



European Network Against Racism
Réseau européen contre le racisme
Europäisches Netz gegen Rassismus



ENAR Response to the Commission Consultation

FREEDOM, SECURITY AND JUSTICE: WHAT WILL BE THE FUTURE?

A consultation as part of the exchange of ideas that will lead to the definition of priorities in the area of Justice and Home Affairs for the period 2010-2014.

December 2008

The European Network against Racism (ENAR) is a network of some 600 European NGOs working to combat racism in all EU Member States. Its establishment was a major outcome of the 1997 European Year against Racism. ENAR is determined to fight racism, xenophobia, anti-Semitism and Islamophobia, to promote equality of treatment between EU citizens and third country nationals, and to link local/regional/national initiatives with European initiatives. Further information is available at: .enar-eu.org

Introduction

ENAR welcomes this opportunity to contribute to the debate on the shape of the future EU programme on justice and home affairs. This consultation and the dialogue that will take place between now and the adoption of the new programme at the end of 2009 is an important opportunity to reshape the way in which the European Union approaches the exercise of its competencies and re-focus work where it is most needed. Dialogue with civil society must be a core mechanism of developing the future programme and a core feature of the programme itself.

In this paper we first respond to the 'Open' Questions, regarding the priority areas, actions and legislation for the future programme, and then go on to expand in more detail, answering specific questions posed in the questionnaire and explaining why we believe that these are the most important areas for the European Union to focus on in the future programme.

These priorities are drawn from a wide range of debates within the ENAR network and are based upon the evidence that we have gathered over the past 10 years of working together against racism. Where the priorities are drawn from specific key policy papers or publications, then these are referenced and attached in Annex to this submission.

1. The 'Open' Questions

Which (maximum five) areas or actions should in your opinion definitely be a priority for 2010-2014 in the area of Freedom, Security and Justice?

1. Developing a comprehensive approach to combating Racism and Xenophobia that sees the fight against racism mainstreamed into all relevant areas of work, including through police cooperation and work towards a coherent judicial area in civil and criminal matters, data protection (for example, protection against ethnic profiling) and the fight against terrorism.¹
2. Ensuring the mainstreaming of fundamental rights, including the rights of ethnic and religious minorities, into all EU law and policy²
3. Promote the development of progressive migration and integration policies³
4. Ensure that Counter-terrorism is conducted in the framework of human rights and anti-discrimination⁴
5. Promoting the adoption and/or implementation of National Action Plans Against Racism implementing the commitments made at the World Conference Against Racism 2001 (and due to be renewed at the Durban Review Conference 2009) by individual Member States.⁵

¹ ENAR General Policy Paper on Racism as a Crime, April 2006; European Strategies to combat racism and Xenophobia as a Crime, April 2003.

² ENAR General Policy Papers on Racism as a Crime (2006), Third Country Nationals (2006), Counter-terrorism and Combating racism (2007), Education (2008);

³ ENAR General Policy Paper on Third Country Nationals (2006)

⁴ ENAR General Policy Paper on Counter-terrorism and combating racism (2007)

⁵ ENAR Memorandum to the French Presidency of the EU 2008; ENAR Extended Fact Sheet No. 29: Durban's Legacy: National Action Plans against Racism in the European Union (October 2006)

How do you think existing legislation in the area of Freedom, Security and Justice can be improved or simplified? Please, give (maximum five) examples?

1. Build upon the foundation set by the Framework Decision on Combating Racism and Xenophobia as a Crime to build effective protection for victims of racist crime;⁶
2. Conduct an equality and human rights audit of the European Union Action Plan to combat terrorism;⁷
3. European institutions to fully implement and where needed revise relevant Community legislation to comply with the 1951 United Nations Convention Relating to the Status of Refugees, the 1954 United Nations Convention relating to the Status of Stateless Persons and CERD General Recommendation 30 on discrimination against non-citizens, as well as the relevant recommendations of the Council of Europe, the Conventions of the International Labour Organisation, and the Palermo Protocols to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, and against the Smuggling of Migrants by Land, Air and Sea;⁸
4. Extension of the protection against discrimination on the ground of nationality provided by the Treaties to every person living in the territory of the EU;⁹
5. Extension of the protection Against Discrimination on grounds of racial or ethnic origin, religion or belief and nationality to all areas of EU competence, including Justice and Home Affairs.¹⁰

2. The Specific Questions: ENARs opinions on the future

Question 1. Improve the protection of fundamental rights

1.1. Do you think that the EU should promote respect of Fundamental Rights in Europe in addition to the activities of the Member States?

