Warsaw, 10 September 2021
Opinion-Nr.: MIG-POL /428/2021 [JB]

URGENT OPINION ON DRAFT AMENDMENTS TO THE ALIENS ACT AND THE ACT ON GRANTING PROTECTION TO ALIENS ON THE TERRITORY OF THE REPUBLIC OF POLAND AND MINISTERIAL REGULATION ON TEMPORARY SUSPENSION OF BORDER TRAFFIC AT CERTAIN BORDER CROSSINGS

POLAND

This Opinion has benefited from contributions made by Dr. Liam Thornton, Associate Professor, School of Law, University College Dublin.

Based on an unofficial English translation of the Draft Amendments to the Aliens Act, the Act on Granting Protection to Aliens on the Territory of the Republic of Poland and the Regulation of the Ministry of Interior and Administration of 13 March 2020 on temporary suspension or restriction of border traffic at certain border crossing points, as amended on 20 August 2021, provided by the Deputy Commissioner for Human Rights of Poland.

OSCE Office for Democratic Institutions and Human Rights

Ul. Miodowa 10, PL-00-251 Warsaw
Office: +48 22 520 06 00, Fax: +48 22 520 0605
www.legislationline.org

EXECUTIVE SUMMARY AND MAIN CONCERNS

1. This urgent legislative review finds that the Draft Amendments to the Aliens Act, and the Act on Granting Protection to Aliens on the Territory of the Republic of Poland and the Regulation of the Ministry of Interior and Administration of 13 March 2020 on temporary suspension or restriction of border traffic at certain border crossing points, as amended on 20 August 2021, raise serious concerns as the legislation would violate the international legal obligations and OSCE commitments of Poland. It is recommended to substantially revise or drop the Draft Amendments, as well as revise certain provisions of the Regulation in force.
2. More specifically, and in addition to what is stated above, OSCE/ODIHR makes the following recommendations:
   A. The administrative procedure proposed under Articles 1 and 2 of the Draft Amendments fails to provide the requisite safeguards and guarantees, including due to limiting grounds for requesting international protection, the lack of individual risk assessment of the cases that persons present to border guards and thus can lead to violation of the obligation of indirect *non-refoulement,* as established by Article 33 of the UN Refugee Convention and pursuant to positive obligations under Article 2 and 3 of the ECHR*;* [Section 3.1]
   B. Provisions 2a and 2b of the Ministerial Regulation are recommended to be repealed or substantially revised as they allow forced expulsion by executive order that may also lead to collective expulsion based on a written protocol which merely documents the illegal crossing of the person onto the territory of Poland and thus result in a violation of the prohibition on expulsion and/or collective expulsion; [Section 3.2] and
   C. The proposed provisions will unjustifiably restrict the right to an effective remedy for persons seeking international protection and asylum in Poland *en route* or on the territory of Poland by limiting the possibility of claims for international protection to be made and not providing effective right of redress and appeal; [Section 3.3.]

Recommendations are included throughout the text of this Opinion, highlighted in bold.

As part of its mandate to assist OSCE participating States in implementing OSCE commitments, the OSCE/ODIHR reviews, upon request, draft and existing legislation to assess their compliance with international human rights standards and OSCE commitments and provides concrete recommendations for improvement.

TABLE OF CONTENTS

I. INTRODUCTION

3. By letter of 27 August 2021, the Office of Human Rights Commissioner of Poland ("Ombudsperson") requested an official urgent opinion from the OSCE/ODIHR of the compliance with international standards and OSCE commitments of the Draft Act on the Amendment of the Act on Foreigners of the Republic of Poland, amending the current Act in force[1], and the Act on Granting Protection to Foreigners on the Territory of the Republic of Poland[2] as well as the Amendments to a secondary piece of legislation, the Regulation of the Minister for Interior and Administration of 13 March 2020 (version valid since 21 August 2021).[3]

4. The OSCE/ODIHR welcomes the request of the Commissioner for Human Rights and shares its concern regarding the migrant crisis which has unfolded on the Polish-Belarussian border. Of particular concern is the situation of 32 Afghan nationals[4] who are currently stranded between the border of Belarus and Poland, unable to return to Belarus nor enter Poland.

