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**COMMUNICATION FROM THE COMMISSION TO THE COUNCIL AND THE
EUROPEAN PARLIAMENT**

**Area of Freedom, Security and Justice assessment of the
Tampere programme and future orientations**

National Consultative Committee on Racism and Interculturalism (NCCRI)

Ireland, 31 August 2004

Introduction

The fight against racism is an integral part of the formulation of a European area of freedom, security and justice. Freedom from racial discrimination is a fundamental right of all persons residing within the European Union, who have a justified expectation that the Union will take action to protect them from it. Freedom, in the Tampere conclusions, was not defined as the exclusive preserve of the Union's own citizens, indeed the existence of freedom acts as a contentiously named 'pull factor' and rightly so.

Paragraph 18 of the Tampere presidency conclusions emphasised this, stating that:

The European Union must ensure fair treatment of third country nationals who reside legally on the territory of its Member States. A more vigorous integration policy should aim at granting them rights and obligations comparable to those of EU citizens. It should also enhance non-discrimination in economic, social and cultural life and develop measures against racism and xenophobia.

The Communication outlines progress to date in the implementation of the Tampere programme, however the National Consultative Committee on Racism and Interculturalism¹ (NCCRI) would suggest that progress on the Paragraph 18 commitments has been disappointing. Initiatives concerning the fair treatment of third country nationals have been less forthcoming than those which seek to control immigration, and while progress has been made in terms of the anti-discrimination framework, the framework decision on racism and xenophobia has not been adopted.

In partnership with the Irish Human Rights Commission, the NCCRI published *Safeguarding the Rights of Migrant Workers and their Families: A Review of EU and International Standards: Implications for Policy in Ireland*, in April 2004. By reviewing EU and international standards the report seeks to contribute to the process of ensuring there are adequate safeguards for the rights of migrant workers and their families in Ireland. This document is available on the NCCRI's website, www.nccri.ie.

In considering the forthcoming second action plan on the Tampere conclusions the NCCRI believes that the Union must:

1. Recognise that anti-racism is at the core of the European project
2. Ensure that racism and xenophobia remain at the heart of the new Human Rights Agency (HRA)
3. Implement a comprehensive and consistent approach to racist crime.
4. Implement integration policies which protect the rights of third country nationals.

¹ The National Consultative Committee on Racism and Interculturalism (NCCRI) was established in 1998. The role of the NCCRI is to act as an expert body to develop an integrated and strategic approach to racism and its prevention and to foster interculturalism within Ireland. It also seeks to inform policy development and to build consensus through dialogue in relation to the issues of racism and interculturalism. It is core funded by the Department of Justice, Equality and Law Reform.

1. Anti-Racism, enlargement and the political climate

In an enlarged Europe racism and discrimination remain serious problems. Speaking on behalf of the European Union at the Sixtieth Session of the Commission on Human Rights the Irish Minister for Foreign Affairs, Brian Cowen, T. D. stated that:

Our own experience is far from perfect. The recent past, as well as the present, bears witness to our imperfections, not least in the worrying rise in racism, xenophobia, anti-Semitism and intolerance within the borders of the European Union. We are determined to combat these wherever they occur and to take the necessary measures to ensure that Europe remains a tolerant and inclusive society.

Enlargement will change the political and institutional context for policy-making on anti-racism and non-discrimination. Clear political leadership is required to secure further legislative action in this area. At the NCCRI presidency conference the Minister for Justice, Equality and Law Reform, Michael McDowell, T. D., pointed out that, 'the expansion of the Union and the removal of borders will increase the pace of change in European society and will add significantly to its diversity'.² This reality must be met in a political and institutional context which recognises the challenges of racism and the need to build an intercultural society.

Freedom from racial discrimination has traditionally been one of the most widely recognised human rights.³ However the denial of the existence of racism, racial discrimination, and related phenomena and practice is prevalent.⁴ In recent years European Member States have failed to take racism as seriously as they should, and this political shift has been reflected in the implementation of the Tampere programme.

2. The extension of the mandate of the EUMC

As the Communication points out in December 2003, the representatives of the Member States meeting within the European Council, stressing the importance of human rights data collection and analysis with a view to defining Union policy in this field, agreed to build upon the existing European Monitoring Centre on Racism and Xenophobia (EUMC) to become a Human Rights Agency (HRA) to that effect.

While the specific mandate of the HRA will be defined following the publication of a Commission communication, it is vital that this debate takes place in the broader context of the Tampere agenda. The new mandate should not be considered in isolation from the creation of an area of freedom, security and justice, as it forms part of that process.