ENAR Response: YES

ENAR believes that the European Union has a vital role in the promotion of fundamental rights and a significant responsibility to ensure not only that its own activities respect these

⁶ ENAR General Policy Paper on Racism as a Crime, April 2006; European Strategies to combat racism and Xenophobia as a Crime, April 2003

⁷ ENAR General Policy Paper on Counter-terrorism and combating racism (2007)

⁸ ENAR General Policy Paper on Third Country Nationals (2006)

⁹ ENAR General Policy Paper on Third Country Nationals (2006)

¹⁰ ENAR General Policy Paper on Third Country Nationals (2006), ENAR General Policy Paper on Counter-terrorism and combating racism (2007), ENAR General Policy Paper on Racism as a Crime, April 2006; European Strategies to combat racism and Xenophobia as a Crime, April 2003, ENAR submission to the European Commission consultation on the need for new initiatives combating discrimination outside employment (October 2007), ENAR report of an ad Hoc Experts Group on Extending EU Anti-Discrimination Law (March 2008)

standards but also that it takes action to actively respect, protect and fulfil fundamental rights through the standards that are set for the Union and for Member States.

The fight against racism requires respect for the universality and indivisibility of the fundamental human rights of all. Thus as well as ensuring that combatting racism and xenophobia are high priorities for the future Justice and Home Affairs programme, it is also crucial that the recognition of the rights of all is the foundation on which the future programme is built and the framework within which it operates.

Fundamental Rights as the Foundation and Framework of the future Justice and Home Affairs Programme:

ENAR believes that the work currently underway on building the future European programme on Justice and Home Affairs must not see fundamental rights as simply one aspect of the work to be done. Rather fundamental rights must be seen as the foundation stone and framework for the work of the EU, including as it relates to Justice and Home Affairs.

The Commission as the Guardian of the Treaties must also be the Guardian of Rights:

If our common goal is to build a Union founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities, then the European Commission must use these values to guide it in all aspects of its work. Thus the future programme must further develop the methods and mechanisms for enabling the use of enforcement powers in ensuring that Member States live up to their commitments to these values.

Fundamental Rights Review of existing legislation:

ENAR has called for a review of relevant legislation in the field of justice and home affairs for compliance with the fundamental rights standards. As a network we believe that this should pay particular attention to the rights of third country nationals and to protection against discrimination in the areas of policing and counter-terrorism.

Fundamental Rights Impact Assessment:

We believe that the process of fundamental rights impact assessment should be improved so as to not only ensure that proposals comply with fundamental rights standards but to also explore ways in which proposals can enhance the enjoyment of fundamental rights.

Ratification of key Human Rights Instruments:

ENAR also sees the future accession to the European Convention of Human Rights as important, but also other international treaties. The commitment of the EU to ratify the UN Convention on the rights of people with disabilities sets an important precedent that can be followed for other International standards, such as the UN Convention on the Elimination of All forms of Racial Discrimination and the UN Convention on the Elimination of Discrimination against Women.

This possibility should be further explored in the development of the future EU priorities on Justice and Home Affairs as a core action that can enable a rights based approach to frame the work of the EU in this and other areas.

1.2. Do you think that EU legislation promoting the implementation of fundamental rights such as data protection and fight against xenophobia and racism should be improved?

ENAR Response: YES

The Fights Against Racism and Xenophobia as a Core part of the EU Competence on Justice and Home Affairs:

Preventing and combating racism and xenophobia are core parts of the EU competence under Title VI of the Treaties. As such, the fight against racism and xenophobia is not isolated to the adoption or improvement of a particular instrument, as welcome as that is. The future programme on justice and home affairs must develop mechanisms to ensure that the fight against racism and xenophobia is pursued throughout the work of the European Union in this area, including through police cooperation and work towards a coherent judicial area in civil and criminal matters, data protection (for example, protection against ethnic profiling) and the fight against terrorism.

