this case law. The relevant decisions are ECJ, case C-450/93, *Kalanke*, judgment of 17 October 1995, [1995] ECR I-3051; case C-409/95, *Marschall v. Land Nordrhein Westfalen*, judgment of 11 November 1997, [1997] ECR I-6363; case C-158/97, *Badeck*, judgment of 28 March 2000, [2000] ECR I-1875; case C-407/98, *Abrahamsson v. Fogelqvist*, judgment of 6 July 2000, [2000] ECR I-5539; case C-79/99, *Schnorbus*, judgment of 7 December 2000, [2000] ECR I-10997; case C-476/99, *Lommers*, judgment of 19 March 2002, [2002] ECR I-2891; case C-319/03, *Serge Bribeche*, judgment of 30 September 2004, (not yet reported). Reference can also be made to the judgment delivered by the EFTA Court on 24 January 2003, *Surveillance Authority v. The Kingdom of Norway*, case E-1/02, EFTA.

overcoming the prejudice or stereotyping that an individual may be encountering – but without substituting a group-based conception of justice to an individualistic conception. It may be anticipated that this understanding of the limits of affirmative action will also guide the Court in its interpretation of the Racial Equality Directive.⁷¹

4. Reasonable Accommodation

The Framework Employment Directive requires in its Article 5 reasonable accommodation of people with disabilities:

In order to guarantee compliance with the principle of equal treatment in relation to persons with disabilities, reasonable accommodation shall be provided. This means that employers shall take appropriate measures, where needed in a particular case, to enable a person with a disability to have access to, participate in, or advance in employment, or to provide training for such a person, unless such measures would impose a disproportionate burden on the employer. When this burden is, to a sufficient extent, remedied by existing measures as an element of disability policy in the Members State, it should not be considered disproportionate.

This concept of reasonable accommodation – Waddington and Hendriks prefer to call it ‘effective accommodation’, as the adjective ‘reasonable’ may misleadingly suggest that a reference is made to what is expected from the employer or any other responsible party, rather than to the efficiency of the accommodation itself⁷² – is linked conceptually to the idea of ‘special measures’ for ethnic, religious and linguistic minorities, i.e. measures designed to protect and promote the separate identity of those minority groups.⁷³

Both concepts contain an element of permanence, to take into account the specific characteristics of the groups in question, to the contrary of affirmative action, which is of a temporary nature, i.e. as long as such action is needed to correct discrimination in fact.⁷⁴ Roma with an itinerant lifestyle, for example, will have to be accommodated by a state system based on the majority of the population being sedentary. The requirement of permanent residence as a condition, for example, to have access to social security and

71 Shaw, “Mainstreaming Equality ...”, 13; Waddington, “The Expanding Role ...”, 19-22; Toggenburg, “The Race Directive ...”, 236.

72 Lisa Waddington and Aart Hendriks, “The Expanding Concept of Employment Discrimination in Europe: From Direct and Indirect Discrimination to Reasonable Accommodation Discrimination”, 18(3) *International Journal of Comparative Labour Law and Industrial Relations* (2002), 403-427, at 410, footnote 26.

73 The prohibition of discrimination and special measures constitute a double track of minority protection, already expounded by the Permanent Court of International Justice in its advisory opinion on the minority schools of Albania in 1935, see Kristin Henrard, *Devising an Adequate System of Minority Protection. Individual Human Rights, Minority Rights and the Right to Self-Determination* (Martinus Nijhoff Publishers, The Hague, 2000), 9.

74 UN Human Rights Committee, General Comment 18, Non-discrimination (Thirty-seventh session, 1989), para. 10: “Such [affirmative] action may involve granting for a time to the part of the population concerned certain preferential treatment in specific matters as compared with the rest of the population. However, as long as such action is needed to correct discrimination in fact, it is a case of legitimate differentiation under the Covenant.”

unemployment benefits will have to be adapted to the itinerant lifestyle of a minority of the population. This adaptation has to be of an intrinsic and permanent nature, in order to respect and take into account the itinerant lifestyle as part of the identity and the minority culture of Roma.

In many jurisdictions, the obligation to accommodate in employment matters is not confined to people with disabilities, but also applies to members of minority religions.⁷⁵ In Canada an obligation to make a reasonable accommodation exists in relation to all grounds covered by the Charter of Fundamental Freedoms and the Federal Human Rights Act, which include all grounds mentioned in Article 13 EC.⁷⁶

However, reasonable accommodation and 'special measures' for minorities are different concepts. Reasonable accommodation consists of an obligation to identify solutions which, in the specific context in which the individual faces certain obstacles in his/her social or professional integration (for example, in having access to certain modes of transportation or to a particular professional position), may remove these obstacles in order to facilitate that integration. Reasonable accommodation therefore is seen in principle as possessing an individualised character⁷⁷ and, indeed, the duty to accommodate in non-discrimination legislation is generally framed in terms of an individual right. However desirable reasonable accommodation may be, especially in the context of anti-discrimination on grounds of disability because of the wide variety of the disabilities which may be obstacles to participation in professional and social life, it will be easily seen that, seen from a broader perspective of equality, this approach cannot constitute a substitute for more structural solutions, not limited to the 'accommodation' of individual needs. In most instances, individual accommodation leaves unchallenged and unaffected the underlying discriminatory policy which resulted in the initial exclusion.⁷⁸ It therefore is preferable to keep the two concepts separated and to use them complementarily with one another in a multi-faceted anti-discrimination strategy.

5. Enforcement and Remedies

The Racial Equality Directive places considerable emphasis upon the effective enforcement of the principle of non-discrimination on the grounds of race,⁷⁹ more than is the case under the earlier gender anti-discrimination instruments.⁸⁰ Article 7(1) obliges member states to ensure that judicial and/or administrative procedures are available, including where appropriate conciliation procedures. Article 7(2) requires member states to ensure that associations, organisations or other legal entities, which have a

75 Waddington and Hendriks, "The Expanding Concept ...", 406 and 413. See also, for a systematic examination in this regard of the situation in the EU member states, EU Network of Independent Experts on Fundamental Rights, Thematic Comment No.3: "The Rights of Minorities in the European Union", para. 5.3., 33-35.

76 Waddington and Bell, "More Equal Than Others ...", 597. Indeed, it is in a case concerning freedom of religion that an obligation to provide reasonable accommodation was first explicitly put forward: see *Central Alberta Dairy Pool v. Alberta* [1990] 2 R.C.S. 489.

77 Waddington and Hendriks, "The Expanding Concept ...", 410.

78 *Ibid.*, 414-415.

