PICUM's submission to the European Commission's call for evidence on the EU Anti-Racism Action Plan (implementation)

1 June 2023

Executive Summary

As the former UN Special rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance Tendayi Achiume has underscored, "ethno-nationalism" is an important driver and manifestation of racial discrimination in citizenship, nationality and immigration laws, policies and practices.

The Platform for International Cooperation on Undocumented Migrants therefore welcomes the opportunity to provide input to the European Commissions' call for evidence on EU anti-racism action plan (implementation).

We first call attention to the absence of an adequate examination by the EU's Anti-Racism Action Plan in addressing racial discrimination, violence and exclusion in the context of EU migration policy. The Anti-Racism Action Plan does not reflect how racism is manifested in EU migration policy or its negative impact on racialised people. Instead, within days of announcing its new Anti-Racism Action Plan in September 2020, the European Commission released a New Pact on Migration and Asylum which focuses on

restricting access to Europe, increased immigration enforcement measures (deportations and detention), containment and de fact detention ("hotspots"), increased data processing and use of technology for increased surveillance and profiling. From the outset, this has raised doubts about the EU's commitment to combat racial discrimination.

Secondly, in view of these shortcomings, the submission critically reflects on the implementation of the Anti-Racism Action Plan from the perspective of undocumented migrants. In particular, PICUM provides feedback on three of legal and policy frameworks (Racial Equality Directive, proposal for a regulation on Artificial Intelligence and the Child Guarantee) and two EU tools (mainstreaming and EU funding) addressed by the Anti-Racism Action Plan.

From the analysis, PICUM recommends the European Commission to:

- Renew the Anti-Racism Action Plan beyond 2025, and commit to specific actions to address the link between structural racism, violence and migration, including in the EU's asylum and migration policy;

- Strengthen the implementation of the Anti-Racism Action Plan by:

  » Ensuring adequate mainstreaming of the EU's anti-discrimination obligations under the EU Charter of Fundamental Rights and the Racial Equality Directive throughout all EU policies, legislations and funding, in particular the field of migration, technology, social policies;

  » Calling on Member States to use European Commission's toolkit on the use of EU funds for the integration of people with a migrant background;

  » Proposing a recast of the Racial Equality Directive 2000/43/EC that addresses discrimination based on nationality and that applies to law enforcement, immigration and border authorities;

  » Continuing to call on the Council to adopt the 2008 proposal to implement equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation;

  » Ensuring that EU-funded actions are line with fundamental rights and anti-discrimination obligations, and ensure Member States compliance with the participation principle to ensure that migrant rights organisations and people directly affected by migration enforcement policies (migrants and racialised people) can participate meaningfully in decision-making related to spending of EU resources.

Introduction

The [Platform for International Cooperation on Undocumented Migrants](#) (PICUM) was founded in 2001 as an initiative of grassroots organisations. Now representing a network of 164 organisations working with undocumented migrants in 31 countries, PICUM has built a comprehensive evidence base regarding the gap between international human rights law and the policies and practices existing at national level. With two decades of evidence, experience and expertise on undocumented migrants, PICUM promotes recognition of their fundamental rights, providing an essential link between local realities and the debates at policy level.

An insecure or irregular status creates an imbalance of power that puts people at greater risk of exploitation in the workplace, in personal relationships, and other settings than people with a secure residence status because the state's perceived prioritisation of status over decent work and safety is used to coerce and control, increasing the likelihood of economic dependence, poverty and abuse. Their experiences are compounded by other factors such as sexual orientation, gender, age, type of employment (e.g. sex work) and race.

PICUM welcomes the opportunity to provide input to the European Commission's call for evidence on the EU Anti-Racism Action plan implementation.[1] First, this submission provides an assessment of the Action Plan, reflecting on its failure to respond to the linkages between racism and migration. The submission then critically reflects on the implementation of the Anti-Racism Action Plan, by reviewing selected commitments from the perspective of undocumented migrants in two areas: EU legal and policy frameworks (e.g. Racial Equality Directive, proposal for a regulation on Artificial Intelligence and Child Guarantee) and EU tools (e.g. mainstreaming and EU funding).

