

## UNHCR Comments on the Draft Law Amending the Law of the Republic of Lithuania on the Legal Status of Aliens (Reg. No. XIIP-5109)

### I. Introduction

1. The UNHCR Representation for Northern Europe (RNE) appreciates the opportunity to present its comments to the Draft Law Amending the Law of the Republic of Lithuania on the Legal Status of Aliens (hereinafter – ‘Law Proposal’).
2. As the agency entrusted by the United Nations General Assembly with the mandate to provide international protection to refugees and, together with governments, seek permanent solutions to the problems of refugees,<sup>1</sup> UNHCR has a direct interest in law and policy proposals in the field of asylum. According to its Statute, UNHCR fulfils its mandate *inter alia* by “[p]romoting the conclusion and ratification of international conventions for the protection of refugees, supervising their application and proposing amendments thereto[.]”.<sup>2</sup> UNHCR’s supervisory responsibility is reiterated in Article 35 of the 1951 Convention<sup>3</sup> and in Article II of the 1967 Protocol relating to the Status of Refugees<sup>4</sup> (hereafter collectively referred to as the “1951 Convention”).<sup>5</sup>
3. UNHCR’s supervisory responsibility is also formally recognized under European Union law, including by way of a general reference to the 1951 Convention in Article 78(1) of the Treaty on the Functioning of the European Union (TFEU).<sup>6</sup> Likewise, secondary EU legislation explicitly refers to UNHCR’s mandated responsibilities. For instance, Article 29 of the recast Asylum Procedures Directive<sup>7</sup> states that Member States shall allow UNHCR “to present its views, in the exercise of its supervisory responsibilities under Article 35 of the Geneva Convention, to any competent authorities regarding individual applications for international protection at any stage of the procedure”.
4. UNHCR’s supervisory responsibility is exercised in part by the issuance of interpretative guidelines on the meaning of provisions and terms contained in international refugee instruments, in particular the 1951 Convention. Such guidelines are included in the UNHCR Handbook on Procedures and Criteria for

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<sup>1</sup> UN General Assembly, *Statute of the Office of the United Nations High Commissioner for Refugees*, 14 December 1950, A/RES/428(V) (hereafter “UNHCR Statute”), available at: <http://www.refworld.org/docid/3ae6b3628.html>.

<sup>2</sup> *Ibid.*, para. 8(a).

<sup>3</sup> UN General Assembly, *Convention Relating to the Status of Refugees*, 28 July 1951, United Nations, Treaty Series, vol. 189, p. 137, available at: <http://www.refworld.org/docid/3be01b964.html>.

<sup>4</sup> UN General Assembly, *Protocol Relating to the Status of Refugees*, 31 January 1967, United Nations, Treaty Series, vol. 606, p. 267, available at: <http://www.refworld.org/docid/3ae6b3ae4.html>.

<sup>5</sup> According to Article 35 (1) of the 1951 Convention, UNHCR has the “duty of supervising the application of the provisions of the 1951 Convention”.

<sup>6</sup> European Union, *Consolidated version of the Treaty on the Functioning of the European Union*, 26 October 2012, OJ L. 326/47-326/390; 26.10.2012, available at: <http://www.refworld.org/docid/52303e8d4.html>.

<sup>7</sup> European Union: Council of the European Union, *Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast)*, 29 June 2013, OJ L. 180/60 -180/95; 29.6.2013, 2013/32/EU, (hereinafter – “recast Asylum Procedures Directive”), available at: <http://www.refworld.org/docid/51d29b224.html>.

Determining Refugee Status (hereafter “UNHCR Handbook”) and subsequent Guidelines on International Protection.<sup>8</sup> UNHCR also fulfils its supervisory responsibility by providing comments on legislative and policy proposals impacting on the protection and durable solutions of its persons of concern.