79 Toggenburg, "The Race Directive ...", 238.

80 Waddington and Bell, "More Equal Than Others ...", 588.

legitimate interest in ensuring that the provisions of the Directive are complied with, may engage “either on behalf or in support of the complainant, with his or her approval” in any judicial and/or administrative procedure. This formula falls short of collective action understood as the granting of an autonomous *locus standi* to associations,⁸¹ but goes nevertheless one step beyond individual litigation in order to make it more effective.

Article 8 reverses the burden of proof for not only discrimination but also harassment cases.⁸² This move initially attracted opposition as the Directive also applies to situations outside the labour market, in which parties may be of equal bargaining power. The ratio behind this provision, however, is to facilitate the burden of proof in discrimination cases, which the victim may find difficult to prove whatever the context is in which the alleged discrimination has occurred. In combination with the limitation of the scope of the Directive to the supply of those goods and services which are “available to the public”, the move to reverse the burden of proof was approved by the Council.⁸³ In contrast to the 1997 Burden of Proof Directive for sex discrimination cases,⁸⁴ which does not apply the burden of proof provisions to occupational social security schemes, the burden of proof provisions in the Racial Equality Directive apply throughout its material scope, which includes social protection (Article 3(1)(e)). However, the shifting of the burden of proof does not apply to criminal procedures (Article 8(3)). As several member states have hitherto relied mainly on criminal law sanctions for racial discrimination – whereas civil law procedures are more familiar in the context of sex discrimination – the real application of the burden of proof provisions to racial discrimination cases may be considerably more restricted in practice.⁸⁵

According to Article 14, member states moreover have to ensure that any laws, regulations and administrative provisions contrary to the principle of equal treatment are abolished and that any provisions contrary to the principle of equal treatment which are included in individual or collective contracts or agreements, internal rules of undertakings, rules governing profit-making or non-profit-making associations; and rules governing the independent professions and workers’ and employers’ organisations, are or may be declared null and void. The phrasing of “are or may be declared” indicates that member states are not necessarily required to declare null and void each contradictory term in any form of agreement, as it is sufficient that the validity of such is determined in those cases where the respective provisions are challenged.⁸⁶ Article 15 in addition obliges member states to “lay down the rules on sanctions applicable to infringements of the national provisions adopted pursuant to this Directive”. These sanctions may comprise the payment of compensation to the victim and must be effective, proportionate and dissuasive.

81 Schiek, “A New Framework ...”, 299.

82 Article 8 makes reference only to “direct and indirect discrimination”, but Article 2 interprets harassment as a subform of discrimination.

83 Tyson, “The Negotiation of ...”, 214.

84 Council Directive 97/80.

85 Waddington and Bell, “More Equal Than Others ...”, 606.

86 Tyson, “The Negotiation of ...”, 217.

As regards extra-court implementations, Article 11 requires the member states to take adequate measures to promote the social dialogue between the two sides of industry with a view to foster equality and to encourage them to conclude agreements laying down anti-discrimination rules. Article 12 obliges member states to engage in dialogue with non-governmental organisations. This provision reflects the prominent role of NGOs in the genesis of the Directive and corresponds to the enhanced role of such bodies within the EU system.⁸⁷

Article 13 of the Directive calls upon member states to establish bodies for the promotion of equal treatment. These bodies must, as a minimum, be able to provide “independent assistance to victims of discrimination in pursuing their complaints”, conduct “independent surveys concerning discrimination”, and publish independent reports and make recommendations on any issue relating to such discrimination.

Article 17 obliges the member states to communicate to the Commission by 19 July 2005, and every five years thereafter, all the information necessary for the Commission to draw up a report to the European Parliament and the Council on the application of this Directive. This report shall take into account the views of the European Monitoring Centre on Racism and Xenophobia (EUMC) as well as the viewpoints of the social partners and relevant NGOs. The report moreover shall, in accordance with the principle of gender mainstreaming, provide an assessment of the impact of the measures taken on women and men. This last requirement is significant, as many Romani women indeed suffer from double discrimination.⁸⁸

C. EU Policy Framework and Roma⁸⁹

A Community Action Programme to Combat Discrimination (2000–2006) was adopted in 2000 alongside the Racial Equality Directive and the Framework Employment Directive.⁹⁰ It is managed through the Directorate General for Employment and Social Affairs of the European Commission. The Programme is designed to support and complement the implementation of the Directives through the exchange of information and experience and the dissemination of best practice. It promotes measures to combat discrimination based on racial or ethnic origin, religion or belief, disability, age or sexual orientation. The 2004 work programme of the Community Action Programme defined eight priority areas for the establishment of transnational actions. One priority was specifically targeted at Romani integration into education and employment, and has

87 Toggenburg, “The Race Directive: A New Dimension ...”, 240; Isabelle Chopin, “The Starting Line Group: A Harmonised Approach to Fight Racism and to Promote Equal Treatment”, 1(1) *EJML* (1999), 111–129; and *id.*, “Campaigning Against Racism and Xenophobia: from a Legislative Perspective at European Level” (European Network Against Racism, 1999), at <http://www.enar-eu.org/en/publication/2_2_2.pdf>.

88 European Commission, DG Employment and Social Affairs, Unit D3, “The Situation of Roma ...”, 33–35.

89 The following section is largely based on European Commission, DG Employment and Social Affairs, Unit D3, “The Situation of Roma ...”, 11–16.

90 See Council Decision 2000/750/EC of 27 November 2000 establishing a Community action programme to combat discrimination (2001 to 2006), OJ 2000 L 303, 23.

lead to the selection of four Roma-specific transnational partnerships and actions for the preparatory phase in 2004, to be followed by a two-year implementation period.⁹¹

Moreover, in the 2005 Plan of Work and Budget Breakdown of the Programme, a call for proposals for the support towards the operating cost of a Roma network is foreseen. This network would act as an interlocutor at European level on Romani issues. The Commission believes that “in order to ensure the mainstreaming of Romani issues in EU policies, it will be necessary to provide ad hoc funding to a representative Roma network.”⁹²

Regarding the EU social inclusion policy framework, the Union has applied the Open Method of Coordination (OMC). In the common objectives, member states are urged to ‘mainstream’ social inclusion policies in employment, education and training, health and housing policies, and to develop priority actions in favour of specific target groups such as minorities.⁹³