5. The situation, occurring in August 2021, spurred action on the part of the Polish authorities including the extension of barbed wire in the place where the migrants intended to cross. It was reported in the media that humanitarian organisations were initially allowed to provide the migrants with food and water, but that then the border authorities ceased permission for approaching the migrants and providing them with assistance, including for basic medical needs.

6. On August 25, 2021, the European Court of Human Rights handed down an Interim decision (ECHRR 244 (2021)), in the case of *Amiri and Others v Poland* and in the case of Latvia (*Ahmed and Others v. Latvia),* where other migrants were seeking to enter. The interim measure requested the Polish authorities to provide all the applicants with "food, water, clothing, adequate medical care and if possible, temporary shelter".[5] The decision, however, does not call for letting in the trapped migrants at the border with Belarus. The Court ruled that Poland and Latvia should introduce interim measures in the period between 25 August until 15 September 2021 inclusive.

7. At the same time while the crisis described above was evolving, rapid legislative actions were taken by the Polish authorities resulting in the proposal for an amendment of the above listed laws. An amendment to a secondary piece of legislation was introduced earlier in the year by the Ministry of Interior and Administration, restricting the movement into Poland from Belarus, the Russian Federation and Ukraine, justified by the COVID-19 pandemic; this amendment was subject to criticism, by the former Commissioner of Human Right of Poland as noted in the letter of 27 August 2021 of the Human Rights Commissioner of Poland, requesting this Opinion.

8. On September 10, ODIHR responded to the Human Rights Commissioner's request, confirming the Office's readiness to prepare a legal opinion, as well as providing urgent

[1] Act on Foreigners of the Republic of Poland of 12 December, 2013, as amended, Dz. U. 2013 poz. 1650

[2] Act on Granting Protection to Foreigners on the Territory of the Republic of Poland, 13 June 2003, Dz. U. 2003 Nr 128 poz. 1176

[3] Dz.U.2020.435 z 2020.03.13, the Decree is based on the State Border Protection Act of 12 October 1990 (Dz.U 2019 item 1776)

[4] The number of persons is based on the figure provided in the Interim Measures handed down by the European Court of Human Rights on 25 August 2021, ECHR 244 (2021).

[5] European Court of Human Rights, decided to indicate interim measures in cases Amiri and Others v. Poland (application no. 42120/21) and Ahmed and Others v. Latvia (application no. 42165/21), 25 August 2021, ECHR 244 (2021).

preliminary findings on the compliance of these Draft Amendments with international human rights standards and OSCE human dimension commitments.

9. This Urgent Opinion was prepared in response to the above request. Given the short timeline to prepare this legal review and the urgency of the matter, the Urgent Opinion does not provide a detailed analysis of all the provisions of the Draft Amendments and the Regulation of the Minister for Interior, but primarily focuses on the most concerning issues relating to foreigners' access to Poland and protection of foreigners in Poland. A more extended version may follow.

10. ODIHR conducted this assessment within its mandate to assist the OSCE participating States in the implementation of their OSCE commitments.

II. SCOPE OF THE OPINION

11. The Opinion covers only the proposed amendments and existing regulation, that is; the Draft Act on the Amendments to the Act on Foreigners of the Republic of Poland and the Act on Granting Protection to Foreigners on the Territory of the Republic of Poland (hereafter, "the Draft Amendments"), and the Regulation of the Ministry of Interior and Administration of 13 March 2020 on temporary suspension or restriction of border traffic at certain border crossing points, as amended on 20 August 2021 (now adding points 2a and 2b) ("the Regulation").

12. The Opinion raises key issues and provides indications of areas of concern. The ensuing legal analysis is based on international and regional human rights and rule of law standards, norms and recommendations as well as relevant OSCE human dimension commitments.

