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The EU and its Internal Outsiders. The French Deportation of Roma in the Summer of 2010 – an Infringement of the Lisbon Treaty?¹

Keywords: Roma, deportation, infringement procedure, fundamental rights, France

This paper discusses the expulsion of non-national Roma by the French government in the summer of 2010. It does so by concisely portraying the social background of Roma as the biggest minority group in the EU and the lacking methods of integration within EU borders. The discussion therefore centers on the legal framework of the European Union, which is supposed to grant fundamental rights and the prohibition of discrimination to EU citizens. The actual method of control remains to be the infringement procedure initiated by the EU Commission. This paper consequently elaborates not only on its structure, but ultimately discusses the question of the infringement procedure's effectiveness in the context of the Roma deportation. In essence the paper highlights the dilemma of balancing the difficulty of integration within the EU and simultaneously upholding fundamental rights that were granted to all EU citizens.

Die internen AußenseiterInnen der EU. Die französische Deportation von Roma im Sommer 2010 – Eine Verletzung des Lissabon Vertrags?

Schlüsselwörter: Roma, Deportation, Vertragsverletzungsklage, Grundrechte, Frankreich

Dieser Artikel analysiert die im Sommer 2010 vollzogene Roma-Deportation durch die französische Regierung. In diesem Zusammenhang wird zunächst der soziale Hintergrund der Roma als größte ethnische Minderheit innerhalb der EU dargestellt, was gleichzeitig die nach wie vor mangelhaften Integrationsmaßnahmen in einigen Mitgliedsstaaten aufzeigen soll. Den thematischen Schwerpunkt bildet in weiterer Folge der rechtliche Rahmen der EU, welcher Unionsangehörigen nicht nur (Grund-)Rechte, sondern auch Schutz vor Diskriminierung garantieren soll. Als primäres Instrument dient hierfür weiterhin die Vertragsverletzungsklage. Dieser Artikel erläutert folglich nicht bloß deren Aufbau, sondern geht vielmehr der Frage nach, inwiefern die Vertragsverletzungsklage im Zusammenhang mit der Roma-Abschiebung als praktisches und effizientes Instrument für Minderheitenschutz fungieren konnte. Im Wesentlichen soll dadurch die Herausforderung für die europäische Integration aufgezeigt werden, den durch die Europäische Union etablierten Rechtsschutz allen Unionsangehörigen gleichermaßen zu gewähren, unabhängig vom politischen Gewicht mancher Mitgliedsstaaten.

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1. Introduction: Subject and Scientific Analysis

Back in the early stages of the European Union (EU), the founding treaties as well as the motivation for prospective Member States (MS) to join a European Community, demonstrated a commitment for solidarity within the borders of the EU. This commitment was strongly characterized by a political willingness of the European people to restrict their own national interest for the greater good of a European Community. Ever since, some countries have clearly been less willing to pursue this commitment than others, and primarily seek greater protection of their national interest – sovereignty. This development may be observed particularly since discussions on a European Constitution confronted the EU with an increasing skepticism towards the growing European body. Precisely speaking, it was the (even far) right wing political parties, which successfully managed to exploit the emerging wave of skepticism for their populist mechanism by associating citizens' fear about decreasing employment, security and economic welfare with increasing immigration. The ultimate result of stirring such fear is an almost omnipresent mistrust and social hostility towards not only immigrants but also EU citizens with immigrant backgrounds within the EU today.

Now most recently in the summer of 2010, French policy makers attracted the concern of EU Member States and their institutions when deporting hundreds of non-national Roma from their French camps to Romania and Bulgaria. Even though this event did not state the first incident of France deporting non-national Roma, given the proclaimed process of the EU and its commitment to anti-discrimination of EU citizens, the deportation in the summer of 2010 provoked institutional and public outcry. By questioning fundamental principles of the EU under which citizens had been formerly granted certain protections by the early convention of the EU, France thereby not only jeopardized the consistency of adopted EU principles and fundamental Human Rights on the national, but also on the European level as a whole, since it may have encouraged other countries to follow such an approach.

As a result, a closer review of the most current actions in this country raises the question to what extent these French integration policies were still compatible with the very principles the EU and its hitherto twenty-seven MS have committed themselves to. In this context, this essay will therefore discuss the infringement procedure and try to analyze why the infringement procedure has been ceased for this specific case, despite the public and political upheaval the deportation has caused. As a consequence, this paper will discuss the political implications for the EU not having pursued the infringement procedure against France. Additionally, this essay shall consider indications of reactions of other MS and EU institutions primarily condemning, but eventually tolerating the French measures. In order to give full comprehension of the Roma deportation, this analysis will also concisely reflect upon the current living situation and social perception of Roma within the EU in general.

Unfortunately, even strong supporters of the EU and its beneficial vision of true unification may consider this struggle and eventually the lack of sanctions by EU bodies as one of the major deficits of the EU, somehow justifying why it is not yet taken as seriously by other international players. As conclusion, this article reflects upon the question whether the community of law could either prove its effectiveness when showing a collective approach towards the French infringements or simply involve itself in greater difficulties by questioning the legal framework, pursuing unilateral stances and thereby presenting themselves as hypocrites to the international community.