Two components of the EU Structural Funds are of relevance to Romani populations: the European Regional Development Fund and the European Social Fund. The former is the principle instrument of regional policy. It is not a pure infrastructure fund. Apart from infrastructure which accounts for 28% of expenditure, 30% of the fund goes to human resource development and 42% to productive sectors. The fund may therefore finance a number of activities of interest to Romani populations, including basic infrastructure for Romani settlements, social inclusion measures and lifelong learning facilities.⁹⁴ The Community Support Frameworks for 2004-2006 agreed with the Czech Republic, Hungary, Poland and Slovakia in recognising the importance of Romani issues and have adopted strategies to combat Roma exclusion. The actions supported by the structural funds, however, suffer particularly from the unavailability of ethnic data which may influence the targeting of the actions and their effectiveness.⁹⁵

The European Social Fund finances activities aimed at improving involvement in the labour market, including streams on women’s participation, lifelong learning, social inclusion, labour adaptability and an active labour market. The Fund has already been used to finance activities of relevance to Roma, Gypsies and Travellers, including the National Programme for the Spanish Roma Community (ACCEDER), which *inter alia* has established 47 specialist employment offices, serving 17,000 Roma and resulting in the work placement of 10,000 of them, and supported a further 3,600 through

91 European Commission, DG Employment and Social Affairs, Unit D3, “The Situation of Roma ...”, 12.

92 Community Action Programme to combat discrimination (2001 to 2006), “The 2005 Plan of Work and Budget Breakdown”, July 2004, 3, at <http://europa.eu.int/comm/employment_social/fundamental_rights/pdf/prog/planprogbud2005_en.pdf>.

93 Council Document 14164/1/02, 25 November 2002, “Fight Against Poverty and Social Inclusion: Common Objectives for the Second Round of National Action Plans – Endorsement”.

94 European Commission, DG Employment and Social Affairs, Unit D3, “The Situation of Roma ...”, 14.

95 *Ibid.*, 42.

employment- related training programmes. The European Social Fund provided EUR 31.5 million of the EUR 45 million programme cost.⁹⁶

The EQUAL Community Initiative is financed by the European Social Fund and seeks to test new approaches to fighting discrimination and inequalities in the employment market, to disseminate good practice and to ensure subsequent mainstreaming. A number of projects aimed at the inclusion of minority ethnic communities in the workplace have been financed through 'development partnerships', including a number aimed specifically at Romani communities and a number that benefited Romani communities among others.⁹⁷

The Directorate General of Education and Culture has in the past taken a particular interest in Romani issues, having issued a number of documents on the subject, including the 1989 Resolution on "School Provision for Gypsy and Traveller Children", but has yet to effect significant change within Roma education through such documents or through its Socrates II and Leonardo da Vinci Community Action Programmes. A limited number of specific projects aimed at the establishment of transnational partnerships have produced successful outcomes. One such project, financed through the Socrates II programme, led to the development of Parent Held Educational Records for nomadic Gypsy and Traveller pupils, which has subsequently been adopted as a policy by the Department for Education and Skills (DfES) in England.⁹⁸

Prior to enlargement, many candidate member states benefited from funding through the Phare programme for their national Roma projects.⁹⁹ The annual reports on the state of affairs of the candidate member states concerning the satisfaction of the accession criteria, which the Commission submitted to the European Council between 1998 and 2003, revealed that the situation of Roma was a serious cause of concern. From 2001 to 2003 the Phare programme contributed EUR 77 million to Roma projects in the then accession and candidate states, covering a range of infrastructure, public awareness and sector-specific projects.¹⁰⁰

The study "The Situation of Roma in an Enlarged European Union", commissioned by the Directorate General for Employment and Social Affairs of the European Commission, evaluates this contribution by the Phare programme as welcome although it assesses the scale of the problem and the fact that many of the interventions were project- specific as meaning that many more resources need to be committed over a long period of time in order to make a real impact. According to the study, the Phare programmes clearly demonstrated that existing policies and practices in Central and Eastern Europe were failing Roma. The overall lack of vision and direction means that

96 *Ibid.*, 14.

97 *Ibid.*, 14-15.

98 *Ibid.*, 15.

99 The Phare programme is one of the three pre-accession instruments financed by the European Union to assist the applicant countries of Central and Eastern Europe in their preparations for joining the European Union. See further <<http://europa.eu.int/comm/enlargement/pas/phare/>>.

100 European Commission, DG Employment and Social Affairs, Unit D3, "The Situation of Roma ...", 15. See also <http://europa.eu.int/comm/enlargement/docs/pdf/brochure_roma_oct2003_en.pdf>.

there was no clear underpinning policy direction or commitment. Although the issues facing Roma have moved to a position of higher priority on the political agenda, the operational environment surrounding policy making for Roma remains fragile as it became more political and partisan. Moreover, there is a vast gap between the policy level and the operational reality.¹⁰¹

There are several policy initiatives of relevance to Roma being undertaken by other international organisations. These include the Council of Europe, OSCE, United Nations Development Programme (UNDP), and the World Bank. There are a number of joint initiatives between the European Union and other actors. An example is the project “Roma under the Stability Pact”, which the Commission is funding under the European Initiative for Human Rights and where it is cooperating with the Council of Europe and the OSCE. Moreover, the Commission is represented by several Directorate Generals at the Informal Contact Group of International Organisation on Roma and Sinti, co-organised by the OSCE. And the EU Presidency also takes an active part within the Steering Committee of the Roma Inclusion Decade (2005-2015) political initiative.¹⁰²

III. REMAINING INSUFFICIENCIES AND POSSIBLE SOLUTIONS

A. Why Directive 2000/43/EC is Insufficient?

The above description of the equality and non-discrimination framework under EU law shows a patchwork of models.¹⁰³ Racial discrimination receives the highest protection through the broad scope of application of the Racial Equality Directive and racial and

101 European Commission, DG Employment and Social Affairs, Unit D3, “The Situation of Roma ...”, 15-16.

102 The Decade of Roma Inclusion grew out of the conference “Roma in an Expanding Europe: Challenges for the Future”, hosted by the Government of Hungary in June 2003 and organised by the Open Society Institute, the World Bank, and the European Commission, with support from UNDP, the Council of Europe Development Bank and the Governments of Finland and Sweden. Prime Ministers, or their representatives, from eight countries (Bulgaria, Croatia, the Czech Republic, Hungary, Macedonia, Romania, Serbia and Montenegro, and Slovakia) made a political commitment to close the gap in welfare and living conditions between the Roma and the non-Roma and to break the cycle of poverty and exclusion. The Decade will run from 2005 to 2015 and the objective is to speed up and scale up social inclusion and the economic status of Roma by setting a limited number of quantitative national goals for improvements in priority areas (education, employment, health and housing), and the establishment of the necessary information base to measure progress toward these goals; developing and implementing national action plans to achieve those goals; and regular monitoring of progress against the goals, and adjusting action plans as necessary over the Decade. See <<http://www.eumap.org/library/static/libr0/0/h/2qw73y4.doc>>. The Decade was launched during the Central European Summit on Discrimination against Roma in Sofia on 2 February 2005.