## II. General observations

5. UNHCR notes that the declared aim of the Law Proposal is to increase the efficiency of the asylum procedure. To that end, the Law Proposal introduces a number of major changes in the Lithuanian asylum system, including reductions of legal aid in the administrative and appeal procedures, shorter time limits for lodging appeals in accelerated and border procedures and restrictions on the freedom of movement.
6. UNHCR appreciates the declared aim of the Law Proposal to increase the overall efficiency of the asylum procedures. It is indeed in the interest of all parties that quality decisions are taken as soon as possible in an efficient and fair asylum procedure.<sup>9</sup> This *inter alia* shortens the time spent in the reception centers, which is good for the applicants, and also saves financial resources for the state.
7. UNHCR, however, regrets that some of the amendments significantly restrict essential procedural safeguards, and, for this reason, may negatively impact on the fairness of the asylum procedure potentially leading to errors in the decision-making process. In this respect, UNHCR recalls that irrespective of the type of procedure, arrangements aimed at ensuring the efficiency of decision making should not undermine the effectiveness of procedural safeguards asylum-seekers are entitled to and the quality of decisions taken by the asylum authorities.<sup>10</sup>
8. UNHCR further wishes to make the following observations on specific aspects of the Proposal.

## III. Specific observations

### *Detention in relation with the border procedure (Article 3 of the Law Proposal)*

9. The proposed Article 5 (6) of the Law on the Legal Status of Aliens (hereinafter - ‘Aliens Law’) provides that asylum-seekers who have applied for asylum at border crossing points and transit zones must be accommodated at border crossing points, transit zones or the State Border Guard Service. Article 5 (8) of the Aliens Law further stipulates that asylum-seekers may be required to stay at those locations up to 28 days. UNHCR understands that throughout the entire period the asylum-seekers concerned will not be permitted to leave the place of their stay.

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<sup>8</sup> UN High Commissioner for Refugees (UNHCR), Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees, April 2019, HCR/1P/4/ENG/REV. 4, (hereinafter UNHCR Handbook) available at: <https://www.refworld.org/docid/5cb474b27.html>.

<sup>9</sup> UN High Commissioner for Refugees (UNHCR), *UNHCR Comments on the European Commission’s Proposal for an Asylum Procedures Regulation*, April 2019, COM (2016) 467, p. 31, available at: <https://www.refworld.org/docid/5cb597a27.html>.

<sup>10</sup> UN High Commissioner for Refugees (UNHCR), *UNHCR Discussion Paper Fair and Fast - Accelerated and Simplified Procedures in the European Union*, 25 July 2018, available at: <https://www.refworld.org/docid/5b589eef4.html>.

10. In this respect, UNHCR recalls that prolonged confinement at the border amounts to detention.<sup>11</sup> UNHCR recognizes that detention may be resorted to in border procedures. Minimal periods in detention are permissible at the outset to carry out initial identity and security checks in cases where identity is undetermined or disputed, or there are indications of security risks. It is also permissible for a limited initial period for the purpose of recording, within the context of a preliminary interview, the elements of the claim to international protection to facilitate effective triaging as a basis for channeling cases into the different processing streams. For cases triaged as manifestly unfounded, detention beyond this period may be legitimate for up to four weeks from the lodging of the asylum claim with the applicable safeguards. However, when detention is resorted to, the decision to detain must always be necessary and proportionate to the legitimate aim<sup>12</sup> and alternatives to detention must be considered prior to imposing detention. In all circumstances, decisions to detain should be subjected to a judicial review.<sup>13</sup>
11. This position is also supported by provisions of EU asylum legislation, which provides that where detention measure is used in the context of the border procedure based on Article 43 of the Asylum Procedures Directive<sup>14</sup>, it should meet the requirements of Article 8-11 of the recast Reception Conditions Directive.<sup>15</sup> This reading has been recently confirmed by the Court of Justice of the European Union (hereinafter - 'CJEU') in joined Cases C-924/19 PPU and C-925/19 PPU. In particular, the CJEU held that the relevant ground of detention must be stipulated in national law, the detention measure must be subject to an assessment of proportionality and necessity, and a possibility for judicial review should always be provided.<sup>16</sup>
12. Since neither the proposed Article 5 (6) and Article 5 (8) nor any other provisions of the Aliens Law provide for detention related safeguards referred to above, both the current and proposed legislative frameworks on the border procedure do not comply with the requirements of international law and EU asylum legislation.

#### UNHCR recommendations:

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<sup>11</sup> UN High Commissioner for Refugees (UNHCR), UNHCR Comments on the European Commission's Proposal for an Asylum Procedures Regulation, April 2019, COM (2016) 467, p. 36, available at: <https://www.refworld.org/docid/5cb597a27.html>.