In essence, the relevance of the paper's leading subject is primarily centered on the social level: on the one hand, handling the omnipresent difficulty of integration within the EU and on

the other upholding those fundamental rights that ought to be granted to all EU citizens. The history of the EU has hardly seen any periods, which were strongly characterized by such a dominant aggressiveness and rejection of immigrants. Since these xenophobic stances are also taken against citizens of the EU, the Union itself is confronted with the dilemma of unifying both interests and the urgent need to take action.

2. The Life of Roma within the EU – a Concise Overview

Before elaborating on the details framing the sudden deportation of Roma by France in the summer of 2010, a concise insight into the past and current social perception as well as living situation of Roma shall provide a general understanding of their social status within the EU.

The term ‘Roma’ is commonly employed as an umbrella term for a number of groups including Roma, Sinti and Travellers. Numbering between 10–12 million, Roma collectively constitute the largest ethnic minority in Europe.” (European Commission: EU Action against Discrimination. Activity report 2007–2008, European Communities 2009, 15) At the same time, one must distinguish the term ‘Roma’ from ‘Gypsy’, expressions which are commonly but incorrectly referred to as synonyms. Angus Bancroft includes under the term ‘Gypsy-Traveller’ English Romanichels, Welsh Kale, Scottish Travellers (Nawken) and Irish Travellers (Minceir), while using ‘Roma’ to refer to the Gypsies of Continental Europe, including Roma, Sinti, and so on (Bancroft 2005, 5–6). Bancroft’s argument is based upon the belief that even though the (linguistic) division is a rather artificial one, it should still be highlighted due to “important historical, cultural, and socio-economic differences, which are relevant to their experience” (ibid. 6).

The living situation of Roma can obviously not be described without shortly mentioning the continuous historic persecution Roma communities had been confronted with for centuries. The first Roma communities discovered Europe in the 13th and 14th century. Wherever their journey unities took them, Roma were mainly confronted with suspiciousness and marginalization. As a result, those early characteristics of communities travelling in caravans and attracting attention with mysterious rituals and exuberance continue to prevail as stereotypes even today.

While concentration camps during the Holocaust had marked the peak of their persecution, the racist violence continued following the fall of Communism and is still here today, reflected by a predominant hostility throughout the EU. Particularly in this context, it seems rather striking that the growing supranational body, the EU, committed to fight discrimination and for the prevalence of unity and equality does still not succeed in fully guaranteeing those principles to minority groups in society.

Nowadays, the majority of Roma are settled in Continental Europe, particularly Central and Eastern Europe, but various groups of Roma have also settled in North and South America, the UK and Australia throughout time.

Nevertheless, the social perception of Roma and Gypsy-Travellers remains very biased, reviling them “as scroungers and parasites, as incorrigible and, in the words of the former Slovakian Premier Vladimir Meciar, ‘social unadaptables’.” (Bancroft 2005, 9, cited Radio Free Europe: 31/06/1998) Despite the fact that the EU continues to proclaim its rigid battle against the discrimination of Roma, the unacceptable, persistent situation of discrimination and marginalization faced by Roma people in Europe prevails, which may also be exemplified by a statistic of the Eurobarometer stating that 77% of the European public still consider that being Roma is

a disadvantage in society (European Commission: EU Action against Discrimination. Activity report 2007–2008, European Communities 2009, 15). This perception mainly derives from the legal and social status of Roma, since the most dominant disadvantages remain that of housing, education and employment. Therefore, it seems worth proceeding by discussing the question of legal status of Roma groups as well as the policies ultimately shaping their status and thereby Roma's prevailing exclusion.

The Legal Status of Roma

The overall majority of Roma, Sinti and Travellers are citizens of the country they live in, which would in principle guarantee them the same rights as other nationals, based upon both national constitutions and EU treaties. However, it happens quite frequently that provisions of the constitution are only applied selectively and restrictively on Roma or that politics in practice simply contradict the aim of the constitution (Liégeois 2008, 135). As Jean-Pierre Liégeois a leading expert on Roma, Sinti and Travellers explains, there are various reasons behind such a hidden discrimination, “mostly reflecting the fact that cultural differences go unrecognized, that an actual or supposed nomadic lifestyle is equated with parasitic marginality and that the Roma, who have always endured discriminatory treatment, are still suffering its consequences” (ibid.).

Considering these facts, one may wonder how and what kind of legal rules may be established to successfully combat these issues. In fact, the difficulty remains to distinguish between the issue of integrating Roma as a minority group and that of refraining from constantly marginalizing and labeling them as a *distinct* (in other words *different*) group, which would only stir a prevailing exclusion.

The fact that legal progress remains difficult is what Liégeois derives from the perception that Roma are people without a territory, which is why they are rarely listed among the minorities officially ‘accredited’ as deserving of respect and assistance (ibid.). In fact, he argues that “even the most broadly framed legislation and regulations assume that minorities will be permanently established in one place, so travelling or dispersed groups are penalized” (ibid., 135–136). In this context, Liégeois’ argument seems very well-thought, since it exemplifies once again how far back characteristics of a minority group (travelling and not belonging) may continue to stigmatize their descendants with (by then) stereotypes, even after centuries. As a result, no affected state shows true acknowledgement for Roma as ‘their’ citizens, but rather imply that they would grant favors when allowing them a (temporary) stay; a personal observation that shall later be outlined in more detail, when discussing which policies towards Roma have been violated.