13. This Opinion is based on an unofficial English translation of the Draft Amendments provided by the Office of the Commissioner for Human Rights of Poland, which is attached to this document as an Annex. Errors from translation may result. Should the Opinion be translated in another language, the English version shall prevail..

14. In view of the above, ODIHR would like to stress that this Opinion does not prevent ODIHR from formulating additional written or oral recommendations or comments on respective subject matters in Poland in the future.

III. LEGAL ANALYSIS AND RECOMMENDATIONS

1. Relevant International Human Rights Standards and OSCE Human Dimension Commitments

15. The Draft Amendments have been assessed against international refugee law, European Union and Council of Europe law and OSCE commitments. Given the extensive provisions of international law on due process rights, which are of particular relevance to the Draft Amendments and Ministerial Regulations, the EU Procedures Directive of 2013 has been emphasized in the Opinion. While States retain a sovereign power to manage their borders and to devise rules to control the entry and residence of non-

citizens, international standards provide rules on the obligations concerning access to the asylum-seeking process of people who may be refugees.

16. The right to freedom of movement is enshrined in Article 13 of the UN Declaration of Human Rights[6], Article 12 of the International Covenant on Civil and Political Rights,[7] Article 2 of Protocol 4 to the European Convention on Human Rights (ECHR)[8] and in OSCE commitments starting with the Helsinki Act (1975), where participating States committed to simplifying and administering flexibly entry and exit procedures and to facilitating the movement of citizens between participating States. The Concluding Document of Vienna (1989) defined freedom of movement as one of the main commitments of the OSCE.

17. Clearly, as mentioned above, it is understood that each state has the right as a matter of well-established international law, and subject to its treaty obligations, including the European Convention on Human Rights ("ECHR"), to which Poland is a party, to control the entry, residence and expulsion of residents. Such treaty obligations include, most essentially, the UN Refugee Convention of 1951[9], in the case of both countries (Poland and Belarus) and European Union law, in the case of Poland.

18. Furthermore, the International Covenant on Civil and Political Rights (ICCPR) does not allow in any manner to "remove a person from their territory where there are substantial grounds for believing that there is a real risk of irreparable harm, such as that contemplated by articles 6 and 7 of the Covenant, either in the country to which removal is to be effected or in any country to which the person may subsequently be removed".[10] These *non-refoulement* obligations also flow from the prohibition of torture and cruel and inhuman treatment in Article 3 of the ECHR.[11]

19. OSCE participating States have also emphasised the importance of the need to identify and address the root causes of displacement and involuntary migration and the need for international co-operation in dealing with mass flows of refugees and displaced persons, also recognizing that displacement is often a result of violations of OSCE commitments, including those relating to the Human Dimension (Helsinki 1992);[12] and have also committed to ensure that policies related to freedom of movement of persons across the border and imposed restrictions are consistent with relevant OSCE commitments (Maastricht 2003).[13] Furthermore, the OSCE participating States have reaffirmed the obligations and commitments on border‐related issues that they have undertaken at all levels, including in particular international human rights, refugee and humanitarian law, and may consider as well standards and recommendations laid down by the World Customs Organization, the International Organization for Migration, the International

[6] 10 December 1948

[7] Article 12, of the ICCPR (1966)

[8] Rome, 4.XI.1950

[9] The Convention was drafted and signed by the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, held at Geneva from 2 to 25 July 1951. The Conference was convened pursuant to General Assembly resolution 429 (V) of 14 December 1950. The Convention was adopted on 28 July 1951; in accordance with Article 43, it entered into force on 22 April 1954. The Protocol was adopted on 31 January 1967; it entered into force on 4 October 1967 in accordance with its Article VIII.

