

L'affaire des Roms

A Challenge to the EU's Area of Freedom, Security and Justice

Sergio Carrera and Anaïs Faure Atger

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Abstract

The summer of 2010 will long be remembered in Europe for what has become known as “l'affaire des Roms” in France. The case has revealed profound institutional tensions at EU level between the French government and the European Commission and the European Parliament. The political spectacle that has unfolded has only complicated and added confusion to the actual nature and relevance of the affair from an EU perspective. In particular, it has obscured the legality of the eviction and expulsion of Romanian and Bulgarian nationals of Roma origin from France in light of that country's obligations in the context of EU citizenship and free movement law, as well as its profound implications for fundamental rights protection. The Roma affair has constituted a severe test of the legitimacy of the EU's AFSJ and the overall effectiveness of the EU's legal landscape. The developments in France have demonstrated the limits of current EU enforcement mechanisms in providing a swift and depoliticized answer to contested national measures whose compliance with EU law and fundamental rights remains questionable.

With a view to preventing the kind of escalating political conflict that is being witnessed today over the Roma affair between the EU institutions and a Member State, this paper argues that the EU should develop a new ‘freezing enforcement procedure’ (complementing existing ones), in cases where there is evidence that certain national measures are in violation of EU law and the EU Charter of fundamental rights. This (*ex ante*) pre-emptive procedure would have the effect of immediately freezing the practical application of the contested national practice until the Commission had decided upon the formal launching of the infringement and/or fundamental rights proceedings and had reached a formal decision on their lawfulness and compatibility with European law and fundamental rights.

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A Challenge to the EU’s Area of Freedom, Security and Justice

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Introduction

“France will continue to return European citizens residing irregularly on French soil to their country of origin.”¹ This was the official response given by the French Minister of immigration, integration, national identity and development – Eric Besson – to the Resolution adopted by the European Parliament on 9 September 2010 on “the situation of Roma and on freedom of movement in the European Union”. The European Parliament (EP) had expressed “*its deep concerns at the measures taken by the French authorities targeting Roma and travellers*” and urged France “*to immediately suspend all expulsions of Roma*”.² The background to this ‘exchange’ was the announcement by the French government at the end of July of a package of measures mainly calling for the removal of Roma and ‘travellers, mainly European citizens from Bulgaria and Romania. This initiative resulted in the swift dismantlement of 128 irregular settlements and the expulsion of around 979 individuals to their countries of origin by the end of August.

What has become known as ‘l’affaire des Roms’ in France has revealed a profound institutional tension at European Union (EU) level between the French government and the two main institutional motors of European integration (the European Commission and the European Parliament). The high level of politicization that has surrounded the affair has only added to the confusion over its nature and implications at EU level especially in light of the content of the EP’s Resolution and the Commission’s intention to launch infringement proceedings against France for a discriminatory and incorrect application of EU citizenship and free movement law. The difficult political battlefield that has emerged out of the developments in France provides important evidence of the need to devise new EU policy strategies facilitating a better response for such situations beyond the existing set of enforcement mechanisms that exist at EU level to ensure Member States’ compliance with EU law and fundamental rights.

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¹ Ministère de l’Immigration, de l’intégration, de l’identité nationale et du développement solidaire, Résolution du parlement européen relative à l’évacuation des campements illicites: Eric Besson réagit, Communiqué de Presse, Paris, le jeudi 9 septembre 2010: «La France entend aussi que les ressortissants européens qui séjournent sur son sol sans respecter ces conditions continuent à être reconduits dans leur pays d’origine, de manière volontaire ou contrainte, quelle que soit leur origine ethnique ou leur nationalité».

² European Parliament, Resolution on the situation of Roma and on freedom of movement in the European Union, P7_TA-PROV(2010)0312, 9.09.2010.

European citizenship, freedom of movement and fundamental rights law now stand at the heart of the EU's Area of Freedom, Security and Justice (AFSJ).³ The progressive Europeanization of citizenship of the Union since 1993, along with the consolidation of the fundamental rights of freedom of movement and non-discrimination within the EU Treaties and legal framework, has affected the level of discretion enjoyed by EU Member States when moving in the remit of EU law. This includes the rights and procedural safeguards granted to nationals of EU Member States exercising their freedom to move (entry and residence) who must be treated in a non-discriminatory manner, including (yet not only) on the basis of ethnic origin, in contrast with nationals of the receiving Member State. The legality of EU Member States' actions falling within the scope of European law is subject to the scrutiny of the substantive and institutional monitoring mechanisms of the EU legal system. The latter are mainly in hands of the Commission which in conformity with Article 17 of the Treaty on the European Union (TEU) has not only been entrusted to pursue "the general interest of the EU" but also to ensure the application of the Treaties and legislative measures adopted by the institutions of the Union. The Commission has been therefore said to act as 'the guarantor of Treaties' by overseeing the application of EU law under the judicial control of the Court of Justice of the EU. As *l'affaire des Roms* has demonstrated, however, some EU Member States still have major difficulties at times of realising the exact nature and extent of their obligations at Union level as well as when 'digesting' the supervisory powers that have been conferred to the EU institutions for monitoring the correct implementation of EU law and their respect of the rights enshrined in the EU Charter of Fundamental Rights (hereinafter the EU Charter).

The Roma affair in France has constituted a test to the legitimacy of the EU's AFSJ and the overall effectiveness of the EU legal landscape. Independently of the concerns expressed by various European actors on the tensions that the nature and effects of the French measures pose to European law and the EU Charter, the French government has not only showed resistance towards the conferred powers to the EU institutions but it has even 'caricatured' the competences held by the Commission in enforcing EU law as well as those of the European Parliament in ensuring democratic accountability. The main impact that the reactions by the EU institutions have had so far at national level has been a gradual shift in the political language used by the French authorities, who have tried hard to defend the legality of the dismantling and expulsion measures with EU and international law (as well as its 'Republican and humanist traditions and laws') and that the measures have not specifically targeted Roma '*tan que tel*', but rather all nationals of other EU Member States not respecting EU free movement rules. The rather unexpected publication by the media of a *Circulaire* of 5 August 2010, issued by the French Ministry of Interior for implementing the 'measures', made their remarks difficult to trust as the instructions clearly focused on Roma as the main target group of the repressive actions.

Since then the political spectacle that has emerged has attracted intense media attention, which has not served the interests of either of the parties involved nor their reputation in European public opinion and the international community at large. The succession of unfortunate remarks and the exchange of accusations has perhaps more worryingly nuanced the actual issue of discussion (i.e. compliance by France with EU citizenship and fundamental rights law) and the fact that France has reasserted its intentions to continue with the dismantlement of irregular

³ Article 3.2 of the revised version of the Treaty on the European Union (TEU) states: "The Union shall offer its citizens an area of freedom, security and justice without internal frontiers, in which the free movement of persons is ensured in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime." E. Guild, S. Carrera and A. Eggenschwiller (eds), *The Area of Freedom, Security and Justice ten years on: Successes and Future Challenges under the Stockholm Programme*, CEPS Paperback, CEPS, Brussels, 2010.

settlements and the expulsion of EU citizens of Roma origin. The question which is left now is what should the EU do?