However, at this point it seems also worth noting the legal recognition of Roma as autochthonous citizens in Austria and Germany, exemplifying the positive development in legal terms. Concretely speaking, in Austria one must distinguish between the status of Roma as an autochthonous settled group or *Volksgruppe*, primarily based upon Art. 19 StGG (Staatsgrundgesetz) and the rights granted to Roma as fugitives or immigrants without Austrian or EU-citizenship. In this context, also the most recent jurisdiction of the European Court of Human Rights (ECHR) added to improve the legal status of Roma, since the ECHR began to speak out about minority protection of particularly Roma and Kurds. As Peter Hilpold points out, the ECHR did not show much readiness to apply the European Convention on Human Rights in favor of such minorities for quite some time, which has changed significantly within the last decades. As Hilpold observes, the ECHR recently dealt with the enforced sterilization of Roma women in Slovakia and the

destruction of Roma camps in Creta, France and Rumania, repeatedly convicting the contract parties due to the infringement of Roma rights (Hilpold 2010, 13). Even though judgments of the ECHR are not legally binding for national jurisdiction, the international as well as national impact on the later developing jurisdiction and legislation at the national level is evident.

Nevertheless, cases such as the French deportation demonstrate the remaining difficulties in enforcing the achieved legal improvements in practice, which shall now be outlined in more detail by portraying the infringement procedure – the EU's tool to guarantee that developed policies are being upheld by Member States.

3. The Infringement Procedure – Art. 258–260 TFEU

Considering the Roma deportation, the most relevant and most discussed measure of EU institutions related to this subject was the infringement procedure. An infringement equals any violation of an obligation arising from EU law, which may include EU law being laid down in the treaty, in international agreements or simply any violation of a secondary act. “The aim of the infringement procedure is therefore to primarily examine, whether a MS has violated community law (*first action of supervision*, Art. 258 Treaty on the Functioning of the European Union, TFEU)” (Streinz 2005, 207). In case the MS does not refrain from the detected infringement against community law, the Commission may follow a second supervisory claim, which aims to make the belated MS comply with its duties (*second action of supervision*, Art. 259 TFEU).

While the Commission is actively entitled to sue, MS are passively entitled and therefore those being accused to sue as well. In addition to the Commission, MS themselves may also initiate an infringement procedure against another MS, if the accused infringed an obligation of the treaty. However, this right is hardly ever applied by MS. Therefore, the Commission vs. a MS remains the most common scenario when an infringement procedure is initiated.

The main purpose behind such an extensive procedure is, firstly, a uniform application of Community Law. In order to pursue this aim effectively, there is need for one institution being entrusted with the monitoring of states' behavior. In the end that institution may or must launch an infringement procedure against the MS in question. Reflecting upon the characteristics needed, there may have been hardly any doubt that the Commission – being considered the guardian of the treaties – would be assigned with this task.

Secondly, the infringement procedure pursues its enforcement through an impartial institution. By assigning the Commission as a neutral actor, the EU attempts to exclude the domination of national interests within the infringement process. However, even though the Commissioners themselves are not supposed to represent the interest of MS, this condition remains difficult to monitor.

As a third purpose, the infringement procedure shall guarantee a protection of the rights of individuals. As a matter of fact, no right exists guaranteeing individuals that the Commission must take up the individual's complaints. The commission rather *may* follow up on the complaint. Possible reasons for an impartial institution, such as the Commission, to not follow a case of complaint may be centered on the national level of Diplomacy, where the exercise of political discretion could be demanded.

The procedure itself appears rather complicated for most observers, since it is based upon various administrative and procedural steps. According to Art. 258 (2) TFEU, the commission may only appeal to the European Court of Justice (ECJ) if the MS has not followed upon the

commission's statement within the given (appropriate) time frame (ibid., 217). Such a statement of the Commission lists the reasons for taking action and the Commission does so if it is of the opinion that a MS has violated obligations of the treaty. In summary, this leads to the following order: (1) informal negotiations within the Commission; (2) a letter of formal notice to the MS; (3) a further statement referred to as reasoned opinion to the MS; (4) court application after the MS's failure to follow the statements within the given time frame; (5) judgment of the court; (6) enforcement; (7) financial sanctions (Art. 258–260 TFEU).

In conclusion, however, it remains evident that the Commission is bound to financial sanctions as the only measure to penalize MS infringing EU law. The implications of this observation are essential for the prominent discussions about the EU's lack of transparency and eventually effectiveness in making its MS comply with EU standards, exemplified not only by the case of the Roma deportation, but also by Denmark and its suspension of the Schengen Agreement for instance.

Now, having portrayed the social situation of Roma, its political and judicial context and after outlining the structure of the most relevant political and legal measures the EU has committed itself to, we shall proceed by actually discussing the infringement in question.

4. The Deportation of Roma – an Infringement of the Lisbon Treaty?

In order to fully comprehend the discussion of the Roma deportation initiated by France in the summer of 2010, it was fundamental to first outline the applicable terms and the related social, political and judicial structure as a whole. Consequently, we may now proceed in elaborating on the case itself, for which it seems appropriate to concisely portray the current situation of Roma communities in France at first and eventually summarize France's procedure in question.