Seeing real change result from the Durban Review Conference due in April 2009

2009 will see the holding by the United Nations of a review conference on the implementation of the Durban Declaration and Programme of Action adopted at the World Conference Against Racism in 2001. Key to the implementation of the Durban Declaration and Programme of Action is the adoption and implementation by all UN States, including all EU Member States, of a National Action Plan Against Racism. The adoption and implementation of the National Action plans is lacking in many Member States and the future programme should make it a priority to promote the adoption and/or implementation of these plans by individual Member States.

Building on the foundation set by the Framework Decision on Combating Racism and Xenophobia as a Crime to build effective protection for victims of racist crime:

The EU has a vital role to play in the fight against racism and xenophobia. The strides that have been made in the dialogue on this issue, culminating in the political agreement on the text of a Framework Decision on combating racism and xenophobia as a crime, must be continued, strengthened and built upon. The delays in the formalisation of the Framework Decision demonstrated a worrying decline in the political commitment to this important issue as does the minimalist nature of the instrument that has been adopted. Similarly, the dialogue on the future of Justice and Home Affairs has, to date, not sufficiently addressed the need for action to combat racism and xenophobia. This must be reversed and the fight against racism and xenophobia must be a high priority for the EU agenda on Justice and Home Affairs.

To this end, ENAR believes that the following must be a priority:

- Ensuring a high quality transposition of the Framework Decision on Racism and Xenophobia as a crime, ensuring that the minimum standards of the Framework Decision are met and built upon by Member States;
- Ensuring effective implementation of the legal standards and that victims of racist crime and violence have effective access to redress;
- Building on the minimum provisions of the Framework Decision to work towards improved legislation leading to real and effective protection against racism and xenophobia as a crime.

2. Develop EU citizenship

2.1. To facilitate the free movement of EU citizens within the EU do you think that the EU should do more to:

(1) remove the remaining obstacles in the day-to-day life of EU citizens who move to another Member State?

ENAR Response: YES

Discrimination and the violation of fundamental rights are key obstacles to the free movement of EU citizens and action to tackle these must be a priority.

The denial of the right to free movement for ethnic minorities in Europe results from different barriers. There is evidence that the free movement rights of certain ethnic minorities, in particular the Roma, are regularly violated. Thus enforcement of the legal rights to free movement must take particular account of the right to non-discrimination and must be undertaken swiftly in order to ensure an effective remedy for those subject to illegal deportation or other violations of the right to free movement.

More subtly, the right to free movement for ethnic and religious minorities in Europe is curtailed by a series of barriers linked to racism and discrimination. The lack of comprehensive protection against discrimination hinders free movement of EU citizens as does the lack of a minimum level of protection against racism as a crime. Moreover, the problems in securing the existing rights to non-discrimination, such as lack of transposition, lack of access to justice and wide exceptions to the principle of equal treatment represent significant barriers to free movement for EU citizens.

Consideration must also be given to the most effective way to ensure the free movement for third country nationals. The EU in exercising its competence on legal migration must give serious consideration to actions needed to ensure free movement rights to third country nationals.

(2) promote participation in elections to the European Parliament and in local elections?

ENAR Response: YES

Representation and participation of ethnic and religious minorities in European and local elections:

ENAR has raised concerns regarding the low representation of ethnic and religious minorities among election candidates. Currently under 2% of MEPs are from ethnic minorities and yet over 5% of the European population is of ethnic minority origin.

Related to this is the issue of political participation of ethnic minorities. ENAR has called on political parties to ensure that they encourage the political participation of ethnic and religious minorities as much as possible in the 2009 elections; in order to do this; their programme should also address the specific and concrete concerns of this part of the population.

ENAR believes that any actions taken to promote participation in elections to the European Parliament and in local elections must include specific actions aimed to ensure ethnic and religious minorities' participation.

2.2. Do you think that the EU should do more in the field of promotion of the rights of children and the protection of women against violence?