There are at present two main mechanisms in the hands of the European institutions for ensuring compliance by Member States with European law and fundamental rights. There is first the infringement proceedings envisaged by Article 258 of the Treaty on the Functioning of the European Union (TFEU), which confers the discretion on the Commission for launching action against any EU Member State for non-compliance with European law. These proceedings may end up before the Court of Justice in Luxembourg, which will in the final instance determine the extent to which the State is in breach of EU law and, if so, will require the latter to take the necessary measures for ensuring compliance, and potentially even impose financial penalties in those cases where the state is still in violation of European legal commitments. There is also the fundamental rights mechanism stipulated in Article 7 of the Treaty on the European Union which foresees the possibility to apply sanctions against any EU Member State (suspension of the voting rights of the Member State in the Council) when “the existence of a serious and persistent breach” to the Union’s basic principles, including fundamental rights protection, is determined. Until now, however, this has never been used. Both procedures are to a great extent too politicized and generally *ex post* in nature (they come into play after the ‘violation’ has been effectively proved and determined), which prevents them from facilitating a preventative and immediate response to those cases where grave violations of basic EU law and fundamental rights principles are thought to have taken place.

This paper argues that the Roma affair in France demonstrates the limitations of these enforcement mechanisms in providing a swift and depoliticized response to national measures whose compliance with EU law and fundamental rights remains questionable. The EU should therefore develop a new step in its enforcement procedures that would be primarily designed to prevent the cascade of political conflict and contentious speeches which we have recently witnessed between the core Union institutions and one single EU Member State. This (*ex ante*) pre-emptive procedure would consist of the immediate freezing of the practical application of contested national practices (such as the dismantling of settlements and expulsion of European citizens of Roma origin) before the Commission has decided on the formal launching of the infringement and/or fundamental rights proceedings and has reached a formal decision on their lawfulness and compatibility with European law and fundamental rights. This new ‘freezing enforcement procedure’ would supplement the current enforcement instruments in the EU legal system with an additional (and complementary) procedure ensuring a prompt response to affairs where the foundations and basic principles of the EU are seriously in jeopardy.

Before developing further the main components delineating our proposal, the paper starts by briefly outlining the facts substantiating the Roma affair in France. After contextualising the affair, we then move into a legal assessment of the French policy measures against relevant EU law standards/obligations, including citizenship and freedom of movement rights as well as the EU Charter. The nature and appropriateness of the various reactions by Commission and the EP, as well as by other relevant international and regional actors, are then reviewed in section 3. Section 4 complements our analysis by providing a picture of the political spectacle that has emerged around the French affair both at national and EU levels. Section 5 outlines the current supervisory and monitoring mechanisms that exist at Union level for ensuring the correct application of EU law by the Member States and highlights their limitations to provide a timely answer to events such as those still occurring in France. We then conclude by putting forward a set of policy recommendations focusing on concrete policy strategies for overcoming the deficits that affect the European legal system on fundamental rights and European law monitoring and argue for the development of a new ‘freezing enforcement procedure’ at EU level.

1. Background to the affair

Our story starts with the delivery by French President Sarkozy of the *Declaration sur la sécurité*⁴ on 21 July 2010, which constituted a reaction to a long series of unfortunate events that had diminished his popularity (and that of his government) and included unrest and violence in the suburbs, clashes between police and ‘travelling people’ (*les gens du voyage*), increasing attacks against law enforcement authorities and a rather unpopular pensions reform.⁵ In his speech at Grenoble on 30 July 2010, Sarkozy did not hesitate to make sweeping announcements on the need for future legislative reforms (of a rather restrictive nature) on internal security, migration and citizenship rules, and underlined as a political priority the fight against criminality and his intention to launch an “authentic war on traffickers and delinquents”. He then moved on to declaring that the behaviour of certain travellers and Roma was a particular source of problems in this context and proposed the adoption of a set of measures for dismantling irregular Roma settlements and expelling their inhabitants from France. As a follow-up to these presidential declarations, a ministerial meeting “on the situation of travellers and Roma in France” confirmed the enactment of the following initiatives:⁶

First, the systematic dismantling of ‘irregular settlements’. While this was justified by the unacceptable living conditions therein, the political discourses that backed up these measures referred to them as ‘*zones de non-droit*’ and sources of ‘illicit trafficking, child exploitation for the purpose of begging, prostitution as well as crime’. Furthermore, should the illegality of the settlement not be proven, it was recommended to launch a fiscal check to ensure that all the relevant laws were duly respected. Future proposals included a new law to facilitate the eradication of settlements in France.

Second, the return of irregularly staying EU citizens accused of ‘abusing’ EU citizenship and free movement law. It was declared that this should in the future be facilitated by an amendment to the current national legislation in order to widen the possibilities for invoking expulsion on the grounds of threats to public order and public security.⁷

Third, increased cooperation with Romanian authorities to facilitate the return of their nationals as well as the socio-economic inclusion of Romanian Roma. With the exception of the ratification of a Convention on the return of unaccompanied minors, the only additional concrete initiative consisted in the reciprocal posting of French policemen in Romanian.⁸

Following up these announcements, several administrative guidelines (*Circulaires*) were issued to give instructions as to the ways in which these ministerial guidelines needed be interpreted and applied. Primarily aimed at translating into practice the instructions given at governmental level, they remained confidential until their disclosure by the media in the beginning of September 2010.⁹ In fact, until their publication, their existence had been openly denied by the

⁴ Déclaration de M. le Président de la République sur la sécurité, Conseil des ministres, Palais de l’Elysée, 21.07.2010.

⁵ Refer for instance to ‘Une gendarmerie attaquée à la hache dans le Loir-et-Cher’, 16.7.2010, *Le Monde* ; or ‘La nuit a été plus calme à Grenoble, quadrillée par les forces de l’ordre’, 17.7.2010.

⁶ Communiqué de presse, Communiqué faisant suite à la réunion ministérielle de ce jour sur la situation des gens du voyage et des Roms, available at www.elysee.fr

⁷ Projet de loi relatif à l’immigration, l’intégration et la nationalité, (n° 2814) Amendement présenté par et les membres du groupe SRC. See Statewatch (2010), Immigration law amendment to turn expulsion of EU nationals into routine, available at <http://www.statewatch.org/news/2010/sep/02france-expulsion-routine.htm>

⁸ Déclaration Conjointe des Ministres Roumains et Français, Communiqué de Presse, Paris, le jeudi 9 septembre 2010.