The Summer of 2010 and a leaked Memo

Even though some countries, such as Austria and Germany have progressively counteracted the existence of Roma slum settings (legally based upon the foundations mentioned above), the living situation of Roma in France and other MS, such as Italy and Hungary, remains socially and legally discriminatory, even violating Hungarian and Italian national law to some extent. Roma communities are mainly centered on the outskirts of cities in (often illegal) camps, caravans or other forms of accommodation near urban zones, which encompasses both, non-national and national Roma. The conditions there are known to be very deprived, sometimes even leaving them with no water or electricity. While Liégeois argues that the total number of Roma living in France today varies from 300.000 to 400.000, a study of the European Roma Rights Centre published in August of 2010 states that the number of migrant Roma living in France lies between 10.000 and 20.000, of which a significant number are from Romanian or Bulgarian origin (European Roma Rights Centre, Aug. 2010). According to government officials, these big numbers seek to escape from poverty and prejudice in home countries as discussed above and therefore hope to improve their living conditions in a prosperous country like France. Such hopes have clearly been disappointed so far.

Due to the just described living conditions, more and more Roma in such communities tend to turn to criminal activities and even the use of violence when it comes to defending themselves

against French police activities, which was reported most recently in July 2010. The incident triggering Sarkozy's sudden announcement on a crackdown on 539 unauthorized settlements. In fact, French authorities published a press release on the 28 July 2010, in which they announced a series of upcoming measures regarding the current Roma and Travellers situation in France. The main aims were: (1) Dismantling 200 illegal settlements in France within three months notably due to the situation of 'lawlessness' linked to such settlements: illicit trafficking and the exploitation of children for begging, prostitution and crime, and the violation of property rights; (2) Reforming existing French law enabling a more efficient process of dismantlement of illegal settlements in the future; (3) Removing from France EU citizens from Eastern Europe, mostly from Romania and Bulgaria, in irregular situations; (4) Repatriating them and paying, in this context, "an aid of return" and to resettlement € 300 per adult and € 100 per child; (5) Using from October 2010 a database named OSCAR to collect fingerprints from the recipients of the "aid to return" to allow the detection of possible frauds, e.g. requests done several times by a same person and using different identities (State Watch, 1 Sept. 2010).

Following this announcement, "French authorities announced that 128 illegal settlements had been dismantled and that 979 (of which 151 were forced returns and 828 voluntary returns) Romanian or Bulgarian citizens in irregular situation in France had been repatriated since 28 July" (ibid.). According to the French Interior Minister Brice Hortefeux, about 700 Romani people had been evicted from 40 camps in the first two weeks since President Sarkozy's measures were announced and as later reports published, these camp clearances were pursued with dawn raids on family homes, rendering people homeless (European Roma Rights Centre, Aug 2010).

The controversial aspect and therefore international condemnation for this measure was actually due to the unmistakable reference to '*Roma*' in the French announcement, which had been published because of an 'unfortunate' leak within the French interior ministry. In fact, "a leaked memo, dated 5 August 2010 and signed by the chief of staff for interior minister Brice Hortefeux, reminds French officials of a 'specific objective' set out by Sarkozy" ("France's deportation of Roma shown to be illegal in leaked memo, say critics", The Guardian, 13 Sept. 2010). The memo explicitly stated that "[t]hree hundred camps or illegal settlements must be evacuated within three months; Roma camps are a priority" and that "[i]t is down to the *préfet* [state representative] in each department to begin a systematic dismantling of the illegal camps, particularly those of the Roma" (ibid.). The actual embarrassment for French authorities was, however, that the "leaked memo emerged a few days after France's immigration minister, Eric Besson, insisted that sending police to destroy camps and settlements and ordering inhabitants to leave France was not aimed at the Roma. He insisted they were being treated no differently to other EU migrants who do not meet France's residency rules" (ibid.). What followed were an international outcry and the EU Commission's immediate announcement of launching an infringement procedure against France if it did not revise their policies in accordance with EU Law (stage of *informal negotiation*). Instead of complying immediately, French officials denied the exclusive stigmatization of one ethnic group, but claimed to punish illegal behavior in general. What came next was a rather long period of heated debates between Sarkozy and the EU Justice Viviane Reding, firmly repeating her call to take action against France, describing Paris' action as 'disgrace' and giving voice to the majority of the EU's public opinion when stating in a speech to the European Parliament in September 2010 that "[t]his is a situation I had thought Europe would not have to witness again after the Second World War" (Europa Press Releases, 14 Sept. 2010). France eventually submitted a revised statement of the policies to the Commission in October in which it had adopted the announcement of 'expulsion of Roma camps' to the expulsion of illegal

camps ‘whoever the residents may be’. This simply revision supposedly helped France to avoid the initiation of an infringement procedure. However, the Commission’s argument in why it refrained from pursuing the procedure is everything but convincing in this context. The Commission’s mere announcement that it would instead simply set up a task force, which should examine how EU funds earmarked for Roma are being spent, must not mark the end to this case. Bearing in mind the obvious and targeted stigmatization of Roma, such a simple change of the Commission in weighing and sanctioning France’s unlawful behavior cannot be understood.