[10] Human Rights Committee, General Comment No. 20, Prohibition of torture and cruel treatment or punishment, UN Doc. CCPR/C/21/Rev.1/Add 13, 26 May 2004, para. 12

[11] Soering v. The United Kingdom, Judgment of the European Court of Human Rights, 7 July 1989, para. 91; Cruz Varas and Others v. Sweden, Judgment of 20 March 1991, paras. 69–70

[12] Concluding Document of Helsinki, – Fourth Follow –up Meeting 1992, par 42

[13] Eleventh Meeting of the Ministerial Council 1 and 2 December 2003, MC.DOC/1/03, Section III, par 13 (1)

Labour Organization, the United Nations High Commissioner for Refugees (UNCHR) and other relevant international organizations (Ljubljana 2005).[14]

20. While as stated above, States retain a sovereign power to manage their borders and to devise rules to control the entry and residence of non-citizens, this should be done in compliance with state's human rights obligations, respecting the right to life, right to human dignity and freedom from torture, right to a legal remedy, etc.

21. In times of a declared state of emergency, human rights treaties allow for derogations from some non-absolute rights under strictly defined conditions. However, it is not permissible to derogate from or limit certain absolute rights such as the right to be free from torture or inhuman or degrading treatment. This right, (to be free from torture or inhuman or degrading treatment) is intrinsically connected to the right of *non-refoulement* (discussed below in this opinion) as stipulated in General Comment 4 of the Committee Against Torture, the principle of *non-refoulement* of persons to another State where there are substantial grounds for believing that they would be in danger of being subjected to torture is similarly absolute."[15]

1.1 Principle of Non-Refoulement and the Safe Third Country Principle

22. The principle of *non-refoulement* prohibits the removal, expulsion or extradition to a country where a person may be at risk of torture, persecution or other serious harm (direct *refoulement*).[16] The principle also prohibits the same to countries where individuals would be exposed to a serious risk of onward removal to such a country (indirect *refoulement*).[17]

23. In the European Union, in line with Article 6 (2) of the Asylum Procedures Directive,[18] a person who asks for international protection must have an effective opportunity to apply for it as soon as possible.[19] Furthermore, if there are 'indications' that a person is in need of international protection, the migrant must be informed about the possibility to ask for asylum and referred to the asylum procedure.[20] Article 8 (1) of the said Directive specifies that, at border crossing points, Member States must make arrangements for interpretation to the extent necessary to facilitate access to the asylum procedure.

24. Furthermore, the UN Convention against Torture (UNCAT)[21] applies to the principle of *non-refoulement*; cases where there are substantial grounds for believing that the person

[14] Thirteenth Meeting of the Ministerial Council 5 and 6 December 2005, MC13EW66, Chapter 1, par 2.1

[15] Committee against Torture General comment No. 4 (2017) on the implementation of article 3 of the Convention in the context of article 22, CAT/C/GC/4, 4 September, 2018.

[16] United Nations Convention on Refugees, 1951, Article 33.

[17] Page 7, "Scope of the principle of non-refoulement in contemporary border management: evolving areas of law", European Fundamental Rights Agency (FRA), 2016.

[18] 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 (Asylum Procedures Directive)

[19] 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 (Asylum Procedures Directive)

[20] Art. 8(1) of the Asylum Procedures Directive reads as follows: "Where there are indications that third-country nationals or stateless persons held in detention facilities or present at border crossing points, including transit zones, at external borders, may wish to make an application for international protection, Member States shall provide them with information on the possibility to do so".

[21] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Adopted and opened for signature, ratification and accession by General Assembly resolution 39/46 of 10 December 1984 entry into force 26 June 1987, in accordance with article 27 (1).

in question, if returned (refouled) would be in danger of being subjected to torture (under Article 3 UNCAT). Both the UN Human Rights Committee and the European Court of Human Rights consider this principle as being inherent in articles prohibiting torture and inhuman and degrading treatment (Article 7 of the ICCPR and Article 3 of the ECHR). As mentioned above, General Comment No. 4 (2017) on the implementation of Article 3 of the UNCAT in the context of Article 22, clearly states that the principle of *non-refoulement* of persons to another State where there are substantial grounds for believing that they would be in danger of being subjected to torture or inhuman or degrading treatment is similarly absolute and the prohibition of torture itself.[22]