⁹ Refer to <http://www.lecanardsocial.com/Article.aspx?i=193>

representatives of the French government. While it transpires from their reading that the order to evacuate illicit settlements was already given in June 2010, the *circulaire* of 5 August 2010 was the one plainly instructing the authorities to target Roma when implementing the dismantling and expulsions measures. In addition to the setting of target numbers of settlements to be dismantled (at least 100 a month so as to reach 300 within three months), explicit command was stressed to give priority to those settlements occupied by the Roma.¹⁰ The *circulaire* even regretted that the implementation of previous governmental instructions had so far resulted in 'too few' expulsions of Roma. The operational instructions of the 5th of August thus provided for the evacuation of irregular settlements and for the immediate return of those Roma irregularly staying on the French territory. Shortly after, and as we will see below, mainly as a consequence of the concerns expressed at EU level by the Commission and the EP, a new *circulaire* was adopted by the Ministry of Interior on 13 September 2010 reasserting the overall objective of the original instructions but this time 'carefully' omitting any express and direct reference to Roma.¹¹

According to a speech delivered by the French Minister of Immigration, Integration, National Identity and Development – Eric Besson – in a press conference organised on 30 August 2010 on the 'evacuation of illicit settlements', between 28 July and 27 August 2010, a total number of 979 national of Romania and Bulgaria in irregular situation had been returned to their countries of origin, of which 828 were said to be 'voluntary' in nature and 151 forced returns.¹² It is important to stress that this was not the first time that this country has engaged in the expulsion of Roma holding the nationality of another EU Member State. Since 2007 France has elaborated a complex procedure of 'humanitarian' returns that involves the granting of a financial retribution – "financial aid" – of €300 (€100 to minors) and the future inclusion of biometric data of the returnees into a database named OSCAR (which is expected to be operational as from October of this year) so as to prevent multiple applications and 'abuse' of the financial assistance.¹³ This 'humanitarian return' of individuals on the basis of their inability to sustain themselves has mainly targeted nationals of Romania and Bulgaria of Roma origin. The fact that the Roma who are being expelled are citizens of the Union has constituted the linking factor for the case to gain relevance and implications at EU level. Since 2007, both countries have joined the EU and as EU citizens, their nationals (independently of their ethnic origin) benefit from the set of well delineated European set of rights of entry, stay and protection against expulsions as enshrined in European citizenship and free movement law as well as the EU Charter of Fundamental Rights, all of which we examine below.

¹⁰ Ministère de l'Intérieur, de l'Outre-Mer et des Collectivités Territoriales, Circulaire IOC/K/1017881/J du 5 Aout 2010, Paris, Objet: Evacuation des campements illicits. It stated: «Il revient donc, dans chaque département, aux préfets d'engager, sur la base de l'état de situaion des 21 et 23 juillet, une démarche systématique de démantèlement des camps illicities, en priorité ceux du Rom.».

¹¹ Ministère de l'Intérieur, de l'Outre-Mer et des Collectivités Territoriales, Circulaire Objet: Evacuation des campements illicites, le 13 septembre 2010.

¹² Discours d'Eric Besson, Ministre de l'immigration, de l'intégration, de l'identité nationale et du développement solidaire, Conférence de presse du lundi 30 août 2010 A propos de l'évacuation des campements illicites, Paris, le 30 août 2010, retrievable from www.immigration.gouv.fr

¹³ Refer to C. Cahn and E. Guild (2008), Recent Migration of Roma in Europe, Study commissioned by the OSCE High Commissioner on National Minorities and the Council of Europe Commissioner for Human Rights, 10 December 2008, available at www.coe.int

2. Testing the Case against EU Citizenship and Free Movement Law

One of the central questions surrounding the political debates during the past weeks has been the extent to which the French measures were ‘legal’ and in conformity with EU law and the EU Charter. The protection of nationals of other EU Member States against expulsion (freedom of movement and security of residence) lays at the heart of the institution of Union citizenship and of Europe’s foundations on the protection of fundamental rights and liberties. The lawfulness of the expulsions of European citizens needs more precisely to be evaluated against the principles of freedom of movement and non-discrimination as envisaged by the Treaties and the EU Charter, and as developed by the Citizens Directive 2004/38.

The establishment of the citizenship of the Union with the entry into force of the Maastricht Treaty in 1993 has meant that EU nationals now benefit from a supranational regime of protection consisting of a shared framework of rights which include the freedom of movement within the territory of other Member States and to be treated in a non-discriminatory manner (equal treatment) in comparison with the nationals of the receiving state (Article 21 TFEU).¹⁴ Since the entry into force of the Lisbon Treaty in December 2009, the new EU Treaties’ landscape needs to be understood in conjunction with the EU Charter, which has acquired the same legally binding nature as the Treaties (Article 6 TEU). The EU Charter applies to both EU institutions as well as Member States’ actions falling within the scope of EU law.¹⁵ The EU Charter has transformed the general principles of ‘freedom of movement’ and ‘non-discrimination’ into key normative components of the package of core ‘fundamental rights’ of the Union’s legal system and the very status of European citizenship.

The citizenship-related freedoms envisaged by the Treaties have been given material effect through the adoption of Directive 2004/38 on the right of the citizens of the Union and their family members to move and reside freely within the territory of the Member States (hereinafter the Citizens Directive).¹⁶ The general rule purported by this Directive is that any national of an EU member state has the right to exit and enter into the territory of another Member State with mere evidence of a valid passport and/or ID card.¹⁷ It provides for a harmonized set of rules on the right of residence in a second EU Member State as well as procedural guarantees to be complied with by national authorities when considering expulsion of an EU citizen. For periods of more than three months, a right of residence exists if the Union citizens are workers or self-employed persons, students or following vocational training, have sufficient resources for them and their family members not to become a burden to the social assistance system and have

¹⁴ Jacobs, F.G. (2007), “Citizenship of the European Union – A Legal Analysis”, *European Law Journal*, Special Issue on EU Citizenship, Vol. 13, Issue 5, pp. 591-622. Kostakopoulou, T. (2007), “European Citizenship: Writing the Future”, *European Law Journal*, Special Issue on EU Citizenship, Vol. 13, Issue 5, pp. 623-646.

¹⁵ E. Guild (2010), *Fundamental Rights and EU Citizenship after the Treaty of Lisbon*, CEPS Liberty and Security in Europe Series, Centre for European Policy Studies, CEPS: Brussels, July 2010; S. Peers and Ward (eds), *The EU Charter of Rights: Politics, Law and Policy*, Hart Publishing: Oxford.

¹⁶ Council Directive 2004/38 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, 29 April 2004. For an analysis of the Directive refer to Carrera, S., What does Free Movement mean in Theory and Practice in an Enlarged EU?, *European Law Journal*, Vol. 11, Number 6, November 2005, pp. 699-721. I. Alexovicová (2005), The Right of Citizens of the Union and their Family Members to Move and Reside Freely within the Territory of the Member States, in H. Schneider (ed), *Migration, Integration and Citizenship: A Challenge for Europe’s Future*, Volume 1, Forum Maastricht: Maastricht, pp. 73-106.

¹⁷ On how this extends beyond EU nationals refer to Carrera, S. and A. Wiesbrock (2010), Whose European Citizenship in the Stockholm Programme? The Enactment of Citizenship by Third Country Nationals in the EU, *European Journal of Migration and Law*, 12, pp. 337-359.

comprehensive sickness insurance. This also applies to family members of the individuals falling in any of those categories. After five years of continuous residence the citizens of the Union shall be granted a right of permanent residence.¹⁸ As regards procedural guarantees, an EU national exercising his/her freedom of movement (as well as their family members) benefits from security of residence which implies protection against expulsion from the receiving state. EU Member States can only apply restrictions on the right of entry and residence on well determined grounds of public policy, public security and /or public health. As it has been declared by the Court of Justice, and confirmed by the Commission, the principle of the free movement of persons is one of the foundations of the EU and any provisions granting that 'European freedom' must be interpreted broadly and any derogation and exception to it must be given a strict interpretation.¹⁹ EU Member States must therefore comply with the prioritization conferred to 'the right of free movement' over the exceptional application of any derogation to the latter (in order to secure public policy, security and health). Any such restrictions should also in any case comply with the following procedural safeguards:²⁰

First, the grounds for expulsion cannot be invoked to serve 'economic ends'.