<sup>12</sup> Detention Guidelines 2012, Guideline 4.1, para 22. The UN Human Rights Council has also reaffirmed that detention should be used only as a "last resort". U.N. Human Rights Council, *Report of the Working Group on Arbitrary Detention*, 18 January 2010, A/HRC/13/30, <https://undocs.org/A/HRC/13/30>, para. 77. Moreover, the UN Human Rights Commission noted that under the principle of proportionality, any restriction on liberty must be the least intrusive option to achieve the desired result, and any restriction must both serve "permissible purposes" and be necessary to achieve them: UN Human Rights Committee (HRC), *CCPR General Comment No. 27: Article 12 (Freedom of Movement)*, 2 November 1999, CCPR/C/21/Rev.1/Add.9, [www.refworld.org/docid/45139c394.html](http://www.refworld.org/docid/45139c394.html).

<sup>13</sup> Detention Guidelines 2012, Guideline 7, para 47.3.

<sup>14</sup> European Union: Council of the European Union, *Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast)*, 29 June 2013, OJ L. 180/60 -180/95; 29.6.2013, 2013/32/EU, available at: <https://www.refworld.org/docid/51d29b224.html>.

<sup>15</sup> European Union: Council of the European Union, *Directive 2013/33/EU of the European Parliament and Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast)*, 29 June 2013, OJ L. 180/96 -105/32; 29.6.2013, 2013/33/EU, available at: <https://www.refworld.org/docid/51d29db54.html>.

<sup>16</sup> Court of Justice of the European Union, *Joined Cases C-924/19 PPU and C-925/19 PPU*, Judgment of 14 May 2020, available at <http://curia.europa.eu/juris/liste.jsf?lgrec=fr&td=%3BALL&language=en&num=C-924/19&jur=C>.

- Provide for requisite procedural guarantees, such as a written detention order, an assessment of proportionality and necessity of detention and judicial review with respect to asylum-seekers who stay at border crossing points, transit zones or the State Border Guard Service (i.e. the Foreigners Registration Centre) in the context of the border procedure.

#### *Legal aid in appeals procedures (Article 35 of the Law Proposal)*

13. Pursuant to the proposed Article 71 (1) (4) of the Aliens Law, asylum-seekers would be entitled to legal aid in two sets of judicial proceedings only, i.e. (i) at the hearing before a district court when deciding whether to detain an asylum-seeker for a period extending 48 hours or apply an alternative to detention based on the submission of the SBGS, and (ii) procedures before an administrative court of first instance concerning decisions taken with respect to an asylum-seeker.
14. UNHCR notes that the envisaged legislative framework significantly reduces the scope of legal aid currently available for asylum-seekers in Lithuania. **As far the as the appeal stage of the asylum procedure is concerned**, the proposed amendments would deprive asylum-seekers of legal aid in procedures before the Supreme Administrative Court. This may in practice exclude decisions on asylum applications issued by the Migration Department from a judicial review by the Supreme Administrative Court, i.e. a higher judicial authority of Lithuania.
15. **As regards detention-related judicial proceedings**, the proposed legislative framework likewise excludes legal aid from appeal procedures before the Supreme Administrative Court (Article 117 of the Aliens Law) as well as procedures for a subsequent review of detention orders (Article 118 of the Aliens Law). Moreover, it remains unclear, based on the proposed wording, whether asylum-seekers would be entitled to legal aid in procedures on extending detention periods before a district court.
16. In this respect, UNHCR would like to underline that the right to legal aid is an essential component of the right to an effective remedy and fair trial under international law, and the right to effective judicial protection under EU Law. Pursuant to the respective case-law of the ECtHR and the CJEU, the grant of legal aid is governed by certain criteria, including the subject-matter of litigation and the importance of the issues at stake for the individual; the complexity of the applicable law and procedure; and the applicant's capacity to represent himself effectively.<sup>17</sup>
17. Asylum-seekers generally satisfy the above criteria notably because the issues which are at stake in asylum cases frequently involve fundamental human values such as the right to life, the right to liberty and the prohibition of torture or inhuman or degrading treatment or punishment; applicable law and procedure in

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<sup>17</sup> See *inter alia* judgments of the ECtHR in *Airey v. Ireland*, § 26; *McVicar v. the United Kingdom*, paras. 48 and 49; *P., C. and S. v. the United Kingdom* of 16 July 2002, para. 91, and *Steel and Morris v. the United Kingdom*, para 61, as well as the judgment of the CJEU in the case C-279/09, para. 61.

the area of asylum in the EU is increasingly complex and sophisticated, and asylum-seekers typically lack knowledge of the language of national judicial procedures as well as knowledge of applicable legislation.