² Speaking at the NCCRI conference 'Combating Racism through Building a More Inclusive, Intercultural Europe', 9 June 2004. Conference report contained in the NCCRI Journal *Spectrum* available at: www.nccri.com

³ The International Convention on the Elimination of Racial Discrimination (CERD) is the oldest of the seven main United Nations human rights treaties, it came into force in 1969. Most European States have been party to the Convention for decades.

⁴ Theo van Boven (2001) *Discrimination and Human Rights Law: Combating Racism*, in Fredman, S. (ed.) *Discrimination and Human Rights: The case of racism*, Oxford: Oxford University Press, p. 111

Without data, and complementary research and analysis it will not be possible to monitor the outcomes and impact of the programme.

While the Tampere programme must regain its focus on anti-racism and the rights of third country nationals, the new HRA must not lose this expertise. The Agency must maintain its mandate for racism and xenophobia in order to secure the sustainability of the work undertaken to date. The European Racism and Xenophobia Network (RAXEN) has in recent years produced an important body of research and analysis which will have a significant role to play in the implementation of the area of freedom, security and justice.⁵

Historically racism has served both as a catalyst and as a restriction for the development of human rights instruments. Racial discrimination is not only an abuse of fundamental rights in and of itself, but it also serves as the cause for many other breaches of fundamental rights, including the right to life and human dignity. Consequently any agency concerned with fundamental rights must have anti-racism at its core.

3. Racist crime and violence

Two white women set upon a female South African asylum seeker in the street. They beat her on the legs and head, and used racially abusive terminology.⁶

Incidents such as this one are a serious reminder of the reality of racially motivated violence. In Ireland, while the incident may well be reported to the police it is at the discretion of the judge whether or not to consider the racist motive as an aggravating circumstance. What is needed is a comprehensive and consistent approach to the crime of racism in order to secure the fundamental rights of everyone in the European Union.

People have the right to expect the European Union to address the threat to their freedom and legal rights posed by serious crime. Article 29 of the Treaty on European Union sets out the development of common action among Member States in criminal matters and the prevention and fight against racism and xenophobia. This cooperation is a means of achieving the Union's objective of providing citizens with a high level of safety within an area of freedom, security and justice.⁷ However, to date, the European Union has failed to respond to the need for comprehensive criminal legislation on racism.⁸

While criminal provisions can only form one part of the much broader fight against racism, it nonetheless has an important function, and sends out an important message

⁵ The NCCRI, in partnership with the Equality Authority, is the National Focal Point (NFP) for RAXEN in Ireland.

⁶ Racist incident reported to the NCCRI, August 2004

⁷ COM(2001) 664 final

⁸ The provisional consolidated version of the draft Treaty establishing a Constitution for Europe (25 June 2004), Chapter IV, Section 1, Article III-158 (ex Articles 29 TEU and 61 TEC), part 3 states that 'The Union shall endeavor to ensure a high level of security by measures to prevent and combat crime, *racism and xenophobia* (emphasis added), and measures for coordination and cooperation between police and judicial authorities and other competent authorities, as well by the mutual recognition of judgment in criminal matters and, if necessary, *the approximation of criminal laws* (emphasis added)'

about the priorities of the Union.⁹ As Theo van Boven has pointed out, it is obvious that in any review of the responsibility of the State to combat racism and racial discrimination attention has to be paid to the crucial role of the police and other law enforcement officials. The criminal justice system has its distinct function which cannot be overtaken by the various types of specialised bodies.¹⁰

The failure to adopt the Framework Decision on Racism and Xenophobia has undermined progress in this area. An effective instrument is needed to overcome the patchy approach at national level and the difficulties in consistency which conflicts with the EU objective of establishing an area of freedom, security and justice.¹¹ For example in Ireland the Prohibition of Incitement to Hatred Act, 1989 has been under review since 2001, in recent statements government officials have indicated that the finalisation of the review has been linked to the adoption of the Framework Decision. In other words, the failure to make progress at the European level is undermining national developments.

4. Securing the rights of third country nationals

The Tampere conclusions stated that ‘the legal status of third country nationals should be approximated to that of Member States’ nationals’, however it is clear, that to date the policy has not been implemented.

While acknowledging that progress has been made in developing a framework on immigration policy at EU level, progress in implementing the rights of third country nationals has been piecemeal and slow. Where developments have been made such as the Family Reunification Directive, the results are very disappointing.

