Date: 03.06.2022

MEMORANDUM

For the attention of:
Name: Mr. Tlaleng Mofokeng
Title: Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health

Subject: Department of Social Rights submission in response to the questionnaire regarding a thematic report on "Racism and the right to health"

The Department of Social Rights of the Council of Europe ("the Department") welcomes the opportunity to provide comments on the forthcoming thematic report on "Racism and the right to health" by the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health. This is a consolidated response that focuses on the first two questions of the questionnaire, considering the mandate of the European Committee of Social Rights (ECSR) as the independent expert body tasked with monitoring compliance with the European Social Charter ("the Charter").

The Department recalls that the Charter includes provisions on the right to protection of health (Article 11) and the prohibition of discrimination (Article E). Relying on these provisions, the ECSR has developed a substantial body of jurisprudence on the manifestations of racism in the context of healthcare, including, insofar as relevant for the present submission, with regard to the Roma communities, or undocumented migrants in Europe.[1] Under Article 11, States Parties are called upon to ensure the best possible state of health for the population according to existing knowledge, including both positive obligations to realise the best possible state of health through, inter alia, adequate health services, and negative obligations to refrain from interfering directly or indirectly with this

[1] All materials cited in this document are available on the European Social Charter website here: https://www.coe.int/en/web/european-social-charter/home.

right. Health systems must respond adequately to avoidable health risks, that is, ones that can be controlled by human action. The ECSR's assessment is based on indicators such as life expectancy or the principal causes of death.

The implementation of the Charter by States Parties is supervised by the ECSR through the reporting system and the collective complaints procedure. The ECSR's most recent review of State Party reporting under Article 11 took place in 2021 and was based on a questionnaire including general observations and targeted questions. Insofar as Article 11 was concerned, the ECSR called for information regarding various aspects of the right to health, including insalubrious work or living environments, environmental pollution, mental health, sexual and reproductive health, and measures to combat infectious diseases. The ECSR emphasised that health care must be ensured to everyone without discrimination, and noted that, for example, members of certain groups, including underprivileged ethnicities, enjoyed poorer health and had shorter life expectancy.

The information provided by States and other sources revealed a range of recurrent disparities connected to race in the context of healthcare, such as:

- Roma communities in some countries were more likely not to have health insurance, often due to being unemployed (Conclusions 2021, Bosnia and Herzegovina); they were often shown to face major obstacles in accessing basic healthcare services and were often unable to pay for medical treatment (Conclusions 2021, Sweden); Roma were shown to have a lower consumption of health services and considerably higher mortality rate (Conclusions 2021, Slovak Republic).

- Roma women had limited access to sexual and reproductive health services (Conclusions 2021, Lithuania); poor and/or migrant women and girls faced obstacles in accessing abortion and often had to carry their pregnancies to full term or to undertake unsafe abortions, leading to severe mental pain and suffering (Conclusions 2021, Andorra).

- Roma communities were often situated in the proximity of landfills, and lacked optimal water and sanitation facilities, with severe health consequences (Conclusions 2021, Slovak Republic).

- Vaccination coverage was often lower in Roma communities (Conclusions 2021, Slovak Republic, Romania).

The ECSR examined the situation of the Roma and unaccompanied migrant minors in the context of healthcare in several collective complaints, including the following recent examples:

- In European Roma and Travellers Forum (ERTF) v the Czech Republic (Complaint No. 104/2014, decision on the merits of 17 May 2016), the ECSR found that Roma families lacked adequate access to healthcare, caused mainly by the lack of reasonable steps to address the specific problems stemming from their often-unhealthy living conditions and difficult access to health services, in breach of the Charter;

- In European Roma Rights Centre (ERRC) v Bulgaria (Complaint No. 151/2017, decision on the merits of 5 December 2018), the ECSR found that Roma women lacked adequate access to health care in respect of maternity, amounting to indirect discrimination in violation of Article E in conjunction with Article 11 of the Charter;

- In International Commission of Jurists (ICJ) and European Council for Refugees and Exiles (ECRE) v. Greece (Complaint No. 173/2018, decision on the merits of 26 January 2021), the ECSR held that the failure to provide appropriate accommodation and sufficient healthcare to accompanied and unaccompanied migrant children on the Greek islands, and appropriate shelter to unaccompanied migrant children on the mainland, with the result that some of these children were forced to live on the streets or held in detention under “protective custody”, amounted to a violation of Article 11 of the Charter.