18. Given the importance of the legal issues often involved in cases of second or higher-level appeals and complexity of the relevant appeal procedures, UNHCR recommends that access to free legal assistance and representation should be maintained in these cases. Where a national legal system allows the applicant to lodge a second or higher appeal, UNHCR considers that the applicant should have an effective opportunity to make use of such a right, including by enjoying free legal assistance and representation.<sup>18</sup>
19. It is true that Article 21 (2) of the recast Asylum Procedures Directive *inter alia* allows for granting legal assistance and representation only for appeals procedures before a court or tribunal of first instance. It needs to be underlined, however, that the directive, as an instrument of secondary legislation, must be applied in conformity with primary EU Law, notably Article 47 of the EU Charter of Fundamental Rights and the principle of effective judicial protection. In this respect, it is settled case-law of the CJEU that Member States must not rely on an interpretation of an instrument of secondary legislation which would be in conflict with the fundamental rights protected by the European Union legal order or with the other general principles of European Union law.<sup>19</sup> As held by the CJEU in *X*, while there is no EU obligation to have, in asylum appeals procedures, a second level of jurisdiction, if Member States chose to have one, procedural rules governing access to the second level of appeal “must observe the principles of **equivalence and effectiveness**”, as those rules implement EU law. According to the Court, these principles imply that relevant procedural rules “**must not be any less favorable than those governing similar domestic actions (principle of equivalence) and must not be framed in such a way as to render impossible in practice or excessively difficult the exercise of rights conferred by the legal order of the European Union (principle of effectiveness)**”.<sup>20</sup> Moreover, as the CJEU further specified in *Gnandi*, “it is for the Member States to **ensure the full effectiveness** of an appeal against a decision rejecting an application for international protection, in accordance with the **principle of equality of arms [...]**.”<sup>21</sup>
20. With this background, the proposed legislative framework appears to be problematic in several respects. First, the Aliens Law and the Law on Administrative Proceedings (lith. *Administracinių bylų teisenos įstatymas*) clearly entitle asylum-seekers to challenge decisions of the Vilnius Regional Administrative Court by lodging appeals with the Supreme Administrative Court. Pursuant to Article 9 and 134 (2) (6) of the Law on Administrative Proceedings, these appeals must be prepared in Lithuanian, and include *inter alia* a legal basis, i.e. references to applicable legal provisions and factual circumstances. It is clear that asylum-seekers deprived of legal aid would never be able to comply with these requirements and implement the right to appeal in practice. While some might hire a private lawyer, the majority would simply lack required financial resources and never be able to effectively lodge the appeal with the

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<sup>18</sup> UN High Commissioner for Refugees (UNHCR), *UNHCR Comments on the European Commission's Proposal for an Asylum Procedures Regulation*, April 2019, COM (2016) 467, p. 15, available at: <https://www.refworld.org/docid/5cb597a27.html>.

<sup>19</sup> See *inter alia* CJEU, joined cases of *N.S* and *ME*, C-411-10 and C-493-10, para.77

<sup>20</sup> CJEU, *X*, Case C-175/17, paras 38 and 39.

<sup>21</sup> CJEU, *Sadikou Gnandi*, Case C-181/16, para. 61

Supreme Administrative Court. The right granted to asylum-seekers pursuant to the Lithuanian legislation would only become illusory.