Second, they need to comply with the general principle of EU law of proportionality and be based on the exclusive conduct of the person involved. Previous criminal convictions can be taken as the grounds for expulsion.

Third, the personal conduct of the individual concerned must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society.

Fourth, the expiry of an identity card or passport cannot constitute a ground for expulsion.

Fifth, before conducting the expulsion of a person on the basis of public policy, public security or public health the national authorities will need to carry out a case-by-case assessment taking into account the following considerations: the length of residence on its territory, age, family and economic situation, state of health, social and cultural integration into the host Member State and the extent of his/her links with the country of origin.

Sixth, if the person has resided in that EU Member States for the previous ten years or is a minor an expulsion decision will be exclusively acceptable if based on "imperative grounds of public security".

¹⁸ On the issue of access to social benefits in the scope of the Directive refer to P. Minderhoud (2009), Free Movement, Directive 2004/38 and Access to Social Benefits, in P. Minderhoud and N. Trimikliniotis (eds), Rethinking the free movement of workers: The European challenges ahead, Wolf Legal Publishers: Nijmegen, pp. 69-85.

¹⁹ Refer as a way of illustration to the Court of Justice Cases 139/85 *Kempf* and C-33/07 *Jipa*. See also the Commission Communication on guidance for better transposition and application of Directive 2004/38 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, COM(2009) 313 final, Brussels, 2.7.2009. See in particular Section 3 of the Communication. See also E. Guild (2007), Citizens without a Constitution, Borders Without a State: EU Free Movement of Persons, in A. Baldaccini, E. Guild and H. Toner (eds), Whose Freedom, Security and Justice? EU Immigration and Asylum Law and Policy, Hart Publishing: Oxford, pp. 25-56.

²⁰ For an overview of the case law of the Court of Justice on 'public policy and public security' exceptions and other 'soft borders' refer to N. Trimikliniotis (2009), Exceptions, Soft Borders and Free Movement for Workers, in P. Minderhoud and N. Trimikliniotis (eds), Rethinking the free movement of workers: The European challenges ahead, Wolf Legal Publishers: Nijmegen, pp. 135-154. Communication from the Commission to the Council and the European Parliament on the special measures concerning the movement and residence of citizens of the Union which are justified on grounds of public policy, public security or public health, COM/99/0372 final, 19.7.1999.

Seventh, the individuals' concerned need to be granted access to judicial and administrative redress procedures in the Member State to appeal or seek review of the decision taken against them.

Finally, Member States cannot impose a re-entry ban together with an expulsion decision.

In so far as the French measures fall within the *champ d'application* of EU citizenship and free movement law,²¹ their national transposition and practical implementation must comply with the following rights envisaged by the EU Charter: First, the prohibition of discrimination on grounds of race, ethnic or social origin or membership to a national minority (Article 21 of the EU Charter), which needs to be read in conjunction with the Council Directive on the principle of equal treatment between persons irrespective of racial or ethnic origin²² and second, the prohibition of 'collective expulsions' as stipulated in Article 19 of the Charter.²³

As exemplified by the above-mentioned *Circulaire* of 5 August 2010, the dismantling of irregular settlements and the collective expulsions conducted by the French authorities have targeted the Roma. One can only imagine the ways in which the instructions given in the scope of the *Circularies* have been implemented by the relevant local law-enforcement authorities, who were told that they were actually eradicating "the sources of criminality and trafficking". The quasi-systematic targeting of the Roma in the dismantlement of irregular settlements during the operations carried out in the month of August has now been confirmed by the main French travellers' associations, *l'Union française des associations tsiganes*.²⁴ Several deportations orders against Roma had been actually annulled on the 27th August by a French administrative tribunal in Lille. It grounded its decision on the fact that the illegal occupation of a public space did not amount to a 'threat of public order' and therefore did not thus justify a return order for these people.²⁵ The change in official discourse by the French authorities since the end of August and the consequent amendment of the *Circulaire* 5th August by another one adopted on the 13th September 2010 omitting any express reference to 'Roma' in the scope of evacuation and return measures have not prevented that the expulsions that have been already conducted until present individually targeting this ethnic group as well as the announced continuation of dismantling of settlements and expulsions to Romania and Bulgaria, which will in any case 'indirectly' affect Roma and other vulnerable groups falling within the general label of 'travellers'.

From an EU law perspective the command to 'immediately' enforce collective expulsions of non-nationals from the territory stands in a very difficult relationship with any individual assessment of the personal situation of the returnees as well as the respect of the procedural guarantees of the Citizens Directive. The fact that France has not properly transposed into its national law the procedural guarantees envisaged by this Directive brings further uncertainties about the entire lawfulness of the expulsions. In its 2008 Report on the evaluation of EU

²¹ Also relevant at times of evaluating the lawfulness of the French affair is the Recital 31 of the Citizens Directive's Preamble which emphasizes that "In accordance with the prohibition of discrimination contained in the Charter, Member States should implement this Directive without discrimination between the beneficiaries of this Directive on grounds such as sex, race, colour, *ethnic or social origin*, genetic characteristics, language, religion or beliefs, political or other opinion, *membership of an ethnic minority*, property, birth, disability, age or sexual orientation, (Emphasis added)."

²² Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, OJ L 180, 19.7.2000.

²³ Moreover, the implications of the expulsion of minors with Article 24 of the Charter remains equally an issue of concern, as it is also the compatibility of the 'OSCAR' database with Article 8 of the Charter.

²⁴ Le Monde, Les gens du voyage assurent que le démantèlement des camps visait les Roms, 23.09.2010

²⁵ Roms : un tribunal annule quatre arrêtés de reconduite à la frontière, Le Monde, 27.8.2010, www.lemonde.fr

Member States' transposition of this Directive, the Commission had already found France to be in violation of EU law over the procedural safeguards of the Directive.²⁶ The Commission stated there that "in cases of absolute urgency, no procedural safeguards apply in France. The EU citizen receives no written notification of the expulsion decision, is not informed of the grounds on which the decision was taken and has no right of appeal before the decision is enforced." The disproportionate application of expulsion measures in France against nationals from Romania was also an issue of concern for the European Parliament and external independent studies.²⁷ In fact, the transposition and practical implementation of the Citizens Directive was subject to a legal complaint introduced by eight French NGOs which has so far not triggered any reaction or acknowledgement by the Commission.²⁸ These front line civil society organisations had claimed that France's observance of the obligation to individually assess the personal situation of persons to be expelled, its interpretation of threats to public order as well as the granting of procedural rights do not comply with the parameters outlined in the Directive. The vulnerability of EU citizens of Roma origin at times of exercising their freedom of movement rights across the Union was additionally pointed out by a report of the EU Agency for the Protection of Fundamental Rights (FRA) in Vienna which observed "a disturbingly negative Roma-specific dynamic stemming from: First, the arrival of Roma EU citizens is often seen negatively and little effort is made to support their integration in the local labour market; Second, the existence of anti-Roma policies in some EU Member States; and third, the practice of certain policies which affect Roma EU citizens' access to social benefits."²⁹ There was therefore already plenty of independent and sound evidence in hands of the EU institutions (and particularly the Commission) illustrating the incorrect implementation by France of EU citizenship and free movement law, and the difficult relation between the French national coercive measures and fundamental rights, much before the measures enforced during the summer 2010. Yet, what have been the main European responses after the latest developments?