1. The EU's Anti-Racism Action Plan: a missed opportunity to address structural racism and violence in the context of migration

1.1 The link between migration and racism

The former UN Special rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance Tendayi Achiume has noted that "ethno-nationalism" is an important driver and manifestation of racial discrimination in citizenship, nationality and immigration laws, policies and practices. She defines ethno-nationalism as an explicit prejudice often rooted in ideologies where the nation is "defined in terms of assumed blood ties and ethnicity"[2]. This "ethno-nationalism", she notes, has deep historical roots, including in relation to Europe's colonial past and xenophobic policies targeting Jews, people of Romani background, sexual minorities and people with disabilities. She draws attention on how "ethno-nationalists and other groups manipulate national anxieties about national security and

---

1   [Ref. Ares(2023)3136799](#) - 04/05/2023

2   As quoted under para 39 of United Nations General Assembly, Human Rights Council, 2018, *Report of the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related in tolerance*, §30, p.10 [accessed 27 March 2023], original quote from René Lemarchand, "The siren song of self-determination", UNESCO Courier (June 1993), p. 30.

economic prosperity to achieve and advance racist and xenophobic policies against indigenous peoples, non-nationals and other minority groups" [3].

She further underlines that in matters related to citizenship and migration status, it is particularly important to take an intersectional approach. This is because people perceived as 'foreigners' are particularly vulnerable to discrimination along a wide range of social categories such as race, ethnicity, religion, gender, sexual orientation and class, often irrespective of their nationality.[4]

She notes the need for a specific consideration to gender: "In the context of citizenship, national and immigration law and policy, States rely heavily on patriarchal laws and gender-based discrimination to achieve racial, ethnic and religious exclusion or restrictions", for instance by denying women the ability to confer nationality on their children"[5].

1.2 The EU's treatment of undocumented migrants

The European Union (EU)'s common asylum and migration policy, which has been in place for 24 years[6], has led to violations of migrants' human rights both at the external border of the EU as well as within the EU, where racism plays an important role[7]. Forcing undocumented migrants to leave the EU has become one of the key pillars of how the EU manages migration at its borders and within its territory[8].

Human rights groups, NGOs and civil society have extensively documented violence and ill treatment against migrants at borders, through practices such as immigration detention, deportation and stop-and-search police procedures, among others. The European Network Against Racism (ENAR) argued in its 2021 report on police brutality[9]:

> *Migrants across Europe experience violence and at times torture due to police and law enforcement misconduct, during forced return operations and in detention as well as illegal collective expulsions. Current EU policy that is designed to curb migration can result in the dehumanisation and criminalisation of irregular migrants. Recent EU plans to increase the number of expulsions from the EU will cost hundreds of millions of euros, create giant, opaque and unaccountable agencies and further undermine claims that the EU occupies the moral high ground in its treatment of migrants. The migration enforcement system especially targets racialized groups.*

3   United Nations General Assembly, Human Rights Council, 2018, *Report of the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related in tolerance*, §6, p.3 [accessed 30 March 2023];

4   United Nations General Assembly, Human Rights Council, 2018, *Report of the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related in tolerance*, §30, p.10 [accessed 30 March 2023]; Child Friendly Justice European Network, 2022, *Towards LGBTI+ sensitive justice system for children in Europe* [accessed 17 March 2023]; Fundamental Rights Agenda, 2020, *A long way to go for LGBTQI equality* [accessed 18 April 2023].