103 Schiek, “A New Framework ...”, 314 and 305-308; Shaw, “Mainstreaming Equality ...”, 11; Waddington, “The Expanding Role ...”, 25; and McCrudden, “The New Concept of ...”, 16-26 (distinguishing four meanings of equality).

ethnic belonging stands at the peak of the 'hierarchy of equalities'. However, although the Directive is qualified as a 'quantum leap' forward in the protection against racial discrimination,¹⁰⁴ there remains scope for improvement in order to tackle effectively the current exclusion of Roma from mainstream society.

The Report on the Situation of Fundamental Rights in the EU in 2003 prepared within the EU Network of Independent Experts on Fundamental Rights points out that the Racial Equality Directive is inappropriate for achieving the integration of Roma in a number of respects.¹⁰⁵ First, and most importantly, to achieve integration, the mere prohibition of direct and indirect discrimination does not suffice. Positive action is needed, and this is allowed and not obliged by the Directive (Article 5). Second, the material scope of application of the Racial Equality Directive is too limited for the needs of Roma. The Directive does not prohibit discrimination in the issuing of administrative documents. Such documents, however, are often required to access certain social benefits and a number of public services which constitute, particularly for marginalized peoples, an essential aid to integration. As already mentioned, Roma often lack identity cards, birth certificates and other official documents attesting their legal status. These documents are often expensive to obtain for a highly impoverished people. Moreover, the requirement to furnish proof of a fixed address to which social benefits can be paid *de facto* excludes Roma who lead an itinerant or semi-itinerant life.¹⁰⁶ A third insufficiency may be added, which concerns the exclusion of discrimination on the basis of nationality from the scope of the Directive. Roma often face difficulties in many countries having access to citizenship and in extreme cases are even in the situation of statelessness. As such, they belong to the category of non-nationals in many states. Although this does not exclude them from the benefit of the Racial Equality Directive, the fact that the Directive is without prejudice to differences of treatment based on nationality means that it is doubtful whether such differences in treatment, even if they appear to create an indirect discrimination on the grounds of race or ethnic origin, could be challenged under the Directive. Moreover, the rules relating to the acquisition of nationality may not be challengeable under the Racial Equality Directive, even if they have a discriminatory impact on certain racial or ethnic groups, either because of their content or because of the way in which they are applied.

We may elaborate somewhat on these arguments. The introduction of positive action measures is required in order to ensure the desegregation of Roma in the area of housing and in particular of education. Studies clearly show alarming figures of racial segregation of Roma in these and other fields.¹⁰⁷ But there still are doubts as to the ability of an anti-discrimination approach to tackle effectively such a situation. First, from the point of view of the legal requirement of non-discrimination, the question of whether segregation should be considered a form of direct discrimination is debatable,

104 European Commission, DG Employment and Social Affairs, Unit D3, "The Situation of Roma ...", 12.

105 EU Network of Independent Experts on Fundamental Rights, "Report on the Situation of Fundamental Rights ...", 103-105.

106 See also European Commission, DG Employment and Social Affairs, Unit D3, "The Situation of Roma ...", 31-33.

107 See e.g. *ibid.*, 17-30, and the recommendation at 48.

at least where segregation is not combined with unequal treatment. The “Report on the Situation of Fundamental Rights in the Union in 2004” prepared within the EU Network of Independent Experts on Fundamental Rights notes¹⁰⁸ in this regard that, according to Council Directive 2004/113/EC implementing the principle of equal treatment between men and women in the access to and supply of goods and services,¹⁰⁹ that “[t]he principle of equal treatment in the access to goods and services does not require that facilities should always be provided to men and women on a shared basis, as long as they are not provided more favourably to members of one sex”, and that a restrictive interpretation of the requirements of Council Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin – not extending the prohibition of discrimination formulated in this instrument to instances of racial or ethnic segregation, unless it is accompanied by unequal advantages – risks being encouraged by the distinction made between “separate facilities” and “discrimination” in Directive 2004/113/EC.

Second and more importantly, a discrimination-based approach to the situation of Roma, although of course essential, is still an inadequate answer to a situation of structural discrimination, where the exclusion they are subjected to is not attributable to any single act or, indeed, regulatory framework, but to the entrenched caste-like situation they face in all areas of social life, particularly employment, education, and housing. Combating discrimination in access to employment and working conditions is not sufficient to ensure an adequate professional integration of a minority if its members, on average, are widely deprived of access to adequate levels of education. Both education and employment are hardly accessible to a minority whose life conditions, especially housing, constitute an obstacle to children attending school and to adults taking up regular employment, quite apart from the discriminatory attitudes or even policies they may be facing in those two spheres. And conversely, lack of employment, and thus of revenue, impedes both the education of children and the improvement of living conditions. Together these vicious circles constitute what we may call institutional racism: a situation of race-based exclusion which may not be attributed to any specific act, regulation, or policy, but which is the result of a particular racial group being systematically placed in a disadvantaged position in all areas of social life, so that classical anti-discrimination tools are insufficient to ensure the social and professional integration of its members.¹¹⁰

Third, whether or not the Racial Equality Directive now provides them with an adequate protection against discrimination, the Roma have been subjected in the past to widespread discrimination which, for many years, went unpunished. There is some naivety in thinking that the sudden imposition of a prohibition of discrimination will suffice to remedy the resulting consequences. We should not only ask whether the Racial Equality Directive effectively prohibits discrimination. We should also ask whether it is an adequate tool to ensure desegregation, as this is the situation the Roma inherited.

108 EU Network of Independent Experts on Fundamental Rights, “Report on the Situation of Fundamental Rights ...”, 95.

109 OJ 2004 L 373, 37.

110 See for a detailed exploration of this notion Christopher McCrudden, “Institutional Discrimination”, 2(3) *Oxford Journal of Legal Studies* (1982), 303–367.