21. Furthermore, UNHCR notes that the Law on the State Guaranteed Legal Aid of the Republic of Lithuania which governs the provision of legal aid in criminal and civil cases, as well as administrative cases outside the area of asylum, does not limit legal aid to the proceedings before a court of first instance. This situation may give rise to concerns in light of **the principle of equivalence** of EU Law, as elaborated above, as well as **the principle of non-discrimination and equality**, as enshrined in Article 29 of the Constitution of the Republic of Lithuania.
22. As regards detention procedures, in addition to the above considerations, the envisaged denial of legal aid may be in conflict with Article 9 (6) of the recast Reception Conditions Directive which requires Member States to ensure that applicants have access to free legal assistance and representation in cases of a judicial review of the detention order. The directive does not provide for a possibility to limit legal aid to certain levels of jurisdiction. It follows that the proposed provisions may be at variance with an instrument of secondary EU Law governing access to legal aid for asylum-seekers in detention cases.
23. UNHCR agrees that the current legal aid system for asylum-seekers in Lithuania has certain shortcomings and may need to be modified and improved. The scope of legal aid, criteria for selecting service providers, remuneration rates, capacity building and quality assurance are among the issues which might inform the review process. However, in UNHCR's view, any major reform of this essential component of the national asylum system should be based at a minimum on (i) a thorough evaluation of the current arrangements and practices and (ii) an impact assessment of the envisaged measures, including the impact on fundamental rights of the persons concerned. In this respect, UNHCR notes that no impact assessment accompanies the present legislative initiative. For the reasons elaborated above, UNHCR recommends conducting a thorough assessment of the legal aid system for asylum-seekers in Lithuania, including possible options for its reform, before introducing amendments to the current legislation.

#### UNHCR recommendations:

- Retain the current provision of legal aid for appeals procedures before the Supreme Administrative Court against decisions issued by the Migration Department on asylum applications, decisions to end, revoke or cancel international protection, decisions to detain an asylum-applicant, and decisions concerning reception conditions.
- Retain the provision of legal aid in judicial procedures on subsequent review of detention orders and judicial procedures on extending the detention periods.
- Consider conducting a reform of the legal aid system for asylum-seekers based on a thorough evaluation and impact assessment of the envisaged measures.

### *Legal aid in administrative procedures (Article 44 of the Law Proposal)*

24. The proposed amendments modify Article 82 (1) of the Aliens Law reducing the scope of legal aid *ratione personae* at the administrative stage of the asylum procedure (hereinafter – ‘first instance asylum procedure’). Currently Article 82 (1) entitles any asylum-seeker to request the presence of a legal aid lawyer at an asylum interview. According to the proposed provision, the asylum-seeker would always have the right to a legal counsel during the asylum interview, but legal aid at asylum interviews would only be state-funded with respect to vulnerable asylum-seekers.
25. While UNHCR welcomes that vulnerable applicants would still have the right to legal aid free of charge at asylum interviews, we regret that Lithuania is introducing restrictions on free legal aid in first instance asylum-procedures. UNHCR considers that investing in the first instance procedure in line with the principle of “front loading”, including through the provision of **quality legal aid early in the process**, has the potential to enhance the quality of decisions and reduce the number of appeals and repeat applications leading to a shorter overall duration of the procedure and reduced costs of reception conditions. “Frontloading” the asylum process may thus save resources for Member States and produce more efficient and fairer decisions for asylum-seekers.<sup>22</sup>
26. In view of the above, UNHCR recommends considering to refrain from reducing legal aid in first instance asylum procedures.

#### UNHCR recommendations:

- Maintain legal aid in first instance asylum procedures.

### *Alternatives to detention (Article 38 of the Law Proposal)*

27. The Law Proposal adds point 5 to Article 115 (2) of the Aliens Law which lists alternatives to detention. The proposed provision reads as follows:

“[T]o accommodate a foreigner at the State Border Guard Service providing for a right to move within the territory belonging to a place of accommodation only” (lith. “apgyvendinti užsieniečių Valstybės sienos apsaugos tarnyboje nustatant teisę judėti tik apgyvendinimo vietai priklausančioje teritorijoje”).

In accordance with the proposed Article 115 (5), the measure would apply to asylum applicants, as well as the rejected asylum applicants who are the subject to the return procedures.

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<sup>22</sup> UNHCR, Moving Further Toward a Common European Asylum System: UNHCR's statement on the EU asylum legislative package, June 2013, p. 2, available at: <http://www.refworld.org/docid/51de61304.html>.