5   United Nations General Assembly, Human Rights Council, 2018, *Report of the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related in tolerance*, §12, p.5 [accessed 30 March 2023];

6   Tampere European Council 15 and 16 October 1999 Presidency conclusions

7   Border Violence Monitoring Network, 2020, The Black Book of Pushbacks Volume 1; Border Violence Monitoring Network, 2020, The Black Book of Pushbacks Volume 2; PICUM input of April 2022 to the Report of the United Nations High Commissioner for Human Rights pursuant to Human Rights Council resolution 47/21 on the Promotion and Protection of the Human Rights and Fundamental Freedoms of Africans and of People of African Descent against Excessive Use of Force and Other Human Rights Violations by Law Enforcement Officers; Abigail Cárdenas Mena, 2021, Tarajal and the legacy of racism in Spain's migration system, Part one of a series of blogs looking at the intersection between racism and migration policy, PICUM.

8   Michele LeVoy and Marta Gianco, 2023, On migration, Europe's fixation with returns does not work

9   European Network Against Racism, 2021, The sharp edge of violence: Police brutality and community resistance of racialised groups.

UNHCR stated[10] in February 2022 that violence at the borders of the European Union is increasing and that "what is happening at European borders is legally and morally unacceptable and must stop." Violence and ill-treatment of migrants and asylum seekers at EU land and sea borders are prevalent in the EU. Pushbacks[11] have also intensified in recent years[12].

In addition to violence experienced by migrants at borders, stop-and-search procedures by the police are a regular occurrence across Europe. A 2021 report by the EU Agency for Fundamental Rights shows that Black people, Asians and Roma are more likely to be stopped by the police[13]. These stops can be accompanied by excessive use of force, racist language and violence[14]. The risk of racial abuse, violence, imprisonment, is compounded for people with insecure migration status with the risk of family separation or deportation – which result in low levels of trust in the police and in public authorities. Linking migration with criminalisation creates stigma and fear, and, as the EU's Agency for Fundamental Rights has noted, legitimises and reinforces racism and negative stereotyping against people from Africa or of African descent in wider society and among law enforcement officials[15]. The criminalisation of undocumented migrants undermines their safety and wellbeing, drives inequality and marginalisation, and perpetuates systemic discrimination against them.

Moreover, racial and ethnic profiling are systemically used by law enforcement and migration enforcement authorities, with race, ethnicity or skin colour viewed as a proxy for an individual's migration status, and racialised people (regardless of nationality and EU citizenship status) are more likely to be exposed to racial profiling practices. A 2014 study by the FRA showed that 79% of surveyed border guards at airports rated ethnicity as a helpful indicator to identify people attempting to enter the country in an irregular manner before speaking to them[16]. Earlier this year, in February 2023, the Dutch court prohibited the country's border police from using racial profiling to carry out identity checks at borders[17]. The court overturned a 2021 ruling that said ethnicity could be one of the criteria for singling out passengers, but not the only one. This recent ruling was welcomed by national human rights organisations as a step forward in the fight against discrimination[18].

10   UN High Commissioner for Refugees, 2022, UN Refugee Agency warns of increasing violence and human rights violations at European borders [accessed 25.03.2023]

11   The European Union Agency for Fundamental Rights (FRA) defines pushbacks as "when a person is apprehended after an irregular border crossing and summarily returned to a neighbouring country without assessing their individual circumstances on a case-by-case basis." Pushbacks are an increasing phenomenon at Europe's borders and entails the violation of "the right to seek asylum and the protection against refoulement, which are at the core of international refugee and human rights law".

12   Protecting Rights at Border, May 2023, What we do in the shadows: While Europe sleeps, rights and abuses at the border to the Union flourish. Latest data sheds new light on the systematic and continued pushbacks practices; Council of Europe, 2023, The Council of Europe anti-torture Committee (CPT) calls for an end to illegal pushback practices and for increased safeguards against ill-treatment; PICUM, 2021, Input to the UN Special Rapporteur on the Human Rights of Migrants Report on pushback practices and their impact on the human rights of migrants.