Fourteen years after the United States Supreme Court had found, in *Brown v. Board of Education*, that racial segregation (the “separate but equal” educational system) was unconstitutional under the 14th Amendment to the United States Constitution,¹¹¹ it had to acknowledge that the simple affirmation of the principle of non-discrimination would not achieve the aim of desegregation, and that affirmative action – in particular, the ‘bussing’ of children from predominantly African-American neighbourhoods to predominantly white neighbourhoods and conversely – could be required to fulfil the mandate of the Constitution. The Supreme Court considered that ensuring freedom of choice for the children was not necessarily sufficient. What mattered, in its view, was not the means chosen (freedom or, indeed, more affirmative measures), but the end result. In a landmark judgment of 27 May 1968, it concluded that the “freedom-of-choice” plan adopted by a school board to put an end to segregation should be judged by its effectiveness in achieving that aim, and that freedom (or “colour-blindness”) could not be seen as an end in itself.¹¹² It quoted from a lower federal court: “If the means prove effective, it is acceptable, but if it fails to undo segregation, other means must be used to achieve this end. The school officials have the continuing duty to take whatever action may be necessary to create a ‘unitary, non-racial system’”.¹¹³ The Racial Equality Directive adopted on 29 June 2000 should be judged according to the same criterion.

Indeed, while the Racial Equality Directive presents the adoption of positive action measures by the EU member states as optional, this should not obfuscate the fact that, under international human rights law, the adoption of such measures may be required in order to effectively combat institutional discrimination, and thus be a component of the more general requirement of equal treatment. The UN Human Rights Committee’s General Comment No.18 (1989) on Non-Discrimination points out in its paragraph 10 that:

the principle of equality sometimes requires States parties to take affirmative action in order to diminish or eliminate conditions which cause or help to perpetuate discrimination prohibited by the Covenant. For example, in a State where the general conditions of a certain part of the population prevent or impair their enjoyment of human rights, the State should take specific action to correct those conditions. Such action may involve granting for a time to the part of the population concerned preferential treatment in specific matters as compared with the rest of the population. However, as long as such action is needed to correct discrimination in fact, it is a case of legitimate differentiation under the Covenant.

111 *Brown v. Board of Education of Topeka*, 347 U.S. 483, 487, 74 S.Ct. 686, 688, 98 L.Ed. 873 (1954) (*Brown I*). See also *Brown v. Board of Education of Topeka, Kan.*, 349 U.S. 294, 300–301, 75 S.Ct. 753, 756, 99 L.Ed. 1083 (1955) (*Brown II*), according to which the boards of education should proceed “with all deliberate speed” in moving towards desegregation.

112 *Charles C. Green et al. v. County School Board of New Kent County, VA et al.*, 391 U.S. 430, 88 S.Ct. 1689, 20 L.Ed.2d 716 (1968).

113 The quote is from *Bowman v. County School Board of Charles City County*, 382 F.2d 326, 333 (C.A.4th Cir. 1967) (concurring opinion).

One specific difficulty in the choice of the integration measures which, beyond the Racial Equality Directive, might be adopted in order to achieve the aim of desegregation is that such measures should respect the Romani minority identity, including the attachment to an itinerant lifestyle which some members of the Romani community may still have. It should be recalled in this regard that, according to the European Court of Human Rights, the traditional lifestyle of the Roma/Gypsies forms part of the right to respect for private life, family and home, which is protected under Article 8 of the European Convention on Human Rights. As explained in the judgment delivered in *Chapman v. the United Kingdom*, the occupation of a caravan by a Roma/Gypsy “is an integral part of her ethnic identity as a Gypsy, 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 by their own choice, 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 affecting the applicant’s stationing of her caravans therefore have an impact going beyond the right to respect for her home. They also affect her ability to maintain her identity as a Gypsy and to lead her private and family life in accordance with that tradition”.¹¹⁴ These integration measures should provide for ‘special measures’ or, in terms of the Framework Equality Directive (Article 5), ‘reasonable accommodation’ which take into account the Romani minority identity in fields such as employment, services, housing, education, health care and transport. For example, Roma should be able to have access to employment or obtain services without being prevented from doing so by the fact of them wearing traditional clothing, even where a justification may be given to support *in general* the prohibition of such clothing *in general*: Only in the instances where there is a justification for *not providing for an exception* benefiting the Roma to a general vestimentary policy should the refusal to provide reasonable accommodation be considered acceptable. Also, Roma should be able to choose to lead an itinerant or semi-itinerant lifestyle, even where there are good justifications for land use regulations which in principle deny them the availability of stopping places for caravans. As regards education too, flexible structures are necessary to meet the diversity of the Roma population and to take into account the itinerant or semi-itinerant lifestyle of a part of them. Having recourse to distance learning, based on new communication technologies, might be envisaged. With regard to health care, the recommendations of Part IV of the report “Breaking the Barriers – Romani Women and Access to Public Health Care”,¹¹⁵ could be referred to. These present mechanisms that would make it possible to take better account of the specific situation of Roma, and particularly that of Romani women, in access to health care services. The policy of ‘openness’ advocated by this report implies that health care workers become more familiar with Romani practices relating to health care and thus are able to make the necessary accommodations for those practices in

114 ECtHR, *Chapman v. the United Kingdom*, judgment (Grand Chamber) of 18 January 2001, para. 73.

115 “Breaking the Barriers – Romani Women and Access to Public Health Care”, report published by the Council of Europe with the collaboration of the OSCE High Commissioner on National Minorities, the Office for Democratic Institutions and Human Rights (ODIHR), and the EU Monitoring Centre on Racism and Xenophobia, September 2003.

order to ensure a non-discriminatory access to health care for Roma. Concerning transport, the EU Network of Independent Experts on Fundamental Rights has insisted that the concept of universal service, which the Green Paper on services of general interest¹¹⁶ cites among the obligations that are traditionally associated with the concept of services of general economic interest, should in particular take into account the special situation of communities living in conditions of segregation, isolated from the rest of the community, such as Roma, especially when low income forms an obstacle to the use of paid transport. In 2004, the Commission built on the consultation launched by the Green Paper¹¹⁷ to present a White Paper in which it presented its proposals in the field of services of general economic interest and the respective roles of the member states and Union law in defining their status.¹¹⁸ Regrettably, the need to accommodate the specific situation of minorities such as the Roma is not taken into account in the most recent communication.

Special measures are also recommended by the UN Committee on the Elimination of Racial Discrimination (CERD/C) in its General Recommendation No. XXVII (2000) on Discrimination against Roma. In the field of education, the CERD/C recommends the adoption of the “necessary measures to ensure a process of basic education for Romani children of travelling communities, including by admitting them temporarily in local schools, by temporary classes in their places of encampment, or by using new technologies for distance education” (para. 21). In the field of living conditions – more precisely housing – the CERD/C encourages states “to take the necessary measures, as appropriate, for offering Romani nomadic groups or Travellers places for encampment for their caravans, with all possible facilities” (para. 32), which implies that exceptions may have to be provided in generally applicable land use regulations to accommodate the specific needs of these families.