Even though the overall reaction of the international community showed high support for the large numbers of Roma being deporting, some MS have appeared to view the discriminatory measures as giving legitimacy to their own anti-Roma policies. As a matter of fact, the Italian Interior Minister Roberto Maroni showed strong support for the French measures and even requested increased requirements for the exercise of free movement and residence rights, including that EU-citizens should be required to demonstrate that they have adequate housing (European Roma Rights Centre, Aug. 2010). Nevertheless, considering the later following breaking off of the highly disputed fingerprint measures in Italy targeting Roma, which had been initiated in 2008², one may also categorize this development as one of the positive impacts caused by the attention for the French deportation.

However, similar to Italy’s Interior Minister, a Member of the EU Parliament representing Jobbik, a far right Hungarian political party, called for the “eviction of habitual Romani criminals from a northeastern Hungarian city, their placement in a camp and the stripping of their Hungarian citizenship” (ibid.). Furthermore, Germany also got into the spotlight with its own plans on expelling thousands of non-national Roma back to Kosovo by the end of the year, a debate which stopped rather quickly when Germany refrained from its actions, only expelling a very small number in the end. Nevertheless, the supportive voices for Roma prevailed, including the Romanian President Traian Basescu, the Swedish Ministers of EU Affairs and Integration, the Catholic Church, the UN, other numerous NGOs and different EU bodies, including the European parliament, which immediately announced a special debate. Even more so it remains simply incomprehensible, why none of these supporters actually insisted on a continuation of the infringement procedure, considering the extent of violations, which will now be analyzed in more detail.

Before doing so, it remains vital to stress, however that France, like other European countries having a significant Roma migration record, had already deported non-national Roma prior to the event in the summer of 2010. However, such earlier measures were not only at a smaller scale but also different in their procedural steps. Apart from the question of legality it has been the very disturbing claim of French authorities characterizing most of these returns as ‘voluntarily’, which intergovernmental agencies and NGOs had questioned two years ago already. Particularly, as a Commissioner of Human Rights had already expressed in a report on France in 2008, “such repatriation is not always genuinely ‘voluntarily’, as repatriation operations are sometimes coordinated with intimidating, or even improper, police operations” (ibid.). The Commissioner would have furthermore been informed that “in some instances of organized repatriation, ‘volunteers’ had had their identity papers confiscated until they reached their country of origin, so that they could not change their mind” (ibid.). Consequently, the expulsion of 2010 itself does not only present legal issues in terms of a possible breach of European Law and that of fundamental rights, but also reveals infringement measures that were pursued a couple of years ago already.

The Legal Analysis

Having outlined the facts framing the expulsion of thousands of Roma citizens of Romania and Bulgaria merely leaves us with the ultimate question: was it legal?

As a response to this question, one could argue that the Commission has obviously refrained from following an infringement procedure, simultaneously leading to the conclusion that the French conduct was legal. I clearly oppose such a stance. In fact, I oppose the idea that by simply revising an earlier published act entailing such a straight stigmatization of an ethnic group, a MS may be exempted from any further investigation. Therefore, this essay shall now give attention to the actual infringements the Commission had found prior to its sudden change of course.

As discussed in the prior chapters already, MS have not only committed themselves to the upholding of Union Law but also to that of fundamental rights, especially valid since the enforcement of the Lisbon Treaty. Therefore, in order to respond to the question of legality in terms of the Roma deportation, one must distinguish between the system of European Law (Free Movement Directive, the Racial Equality Directive, the Data Protection Directive) and the European Convention of Human rights.

In terms of European Law, a possible infringement concerns the incompatibility with Directive 2000/43/EC (Racial Equality Directive), Directive 2004/38/EC (Free Movement Directive) and Directive 95/46/EC (Data Protection Directive) as well as with Art 20 TFEU, restating the Directives' content.

Incompatibility with EU Directives

Beginning with the Racial Equality Directive, it basically prohibits discrimination on grounds of race and ethnic origin. It covers the fields of employment and occupation, vocational training, membership of employer and employee organizations, social protection, including social security and health care, education, access to goods and services which are available to the public, including housing (Council Directive 2000/43/EC of 29 June 2000). Having outlined its content, there is clearly no need for questioning the racial element of the expulsion enacted, the racial/ethnic aspect of the measures is rather evident and therefore provides a clear violation of Directive 2000/43/EC.

Secondly, the Free Movement Directive indicates that citizens of the EU have the right to move and reside freely within the territory of the MS. This right, however, is subject to limitations and certain conditions provided in the Treaties, which is very important to note, since many EU citizens mistakenly believe that their right of residence is unconditional. Now, the limitations on the Free Movement of citizens are laid down in Article 27 of the Free Movement Directive, which is most probably the legal basis President Sarkozy had founded his arguments on a "situation of 'lawlessness' linked to such settlements, illicit trafficking and the exploitation of children for begging, prostitution and crime, and the violation of property rights" (State Watch, 1 Sept. 2010, 3). It is true that Article 27 paragraph 1 limits the Free Movement, stating that "MS may restrict the freedom of movement and residence of Union citizens and their family members, irrespective of nationality, on grounds of public policy, public security or public health" (Directive 2004/38/EC, Article 27 para. 1), however, at the same time paragraph 2 defines a restraint to the restriction, namely that the personal behavior of individuals in question "must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of

society” and that “[j]ustifications that are isolated from the particulars of the case or that rely on considerations of general prevention shall not be accepted” (ibid., para. 2). Considering the living situations of Roma communities in France and the circumstances under which the spate of violence in July 2010 arose, I strongly oppose the idea that Roma communities were actually posing a public threat at any time.