13   Fundamental Rights Agency, 2021, Police stops in Europe: everyone has a right to equal treatment [accessed 25.03.2023]

14   Medecin du Monde, 2018, Violences policières envers les migrants et les réfugiés en transit en Belgique : une enquête quantitative et qualitative [accessed 25.03.2023]

15   Fundamental Rights Agency, 2018, Preventing unlawful profiling today and in the future: a guide

16   Fundamental Rights Agenda, 2014, Fundamental rights at airports: border checks at five international airports in the European Union

17   Politico, 14 February 2023 Dutch police are guilty of racial profiling, court rules [accessed 26 May 2023]

18   PICUM, February 2023 Newsletter

1.3 Migration in the Anti-Racism Action Plan

The EU's Anti-Racism Action Plan[19] does not reflect on the EU's migration policy or its negative impact on racialised people and does not explore the issue of border violence, or how EU migration policies contribute to discrimination against migrants within Europe[20]. The Action Plan rather subsumes migration as part of the broader policy areas to cover in a mainstreaming approach and in the role of the new internal Task Force on Equality[21].

Furthermore, within days of announcing its new Anti-Racism Action Plan in September 2020, the European Commission released a 'New Pact on Migration and Asylum' (hereinafter the 'EU Migration Pact')[22] which focuses on restricting access to Europe, increased immigration enforcement measures (deportations and detention), containment and de facto detention (hotspots), and increased data processing and use of surveillance and digital technologies to augment immigration enforcement. In particular, the Commission proposal for the Pact on Migration seeks to criminalise and target undocumented people, leading to discrimination, enablement of violence against migrants and racialised people, whether at the borders or already living in the EU[23].

The Commission's proposal for the EU Migration Pact also includes elements on strengthened interoperability and the use of artificial intelligence in the context of immigration enforcement. The Pact proposes changes to existing EU legislation to permit the collection of data to better locate undocumented people[24]. The interoperability framework is highly discriminatory[25], implying a false link between serious threats and immigration, and is a deeply complex system with multiple databases that increases the likelihood of errors with a huge lack of transparency. While PICUM and other civil society organisations had raised attention to the issues of the interoperability framework adopted in 2019[26], the Anti-Racism Action Plan failed to address them.

All of this raises serious concerns about increased discriminatory policing and racial profiling targeting communities of colour in Europe[27]. From the outset, this has raised doubts about the EU's commitment to combat racial discrimination in a comprehensive way and towards all people affected.

---

19   European Commission, 2020. A Union of equality: EU anti-racism action plan 2020-2025, COM(2020) 565 final

20   Equinox, 2022, Ending Fortress Europe: Recommendations for a racial justice approach to EU migration policy'; Abigail Cárdenas Mena, 2021, The EU's Migration and Anti-Racism policies: are we ready for a racism-free Europe? Part two of a series of blogs looking at the intersection between racism and migration policy, PICUM.

21   COM(2020) 565 final, p.19

22   European Commission, 2020, New Pact on Migration and Asylum: A fresh start on migration in Europe COM/2020/609 final

23   See also PICUM, 2021, The EU Migration Pact, Questions and answers

24   PICUM, 2020, More detention, fewer safeguards: How the new EU Pact on Migration and Asylum creates new loopholes to ignore human rights obligations

25   PICUM, 2020, How do the new EU regulations on interoperability lead to discriminatory policing?

26   Statewatch, PICUM, 2019, Data Protection, Immigration Enforcement and Fundamental Rights: What the EU's Regulations on Interoperability Mean for People with Irregular Status

27   PICUM, 2020, How do the new EU regulations on interoperability lead to discriminatory policing?

2. EU implementation of the EU Anti-Racism Action Plan – urgent need for reinforced actions

Despite the shortcomings described above, numerous commitments under the Anti-Racism Action Plan have the potential to address the needs and challenges faced by undocumented migrants.