25. Finally, it is important to recall that the prohibition of *refoulement* also applies to returns of people in need of international protection to a third country based on 'safe third country' or 'country of first asylum' rules. These rules arise from Articles 35 and 38 of the Asylum Procedures Directive.[23] These are tools given to states of the EU to deal with asylum applicants who previously stayed in, or transited, a third country. However, it is not permitted for EU Member States to use this principle to return a person to a risk of persecution or other serious harm. They may indeed only be applied in the case where after applicant has applied for asylum, an EU Member State authority concludes that all conditions required by the directive are met, including protection from *refoulement*, in the 'safe third country' from which the applicant arrived.

26. Questions of jurisdiction may arise where migrants are in a transit/border area or are *en route* to their destination country, where they would wish to seek international protection and asylum. This question has been discussed by the European Court of Human Rights, the UN bodies and the EU. It is settled international law, European law, and the law of EU, that Member States' obligation to respect the principle of *non-refoulement* also applies when they turn back people who have reached the EU's external borders, and when they are "effectively under their control".

1.2. The right to effective remedy and prohibition of collective expulsion

27. *Refoulement* may also trigger other fundamental rights, such as, crucially, the right to an effective remedy and the prohibition of collective expulsion, the latter is expressed in Article 4 of Protocol 4 to the ECHR and in Article 19 of the EU Charter of Fundamental Rights.[24]

28. According to the principles of human rights law and refugee law,[25] persons have the right to challenge forcible return before an independent and impartial body and this opportunity must be provided by the State. In particular, this procedural right is based on general principles of human rights law, including the right to a remedy and the requirement of a fair hearing.[26]

---

[22] UN Committee Against Torture CAT/C/GC/4, 4 September, 2018, par 9.

[23] 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 (Asylum Procedures Directive)

[24] Official Journal of the European Union C 326/391.

[25] UN Refugee Convention 1951, Article 16 on the right of access to courts.

[26] Committee against Torture, Ahmed Hussein Mustafa Kamil Agiza v. Sweden, Communication No. 233/2003, 24 May 2005, UN Doc. CAT/C/34/D/233/2003, para. 13.7: The Committee's previous jurisprudence has been consistent with this view of the requirements of article 3, having found an inability to contest an expulsion decision before an independent authority, in that case the courts, to be relevant to a finding of a violation of article 3; See also, Committee against Torture, Concluding observations : Australia, UN Doc. CAT/C/AUS/CO/3, 22 May

29. Article 32.2 of the 1951 UN Refugee Convention specifically requires that "expulsion of such a refugee shall be only in pursuance of a decision reached in accordance with due process of law. Except where compelling reasons of national security otherwise require, the refugee shall be allowed to submit evidence to clear himself, and to appeal to and be represented for the purpose before competent authority or a person or persons specially designated by the competent authority",[27] this due to the possibility that "expulsion orders may sometimes be due to false accusations and the malice of ousted competitors. It may even happen that such orders are due to errors in identity. For these reasons paragraph provides that a refugee shall be permitted to clear himself and to be represented before the competent authority."[28]

30. Furthermore, in *Chahal v. The United Kingdom (1996)*[29], the European Court of Human Rights found that "given the irreversible nature of the harm that might occur if the risk of ill-treatment materialised and the importance the Court attaches to Article 3 he notion of an effective remedy under Article 13 requires independent scrutiny of the claim that there exist substantial grounds for fearing a real risk of treatment contrary to Article 3. This scrutiny must be carried out without regard to what the person may have done to warrant expulsion or to any perceived threat to the national security of the expelling State".[30]

2. BACKGROUND

31. The Draft Amendments to the current Act on Foreigners of the Republic of Poland and the Act on Granting Protection to Foreigners on the Territory of the Republic of Poland are included in one act of amendment. Separately, the Ministerial Regulation has introduced two new provisions, which in combination with each other effectively take away the right of migrants to claim asylum and international protection and the right to have their cases heard and reviewed by a competent and independent tribunal or court. Another way to express the general idea which seems to transpire from the proposed Act on Amendments is that it seeks to enact in primary law, what is already in practice, the case under the Regulation.