A further aspect of France’s expulsion was the so labeled ‘humanitarian return’ by which Roma were supposedly accompanied to Romania and Bulgaria by French humanitarian assistance, granting a repatriation of € 300 per adult and € 100 per child. It goes without saying that such humanitarian-returns are incompatible with the Free Movement Directive since one cannot simply request to sell an EU citizen’s fundamental right. Furthermore, the ‘voluntary’ character of these returns was strongly questioned by intergovernmental officials and NGOs. In fact, the report of the European Roma Rights Center revealed that “returnees state that they took up the offer of repatriation before they would – in their view – be returned in less favourable circumstances” and that they “were aware of the government rhetoric and had also suffered police harassment” (European Roma Rights Centre, Aug. 2010), an observation which clearly echoes the findings of the Council of Europe’s Commissioner of Human Rights cited above.

Overall, one may argue that there is not any argument of the French authorities justifying the violation of Roma’s right to Free Movement, more a generalization of individual behavior. In fact, if following the wording of the Free Movement Directive, the French state must have assessed the personal conduct of the individual in each and every case of expulsions the French. It remains rather difficult to imagine that France pursued such an assessment with the 979 Roma in question that were deported within a two weeks period only.

Given the information published by the media and considering the legal basis discussed, one may consequently consider the French measures as a clear violation of the Free Movement Directive. In fact, one may rather imagine a mere situation of overwhelmed French authorities due to the accumulation of political upheavals in France as a whole, such as the riots concerning the retirement plans, school system and wages for instance. At the same time it remains a sad but given fact that periods of such social downsides tend to be related with increased immigration numbers. One may therefore argue that initiating the rigid expulsion of non-national Roma from France may simply be categorized as a political move to combat decreasing public support.

Finally, following reports from NGOs (no official facts acknowledged by French authorities) a violation of the Data Protection Directive remains questionable. According to the European Roma Rights Centre (ERRC) submitting a report on the consideration of legality under EU law of the situation of Roma in France, the ERRC states to have sought information from French Immigration authorities as to the collection of biometric data being taken from Roma in the past weeks in France (ibid.), meaning before their actual deportation. More interesting though, the ERRC had supposedly been informed by Roma returnees to Timisoara, Romania that they had been asked to “sign a document on entering the airplane in France which they did not understand and of which they did not receive a copy” (ibid.). If these claims may be proven (investigations have been requested by several NGOs since the summer of 2010), the legality of this data collection and therefore the compatibility with the Data Protection Directive must be investigated further. In general, the Directive aims to protect the rights of persons with respect to the processing of personal data by laying down guidelines determining when this processing is lawful. The guidelines determining the legality of measures focus on the quality of the data and the legitimacy of data processing. While the first guideline aims to guarantee that personal data must be processed fairly and lawfully, and collected for specified, explicit and legitimate purposes. They

must also be accurate and, where necessary, kept up to date, the legitimacy of data processing on the other hand aims to guarantee that personal data may be processed only if the data subject has unambiguously given his/her consent or processing is necessary (Directive 95/46/EC, Art. 6). Furthermore, the Data Protection Directive would request that information on the identity of the collector, the purpose of collection etc. will be given to the data subject and that the data subject would also have a right of access to the further processing of the data (*ibid.*, Art. 10).

Now, reflecting upon the aims of the Data Protection Directive and on the condition that the claims of the ERRC will be proven, one may essentially derive a violation of the Data Protection Directive as well.

Incompatibility with the EU Charter of Fundamental Rights

Following the analysis of incompatibility with the EU Law, we should now turn to the second system subject to legal discussion, the EU Charter of Fundamental Rights (ECFR). As already mentioned in a prior chapter, the ECFR is applicable to MS “only when they are implementing Union law” (Charter of Fundamental Rights of the European Union, Art. 51 para. 2). According to a joint note by Vice-President Viviane Reding, Commissioner László Andor and Commissioner Cecilia Malmström regarding the situation of Roma in France, the application is clearly given:

A situation where national authorities are implementing the EU's free movement law or are making use of exceptions to free movement foreseen under EU law is therefore one in which national authorities need to comply fully with all the rights and principles foreseen in the EU Charter of Fundamental Rights. (State Watch, 1 Sept. 2010, 6)

Considering the fact that France was obliged to apply the ECFR, the rights subject to a possible violation primarily concern the right of non-discrimination, “which rules out in particular discrimination based on race, colour, ethnic, social origin or membership of a national minority as well as discrimination on grounds of nationality [...], needs to be fully respected” (*ibid.*). Furthermore, the Commissioners emphasize the prohibition of collective expulsion (Charter of Fundamental Rights of the European Union, Art. 19), requesting that in any case of child involvement, public authorities must primarily act in the children’s best interest (*ibid.*, Art. 24) and finally the right of each individual to the protection of personal data concerning him or her (*ibid.*, Art. 8), referring to the content of the Data Protection Directive.