2.1 EU legal and policy framework

Under chapter 2.1. of the Action Plan, the European Commission explicitly identified several legal and policy frameworks which may directly and indirectly support the objective to tackle racism and racial discrimination. PICUM provides feedback on three of these frameworks:

· Racial Equality Directive
· Proposal for a Regulation on Artificial Intelligence (currently under negotiation)
· Child Guarantee.

2.1.1 Racial Equality Directive

In line with the Anti-Racism Action Plan commitment, the Racial Equality Directive was reviewed[28] in 2021. The review raises two important issues from the perspective of undocumented migrants or people with insecure status: the place of nationality under the notion of 'ethnic and racial origin'[29] and the Directive's material scope of application which does not foresee applicability to public sector actions entailing the 'exercise of public authority' among others by police without any element of 'service provision'. The review notes that the directive is thus not applicable "when a person is stopped or harassed by the police because of his or her racial or ethnic background" [30].

Despite the limitations of the scope of the directive, the review failed to consider in more detail the evidence of ethnic profiling of third country nationals as well as the available evidence of ethnic profiling by law enforcement. It also did not call on the European Commission to present a review of the Racial Equality Directive to address shortcomings.[31]

This is a considerable gap. Indeed, the criminalisation of irregular migration makes people who are undocumented fearful of engaging with public authorities[32], and especially with the police, because of the risk that they will be detained and ordered to leave the territory as a result[33]. People who belong to ethnic and racial minorities are particularly affected by heavy policing and surveillance, which increases the distrust and insecurity in state authorities. When a person is a victim of violence or discrimination,

---

28   REPORT FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT AND THE COUNCIL on the application of Council Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin ('the Racial Equality Directive') and of Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation ('the Employment Equality Directive'), COM(2021) 139 final

29   Ibid

30   Ibid

31   Ibid

32   For an analysis of undocumented workers' access to state judicial and non-judicial complaints mechanisms for violations of labour rights, see PICUM, 2020, A Worker is a Worker: How to Ensure that Undocumented Migrant Workers Can Access Justice.

33   Statewatch, PICUM, 2019, Data Protection, Immigration Enforcement and Fundamental Rights: What the EU's Regulations on Interoperability Mean for People with Irregular Status

their residence status should never be an obstacle to safely engaging with the criminal justice system and accessing services and support.[34]

Until now, the Commission has not followed up with a proposal for legislative review of the Racial Equality Directive, nor released a new proposal on law enforcement, both of may have been potential follow up initiatives as highlighted in the Anti-Racism Action Plan[35].

2.1.2 Proposal for a Regulation on Artificial Intelligence

The growing use of technology in the migration context has an important racial justice dimension[36]. In her 2020 report on racial discrimination and the use of technology in the context of borders, the former United Nations Special Rapporteur on contemporary forms of racism, Tendayi Achiume, underscores "how digital technologies are being deployed to advance the xenophobic and racially discriminatory ideologies that have become so prevalent, in part due to widespread perceptions of refugees and migrants as per se threats to national security."[37]

The Anti-Racism Action Plan acknowledges both the opportunities and challenges in the digital transition and development of new technologies[38]. In particular, the Action Plan committed to ensure that the forthcoming proposal on artificial intelligence (AI) would specifically address the risk of bias and discrimination built in AI systems.

Given concerns about its use for migration control and law enforcement ends, when released in 2021, advocates welcomed the proposal's ban of certain uses of AI, including the use by police of real-time facial recognition in public spaces; and its categorisation of some uses of AI for migration, asylum and border control as "high risk" [39]. However, the Commission proposal does not prohibit some of the sharpest and most harmful uses of AI in migration control, despite the context of significant power imbalances in which these systems operate. The proposal also includes a carve-out for AI systems that form part of large-scale EU IT systems, such as EURODAC[40]. This is a harmful development and means that the EU itself will largely not be scrutinised for its use of AI in the context of its migration databases[41].

It is therefore critical for the European Commission to use the opportunity of continued negotiations on the AI legislation during trialogues to recalibrate its approach, by prioritising fundamental rights and broader democratic values. PICUM, alongside other actors of the civil society, has welcomed the European Parliament's strong stance on these issues and called attention about gaps that remain in the legislation[42].