ENAR Response: YES

Efforts to promote the rights of children and the protection of women against violence must take into account the specific vulnerabilities of minority and migrant children and minority and migrant women. (see further ENARs '15 Principles for a Positive Approach to Migration')

3. Develop a common immigration policy for Europe

3.1. Do you think that there should be a role for the EU in managing legal migration to cope with future labour and skills shortages?

3.2. Do you think integration of legal immigrants should be further strengthened and that the EU could help Member States, for example by sharing information?

3.3. Do you think that the EU should step coordination to curb illegal immigration into the EU?

4. Further develop a Common European Asylum System

4.2. Do you think a Common European Asylum System with higher common standards of protection should be developed?

ENAR believes that the development of a common immigration policy and a Common European Asylum System are important parts of the work on Justice and Home Affairs and must continue. However, we are seriously concerned that the current approach pays insufficient attention to the potential for actions taken in this area to undermine the vision of Europe free from racism and strongly believe that the foundation on which such measures are taken must be changed in the future programme. A more positive approach to migration must be promoted that respects the rights of all and ensures that anti-racism is a core value against which all action is tested.

In November 2008 ENAR held a Policy Seminar entitled 'Framing a Positive Approach to Migration'. The seminar was held in order to enable anti-racist civil society to proactively define the frame of reference for debate on an EU approach to migration. Following on from the European Commission Communications 'A Common Immigration Policy for Europe: Principles, actions and tools' and the 'Policy plan on Asylum' and following the adoption of the European Pact on Migration under the French Presidency, the seminar considered the practical realities of EU migration policy, but also the less tangible 'shape of the debate' that underlies the approach taken and leads to these practical realities.

The Seminar was held in response to the analysis of ENAR that while the Member States of the European Union face a variety of different situations with regard to third country nationals and mobile European Union nationals, a common theme is that across Europe migrants are treated as second class persons, socially excluded and subject to various forms of discrimination with regard to access to rights, employment, education, and social services.

The current consultation and the development of the future programme on Justice and Home Affairs has the potential to enable the EU to revisit its approach to immigration and asylum, framing it within a positive approach that combats racism and xenophobia and promotes the rights of all.

In Annex 1 to this submission we therefore put forward our concerns and propose 15 Principles for Framing a Positive Approach to Migration.

7. Develop and promote a coherent judicial area for criminal matters

7.1. Do you think that the EU should provide all citizens with a basic set of rights as a guaranteed minimum in criminal investigations?

ENAR Response: YES

Action Against Discrimination, including Racial Profiling:

Evidence from ENAR members indicates that the official sanctioning of racial profiling,¹¹ and the de facto implementation of such approaches, particularly in the context of counter-terrorism measures, is increasingly problematic for ethnic and religious minority communities. While the extent of racial profiling is difficult to ascertain given the lack of data and the fact that racial profiling has not been sufficiently considered by either researchers or policy-makers, the ENAR Shadow Reports demonstrate racial profiling as a widespread practice in the European Union. Racial profiling is a direct derogation of the principle of non-discrimination and undermines the enjoyment of fundamental rights. Practices which previously would have been unjustifiable are increasingly identified as an 'acceptable' price to pay for security.

Racial profiling undermines the rights of individuals, contributes to the exclusion and demonisation of particular communities, and has proved an ineffective security strategy. Terrorists come from all walks of life, and actions which target individuals and communities on the basis of race or religion, or proxies such as nationality, place of birth or residency status, divert the attention of police and security personnel and actually contribute to heightened insecurity. In addition such measures serve to alienate communities with whom police and security officials need to have strong links.

Recommendations that ENAR believes must adopted in undertaking work to combat profiling in criminal investigations:

- Undertake actions to restore the confidence of minority communities who have perceived themselves to be the victims of arbitrary policing and security practice;

¹¹ For example a European Council Recommendation of 28 November 2002 on the development of terrorist profiles, while explicitly excluding the use of race or ethnicity, includes criteria such as nationality, travel document, and place of birth.

- Put in place accessible, confidential and independent complaint mechanisms and provide supports to civil society organisations to assist individuals in making complaints;
- Adopt a clear legal standard outlawing the use of racial profiling in all circumstances;
- Ensure effective monitoring, including ethnic monitoring, of all police, security and immigration practices, particularly those where discretion may be exercised, in order to identify profiling practices.