Considering these rights and the measures taken by French authorities against non-national Roma, the Commissioners conclude that French measures can only comply with Union law (1) if the measures taken by the French authorities targeted equally all EU citizens in comparable situations and did not target or single out individual EU citizens on the basis of race, colour, ethnic origin, membership of a national minority or on the grounds of nationality; (2) If the measures taken by French authorities cannot amount to collective expulsion; (3) If the rights of children have been taken fully into consideration; (4) If the personal data entered into the OSCAR data base are only collected and used for the specified purpose of avoiding fraudulent double payments and not for other non specified purposes (State Watch, 1 Sept 2010, 6–7).

The Commissioners statement is cited that extensively, as it is essential to truly understand the extent to which French measures have actually infringed the EU Charter. However, this extent may only be understood if fully comprehending the legal grounds France has most probably

ignored when pursuing the deportation. Furthermore, a violation of the EU Charter can also be of greater need for discussion, because it is only enacted since the enforcement of the Lisbon Treaty. Therefore, one could argue that the French expulsion of Roma presented one of the first violations of the ECFR since its enforcement, which would only underline the need for a further investigation of the matter.

5. Political Implications of the Proceeding's Dismissal

Reflecting upon all the relevant provisions of EU Law and the ECFR, one can only underline the still evident infringements of the Lisbon Treaty and thereby strongly criticize that neither the European Commission nor the Council of Europe have further investigated these matters, merely setting up a task force to examine how EU funds budgeted for Roma are being spent. In fact, bearing in mind the high degree of critical comments concerning the lack of transparency, democratic deficit and the believed superiority of big MS within the EU, its institutions do everything but dispute such bias by not having pursued an infringement procedure so far. At this stage one may argue that France, being a superior MS within the EU obviously minimized its violation of EU law and the vague compliance during the infringement procedure since France's actual goal focused on the national level in terms of touting for votes during the economic crisis and thereby satisfying right wing voters.

Considering its further political implications, it has already been mentioned that other MS considered the French measures as giving legitimacy to their own anti-Roma policies, such as Italy and Hungary. In this context, however, one must distinguish between their discriminatory measures. Italy's policies on the one hand, rather focus on the large number of Roma fugitives and immigrants from South Eastern Europe, while Hungary on the other hand, actually pursues strict marginalization and persecution measures against their own Roma population as initiated by the Fidesz Party and Jobbik. Nevertheless, in both MS, politicians initially showed support for the French deportation measures. Therefore, in general terms the case of France certainly exemplifies that an unlawful behavior set by a big MS and the lacking sanctioning of it, may only lead to undermining the Commission's authority now and in future. Thereby this idea further underlines the balance of power among the players of the EU and the question of *Kompetenz-Kompetenz*, which seems to ultimately hinder an effective implementation of EU law and consequently the violated EU directives in question.

When wondering about what factors may influence the Commission's leading political role in monitoring policy implementation by the MS and making rules and regulations, one may argue that EU jurisdictional options such as the Roma case, are – as many other EU realms – bound to the choice between a supranational/federal Europe and an intergovernmental/state-centric Europe. While it is widely known, that the EU Commission remains an advocate of the latter, it remains somehow ambiguous why the Commission refrains from following up specific cases more rigidly and why others faded away. Recent discussions suggest that explanations for this phenomenon may be found in contextual challenges for the Commission. Primarily, the Commission faces the challenge to not only serve multiple principles and nurture diverse governance views within the Commission, but also to “contend with national politicians (and national bureaucrats!) who shift blame for unpopular policies to the European level” (Hooghe 2012, 89). Therefore, according to Liesbet Hooghe, when fulfilling their tasks, “Commission officials are cross-pressured between incentives to retreat in an apolitical administrative role and incentives to justify their

role in political terms” (ibid., cited Kassim and Dimitrakopoulos 2007). The result – a tension of various influences when monitoring MS’ policy implementation – strongly opposes the *Community Method*, systematically promoted by the Commission. This official doctrine, first termed by Walter Hallstein, reflects that the “officials of the European Commission have a constitutional obligation to set the legislative agenda, based on the Commission’s near-exclusive competence to draft EU legislation and its competence to bring infringement proceedings against MS” (ibid.). Without going into details about the implications of the just portrayed internal power struggle, one can therefore not dismiss the fact that the Commission remains subject to diverse influences when executing EU law. However, due to the lack of further public statements from EU officials, it remains ambiguous whether and if so what external impacts may have led to the Commission’s reluctant proceeding in the case of the Roma deportation.

However, when bearing the entire case in mind, the most critical implication of the proceeding’s dismissal remains the question of effectiveness of the infringement procedure. Considering the time frame of the entire infringement procedure, which may eventually take up to two years until the first judgment is ruled, even longer if a case is taken to the second round, the effectiveness of the infringement procedure appears rather detrimental. On the other hand, however, the question of prestige and reputation among the MS may raise a feeling of moral pressure to comply. Nevertheless, with regard to the violation of France the argument of prestige has clearly not increased their willingness to comply to the extent the Roma community and its supporters had hoped for. In fact, the rather modest revision and with it the sullen reaction of French authorities to the verbal interference of Viviane Reding and other MS shows anything but understanding from the French part. Therefore, the Roma expulsion may have rather been a blue example of those cases falling victim to time, since today the majority of both EU citizens and its representatives seem to have turned to new chapters, simply filing the case away.