We may conclude, then, that the Racial Equality Directive presents two major deficiencies, if it is to serve as an instrument to ensure the social and professional integration of the Roma. First, the Directive adopts a reactive, *post hoc*, approach to the question of discrimination, ensuring that the victims of discrimination will be protected against any measures causing that discrimination and will have effective remedies at their disposal, when what would be required is a proactive, *ex ante*, approach, affirmatively ensuring the integration of the Roma even where there is no identifiable discriminatory measure targeting them or *de facto*, imposing on them a particular disadvantage. Second, the Directive does not include a requirement that special measures are adopted in order to ensure that the specific situation of racial or ethnic minorities is taken into account, without obliging them (in the case of ethnic minorities) to sacrifice a dimension of their identity. But another problem, as has been mentioned above, is that the Racial Equality Directive has a limited scope of application which does not extend to the rules relating to the acquisition of nationality (Article 3(1)). This restric-

116 COM(2003)270 final of 21 May 2003.

117 For the results of the public consultation, see “Report on the Public Consultation on the Green Paper on Services of General Interest, Commission Staff Working Paper”, SEC(2004) 326, (15 March 2004), at <http://europa.eu.int/comm/secretariat_general/services_general_interest/docs/comm_2004_0326_en01.pdf>.

118 COM(2004) 374 final of 12 May 2004.

tion to its scope may be justified under the present case-law of the European Court of Justice, which has recognized that “[u]nder international law, it is for each Member State, having due regard to Community law, to lay down the conditions for the acquisition and loss of nationality”.¹¹⁹ On the other hand, the Directive should not be used as a pretext by the member states for escaping their other international obligations,¹²⁰ such as, in particular, those defined in the International Convention on the Elimination of All Forms of Racial Discrimination. Although it does not in principle affect the legal provisions of states parties concerning nationality, citizenship, or naturalization,¹²¹ this Convention has been interpreted by the Committee on the Elimination of Racial Discrimination to encourage the states parties to ensure “that particular groups of non-citizens are not discriminated against with regard to access to citizenship or naturalization, and to pay due attention to possible barriers to naturalization that may exist for long-term or permanent residents”.¹²² It is legitimate to ask therefore whether, without questioning the right the EU member states have in principle to define the rules relating to nationality, citizenship, or naturalization, their freedom of appreciation in this regard should not be limited in order to ensure that no discrimination, direct or indirect, on grounds of race or ethnic origin, results from the way those rules are formulated or applied. It is – we should recall – “having due regard to Community law” that the Court of Justice has recognized the right of states to define those rules, and under a broad reading of Article 13 EC, this provision could allow for the adoption of an instrument prohibiting a discriminatory application of rules relating to nationality. Indeed, the formulation chosen by the UN Committee on the Elimination of Racial Discrimination, according to which states should “take into consideration that in some cases denial of citizenship for long-term or permanent residents could result in creating disadvantage for them in access to employment and social benefits, in violation of the Convention’s anti-discrimination principles”,¹²³ could apply, *mutatis mutandis*, to the situation of the Roma under the Racial Equality Directive: Where the rules or practices relating to nationality create an obstacle to the exercise by the Roma of the right not to be discriminated against in the access to employment, to vocational guidance and training, to social protection or social advantages, to education, or to goods and services which are available to the public, including housing, should these rules and practices not be challenged as discriminatory in precisely the very fields the Directive covers?

The Racial Equality Directive also exempts differences of treatment based on nationality from its prohibitions of discrimination (Article 3(2)). But neither this provision nor Recital 13 of the Preamble of the Directive excludes that differences of treatment based on nationality, which constitute indirect discrimination on grounds of race

119 ECJ, case C-369/90, *Mario Vicente Micheletti and others v. Delegación del Gobierno en Cantabria*, judgement of 7 July 1992, [1992] ECR I-04239, para. 10.

120 Article 6(2) of the Racial Equality Directive.

121 Article 1(3) of the International Convention on the Elimination of All Forms of Racial Discrimination.

122 Committee on the Elimination of Racial Discrimination, General Recommendation 30: Discrimination against non-citizens, adopted at the 64th session of the Committee, 23 February–12 March 2004 (CERD/C/64/Misc.11/rev.3), at para. 13.

123 *Ibid.*, para. 15.

or ethnic origin, are exempted from the general prohibition of discrimination imposed under Article 2 of the Directive. Apart from the argument put forward by Toggenburg, according to which Article 3(2) might not exempt nationality-based differences of treatment practiced by private persons, this provision could also be read as clarifying that although differences of treatment based on nationality *as such* remain allowable and are not affected by the Directive, where such differences of treatment have a discriminatory impact on groups defined by the race or ethnic origin of their members, they might have to be justified under the criterion defined in Article 2(2)(b), according to which provisions which are apparently neutral as to race or ethnic origin, but which put persons of a racial or ethnic origin at a particular disadvantage compared with other persons, may only be admitted if they are objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.

B. *Moving beyond the Racial Equality Directive*

We would conclude from what precedes by paraphrasing Christopher McCrudden: Generally, the inclusion of groups excluded from the mainstream of society, especially when this exclusion is entrenched across a diversity of sectors as is the case of the Roma, is seen as an issue of social policy; the EU Network of Independent Experts on Fundamental Rights has argued, in substance, that it should be seen as an issue of legal policy.¹²⁴ In its most recent Thematic Comment on the Rights of Minorities in the European Union, the Network explores two avenues for reform. First, it has put forward the idea of a Directive addressed to the situation of the Roma, which would make it possible to take into account their specific needs, especially in the fields of education and housing. There are two problems with this proposal. One is that it may be undesirable to adopt an instrument specifically addressing the situation of one community, where other groups may be in need of a similarly reinforced protection. But, of course, the counter argument is that there exists no other group whose situation is comparable to that of the Roma in the enlarged European Union, and that the adoption of such an instrument would send a strong political signal that the situation of the Roma is seen as a priority by the Union.