34   PICUM, 2021, Preventing Harm, Promoting Rights: Achieving safety, protection and justice for people with insecure residence status in the EU

35   COM(2020) 565 final In particular, the Action Plan notes that: "In 2021, the Commission will report on the application of the Directive and would follow up with any possible legislation by 2022. The report will assess what lessons should be drawn from the Directive's implementation and identify any gaps: one area to be looked at specifically in the context of possible new legislation is law enforcement. The report will also help to inform continued action to prioritise infringement proceedings that have a major impact" (p.4).

36   PICUM, 2022, Digital technology, policing and migration – what does it mean for undocumented migrants? Briefing paper

37   United Nations General Assembly, Human Rights Council, 2020, Report of the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related in tolerance, A/75/590, §3, p.4 [accessed 30 March 2023];

38   COM(2020) 565 final, p. 8

39   European Commission, 2021, Europe fit for the Digital Age: Commission proposes new rules and actions for excellence and trust in Artificial Intelligence

40   EDRI, 2021, Intensified surveillance at EU borders: EURODAC reform needs a radical policy shift

41   PICUM, 2022, Regulating migration tech: how the EU's AI Act can better protect people on the move; PICUM Dismantling the use of Big Data to deport

42   PICUM, 2023, Press release – AI Act: European Parliament endorses protections against AI in migration

2.1.3 Child Guarantee

In addition to the legal framework against discrimination, the Anti-Racism Action Plan underlined various policy and funding programs to combat racism – including the Child Guarantee which aims to ensure better social inclusion of all children in need and ensuring their access to key services.

In 2021, the Council adopted a recommendation establishing the European Child Guarantee[43] which states that all children in need must be able to benefit from the Child Guarantee actions, irrespective of their migration status[44]. From the perspective of undocumented children and their families, this was a momentous step forward cannot be underestimated, due to the recognition by the European Council of undocumented children as having significant disadvantages requiring specific social inclusion measures, and also given the formal exclusion of undocumented migrants from a wide range of EU funding measures on integration until now[45].

Member states had until April 2022 to submit their action plans on how to implement the Child Guarantee, but six Member States have still not submitted theirs. When reviewing the national action plans that have been submitted, one must conclude that their specificity and actionability varies greatly. While many action plans do mention children with a migrant background, PICUM has only noted four[46] which specifically mention undocumented children (Croatia, Sweden, Spain and Denmark). It should also be noted that Denmark argues that they fulfil the recommendation to provide free early childhood education and care (ECEC) to undocumented children - by providing childcare services to one and two-year olds in immigration detention (in a return (expulsion) centre).

2.2 EU tools

Under Chapter 2.2, the Anti-Racism Action Plan identifies numerous EU tools that will support the delivery of the commitments made under the Anti-Racism Action Plan. The following provides feedback on two of the tools, namely mainstreaming and EU funding.

2.2.1. Mainstreaming

While the Action Plan fails to adequately address racism in the migration policy, it did commit to mainstreaming:

> *"When developing policies, from social inclusion to AI, from the Green Deal to digital inclusion and from addressing hate speech to migration policies, integrating the equality dimension also includes ensuring that EU and national policies serve the interests of all people, irrespective of their racial or ethnic origin. The Commission will seek to ensure that the fight against discrimination on specific grounds and their intersections with other grounds of discrimination, such as sex, disability, age, religion or sexual orientation is integrated into all EU policies, legislation and funding programmes."[47]*

---

43   Council Recommendation establishing a European Child Guarantee, 9106/21

44   PICUM, 2021, EU Council Adopts Child Guarantee that benefits undocumented children

45   PICUM, 2021, How do undocumented migrants fare in the new EU funds?

46   PICUM is currently reviewing the national actions plans and have reviewed the following countries' plans to determine if they mention undocumented children: Belgium, Croatia, Denmark, Estonia, Finland, France, Greece, Ireland, Italy, Luxembourg, Malta, Netherlands, Poland, Sweden, Spain.