Then again, the question remains whether financial sanctions actually present an effective threat to MS, since they may only be successful if the payment is proportional to the accused MS. Strictly speaking, the calculation of the payment considers MS’ economic situation (GDP), the benefits for MS to continue pursuing a specific violation, the actual capacity of MS to pay, the gravity as well as the duration of the violation. However, in case of a refusal of MS to pay, there is no real execution of judgments on EU-level but only on national level. In very rare cases, the voting right may be taken. The withholding of further (financial) support from the EU remains the more common procedure, however, even this exercise shows difficulties since some MS give more to the EU than they actually receive.

In the end, one may therefore continue discussing the various shortcomings of the infringement procedure rather than praising its effectiveness. On the one hand, the problem of detecting a violation definitely poses an obstacle, as sometimes individuals are not immediately hurt by policies of MS, so the Commission will not receive a complaint it could follow up on. Furthermore, the Commission and therefore the effectiveness of the infringement procedure, suffer from a lack of resources, which often leaves the Commission with other priorities. A further and arguably the most prevailing hindrance of the infringement procedure are political considerations that would refrain the Commission from taking up a case even though they are aware of disturbing conditions in a particular MS. The aim of this paper was to demonstrate that the French deportation case clearly exemplifies this scenario and would therefore reflect the above-mentioned issue of external influences on Commission proceedings.

Additionally, the effectiveness of the infringement procedure may decline in future, if the Commission starts adopting a certain line in which it puts more weight on general cases. Such a

procedure has actually become more common over the last years, especially when assessing the burden of proof. Finally, apart from the issue of time that has already been discussed above, recalcitrant states and their lack of enforceability pose another threat to the value of the infringement procedure. States' refusal to pay and rather pursue the stance of continuing the violation would be of greater benefit to them than fearing to be voted out of office, would harm the effectiveness of the infringement procedure immensely.

6. Conclusion

All that being said, one may only derive the conclusion that the effectiveness of the infringement procedure and thereby individuals' chance to proceed against the violation of a MS is not efficiently provided, the deportation of non-national Roma being the most accurate example at this point.

In conclusion, when reflecting upon the Roma expulsion in the summer of 2010, the French measures did not present a plain new scenario, since the tendency to deport non-national Roma remains present in many other MS. However, by exclusively referring to the expulsion of Roma in an official governmental statement and ultimately deporting 979 of non-national Roma within a few weeks time, France transcended ordinary immigration policies by stigmatizing one ethnic group and denying them the most fundamental rights EU citizens normally enjoy. In fact, these discriminatory measures posed a violation of EU law on various levels, mainly infringing the Directive of Racial Equality, of Free Movement of EU Citizen and of Data Protection. The violation of the Charter of Fundamental Human Rights of the EU remains even more controversial, since the French infringement shatters the much-lauded accomplishments of the Lisbon Treaty.

At the same time, the negative outcome of this case does not only concern the French conduct as such but also shows the failing action of the EU Commission. Being referred to as the Guardian of the Treaty, one would expect more than verbal interference. One would expect that a leading MS openly violating the rights of EU citizens, would be subject to those sanctions the EU institutions and all its hitherto 27 MS had agreed on when deciding upon a successful European framework. Instead the European public and with it the international community could witness pure hypocrisy when the Commission and MS refrained from taking action due to a simple rewording of the French policy statement.

However, at the same time one must consider that the incident itself also helped to prevent the final enforcement of other anti-Roma policies, such as the very disputed fingerprint measures of the Italian government, initiated in 2008. Without going into detail, one could observe that the outspoken criticism particularly leveled from Viviane Redding not only added to an increased awareness among the public but also revealed the remaining legal gaps left for future legislation in terms of combatting Roma discrimination. At the EU level, initiatives such as the EU Roma strategy, focusing on the integration of Roma, will also shape the national Roma policy of MS. In this context, the role of NGOs and that of the ECJ and ECHR will again be essential in its actual implementation.

In the end, however, what remains left when reflecting upon the Roma expulsion in the summer of 2010 are hundreds of EU citizens having lost their home by falling victim to discriminatory measures within the EU. Not necessarily a positive outlook for EU citizens. However, one may only hope that EU institutions and its MS will eventually refrain from policies

neglecting the very essence of EU integration, since anything else would only contribute to weaken the enormous accomplishments already achieved. As a matter of fact, when reflecting upon where the idea of a European Community stood at the very beginning of its vision and where we find ourselves today, one must not lose an optimistic outlook. When Walter Hallstein, first President of the European Commission, envisioned the idea of a community of law, built upon a united stance against superiority, the democratic elections of a European Parliament and also the protection of fundamental rights, his vision met skepticism from all sides. Today the growing number of EU citizens enjoys just those privileges, even more so since the recent success of the Lisbon Treaty. Bearing all these accomplishments in mind, one may therefore only hope that they will be maintained and granted to all EU citizens, even to its internal outsiders.

NOTES

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- 2 Roma fingerprinting had been taken up by Italian authorities in 2008 as part of a wider crackdown on street crime and to identify illegal immigrants for expulsion (The Guardian)

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