The second problem, however, is that of the legal basis on which such a Directive could be proposed. Article 13(1) EC states that the Council “may take appropriate action to *combat discrimination*” based on, *inter alia*, “racial or ethnic origin”. The argument has sometimes been put forward that a directive *promoting integration* has an objective distinct from *combating discrimination*, and that, therefore, it would not be possible, on the basis of Article 13(1) EC, to adopt an instrument imposing the adoption of affirmative action measures or desegregation. This argument is debatable. Segregation is a form of discrimination, although the definitions of discrimination contained in the Racial Equality Directive do not explicitly include the notion of segregation, and indeed, as we have argued, may be considered insufficient to effectively address that problem. There is

124 McCrudden, “Institutional Discrimination ...”, 303: “The continuing absence of racial minority groups from important areas of British life has become a major issue of social policy. It will be the argument of this article that it should also become an important issue of *legal policy*”.

a need for more far-reaching, affirmative active initiatives to tackle more effectively the exclusion of Roma: this is because they face a situation of institutional discrimination, as defined above, and which we may presume is included in the conception of discrimination in Article 13(1) EC. The real difficulty in the use of Article 13(1) EC, in fact, is political rather than legal. Measures adopted under this provision require the member states to agree unanimously within the Council. In the present context, and considering the extremely sensitive character of the issues, it is implausible that a proposal for a Roma-specific directive can be adopted in the near future. Therefore, as recognized by the Network, this route is probably unrealistic.

The Network has therefore proposed that, as an alternative, a more open form of coordination of the measures adopted by the member states could be devised in order to tackle the situation faced by the Romani minority. Indeed, since the entry into force on 1 February 2003 of the Treaty of Nice, Article 13(2) EC has provided the possibility for the Council, acting by a qualified majority in co-decision with the European Parliament, to adopt Community incentive measures, excluding any harmonisation of the laws and regulations of the member states, to support action taken by the member states in order to contribute to combat discrimination based, *inter alia*, on racial or ethnic origin or on religion. The Network considers that this provision provides an adequate legal basis for the launching of a process of collective learning and exchange of best practices between the member states:

Under a decision to launch an open method of coordination between the Member States in order to achieve the integration of the Roma/Gypsies, an initiative for which Article 13(2) EC offers the adequate legal basis, each Member State would submit at regular intervals a report on the measures which have been adopted in order to make progress towards that goal, which should result in a process of mutual evaluation and contribute to collective learning. The information contained in the reports submitted by the Member States on these measures should be evaluated not only from the point of view of their success in achieving desegregation, but also, no less importantly, in their ability to do so while respecting the right of the Roma/Gypsies to maintain their traditional lifestyle, nomadic or semi-nomadic, where they choose to do so, and on the basis of the international and European standards applicable.¹²⁵

The Network has also proposed that the template on the basis of which such a process could be launched should be based on Recommendation Rec(2001)17 on improving the economic and employment situation of Roma/Gypsies and Travellers in Europe addressed by the Committee of Ministers of the Council of Europe to the member states of that organisation, and on the General Recommendation XXVII on discrimination against Roma adopted by the Committee on the Elimination of Racial Discrimination at its fifty-ninth session in 2000. It is important, indeed, that any initiative adopted within the European Union fits within the framework of the international law of human rights, and builds on the *acquis* of international and European human rights law. This requirement of coherence is especially important from the point of

125 EU Network of Independent Experts on Fundamental Rights, Thematic Comment No.3: "The Rights of Minorities in the European Union", para. 7.4.

view of the EU member states, who should not be facing different expectations – and certainly not conflicting requirements – within the Union, on the one hand, within the Council of Europe and the United Nations human rights treaties, on the other.

This option, it should be acknowledged, may encounter scepticism as well, especially in the present context where the tendency is clearly to limit and consolidate the number of open method of coordination processes in the Union. There is however little doubt that the visibility of the Roma in the present OMCs is unsatisfactory. The 2004 study “The Situation of Roma in an Enlarged European Union”, which was commissioned by the Directorate General for Employment and Social Affairs of the European Commission, found that in the field of social inclusion policy, although those new member states with significant Romani populations did name Roma explicitly as a target group for their social inclusion policies, in the old member states only five countries out of fifteen (Finland, Greece, Ireland, Portugal and Spain) have to date named Roma as a target group with their National Action Plans. Roma are not cited in the National Action Plans of Austria, Belgium, Denmark, France, Germany, Italy, the Netherlands, Sweden or the United Kingdom, although reports from all of these countries indicate that Roma are in need of targeted policy actions aimed at social inclusion and eliminating existing discriminatory practices.¹²⁶

C. Inadequacy of the European Policy Framework

It is clear that, however tempting it may be to rely on the adoption of new legal instruments or on the improvement of the institutional framework such as one which could be provided by the inauguration of an open method of coordination for the integration of the Roma, these solutions – quite apart from their political acceptability in an enlarged Union – should not be considered in isolation. Indeed, there remains a lot to be done even with the existing instruments, in order to ensure that they will function more effectively for the benefit of an improved integration of the Roma.

The conclusions which the report on “The Situation of the Roma in an Enlarged European Union” draws with respect to the existing initiatives which have been taken to address this situation are quite explicit on the inadequacy of the approaches chosen, and on their failure to deliver what they promise. Even in situations in which the needs of a minority are identified clearly, it is often the case that the level of policy response is inconsistent with the level of assessed need. Where Roma-specific policies exist, few have yet to demonstrate durable impact. Several of the old member states began undertaking policies in the 1980s or even earlier. In some areas, these have yielded results, but according to the study the Commission was presented with, not nearly to the level required under current anti-discrimination and social inclusion policy. Most of the comprehensive government policies in effect in Central and Eastern Europe date from no earlier than 1996 (Hungary) and in most cases were adopted even more recently. To date, they remain underfunded, at very preliminary stages of implementation, and often resemble more a menu of desired outcomes than viable and realistic outcomes. Universally there also appear to be significant deficiencies in terms of targets

126 European Commission, DG Employment and Social Affairs, Unit D3, “The Situation of Roma ...”, 39-40.

for assessing the success of the existing policies, making it thus difficult to see to what standards policy makers aspire in the implementation of many Roma-related policies. Consultation with Roma and Roma participation in the design and implementation of policies intended to benefit them is currently very modest, where existing at all, and generally hesitant. In some cases, member states have adopted measures which eliminated previous gains. In 1994, for example, the United Kingdom adopted an act removing the obligation of municipalities to provide halting sites for Gypsies and Travellers, effectively eroding close to three decades of progress in the area of Traveller accommodation, education and other positive measures.¹²⁷

Furthermore, a very powerful force for undermining social inclusion projects targeting Roma is local opposition. Local authorities frequently use discretionary powers to block the implementation of projects aimed at improving the situation of Roma. Examples are given by the report delivered to the Commission.¹²⁸ Central policies and funding through EU programmes – such as the European Regional Development Fund – may be rendered ineffectual by inadequate commitment and knowledge at the local level. There is scope for using structural funds for the improvement of capacity at the local levels.¹²⁹

