

ANNEX

13 April 2018

Response of the European Commission and European External Action services to the letter of Ms. E. Tendayi Achiume, the UN Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance dated 25 January 2018 on gathering contributions from States and other relevant stakeholders in preparation of her first thematic report.

The European Union is 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. 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.

Article 67 of the Treaty on the Functioning of the European Union specifically provides that "*The Union shall endeavour to ensure a high level of security through measures to prevent and combat crime, racism and xenophobia (...)*".

The EU's Charter of Fundamental Rights, to which all EU institutions and bodies are bound to, as well as EU Member States when they implement European Union law, also prohibits discrimination on any grounds including race, colour, ethnic origin and religion or belief.

The EU is strongly committed to fighting against racism, xenophobia and all forms of intolerance. EU action in this area builds on a solid legal framework which has been developed over the years to address discrimination, racism, xenophobia and hate crimes in all Member States.

This legal framework includes anti-discrimination legislation, in particular the so called Racial Equality Directive¹, which applies in a wide range of areas, from employment, to social protection, including social security and healthcare, to social advantages, to education and access to and supply of goods and services which are available to the public, including housing; as well as the so called Employment Equality Directive², which lays down a general framework for combating discrimination on the grounds of, among others, religion or belief, as regards employment and occupation. Both these instruments provide for the obligation to ensure the availability of judicial remedies to victims to ensure access to justice, as well as for the grounds for taking positive actions to promote equality within the Member States.

The EU is also equipped with legislation on combating certain forms of racist and xenophobic crime³, which sets the frame for a common response to hate speech and hate crime obliging Member States to penalise the public incitement to violence or hatred against a group of

¹ Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin

² Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation

³ **Council Framework Decision 2008/913/JHA of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law**

persons or a member of such a group defined by reference to race, colour, religion, descent or national or ethnic origin (hate speech). Furthermore, for any other criminal offences, Member States must ensure that racist and xenophobic motivation is considered as an aggravating circumstance, or alternatively that such motivation may be taken into account in the determination of the penalties (hate crime).

This legislation is complemented by rules to protect victims of crime⁴, which oblige Member States to ensure a fair and non-discriminatory treatment of victims of crime, including with respect to their residence status, and pays particular attention to the needs of victims of bias motivated crime.

The European Commission closely monitors the transposition and implementation of these laws in the EU Member States.

In addition, in order to support Member States' efforts in this area, the European Commission fosters, through regular expert groups meetings, good practice exchanges among national authorities and other key stakeholders such as civil society organisations and private actors; develops informal guidance for national authorities; brings forward targeted initiatives (for example, on diversity management and on countering illegal hate speech online) and makes available funding for projects in this area for authorities and civil society actors.⁵

The principle of non-discrimination and the objectives linked to the prevention and fight against racism, xenophobia and other forms of intolerance are mainstreamed across all EU policies: this includes recent Commission proposals and actions in key areas such as security and radicalisation⁶, migration and integration⁷, media and the digital single market⁸ as well as education⁹.

This is allowing to progressively build a comprehensive and cross-cutting EU response to prevent and combat racism, xenophobia and other forms of intolerance.

As far as legislation and policies concerning in particular access to citizenship and naturalisation, as referred to in the request, are concerned, it is for each Member State, having due regard to Union law, to lay down the conditions for the acquisition and loss of its nationality, according to settled case-law of the European Court of Justice¹⁰.

Any legislation, policy or initiative adopted by the EU in exercising its competences in the area of migration undergoes a scrutiny as to its impact on fundamental rights including the principle of non-discrimination.

⁴ Directive 2012/29/EU establishing minimum standards on the rights, support and protection of victims of crime

⁵ For more information, see: https://ec.europa.eu/info/strategy/justice-and-fundamental-rights/discrimination_en

⁶ See the [European Agenda on Security](#) and the Commission's [communication on supporting the prevention of radicalisation leading to violent extremism](#)

⁷ See the [European Agenda on Migration](#) and the Commission's [Action Plan on the integration of third country nationals](#)

⁸ See in particular the Commission's [proposal](#) on the recast Audiovisual Media Services Directive as well as the [conclusions](#) of the 2016 Colloquium on Fundamental Rights on "Media Pluralism and Democracy".

⁹ See the [work around the Paris Declaration](#), including the Commission's [communication on supporting the prevention of radicalisation leading to violent extremism](#)

¹⁰ See case C-135/08, *Rottmann*.

Key examples where the principle of non-discrimination is mainstreamed in EU migration laws/policies.