47   COM(2020) 565 final, p.19

While the mainstreaming commitment is laudable, since the adoption of the Anti-Racism Action Plan in September 2020, several legislative files on migration have been proposed by the European Commission that fail to address the link between migration and racial and ethnic discrimination in the EU, and are likely to increase racial and ethnic profiling. Examples of these legislative files include:

- The **Asylum Procedures Regulation**[48] of the EU Migration Pact would channel people arriving in the EU into different asylum and return procedures depending on their country of origin. According to the Commission's proposal, people coming from a country with an asylum recognition rate below 20 % would be held in border facilities, which would likely include de facto detention, for up to 24 weeks, extendable in situations of crisis, and would be subject to separate asylum and return procedures which entail fewer safeguards. This will lead to unequal treatment and people being discriminated based on their nationality because people will be detained based on their country of origin.

- The Commission proposal for a **Screening Regulation**[49] established a pre-entry screening process for anyone arriving at an EU border irregularly. It aims to strengthen control of persons entering the Schengen area and refer them to a new five-day procedure (up to ten days in exceptional circumstances) to check ID and security threats, register biometrics, and verify health and vulnerabilities. In addition, the Screening Regulation would allow Member States to detain undocumented people on EU territory and detain them for up to 3 days with no judicial review nor access to a lawyer while they undergo a security screening. This proposal would give Member States another ground to arrest undocumented people in the territory, a practice which is often based on the categorisation of people based on their sex, race, ethnicity, religion, etc, and which amounts to discriminatory policing.

- The proposal to reform the **Schengen Borders Code**[50] aims to further increase surveillance and controls over non-EU citizens crossing internal and external borders. These proposals would increase the use of technology and would practically legitimise ethnic and racial profiling. [51] More broadly, the proposals reinforce the narrative that irregular migration is a threat to the EU and that it needs to be fought with more policing.

2.2.2 Mobilising EU funds

While the Anti-Racism Action Plan recognises that EU funds should be used to support measures promoting equality, inclusion and non-discrimination in programmes at national level, it does not acknowledge that particularly vulnerable groups, such as undocumented migrants, still face specific barriers in accessing EU-funded services in the area of housing, education, employment, healthcare and social care.

48   Amended proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU

49   Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL introducing a screening of third country nationals at the external borders and amending Regulations (EC) No 767/2008, (EU) 2017/2226, (EU) 2018/1240 and (EU) 2019/817 ; European Council for Refugees and Exiles, 2020, Screening out rights? Delays, detention, data concerns and the EU's proposal for a pre-entry screening process.

50   European Commission, Proposal for a regulation of the European Parliament and of the Council amending Regulation (EU) 2016/399 on a Union Code on the rules governing the movement of persons across borders

51   PICUM, 2022, The new draft Schengen borders code risks leading to more racial and ethnic profiling

Despite this shortcoming, the European Commission's toolkit on the use of EU funds for the integration of people with a migrant background[52], published in 2021, recognises the needs of undocumented migrants and highlights how EU funds – in particular the European Social Fund +, the European Regional Development Fund and the Asylum, Migration and Integration Fund (AMIF) - can support their integration.

For example, the toolkit shows how Member States might implement measures through the AMIF to promote awareness-raising on regular migration pathways, including on the regularisation of undocumented migrants. Another example relates to the use of ESF+ and ERDF to support access to mainstream social care and healthcare services for undocumented people, including to systematic support that is offered to families and individuals experiencing extreme social exclusion. [53] However, Member States often set more restrictive requirements in their programmes, calls for proposals and reporting requirements, often requiring access to the labour market or social security numbers for accessing these forms of support. The European Commission should call on the Member States to draw upon the toolkit to implement EU funded measures to support the inclusion of undocumented migrants and their access to mainstream services, by refraining from including additional barriers related to status.