3. Testing the EU Responses

The implementation of the dismantling and expulsion measures since the beginning of August 2010 has attracted wide attention by the media inside and outside the EU, with journalists turning towards Brussels awaiting for 'a comment' or some sort of condemnation. The much-praised renewed European institutional setting resulting from the entry into force of the Lisbon Treaty and the legally binding nature of the EU Charter of Fundamental Rights were somehow expected to enable a strong European stance when faced with potential fundamental rights violations such as the ones supposedly at stake in France. The new Commission and in particular its new Commissioner for Justice, Fundamental rights and citizenship – Viviane Reding – were perceived to be well placed to play such a role. The Catholic Church

²⁶ Report from the Commission on the application of Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States COM(2008)840, 10.12.2008, Brussels.

²⁷ See also the European Parliament Resolution on the application of Directive 2004/38/EC on the right of EU citizens and their family members to move and reside freely within the territory of the Member States, 15 November 2007. Refer also to S. Carrera and A. Faure-Atger (2009), Implementation of Directive 2004/38 in the context of Enlargement: A Proliferation of Different Forms of Citizenship? CEPS Liberty and Security Series, April 2009, Centre for European Policy Studies, CEPS: Brussels.

²⁸ CCFD, Cimade, FASTI, GISTI, Hors la Rue, LDH, MRAP, Collectif Romeurope, Plainte contre la France pour violations du droit communautaire en matière de libre circulation des personnes, 30.07.2010

²⁹ Fundamental Rights Agency, The situation of Roma EU citizens moving to and settling in other EU Member States, November 2009.

immediately condemned the French measures as also did the United Nations Committee for the Elimination of Racism and Discrimination, the Council of Europe as well as an impressively large number of national and international NGOs and civil society organisations.³⁰ Brussels however remained silent.

The first EU response only arrived on 25 August 2010, through a written statement by Reding “on the Roma situation in Europe”.³¹ The Commissioner announced that the French government had given the Commission “political assurances” as to the conformity of their practices with EU law, but it also specified that further precisions on the situation were however needed. In the meantime three Commissioners had instructed their respective services (Directorate General (DG) for Justice, DG for Employment, social affairs and equal opportunities and DG Home Affairs) to draft a common Information Note so as to clarify ‘the state of the situation’ in France. Along an outline of the development of the French affair since July 2010, the Joint Information Note contained a preliminary legal analysis and proposed steps for future action on Roma in Europe.³² The Note was dated 1st of September which coincided with the day following a visit to Brussels by Ministers Besson and Lellouche to discuss ‘the French measures’ along with the Commission.³³ They had attended the Commission’s Working Meeting convened for the purpose of encouraging French and Romanian authorities to discuss and present their respective stances on the events. It is striking that the Note did not include any reference neither to the famous *circulaire* of the 5th of August nor to the above-mentioned complaint filed by French NGOs to the Commission. This is surprising as the detailed evidence that the complaint could have brought further insights as to the exact dilemmas of the situation on the ground. The analysis on the compliance of the French measures with the legal framework carried out by the Commission ended in a conditional way by specifying that further information was still required to reach a conclusion on the affair. After a month, the Commission thus concluded that investigations should be pursued and no concrete measure was adopted. Contrary to what the French government had claimed during the summer, the legality of the French practices remained still far from evident.

The EP’s condemnation on 9 September 2010 was on the other hand resolute.³⁴ In a Resolution adopted only a few days after having come back into office, 337 MEP against 245 called for the

³⁰ As a way of illustration we can refer to the comments by the Council of Europe Human Rights Commissioner available at http://commissioner.cws.coe.int/tiki-view_blog_post.php?postId=77 See also ‘Rights of migrants in France: Commissioner Hammarberg calls on the authorities to comply fully with European standards’ available at http://www.coe.int/t/commissioner/News/2010/100921LetterFrance_en.asp Refer also the UN Committee for the Elimination of Racism and Discrimination [http://www.unog.ch/unog/website/news_media.nsf/\(httpNewsByYear_en\)/680AEEF478947431C125777D0047B764?OpenDocument](http://www.unog.ch/unog/website/news_media.nsf/(httpNewsByYear_en)/680AEEF478947431C125777D0047B764?OpenDocument) See ENAR organizes EU-wide protest against France xenophobic policies, Press Release, 1 September 2010, Brussels, www.enar-eu.org or EU Roma Policy Coalition, European Union should do more to uphold Roma Rights, Press Release, 8 September 2010, Brussels. Amnesty International, France must end stigmatization of Roma and travelers, Press Release, 27 August 2010, <http://www.amnesty.org/en/news-and-updates/france-must-end-stigmatization-roma-and-travellers-2010-08-27>

³¹ Statement by Viviane Reding, Vice-President of the European Commission and EU Commissioner for Justice, Fundamental Rights and Citizenship, on the Rome situation in Europe, MEMO/10/384, Brussels, 25 August 2010.

³² European Commission, The Situation of Roma in France and in Europe, Joint Information Note by Vice-President Viviane Reding, Commissioner László Andor and Commissioner Cecilia Malsmtröm, 1 September 2010.

³³ http://www.immigration.gouv.fr/spip.php?page=actus&id_rubrique=254&id_article=2342

³⁴ ‘Outraged MEPs attack France over Roma Policy’: Political groups in the Parliament ready to recommend a formal condemnation of Nicolas Sarkozy., European Voice, 2.9.2010.

immediate suspension of the removals in France.³⁵ The debates which took place inside the EP were heated but a largely shared position was the condemnation of the Commission's timid attitude (with Barroso's Commission accused of not having condemned the French government's actions more vigorously), and the call for a swift investigation into the legality of the affair. The EP urged the Commission, the Council and the Member States to intervene in their request to the French authorities to "immediately suspend" all expulsions of Roma and expressed concerns on "the late and limited response by the Commission, as guardian of the Treaties, to the need to verify the consistency of Member States' actions with EU primary law and EU legislation". The EP's response was therefore fast, efficient and of an EU-wide reach.

In contrast, the position of the Commissioner for Justice, Fundamental Rights and Citizenship was indeed rather ambivalent until the mid of September 2010. A few days after the EP Resolution, however, the Commission made a 'blistering' declaration on that date which constituted a substantial move from its former position towards the French government's measures against Roma and which was seen by certain media as an action "dividing the EU".³⁶ It was only on her speech of 14th of September on "the latest developments on the Roma situation"³⁷ when for the first time Redding explicitly referred to the Commission's intention to initiative infringement procedures against France. She started by expressing her 'deepest concerns' on the developments in France regarding Roma and said that "I personally have been appalled by a situation which gave the impression that people are being removed from a Member State of the European Union just because they belong to a certain ethnic minority. This is a situation I had thought Europe would not have to witness again after the Second World War". Reacting to the now evidently false political assurances which had been given by Members of the French government to the Commission on their non-discriminatory nature, Redding deplored the fact that the Commission could not rely on national officials' answers when asked about their practices when implementing EU law and qualified the situation as a "disgrace".³⁸ Redding stated that "enough is enough" and that "no Member State can expect special treatment, especially not when fundamental values and European laws are at stake. This applies today to France". She thus indicated her '*intention*' to initiative infringement proceedings against France for a discriminatory application of the Citizens Directive 2004/38, as well as for the lack of transposition of its procedural and substantive guarantees. This *intention* has so far not yet materialized in a formal opening of enforcement actions (infringement proceedings) against France. While the Commission continues studying the affair from a legal point of view, it appears that infringement proceedings will be formally launched rather soon.