The Department recalls that collective complaints may only raise questions concerning non-compliance of a state's law or practice with the provisions of the Charter. Accordingly, the ECSR's findings in this procedure set out legal assessments of whether legislative provisions and/or broad patterns of fact ("practice") are in conformity with the Charter. For instance, in the above-mentioned ERRC v. Bulgaria complaint, it was noted that both insured and uninsured pregnant women were formally entitled to health services related to maternity and delivery free of charge. The ECSR found however that several contextual elements indicated that there was inferior access to these services in practice, such as the higher ratio of uninsured Roma women, the high level of out-of-pocket payments in public hospitals, the lower number of consultations and tests conducted for uninsured pregnant women and the higher-than-average mortality rates. The ECSR considered that these factors had a considerable and disproportionate impact on the more disadvantaged categories of the Bulgarian population, and particularly on Roma women. In ICJ and ECRE v. Greece, the ECSR highlighted the shortage of doctors and other medical staff, the lack of effective medical screening and psychosocial support and administrative inertia in reception facilities on the Greek islands.

The ECSR's findings with respect to healthcare, among other areas, often reveal discrepancies between regulatory frameworks that on their face seek to ensure equal treatment, and their practical application, which may reveal unlawful distinctions. For instance, in ERTF v Czech Republic, the Committee took note of the fact that legislation in the Czech Republic espoused the principle of universal access to health protection, with mechanisms in place designed to ensure that unemployed individuals benefited from health care, even where they were unable to pay health care contributions. Nonetheless, the Committee identified a coverage gap concerning those individuals who were unemployed and who were not registered on the relevant state register, or, in the case of job seekers, who had been excluded from that register for different reasons, including working illegally and receiving unemployment benefits at the same time, refusing to take up suitable employment or professional training, obstructive behaviour in relation to the relevant authorities, and/or withholding their consent to personal data processing. The ECSR further noted that the programmatic documents designed to address inequalities with regard to healthcare, among other areas, such as the Concept for Roma Integration 2010-2013, had little effect in practice and that little progress had been recorded.

The ECSR has derived violations of Article 11 of the Charter from findings that access to the underlying determinants of health had been restricted. For instance, in ERTF v Czech Republic, the ECSR considered, based on evidence received, that Roma communities often lived in unsanitary environments, a situation that could be attributed to the failure of relevant State policies, such as the lack of protective measures to guarantee clean water in Romani neighbourhoods or the inadequacy of measures to ensure public health standards in housing in such neighbourhoods. This element was constitutive of a violation of the right to the protection of health under Article 11. In ERRC v. Bulgaria, the Committee emphasised the above average unemployment and poverty rates among the Roma population as factors conducive to the finding that there has been a violation of Article 11. In ICJ and ECRE v Greece, the ECSR emphasised the link between the most commonly treated illnesses among unaccompanied migrant children (e.g. respiratory tract infections, watery diarrhoea, skin infections, depression, mental health deterioration leading to self-harm and suicide attempts) and their living conditions (overcrowding, sanitation and hygiene conditions on the islands and homelessness and precarious housing arrangements on the mainland).

The ECSR has had to grapple with provisions in the Appendix to the Charter restricting its personal scope, in that the individuals covered by Article 11 include foreigners only insofar as they are nationals of other parties lawfully resident or working regularly within the territory of the party concerned. The ECSR decided to interpret the Charter broadly as to extend its application to some extent and under certain circumstances to undocumented migrants. Thus, according to the ECSR's case law, including the above-mentioned ICJ and ECRE v. Greece decision, the restriction on the personal scope should not be read in such a way as to deprive persons not falling within this scope, for example migrants in an irregular situation, of the protection of their most basic rights, such as the right to life or to physical integrity. Legislation or practice which denies entitlement to medical assistance to foreign nationals, within the territory of a state party, even if they are illegally present, has been held to be a breach of the Charter.

Finally, it is worth mentioning that the ECSR has often raised in its conclusions and reports the issue of poor data collection practices with respect to the provision and access to health services in the case of people of different racial and ethnic origin across Europe. For instance, in 2021, the ECSR found that some countries did not collect comprehensive and

disaggregated statistical data according to issues related to healthcare, such as average life expectancy, by ethnicity and minority (Conclusions 2021, Czech Republic, Hungary, Spain).

Type of Stakeholder (please select one)	Other: international organisation
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Can we attribute responses to this questionnaire to your State publicly?	Yes