28. UNHCR supports the use of alternatives to detention. If properly designed and applied, these measures may ensure that detention of asylum-seekers is a measure of last, rather than first, resort.<sup>23</sup> However, as set out in the UNHCR Detention Guidelines, liberty should always be the default position and “alternatives to detention should not be used as alternative forms of detention”, nor should they “become substitutes for normal open reception arrangements that do not involve restrictions on the freedom of movement of asylum-seekers.”<sup>24</sup>
29. The wording of the proposed provision indicate that liberty and freedom of movement of the asylum-seekers concerned might be restricted to the territory of the respective SBGS units. UNHCR is concerned that the envisaged measure, if not equipped with requisite safeguards, might amount into deprivation of liberty, i.e. detention.
30. Pursuant to the UNHCR Detention Guidelines, ““detention” refers to the deprivation of liberty or confinement in a closed place which an asylum-seeker is not permitted to leave at will, including, though not limited to, prisons or purpose-built detention, closed reception or holding centres or facilities”<sup>25</sup>. In a similar vein, Article 2 (h) of the recast Asylum Procedures Directive defines detention as “confinement of an applicant by a Member State within a particular place, where the applicant is deprived of his or her freedom of movement.”
31. According to the case-law of the ECtHR on Article 5 ECHR, in order to determine whether someone has been deprived of his/her liberty, the starting point must be his/her concrete situation and account must be taken of criteria such as the type, duration, effects and manner of implementation of the measure in question. The difference between deprivation of and restriction on liberty is one of degree or intensity, and not of nature or substance.<sup>26</sup>
32. It follows that the placement of an asylum-seeker in a reception centre may well amount to deprivation of liberty, even where the arrangement is formally titled “an alternative to detention”. What matters is the intensity of applicable restrictions and whether the person concerned is permitted to leave the place at his/her will.
33. In view of the above, UNHCR recommends to review the envisaged arrangements and for it to be considered an alternative of detention to provide for the possibility to leave the place temporarily.

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<sup>23</sup> Detention Guidelines 2012, *para* 35.

<sup>24</sup> *Ibid.*, *para* 38

<sup>25</sup> *Ibid.*, *para*. 5

<sup>26</sup> See *inter alia* *Amuur v. France*, 17/1995/523/609, Council of Europe: European Court of Human Rights, 25 June 1996, *para*. 42, available at: <https://www.refworld.org/cases/ECHR,3ae6b76710.html>.

- Provide that the envisaged measure may only be applied where it is established that less restrictive measures, as listed in Article 115 (2) of the Aliens Law, may not be effectively applied in the individual case.
- Provide for the possibility for the asylum-seekers to leave the place temporarily.

#### Suspensive effect of appeals (Article 58 of the Law Proposal)

34. Article 139 (1) of the Aliens Law currently in force does not provide for automatic suspensive effect of appeals with respect to decisions taken in accelerated and border procedures. In such cases, an administrative court may apply an interim measure allowing the applicant to remain pending the outcome of the remedy upon his or her request. The proposed Article 139 (2) of the Aliens Law sets out a time limit of 2 days for taking a decision on the interim measure by the court in such cases.

35. In UNHCR view, in cases where an appeal has no automatic suspensive effect, the right to seek the suspension of the enforcement of a negative decision and remain in the country of asylum until a final decision is rendered should be ensured for the asylum-seekers concerned.<sup>27</sup> Given the irreversible and potentially life-threatening consequences of an erroneous administrative decision, it is critical that court scrutinizes rigorously any request for suspensive effect in such cases. To that end, Article 46 (7) (b) of the recast Asylum Procedures Directive which deals with *ad hoc* suspensive effect arrangements in the border procedures requires Member States to ensure that the “court [...] examines the negative decision of the determining authority in terms of fact and law”. UNHCR notes that this essential safeguard is missing in national legislation implementing the recast Asylum Procedures Directive in Lithuania.

#### UNHCR recommendation:

- Provide that the court, when examining a request for an interim measure, reviews the negative decision of the determining authority in terms of fact and law.

UNHCR Representation for Northern Europe, September 2020

<sup>27</sup> See footnote 10 above, *UNHCR Discussion Paper Fair and Fast - Accelerated and Simplified Procedures in the European Union*, p.5.