32. The provisions added to the Ministerial Regulation explicitly expel persons from the territory of Poland as soon as they cross the border in violation of the rules and procedures established under the Regulation. Section 2a requires a person to immediately leave the territory of Poland. Meanwhile, Section 2b states that persons found on the border crossing of Poland, where border traffic has been suspended (by this Regulation which was enacted based on COVID-19 and public order and health grounds) shall be returned to the state border line.

2008, para. 17: The State party should ensure that effective remedies are available to challenge the decision not to grant asylum or to deny or cancel a visa. Such remedies should have the effect of suspending the execution of the above

decision, i.e. the expulsion or removal.; See also, Committee against Torture, Conclusions and recommendations : United States of America, UN Doc. CAT/C/USA/CO/2, 25 July 2006, para. 20: The State party should apply the non-refoulement guarantee to all detainees in its custody, cease the rendition of suspects, in particular by its intelligence agencies, to States where they face a real risk of torture, in order to comply with its obligations under article 3 of the Convention. The State party should always ensure that suspects have the possibility to challenge decisions of refoulement.

[27] Article 32, paragraphe 2, the UN Refugee Convention, 1951.

[28] Travaux Préparatoires to the The UN Refugee Convention, 1951 (https://www.unhcr.org/protection/travaux/4ca34be29/refugee-convention-1951-travaux-preparatoires-analysed-commentary-dr-paul.html)

[29] *Chahal v. The United Kingdom*, Application No. 22414/93, 15 November 1996

[30] European Court of Human Rights, *Chahal v. The United Kingdom* (application No. 22414/93), 15 November 1996, paras. 151

33. Whereas, the Draft Amendments introduce an administrative procedure amending the current Articles 302, 303, and 435 of the current Act on Foreigners. This impacts on the right to access international protection, and could violate obligations relevant to the principle of *non-refoulement*, and could fail to abide obligations under the UN Refugee Convention, the EU asylum *acquis* and the ECHR. Article 1 of the Draft Amendments applies to those who cross or attempt to cross the border in violation of the law,[31] and who are immediately detained.[32] The detainee is subject to an administrative procedure whereby the commanding officer of the Border Guard post may issue an 'Order issued upon crossing the border in violation of the law'.[33] The impact of this order is twofold:

    (i) the foreigner must leave the territory of the Republic of Poland,[34] and (ii) a prohibition of re-entry to Poland and other Schengen States is issued for a period of between 6 months and 3 years.[35] The information/decision on this Order is placed in a database and may be shared, including with countries with access to the Schengen Information System (SIS).[36] This Order may be appealed to the Commander in Chief of the Border Guard, however the 'complaint' does not suspend the execution of the Order.[37] The person is therefore expelled regardless of any appeal which they may make against the Order.

34. Article 2 of the Draft Amendments makes a change to Article 33 of the the Act on Granting Protection to Foreigners on the Territory of the Republic of Poland[38] and permits the Head of the Office of Foreigners, at his/her discretion, to not examine an application for international protection where a foreigner was immediately apprehended after crossing the Polish border in violation of the Schengen Borders Code. This is subject to a provision, which seems to mandate the Head of the Office of Foreigners to examine a protection claim immediately after the border crossing occurred, only when the person has "come directly from territory" where:

    - His/her life was at risk, or
    - at risk of persecution or serious harm; and
    - He/she has presented credible reasons for illegal entry.[39]

35. The **rationale for these amendments,** as outlined by the Draft Amendments' *Explanatory Memorandum*, can be summarised as (i) 'deformalizing' procedures at the border in order to ensure swift removal of a foreigner from Polish territory; (ii)

[31] Proposed Article 302.1, Item 10 Amendment Bill, amending Article 302.1 of the Act of 2013. Art. 302 of the Act of 2013 relates to decisions imposing a return obligation on a foreigner to his/her country of origin.