Safeguards designed to ensure that immigration laws, policies, and practices do not discriminate - in purpose or effect - against certain groups of non-nationals;

As defined in **Return Directive**¹¹ - Article 3(1) corroborated with **Schengen Borders Code** - Article 2(5)¹² a Third – country national is *any person who is not a citizen of the Union within the meaning of Article 17(1) of the Treaty and who is not a person enjoying the right of free movement under Union law, as defined in Article 2(5) of the Schengen Borders Code*. This includes also stateless person/non-national. Therefore, Return Directive 2008/115/EC does not make any exception in the case of stateless person and as provided by Chapter 1 Article 1, *sets out common standards and procedures to be applied in Member States for returning illegally staying third-country nationals, in accordance with fundamental rights as general principles of Community law as well as international law, including refugee protection and human rights obligations*. Moreover, Chapter III of the **Return Directive** sets out Procedural Safeguards to be applied by the Member States while implementing return related decisions and procedures.

On legal migration:

Third-country nationals who reside in the EU may invoke fundamental and human rights guarantees in various domains. However, EU Member States can legitimately differentiate rights accorded to persons on the basis of their citizenship provided it is done **on the basis of an objective justification (i.e. with a view to achieving a legitimate objective of general interest)** and in a proportionate manner. The EUs legal migration directives set out to what extent non-EU citizens enjoy – or don't enjoy – rights similar to rights enjoyed by own nationals. Against that background, EUs migration law - as well as migration rules in other regions of the world - could be characterised as a fine-tuning of **legitimate differentiated treatment**.

The scope for differentiated treatment always depends on the nature of the rights at stake and the situation of the individual. The practical importance of secondary legislation is therefore very high, since concrete provisions in legislation must translate fundamental rights principles into the realities of everyday life. The EUs legal migration directives contain specific equal treatment provisions, as well as specific restrictions, reflecting a **differentiation between the different categories** of migrants covered by the Directives, **as well as the length of stay** in the territory of a Member State. These provisions relate in particular to the following rights: Access to education and vocational training; Recognition of professional qualifications; Access to social security, social assistance and social protection; Tax benefits; Public goods and services; Working conditions; Access to employment and self-employment. The possibility to differentiate rights on the basis of citizenship or migratory status does not apply, however, in those cases in which third-country nationals benefit from basic fundamental rights guaranteed to *any* person: A number of the rights listed in the legal migration directives are therefore - in substance – declaratory confirmation of rights already available to all persons present on EU territory. This applies in particular to the provisions in the legal migration directives dealing with freedom of association and equal treatment in relation to

¹¹ Directive 2008/115/EU On common standards and procedures in Member States for returning illegally staying third-country nationals

¹² Regulation (EU) 2016/399 On a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code)

membership of worker or employer organisations (Article 12 Charter) and fair and just working conditions (Article 31 Charter). With regard to these basic rights it cannot be argued that a different treatment based on nationality may be justified or proportionate. “

On integration:

The principle of non – discrimination is mainstreamed in the EU work on integration of third-country nationals, see in particular the Action Plan on the Integration of Third-Country Nationals adopted by the European Commission (COM(2016) 377 final)¹³. The Commission services cooperate with the European Fundamental Rights Agency (FRA) on this matter, notably to support data collections, funding of projects and to highlight the obstacles facing people with a migrant background in the European Semester of policy coordination. Equal opportunities are covered by principle 3 of the European Pillar of Social Rights, proclaimed on 17 November 2017 by the European Parliament, the Council and the European Commission¹⁴.

On asylum:

The EU asylum acquis must be applied without discrimination in accordance with Article 21 of the Charter of Fundamental Rights.

Additionally Article 10(1)(b) of the Commission proposal (COM(2016)468) for Union Resettlement Framework Regulation¹⁵ requires that EU Member States do not discriminate on the grounds laid down in Article 21 of the Charter when choosing the third-country nationals or stateless persons whom they want to consider for resettlement.

Attachment:

Copy of the Charter of Fundamental Rights of the European Union

¹³ See the Action Plan on the integration of third-country nationals (https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/proposal-implementation-package/docs/20160607/communication_action_plan_integration_third-country_nationals_en.pdf)

¹⁴ Principle 3 of the European Pillar of Social Rights: Regardless of gender, racial or ethnic origin, religion or belief, disability, age or sexual orientation, everyone has the right to equal treatment and opportunities regarding employment, social protection, education, and access to goods and services available to the public. Equal opportunities of under-represented groups shall be fostered.
https://ec.europa.eu/commission/priorities/deeper-and-fairer-economic-and-monetary-union/european-pillar-social-rights/european-pillar-social-rights-20-principles_en
<http://www.consilium.europa.eu/en/press/press-releases/2017/11/17/european-pillar-of-social-rights-proclamation-and-signing/>

¹⁵ See the Regulation establishing a Union Resettlement Framework (https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/proposal-implementation-package/docs/20160713/resettlement_system_en.pdf)