The Extraordinary (Foreign Affairs) Council meeting of the 16th of September 2010, which was originally intended to deal exclusively with EU's external relations policy, become *de facto* 'the situation of Roma in Europe' meeting and allowed Member States' governments to meet and discuss the affair, while not reaching a common position on the issue.³⁹ The event provided a lens of the ongoing games (and struggles) of power at European level among European and

³⁵ European Parliament Resolution of 9 September 2010 on the situation of Roma and on freedom of movement in the European Union, 9 September 2010.

³⁶ Reding divides the EU with an attack on France, *European voice*, 16.9.2010.

³⁷ V. Reding, Statement on the Latest Developments on the Roma Situation, Speech/10/428, Brussels, 14 September 2010, Midday briefing in Press Room.

³⁸ The Commissioner mentioned that "I can only express my deepest regrets that the political assurances given by two French ministers officially mandated to discuss this matter with the European Commission are now openly contradicted by an administrative circular (of 5th August) issued by the same government".

³⁹ Council of the EU, Foreign Affairs, Press Release, 13705/10, Brussels, 16 September 2010.

national interests on the case. It also publicly displayed a confrontation between the French government (and its supporters) with the European Commission, and most interestingly experienced one of the first ‘violent clashes’ between Sarkozy and Barroso inside the Council rooms.⁴⁰ The discussions were overshadowed by the unfortunate choice of words used by Commissioner Reding on the previously mentioned 14th September speech concerning the parallelism with the (pro-Nazi) situation of the Second World War which was to a great extent instrumentalised by the French government in a strategy to avoid addressing the actual facts and dilemmas of the case from an EU law viewpoint.

On this occasion, bilateral alliances (already apparent in the past) were reasserted and overall the EU solidarity appeared to be fading. Evidence of such intergovernmental practice had already occurred when on 6th September 2010 France sought to bypass the European arena by inviting ‘a selection’ of Member States to an intergovernmental meeting in Paris. Arguably, the list of invitees was drafted on the basis of the overall share of immigrants entering their territories in annual basis. The Ministries of Interior from Germany, Greece, Italy, the UK, Spain and Belgium, as well as the Canadian immigration minister, were thus convened to Paris.⁴¹ Labelled as ‘the anti-Roma summit’, the focus of the meeting was promptly shifted to a “Working Seminar on asylum and irregular immigration” and Commissioner Malström (DG Home Affairs) finally represented the Commission at the event.⁴² It was later on publicly affirmed that the situation of Roma had not been actually been discussed on that day. This however illustrates how ‘the silence’ of the EU institutions encouraged the French government to seek a resolution outside of the EU framework without much success.

So have the EU institutions reacted ‘as they should’ when confronted with allegations of fundamental rights and EU law violations in France? The answer remains far from straightforward. After a seemingly (too) ‘cautious’ and watchful attitude, the Commission’s declarations triggered an amendment of the contested legislation with the publication of a new *circulaire* on 13th of September referred above. French Interior Minister Hortefeux in these revised instructions removed the explicit targeting at Roma in the dismantlement of camps and immediate expulsions of their occupants. And if the EP did not manage to halt deportations, the Commission at least forced the French government to rectify the administrative guidelines which had been previously given and implemented on the ground.⁴³ Nonetheless, the absence of a quick and firm condemnation (and enforcement procedure) against the French measures by the Commission played a crucial role in the escalation of political discourses where the classical working arrangements between Member States sovereignty and the European legal order has been put into question and, perhaps more astonishingly, has not as yet prevented the French government from continuing applying the expulsion measures. The Roma affair in France has unleashed a series of strong statements by different actors and a rather unfortunate cascade of accusative discourses between the French government and the European institutions, which we now enter into synthesizing.

⁴⁰ Sarkozy unleashes ‘violent’ tirade against Barroso at Summit, EUobserver, 16.9.2010, <http://euobserver.com/843/30826>

⁴¹ The presence of Canada in this meeting is less surprising when considering that earlier in the year a political row was triggered when Canada reinstated visa requirements for Czech nationals after having recognized the persecutions suffered by several Czech Roma through their recognition as refugees

⁴² <http://www.eutrio.be/pressrelease/paris-melchior-wathelet-makes-plea-asylum-policy-based-responsibility-and-solidarity>

⁴³ *Roms: volte-face gouvernementale sur une circulaire*, Le Monde, Mercredi 7 septembre 2010, page 7.

4. A Political Spectacle on the Roma Affair: Turf Wars and Discourses

It was evident from the outset of the case that public discourses were going to play a central role in the developments of the case and their effects both at national and EU levels. As described in Section 2 above, the starting point was already rather promising with Sarkozy's public declarations linking the Roma community with insecurity and criminality. Throughout the affair, we have witnessed a constant ping pong of public statements and critiques by national and European officials often taking rather sensationalist stances. In France, the months of August and September have seen an impressive number of declarations, press releases and formal and informal interventions by the various representatives of the government (and the relevant Ministries) to justify, object to and condemn the declarations and concerns coming from Brussels both by the European Parliament and the Commission.⁴⁴

Since the inception of the affair the French government has artificially linked nomads and the Roma community to 'illegal settlements', 'illicit trafficking' and 'exploitation of children' as a way to justify the coercive measures which have been practiced on the dismantling of settlements and collective (forced and 'voluntary') expulsions from the country. The general official line of discourse advocated by Sarkozy often associated the Roma population to criminality and freedom of movement to human trafficking and by doing so the stigmatization and a negative stereotyping of the Roma community have only increased. The setting of targets for expulsion further supported a discourse in which collective expulsions, in violation of its international human rights obligations, appeared to be encouraged. In the past, it is precisely on the basis of such discourses that external observers and human rights defenders have criticized some of the political discourses taking place in France.

For instance, the European Commission against Racism and Intolerance of the Council of Europe had already recommended in April 2010 that the French authorities should take steps to curb the exploitation of racism in political discourse as they "underlined that a number of remarks by politicians, including by elected persons and members of the government, in particular on questions of immigration and integration, have been perceived as encouragements to expressions of racism, and, particularly, xenophobia."⁴⁵ A similar position was taken by the Commissioner of Human Rights of the Council of Europe in a Position Paper titled "Positions on the Human Rights of Roma" where it was emphasized that "Today's rhetoric against the Roma is very similar to that used by Nazis and fascists before the mass killings started in the thirties and forties. Once more, it is argued that the Roma are a threat to safety and public health. No distinction is made between a few criminals and the overwhelming majority of the Roma population. This is shameful and dangerous".⁴⁶ The Commissioner of Human Rights therefore recommended that "it is crucial that leading politicians and other opinion makers avoid anti-Roma rhetoric and, instead, stand up for the principles of non-discrimination, tolerance and respect for people from another background".⁴⁷ Public figures carefully choose their use of words to project perceptions, opinions and images to those who listen in the public

⁴⁴ For an overview of the press releases refer to <http://www.immigration.gouv.fr>

⁴⁵ European Commission against Racism and Intolerance of the Council of Europe, Report on France, Adopted on 29 April 2010 and published on 15 June 2010.