[32] Proposed Article 303.1, Item 9a) Amendment Bill, amending Article 303.1 of the Act of 2013. Article 303 of the Act of 2013 indicates circumstances where a decision imposing a return obligation on a foreigner to his/her country of origin may not occur. It should be noted that this Amendment reads that "no proceedings should be initiated to oblige the foreigner to return" but then as per Article 303b, such proceedings are outlined that must occur.

[33] Proposed insertion of Article 303b.1. Amendment Bill, amending Article 303.1 of the Act of 2013.

[34] Proposed insertion of Article 303b.2(1) Amendment Bill, amending Article 303.1 of the Act of 2013.

[35] Proposed insertion of Article 303b.2(2) Amendment Bill, amending Article 303.1 of the Act of 2013 and Proposed insertion of Article 303c. Amendment Bill, amending Article 303.1 of the Act of 2013.

[36] A number of consequential amendments are made to the Act of 2013 that relate to storage and data sharing of this prohibition of entry into Poland: including to Article 435.1, with the insertion of amendments to Article 435.1.1(a), Article 438.1, with the insertion of Article 438.1.1(a) and Article 443.1 with the insertion of Article 443.1(a). Article 435.1 relates to insertion of data of foreigners into a database for use of Poland and other Schengen countries. Article 438 sets limits on storage of this data. Article 443.1 refers to powers to share such data.

[37] Proposed insertion of Article 303b.1. Amendment Bill, amending Article 303.1 of the Act of 2013.

[38] Act on Granting Protection to Foreigners on the Territory of the Republic of Poland, 13 June 2003, Dz. U. 2003 Nr 128 poz. 1176

[39] Proposed insertion of Article 33.1.a. into the Act of 13 June 2003 on the Granting Protection to Aliens on the Territory of the Republic of Poland. Article 33.1.

accelerated returns; (iii) prohibition of re-entry into Poland and Schengen countries. The overarching aim of the Explanatory Memorandum indicates that the rationale for this is to prevent abuse of the international protection system, ensure internal order and security and protection of the Polish state and its residents from "radicalized representatives of various cultures and religions, or even extremists". The justification links this with terrorist atrocities that occurred in Europe in 2015 and 2016. The Explanatory Memorandum suggests that these measures are being imposed for the protection of Europe's external borders and are mandated by European Union law.[40]

36. The Ministerial Regulation, in Section 2a, requires a person to immediately leave the territory of Poland, while Section 2b states that persons found on the border crossing of Poland, where border traffic has been suspended (by the decree which was enacted based on COVID-19 and public order and health grounds) shall be returned to the state border line.

3. CORE ISSUES AND RECOMMENDATIONS

3.1 Non-Refoulement Obligations

37. Thus, the Draft Amendments are assessed in terms of their compliance with the above described norms and principles of international law, namely (i) the principle of *non-refoulement* (direct or indirect) and consequent prohibition of expulsion (ii) decision-making at the border (iii) access to asylum claims and procedural rights (v) "abuse of rights" and justification for expulsion.

38. Poland is a state party to the 1951 Refugee Convention and the 1967 Protocol.[41] Article 33(1) of the Convention prohibits the return (*refoulement*) of any refugee to a territory where his or her life was in danger on account of his or her race, religion, nationality or political opinion.[42] UNHCR has noted that a general rule "States will be required to grant individuals seeking international protection access to the territory and to fair and efficient asylum procedures."[43] This right remains even in situations of 'mass influx' or where States are under significant pressure at the border.[44] The *New York Declaration for Refugees and Migrants* note the international legal obligations of public officials, including border guards, to uphold human rights and respect the principle of *non-*

[40] The Explanatory Memorandum provides that "According to this petitioner, this Bill is not inconsistent with EU law" and was not submitted to institutions of the European Union. Within the Regulatory Impact Assessment (Section 2), the Bill is premised as an obligation to protect the external border of the European Union, as required by the Schengen Border Code.

