

**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, COM(2004) 4002 final, 2 June 2004**

Response by the European Network against Racism (ENAR) Ireland

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 racist crime.

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 on the assessment of the Tampere programme outlines the progress which has been made to date towards an area of freedom security and justice, however it is fair to say that this progress has been less significant in relation to paragraph 18 than it has for other elements of the programme. While some progress has been made in the area of anti-discrimination, the fight against racism and the fair treatment of third country nationals has fallen off the Tampere agenda in the last five years. That is not to suggest that the problem of racism has gone away, or abated.

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.

Anti-racism and the fair treatment of third country nationals must become a key element of the second Tampere programme of action. Freedom from racial discrimination is a fundamental right of all people in the European Union, a fact which should be reflected in the extension of the mandate of the European Monitoring Centre on Racism and Xenophobia (EUMC).

1. Racism as an abuse of fundamental rights

Freedom from racial discrimination has traditionally been one of the most widely recognised human rights.¹ However the denial of the existence of racism, racial discrimination, and related phenomena and practice is prevalent.² 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.

European States have become sceptical about the problem of racism in Europe. Mandana Zarrehparvar of the Danish Centre for Human Rights referred to this scepticism in relation to the failure of governments to realise the anti-discrimination policies they have committed themselves to at the European level. She identified a number of reasons for this including the perception by Member States of the infallibility of their democratic systems, the increasing xenophobia and anti-immigrant sentiment, and an over reliance on the concept of 'integration'.³ According to Barbara Nolan, Head of Unit for Anti-Discrimination and Relations with Civil Society at the European Commission, ethnic and racial discrimination has slipped down the policy agenda of Member States in recent years.⁴

The European Union must refocus its energy on the fundamental right to freedom from racial discrimination in order to establish a real area of freedom, security and justice.

2. Extension of the mandate of the EUMC

In December 2003 the decision was taken by the European Council to extend the mandate of the EUMC to become a Human Rights Agency (HRA). 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 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.

As the fight against racism must emerge as a central focus in the second Tampere programme, its specific role and importance should not be lost within the extension of the mandate of the EUMC.

The new HRA must have a key role in the formulation of policy initiatives in the fight against racism during the second Tampere programme of action, as part of its overall mandate on racism and xenophobia.

¹ 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

² 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

³ Speaking at a Conference on 'Combating Racism through Building a More Inclusive, Intercultural Europe', Dublin, 9 June 2004

⁴ Speaking at a Conference on 'Combating Racism through Building a More Inclusive, Intercultural Europe', Dublin, 9 June 2004

3. Racism and xenophobia as a crime

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 the fields of policy and judicial cooperation in criminal matters and the prevention and fight against racism and xenophobia as 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.⁵ However, to date, the European Union has failed to respond to the need for comprehensive criminal legislation on racism.⁶

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.⁷

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.⁸ 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.

The second Tampere programme of action must reinvigorate the debate on racism as a crime and take concrete measures to ensure protection against racism including the adoption of the Framework Decision on Racism and Xenophobia.

4. Fair treatment 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.

⁵ COM(2001) 664 final

⁶ 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 as by the mutual recognition of judgment in criminal matters and, if necessary, *the approximation of criminal laws* (emphasis added)'

⁷ 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

⁸ ENAR (2003) *European Strategies to Combat Racism and Xenophobia as a Crime*

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’.⁹

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; minorities are *not* discriminated against because they are not integrated enough.

Discrimination and racism are a direct result of prejudice amongst the majority population and not the presence of minority ethnic communities in society. As the 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.

During the second Tampere programme the European Union needs to shift focus to securing the rights and dignities of third country nationals. Integration policies must reflect a pluralistic and intercultural approach to inclusion.

⁹ 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

Conclusions

Paragraph 18 of the Tampere Presidency conclusions has been one of its most underdeveloped policy commitments. The fight against racism, and the protection of third country nationals, is a multifaceted and complex problem requiring a range of responses. While progress has been made through the establishment of an anti-discrimination framework, the creation of an area of freedom, security and justice is being undermined by lack of progress in other areas. In response to the Communication on the Tampere programme, COM(2004) 4002 final, ENAR Ireland recommends that the Union:

1. Refocus its energy on the fundamental right to freedom from racial discrimination
2. Secure the role of the new HRA in the formulation of policy initiatives in the fight against racism
3. Reinvigorate the debate on racism as a crime and take concrete measures to ensure protection against racism including the adoption of the Framework Decision on Racism and Xenophobia
4. Shift the focus of immigration policy to securing the rights and dignities of third country nationals. Integration policies must reflect a pluralistic and intercultural approach to inclusion.