7.2. Do you think that the EU should have common minimum standards for the protection of crime victims?

ENAR Response: YES

Targeted Victim Support for victims of racist crime:

Given the nature of racist crime it is essential that targeted **victim support** initiatives be put in place, either through mainstream service provision or if appropriate specific services dealing with racist crime. These services must be adequately supported to ensure the effective implementation of existing and new legislative provisions, and particularly in securing prosecutions.

Enabling the Criminal Justice System to respond effectively:

In order to provide long term and sustainable responses the needs of ethnic minority communities must be **mainstreamed** throughout the administration of justice. This requires: **participation** of ethnic minorities in all sectors of the system; **training and awareness** to sensitise majority actors (police officers, lawyers and judges) to the needs of ethnic minority communities; and capacity building and empowerment of the communities themselves.

Support to victims:

Where there are active **NGOs** there tend to be more effective strategies for dealing with racism as a crime. Consequently NGOs must be funded to provide alternative victim support services and complementary data collection mechanisms. In this very sensitive area it is essential that there are complementary and alternative means of accessing support.

9. Strengthen action to prevent and combat terrorism and specific forms of crime

9.1. Should the EU take more action to face the terrorist threat?

ENAR Response: Significant change is needed in the methods used

The fight against racism and the fight against terrorism are intrinsically linked:

The challenge facing the European Union is to secure the effectiveness of its counter-terrorism strategy by ensuring that it is carried out within the context of the international human rights framework and in a non-discriminatory manner. Counter-terrorism is both dependent on effective implementation of the rights to equality and non-discrimination, as well as a potential barrier to their full realisation. The dialogue on counter-terrorism too often falls into the trap of placing the protection of the majority in opposition to the rights of the

minority. This analysis is a false start. Undermining the rights of the minority undermines society as a whole and, rather than contributing to security, reduces the community cohesion that is necessary for the effectiveness of counter-terrorism measures.

The fight against racism and the fight against terrorism are intrinsically linked. Both racism and terrorism are the product of intolerance and present serious threats to fundamental rights. While there is no inherent contradiction between these two imperatives, it is clear that the fight against terrorism is having a detrimental impact on broader efforts to overcome intolerance. Legal, policy and practice developments in the fight against terrorism have contributed to an environment whereby direct and indirect forms of discrimination are increasingly tolerated and even mandated. Official actions, such as the use of racial profiling, present direct manifestations of racial discrimination, while the overall tone of public debate and political action has contributed to increasing prejudice and subsequent discrimination across the whole range of social spheres. Recent developments and trends in the fight against terrorism are undermining integration and social inclusion contributing to a context whereby a small minority justify terrorism. Anti-racism is not a right to be sacrificed in the context of a broader security agenda, but rather should represent a key element of any strategy aimed at enhancing security in Europe.

In order to ensure that efforts to combat racism and terrorism are mutually reinforcing, ENAR proposes five key principles which should underpin all actions:

- Terrorism is an extreme form of intolerance which represents a serious threat to fundamental rights.
- Counter-terrorism must be conducted in the framework of human rights and anti-discrimination.
- Counter-terrorism measures must not have a disproportionate impact on ethnic and religious minorities.
- Anti-racism is a key element in preventing terrorism.
- Effective counter-terrorism is the result of engagement and participation with all communities.

3. Annexes

1. ENARs 15 Principles on Framing a Positive Approach to Migration
2. ENAR General Policy Paper on Racism as a Crime
3. ENAR General Policy Paper on Third Country Nationals
4. ENAR General Policy Paper on Counter-Terrorism and Combating Racism
5. ENAR General Policy Paper on Education
6. ENAR European Shadow Report 2007 (published 2008)

If you require further information please contact:

Tansy Hutchinson
Policy Officer
European Network against Racism
43 Rue de la Charité
B -1210 Brussels, Belgium

Tel: + 32 (0)2 229 35 73
Fax: +32 (0)2 229 35 75
Email: tansy@enar-eu.org
Web: www.enar-eu.org