⁴⁶ Commissioner for Human Rights, Positions on the Human Rights of Roma, CommDH/Position Paper (2010)3, Strasbourg, 3 May 2010, page 3.

⁴⁷ Ibid. Page 8.

at large. The use of such discourse taints a particular group with suspicion in the eyes of the population and public officials, and this is precisely what the Roma community suffers from.⁴⁸

In her first public intervention on the case delivered the 25th of August 2010, Commissioner Reding echoed the critiques voiced by other international actors and responded that “the rhetoric that has been used in some Member States in the past weeks has been openly discriminatory and openly inflammatory”. The EP also underlined in its 9 September Resolution “the inflammatory and openly discriminatory rhetoric that has characterized political discourse during the repatriations of Roma, lending credibility to racist statements and the actions of extreme right-wing groups.” By doing so both institutions emphasized the urgent need to stop stigmatization and instead promote ‘Roma inclusion’. EU’s engagements towards Roma were reasserted by bringing to the attention of Member States the EU tools at hand for ensuring their inclusion and, more importantly still, on the urge for political commitments.⁴⁹ Nonetheless, this engagement appears to be today lacking among the majority of the EU governments. Among its peers, the French government did not encounter strong disapproval. From the outset, it sought to distract critics by shifting responsibility to other EU Member States such as Romania. Bulgaria did not enter into the dispute, fearful of France’s threat to call for a delay in its accession to the Schengen regime. As to the other Member States’ none have unequivocally condemned the French attitude. Italian president Berlusconi and the Spanish President Zapatero even supported and encouraged the position of Sarkozy and the French measures.⁵⁰ Other EU Member States chose to remain silent. Germany even decided to publicly negate via the media, the assertions of support voiced previously by Sarkozy.⁵¹

Of major concern has been the attitude demonstrated by the French government towards the EU institutions as well as when referring to the legality of its policies towards Roma. The French government has been keen to emphasise on the sovereignty and *grandeur* of France, putting into question the legitimacy of both the EP and the Commission in scrutinizing and overseeing national practices within the scope of EU law. Following the adoption of the 9 September EP Resolution, the Minister Eric Besson reacted by denouncing “*la multiplication des mensonges et des caricatures ayant abouti à l’adoption de cette résolution...la France regrette les caricatures et tentative d’instrumentalisation de son action, qui alimentent les risques de stigmatisation de cette population*».⁵² Reding’s reference to the Second World War gave Sarkozy the opportunity to distract the debate away from the legality of the French practice by fustigating the Commissioner’s intervention and avoiding any comments on the substance of her condemnations. Furthermore, by ironically proposing that Luxembourg (country of origin from

⁴⁸ Eurobarometer survey 296 of July 2008 and EU Fundamental Rights Agency, Survey on EU Minorities and Discrimination - the Roma - November 2009.

⁴⁹ European Commission, Staff Working Document, Roma in Europe: The Implementation of European Union Instruments and Policies for Roma Inclusion – Progress Report 2008-2010, SEC(2010) 400 final, Brussels, 7.4.2010. Refer also to the Commission’s website: <http://ec.europa.eu/social/main.jsp?catId=518&langId=en> Refer also to Council of the EU, Council Conclusions on advancing Roma Inclusion, 3019th Employment, Social Policy Health and Consumer Affairs Council meeting, Luxembourg, 7 June 2010.

⁵⁰ French expulsions row doing nothing to help the Roma, EUobserver, 20.9.2010 <http://euobserver.com/22/30841>

⁵¹ On a parallelism carried out by Sarkozy on expulsions taking place in Germany, Angela Merkel denied the comparison by saying that Germany’s actions “which amount to repatriating some 2,500 Roma people a year, are not “mass deportations” but “gradual returns.” French expulsions row doing nothing to help the Roma, EUobserver, 20.9.2010, <http://euobserver.com/22/30841>

⁵² Communiqué de Presse, Résolution du Parlement Européen relative à l’ évacuation des campements illicite : Eric Besson réagit, le jeudi 9 septembre 2010, Paris.

which Reding is a national) should take over the expelled Roma before the French senators,⁵³ the French government intended to undermine the Commission's position as a representative of the common European interest and instead reduced it to the country of nationality of its Commissioner for Justice. French ministers were also found to argue that they had 'no lessons to learn from Brussels', emphasising on France's conformity with EU legislation and rejecting any critique as regards its interpretation.

5. The Current EU Law Monitoring System: Time for New Initiatives?

Could this political spectacle have been prevented? The actual shapes delineating the EU enforcement mechanisms do not provide an adequate response for avoiding cases such as the one occurring in France where compliance of basic EU law commitments and the EU Charter of fundamental rights are put into question. At present, two main procedures exist in the EU legal system of application to alleged breaches of EU law and fundamental rights standards:

1. The infringement proceedings stipulated in Article 258 TFEU. This procedure is a key tool in hands of the Commission to guarantee that EU Member States observe and correctly implement EU law. It grants the Commission the competence (and discretion) to monitor and initiate enforcement proceedings against a disobedient EU Member State who is found to be in breach of EU law commitments.⁵⁴ The infringement proceedings are in practice a pre-litigation procedure for the Commission to resolve a 'conflict' with a particular EU Member State *at political level* before involving the Court of Justice. The Luxembourg Court can only come into play as last resort should the (informal and formal) political dialogues between the parties not succeed. The rationale provided for in the Treaties is therefore 'to encourage' Member States to modify their legislations without any judicial proceedings. In practice the procedure takes place around the following four phases:

First, the Member State is given the possibility to submit information and present its own position and views on the matter.

Second, if the case is not resolved the Commission will issue a letter informing the State about the infringement. Except in situations considered of especial urgency, the Member State is given a couple of months to answer the Commission's letter.

Third, if no reply to the letter of formal notice is received or if the observations lodged by the Member State are not considered to be satisfactory, the Commission will issue a 'reasoned opinion' establishing the specific legal grounds upon which the procedures are based and a deadline for the Member State to resolve the situation.

Fourth, should these pressures be in vain, the last phase consists in the possibility by the Commission to refer the case before the Court of Justice in Luxembourg. If the Court finds that the Member State has failed to fulfil its obligations in light of the Treaties it will require the latter to comply with its judgment. Article 260 TFEU offers the possibility of imposing a financial penalty for failure to comply with its judgment.

⁵³ Nikolas Sarkozy tells Luxembourg to take in Roma, The Guardian, 15 September 2010, <http://www.guardian.co.uk/world/2010/sep/15/nicolas-sarkozy-luxembourg-roma>

⁵⁴ The article states that "If the Commission considers that a Member State has failed to fulfil an obligation under the Treaties, it shall deliver a reasoned opinion on the matter after giving the State concerned the opportunity to submit its observations. If the state concerned does not comply with the opinion within the period laid down by the Commission, the latter may bring the matter before the Court of Justice of the European Union."

The infringement proceedings confer to the Commission wide discretion when handling the developments and to continue with ‘informal’ negotiations with the Member State during the entire procedure. This room of manoeuvre also applies as regards the option to bring the case before the Court of Justice should the case not be resolved in the pre-litigation phases.