Another problematic issue is the accessibility of funding of EU policies. EU funding is fragmented, complex and is very difficult to access particularly for civil society actors. Moreover, complexity of funding does not encourage transparency in the application for, and use of, funds. The experience with the Phare Programme has shown that it has been particularly successful where projects have been designed with an eye to building stakeholder capacity to work under future structural funding mechanisms, facilitating future access to EU discretionary funds.¹³⁰

IV. CONCLUSION

Article I-2 of the Treaty establishing a Constitution for Europe defines the values of the Union as “respect for human dignity, freedom, democracy, equality, the rule of law

127 *Ibid.*, 40. It is this policy which was challenged in a series of cases presented to the European Court of Human Rights, which however did not consider that it could identify a violation of Article 8 ECHR – either alone or in combination with Article 14 ECHR – as a result of this policy. See ECtHR, *Buckley v. the United Kingdom*, judgment of 25 September 1996, ECHR 1996-IV; ECtHR, *Chapman v. the United Kingdom*, Appl. 27238/95, judgment (Grand Chamber) of 18 January 2001; ECtHR, *Beard v. the United Kingdom*, Appl. 24882/94, judgment (Grand Chamber) of 18 January 2001; ECtHR, *Coster v. the United Kingdom*, Appl. 24876/94, judgment (Grand Chamber) of 18 January 2001; ECtHR, *Jane Smith v. the United Kingdom*, Appl. 25154/94, judgment (Grand Chamber) of 18 January 2001; ECtHR, *Lee v. the United Kingdom*, Appl. 25289/94, judgment (Grand Chamber) of 18 January 2001.

128 European Commission, DG Employment and Social Affairs, Unit D3, “The Situation of Roma ...”, 40–41.

129 *Ibid.*, 42.

130 *Ibid.*, 44.

and respect for human rights, *including the rights of persons belonging to minorities*”.¹³¹ This text thus mentions for the first time explicitly the rights of persons belonging to minorities in the primary law of the Union. For the moment at least, at best until 2007, the Constitutional Treaty has been swept aside by the results of the referenda held in France and in the Netherlands respectively on 29 May and 1 June 2005. This of course does not mean that the rights of minorities may be ignored in the law- and policymaking of the Union: The Charter of Fundamental Rights, which will continue to be the main reference document on fundamental rights in the Union whether or not it is incorporated in the Treaties, not only prohibits any discrimination based on, *inter alia*, ethnic origin, language, religion or membership of a national minority;¹³² it also protects rights such as freedom of religion, the right to respect for private life, or freedom of association, which have an important role to fulfil in ensuring that the members of minorities may express, preserve and develop their identity. More importantly, it would be a complete misunderstanding to believe that, simply because the notion of minorities does not appear in the current Treaties, there would be no possibility for the European Community to take action in order to promote the rights of minorities in the Union. As recalled by the draft resolution on the protection of minorities and anti-discrimination policies in an enlarged Europe, which the European Parliament submitted to the vote of the plenary at the time of writing, Article 13 EC provides a legal basis for the promotion of certain aspects at least of minority rights:

... this legal basis, which is the most far reaching as regards the protection of minorities, [is one on the grounds of which] the Union could, on the basis of its experience, develop ... initiatives that have already been implemented and strengthen various articles of the FCNM, such as Article 3(1), Article 4(2) and (3) and Articles 6 and 8 thereof.¹³³

The message of this article has been very simple. On the basis of Article 13 EC, important legal instruments have been adopted, which go a long way towards addressing the needs of ethnic and religious minorities in particular, and among the former, the

131 The expression in italics did not figure in the Draft Treaty establishing a Constitution for Europe submitted by Mr Valéry Giscard d'Estaing, the president of the European Convention, to the European Council. It was inserted during the Intergovernmental Conference which followed, at the initiative of Hungary.

132 As has been recalled, Article 21(1) of the Charter of Fundamental Rights states that “[a]ny discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited.” The enumeration of Article 21 of the Charter is strange, however. It is well known that the concept of ‘national minority’, such as it appears in particular in the Council of Europe Framework Convention on the Protection of National Minorities, includes ethnic, cultural, linguistic and religious minorities (see, for instance, the 6th Recital of the Preamble to that Convention). Thus there is a certain redundancy in the enumeration, in any event not limitative, of Article 21 of the Charter.

133 Draft Resolution on the protection of minorities and anti-discrimination policies in an enlarged Europe (2005/2008(INI), 10 May 2005; rapp. C. Moraes), para. 50.

needs of the Roma. But confronting the situation of the Roma with the provisions of the Racial Equality Directive shows that more can and should be done. Article 13(1) EC could be relied upon by the European legislator either to improve further on that Directive, for instance in order to extend its scope of application to the delivery of administrative documents, in order to explicitly include segregation as a form of prohibited discrimination, or in order to adopt another instrument, complementary to the Racial Equality Directive, addressing in a more focused manner the specific needs of the Roma, while remaining attentive to the preservation of their traditional lifestyle for those wishing not to renounce it, and ensuring that such a measure is based on a consultation of the Roma themselves. Article 13(2) EC could be relied upon to encourage the member states to share the best practices they are developing in order to accelerate the integration of the Roma, and to monitor, better and more systematically than they do at present, the situation of the Roma in fields such as housing, education, employment, or health care, where the Roma are not specifically considered in the national action plans or the social inclusion plans of most member states at present.

To those who would ask why such far-reaching measures would be required in order to combat discrimination against the Roma, and why we could not afford to wait and see whether the Racial Equality Directive effectively improves their situation to the full extent desirable – and we believe their question is an entirely legitimate one – our answer has been that the form of the discrimination faced by the Roma may not be reduced to discrete acts by individual actors, or to the existence of certain pieces of legislation which will be weeded out as the Racial Equality Directive becomes more widely known, and more systematically invoked. The discrimination the Roma are facing has lasted for generations. It affects them in all the spheres of life which matter for social integration. Entire groups of Romani children, today, are sitting in separated classes meant for mentally disabled children; entire communities of Roma are confined to ghettos where they are living in substandard conditions; as documented for instance in the reports on the progress made by the new member states towards accession, and the life expectancy of the Roma is significantly lower than that of the average of the population. The question is not simply that any individual Roma applying for a job, or seeking to have his or her child attend a school, is denied employment or the possibility to register; it is that a whole community should be integrated when it has for so many years been subjected to systematic exclusion and segregation. Of course, real integration requires active social and economic policies targeted towards this aim. But, while it should not exonerate us from encouraging the adoption of such policies, the law also is a powerful tool; it is our responsibility to use it the best way we can.