It must be recalled that as a matter of principle basic human rights are universal and apply to everyone regardless of nationality or legal status, however exclusions based on nationality, such as that in CERD, are invoked by states to legitimise the inequalities in the treatment of non-nationals. According to Theo van Boven ‘in Europe such treatment and attitudes affect in particular people of non-European origin who are visibly distinguishable by the colour of their skin’.¹²

The development of instruments to protect the rights of third country nationals must be underpinned by two core principles:

- Migrant workers should not be treated as economic entities, but as people with a broad range of social, cultural, civil and political rights. The development of immigration policy must secure these rights.

⁹ In its General Recommendation 30 (5 August 2004) the Committee on the Elimination of Racial Discrimination recommends that all States who are Party to the Convention ‘Introduce in criminal law the provision that committing an offence with racist motivation or aim constitutes an aggravating circumstance for a more severe punishment’, available at: <http://www.ohchr.org/english/bodies/cerd/docs/CERD-GC30.doc> (25.08.04).

¹⁰ Theo van Boven (2001) *Discrimination and Human Rights Law: Combating Racism*, in Fredman, S. (ed.) *Discrimination and Human Rights: The case of racism*, Oxford: Oxford University Press, p. 125

¹¹ ENAR (2003) *European Strategies to Combat Racism and Xenophobia as a Crime*

¹² Theo van Boven (2001) *Discrimination and Human Rights Law: Combating Racism*, in Fredman, S. (ed.) *Discrimination and Human Rights: The case of racism*, Oxford: Oxford University Press, p. 122

- Equality mainstreaming must inform the development of all immigration policy, including asylum policy. This means the integration of equal opportunities principles, strategies and practices into all spheres of immigration activity. Immigration policy should not undermine equality.

Enforcement bodies must be given adequate resources to enable protection, information and redress for migrant workers. The Union has an important role to play in funding NGOs and other organisations to ensure that these roles are being fulfilled.

Integration of third country nationals

As the Commission Communication points out ‘integration policy, of third country nationals, will have to be promoted and continued. In this perspective, the Union must put in place adequate measures in order to support the action of Member States’. While welcoming this development, integration policy should be careful to avoid any tendency towards assimilation.

It has been mooted that minorities suffer racism because they are not integrated enough. However this assumption fails to taken into account the inherent nature of racism and racial discrimination. Discrimination and racism are a direct result of prejudice amongst the majority population and not the presence of minority ethnic communities in society. Commission Communication COM(2003) 336 recognises integration should be understood as a two way process based on mutual rights and corresponding obligations of legally resident third country nationals and the host society which provides for full participation of the immigrant. This implies on the one hand that it is the responsibility of the host society to ensure that the formal rights of immigrants are in place in such a way that the individual has the possibility of participating in economic, social, cultural and civil life. On the other, immigrants should respect the fundamental norms and values of the host society and participate actively in the integration process, without having to relinquish their own identity.¹³

¹³ COM (2003) final, Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee, and the Committee of the Regions on Immigration, Integration and Employment, pp 17-18

Conclusions

The achievement of an area of freedom, security and justice will not be possible unless anti-racism is placed at the core of the forthcoming Tampere programme. While the last five years have seen some developments, these are being undermined by the lack of coherent and substantial response to racist crime, and the need to secure the rights of third country nationals.

An area of freedom, security and justice is not possible unless it is achieved for everyone in the European Union. It would be contradictory to the principles of human dignity, equality and solidarity, upon which the Union is based, if freedom, security or justice were to be denied to any individual within its borders. Consequently the NCCRI believes that the European Union should underpin the construction of the forthcoming second programme, by:

1. **Recognising that anti-racism is at the core of the European project.** Not only has racism failed to be a central concern of the Tampere agenda, but more widely it has fallen off the European political agenda. Racism must be re-instated as a central concern for the Union, both in terms of the old challenges but also for the new ones facing an enlarged European Union.
2. **Ensuring that racism and xenophobia remain at the heart of the new HRA.** Article 21 of the Charter of Fundamental Rights of the European Union recognises the right to non-discrimination. However racism and xenophobia are also the cause of breaches of the Convention, consequently any agency concerned with protecting human rights must be committed to anti-racism and interculturalism.
3. **Adopting a comprehensive and consistent approach to racist crime.** The failure of the Union to adopt a comprehensive instrument on racist crime is continuing to undermine the fight against racism in the Member States. Criminal law is one part of an overall anti-racism framework; it recognises the particular dangers and concerns associated with racially motivated crime.
4. **Implementing integration policies which protect the rights of third country nationals.** Migrant workers and their families are not simply economic entities but rather people with social and cultural needs. Initiatives aimed at securing the rights of migrants must be effective and underpinned by equality mainstreaming and human rights approaches. The development of integration policies must reflect a pluralistic and intercultural approach to inclusion.