2. The second procedure relevant for the French affair is stipulated in Article 7 TEU. This provision was originally introduced by the Amsterdam Treaty in 1999 in order to equip the European institutions with the necessary means to ensure that all EU Member States respect the general principles or ‘values’ upon which the EU has been founded.⁵⁵ Article 7 procedure aims at offering a preventive remedy and a penalizing mechanism in the event of a serious and persistent breach of these common principles by a Member State, which include all areas of activity by EU Member States, even those not falling within the scope of EU law. In particular:

First, the European Commission, the European Parliament, one third of the Member States, or the Council (acting by a majority of four fifths of its members after obtaining the consent of the European Parliament) may determine that there is a “clear risk” of a “serious breach” by a Member State of the values referred in Article 2”.⁵⁶

Second, the Council may suspend certain of the rights deriving from the application of the Treaties to a Member State found to be in a “serious and persistent breach” of one of the fundamental principles upon which the EU has been founded, and which include the respect of fundamental rights.

Article 7 TEU procedure has been so far never been used.⁵⁷ The main concern with both enforcement procedures is that they are heavily politicized and both are ‘*ex post*’ in nature (they are effective only after the violation of EU law and/or fundamental rights has been ‘fully’ proved). An exception would be the preventive phase of Article 7.1 TEU, but this mechanism neither ensures an immediate action nor gives any clear indications as to the kind of measures that could be adopted at EU level against a disobedient EU Member State. Further, the fact that both procedures rely so heavily on ‘diplomatic solutions and strategies’ leave the democratic scrutiny of the entire process at stake and the individuals subject to unlawful derogations of EU citizenship and fundamental rights in a highly vulnerable situation before the EU Member State involved. Neither of the procedures guarantees immediate EU action. There is in fact no proper monitoring mechanism in place that would prevent a situation such as the one in France from arising and continuing to take place by giving the EU the capacity to act as soon as the risk of a

⁵⁵ Article 2 TEU states that “The Union is founded on the values of respect of human dignity, freedom, democracy, equality, the rule of law and respect of human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.”

⁵⁶ According to the Commission the introduction of the concept of ‘clear risk’ provides “... a means of sending a warning signal to an offending Member States before the risk materializes. It also places the institutions under an obligation to maintain constant surveillance, since the ‘clear risk’ evolves in a known political, economic and social environment and following a period of whatever duration which the first signs of, for instance, racist or xenophobic policies will have become visible”. Moreover, in what concerns the concept of “serious breach” the Commission has clarified that in order to determine the seriousness of the breach a variety of factors need to be taken into account and for instance “... one might consider the social classes affected by the offending national measures. The analysis could be influenced by the fact that they are vulnerable, as in the case of national, ethnic or religious minorities or immigrants. The result of the breach might concern any one or more of the principles referred in Article 6 TEU”. Refer to the Commission Communication on Article 7 of the Treaty on European Union. Respect for and promotion of the values on which the Union is based, COM(2003) 606 final, 15.10.2003, Brussels. Page 7.

⁵⁷ This was subject of concern in the European Parliament, Resolution of 14 January 2009 on the situation of fundamental rights in the European Union 2004-2008, P6_TA-PROV(2009)0019, Strasbourg, 14 January 2009.

flagrant breach of EU law and fundamental rights occurs. New EU level enforcement actions are therefore needed.

6. Conclusions: Towards a Freezing Enforcement Procedure

The Roma affair in France has constituted a test to the legitimacy and added value of the EU's Area of Freedom, Security and Justice in a renewed (post-Treaty of Lisbon) institutional and fundamental rights setting. As it has been showed in this Policy Brief, there is not only a difficult relationship between the above-mentioned facts of the French case and the legal contours of EU citizenship and free movement law. The effects of the French measures over fundamental rights and the principle of non-discrimination on the basis of ethnic origin remain equally highly contested. The unfortunate developments (and battle of contentious discourses) outlined in this Policy Brief and the fact that France still continues to apply evacuation and expulsion measures of Romanian and Bulgarian nationals further illustrate that the current enforcement tools in the hands of the EU are inefficient to satisfactorily halt breaches to basic EU law and fundamental rights principles and commitments by the EU Member States. We have argued that one of the key lessons stemming out of this case is that the current set of monitoring and enforcement mechanisms to ensure EU Member States compliance with European law are not satisfactory in order to address challenges such as those emerging from the French affair, and that a reflection should be opened to amend and improve them further.

The EU should therefore develop a new (preventive) enforcement mechanism that would complement current ones (the infringement and the fundamental rights proceedings). This procedure would be primarily destined to ensure that contested national policies and practices falling within the remits of EU law and fundamental rights (and applying exceptions and/or derogations to European rights and freedoms) would be immediately 'frozen' while the formal opening of infringement or fundamental rights proceedings would be still be considered and/or under study by the relevant services of the European institutions. For such an *ex ante* procedure to ensure its full effectiveness, careful attention should be paid at times of ensuring its overall objectivity, impartiality and accountability. It would be also necessary that the opening of the procedure would not only rely in hands of the Commission, but the latter could be also launched on the initiative of the European Parliament. Its operability could also automatically lead to accelerated infringement proceedings against the EU Member State at stake and to an expedited procedure (similar to the currently existing urgent preliminary ruling procedure for AFSJ-related policies)⁵⁸ before the Court of Justice in Luxembourg which would consist of the application of a shorter period for the parties involved to submit statements of case or written observations and/or for the written phase of the case to be omitted.

The new freezing enforcement procedure would be activated through the existence of 'evidence' provided (for instance) by the European Agency of Fundamental Rights (FRA)⁵⁹

⁵⁸ Article 23a of Protocol 3 attached to the Treaty on the Functioning of the European Union states that "The Rules of Procedure may provide for an expedited or accelerated procedure and, *for references for a preliminary ruling relating to the area of freedom, security and justice, an urgent procedure*. Those procedures may provide, in respect of the submission of statements of case or written observations, for a shorter period ... for the case to be determined without a submission from the Advocate General. In addition, the urgent procedure may provide for restriction of the parties and other interested persons ... authorised to submit statements of case or written observations and, in cases of extreme urgency, for the written stage of the procedure to be omitted." This has been developed in Article 76a of the Consolidated Version of the Rules of Procedure of the General Court, 2010/C177/02, OJ C177/37, 2.7.2010.

⁵⁹ On the FRA work on the situation of the Roma refer to http://www.fra.europa.eu/fraWebsite/roma/roma_en.htm

along with its Fundamental Rights Platform (FRP) of Non-Governmental Organizations,⁶⁰ which could be also tasked ‘to alert’ of any suspected breaches of EU law and fundamental rights by EU Member States. The next step would be the revision by the FRA of the pertinence of such allegations before a formal activation would be requested to the EU institutions. The existence of this EU-wide network for cooperation and information exchange set to act as the main channel for the FRA to engage civil society would enable an EU-wide coverage of the implementation of EU law in an enlarged EU. They could thus be responsible for informing/alerting if a violation of fundamental rights or EU law is suspected to be taking place. The involvement of a network of independent experts who can be consulted quickly to present a report in relevant Member States should also be another initiative to be considered in the implementation of such a procedure.

⁶⁰ http://www.fra.europa.eu/fraWebsite/networks/partners/civil_society/civil_society_en.htm

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