The Anti-Racism Action Plan further mentions that all EU actions, including projects supported by EU resources, should uphold fundamental rights obligations[54]. Particularly, the Common Provisions Regulation[55] (CPR) provides clear steps for Member States to ensure that EU funds do not finance actions that are in violation with the Charter of Fundamental Rights through alignment with the Horizontal Enabling Conditions[56]. This includes important provisions on anti-discrimination based on any ground (Article 21 Charter of Fundamental Rights), particularly relevant for activities in support of migrants and concerning border management.

The implementation of the Anti-Racism Action Plan should therefore address the issue of compliance of EU-funded actions with fundamental rights, by ensuring that appropriate reporting and monitoring mechanisms are in place at national level, and that the European Commission suspends payments and reimbursements where rights are not respected.[57] This is particularly relevant for funds more explicitly targeting actions in support of migrants, but also for border management and security activities.

Finally, the Anti-Racism Action Plan recalls the aim of the European Commission "not only to ensure active cooperation with civil society but also to help secure financial support for non-governmental organisations and community-based organisations". The CPR includes a provision on the Partnership Principle[58], which is an obligation for Member States to consult with relevant actors, from the inception to the implementation of national funding programmes. However, even though it is a welcome development that the AMIF, Border Management and Visa and Internal Security Fund are now included under the CPR, organisations working on migrant rights are often still unable to participate[59] in the programming, implementation and evaluation of programmes.

---

52   European Commission, 2021, Toolkit on the use of EU funds for the integration of people with a migrant background: 2021–2027 programming period

53   Ibid, p. 32

54   COM(2020) 565 final, p.20

55   Regulation (EU) 2021/1060 of the European Parliament and of the Council of 24 June 2021 laying down common provisions on the European Regional Development Fund, the European Social Fund Plus, the Cohesion Fund, the Just Transition Fund and the European Maritime, Fisheries and Aquaculture Fund and financial rules for those and for the Asylum, Migration and Integration Fund, the Internal Security Fund and the Instrument for Financial Support for Border Management and Visa Policy

56   PICUM-ECRE, 2023, Fundamental rights compliance of funding supporting migrants, asylum applicants and refugees inside the European Union

57   BUDG Study, 2023, The tools for protecting the EU budget from breaches of the rule of law: the Conditionality Regulation in context

58   Regulation (EU) 2021/1060, Article 8

59   PICUM, 2023, Partnership Principle in EU funds: strong on paper, weak in practice

Recommendations

From the analysis, PICUM recommends the European Commission to:

- Renew the Anti-Racism Action Plan beyond 2025, and commit to specific actions to address the link between structural racism, violence and migration, including in the EU's asylum and migration policy;

- Strengthen the implementation of the Anti-Racism Action Plan by:

  » Ensuring adequate mainstreaming of the EU's anti-discrimination obligations under the EU Charter of Fundamental Rights and the Racial Equality Directive throughout all EU policies, legislations and funding, in particular the field of migration, technology, social policies;

  » Calling on Member States to use European Commission's toolkit on the use of EU funds for the integration of people with a migrant background[60];

  » Proposing a recast of the Racial Equality Directive 2000/43/EC that addresses discrimination based on nationality and that applies to law enforcement, immigration and border authorities;

  » Continuing to call on the Council to adopt the 2008 proposal to implement equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation[61];

  » Ensuring that EU-funded actions are line with fundamental rights and anti-discrimination obligations, and ensure Member States compliance with the participation principle to ensure that migrant rights organisations and people directly affected by migration enforcement policies (migrants and racialised people) can participate meaningfully in decision-making related to spending of EU resources.

---

60   European Commission, 2021, Toolkit on the use of EU funds for the integration of people with a migrant background: 2021–2027 programming period

61   Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation {SEC(2008) 2180} {SEC(2008) 2181}