[41] Convention Relating to the Status of Refugees, 28 July 1951, 189 *U.N.T.S.* 137 & Protocol relating to the Statue of Refugees 1967, 1968 606 *UNTS* 8791. Poland acceded to the Convention and Protocol on 27 September 1991.

[42] For a concise overview of the principle of *non-refoulement* in the 1951 Convention and how the principle has developed in modern times, see Goodwin-Gil, G.S. and McAdam, J. "Non-Refoulement in the 1951 Convention" in *The Refugee in International Law* (3rd edition, Oxford: OUP, 2007). For a persuasive treatise that the principle of non-refoulement is a *jus cogens* norm see, Allain, J. "The *jus cogens* Nature of *non-refoulement*" (2001) 13(4) *International Journal of Refugee Law* 533. The prohibition on refoulement is subject to very limited exceptions, set down in Article 33(2), see further: UNHCR, N*ote on International Protection of 13 September 2001* (A/AC.96/951), para 16, and under EU law, Article 21(2) of Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast) OJ L 337, 20.12.2011, p. 9–2 (hereinafter 'QDr').

[43] UNHCR, Advisory Opinion on the Extraterritorial Application of *Non-Refoulement* Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol, 26 January 2007, para. 8.

[44] United Nations High Commissioner for Refugees Executive Committee, Protection of Asylum-Seekers in Situations of Large-Scale Influx No. 22 (XXXII) 1981, para. IIA(1).

refoulement.[45] The Declaration also reaffirms the position under international refugee law, that persons who have crossed the border, or are seeking to cross the border are entitled "to due process in the assessment of their legal status, entry and stay".[46]

39. These obligations relating to *non-refoulement* also arise from Poland's membership of the European Union, under Article 19(2) European Charter of Fundamental Rights ("EUCFR"),[47] as well as pursuant to the EU asylum *acquis*.[48] The Court of Justice of the European Union ("CJEU") has noted that the UN Refugee Convention "constitutes the cornerstone of the international legal regime for the protection of refugees" and of the Common European Asylum System.[49] Respect for and operation of the principle of *non-refoulement* requires that at external borders and transit zones, "the right to an effective remedy must be guaranteed by affording the applicant for international protection and the right to an effective remedy which has an automatic suspensory effect (of *refoulement),* before at least one judicial body…".[50]

Jurisprudence of the European Court of Human Rights notes that while contracting states may control entry conditions on non-citizens, this is subject to any other international legal obligations, including obligations under the UN Refugee Convention and the ECHR.[51] The restrictions on access to a State at a border in particular arise when there may be claims that return from the border may violate Article 2 and/or Article 3 of the ECHR. While jurisdiction under Article 1 of the ECHR is "essentially territorial",[52] procedures at borders pertaining to entry or refusal of entry into the territory of the State made by that State's border guards can be attributed to that State.[53] The obligation of *non-refoulement* under the ECHR is examined by exploring whether there are effective guarantees to protect a person seeking protection against direct or indirect arbitrary *refoulement* from the country s/he fled if returned to a third county.[54] The removing State must therefore *"…examine thoroughly the question of whether or not there is a real risk of the asylum-seeker being denied access, in the receiving third country, to an adequate asylum procedure, protecting him or her against refoulement."*[55]

---

[45] UN General Assembly, New York Declaration for Refugees and Migrants, UN Doc. A/RES/71/1, 16 September 2016, para 24 (adopted without vote).

[46] New York Declaration, para 33. See also, UN Human Rights Committee, General Comment No. 31, UN Doc. CCPR/C/21/Rev.1/Add. 13, para 12, and UN Committee on the Rights of the Child General Comment No. 6 (treatment of unaccompanied and separated children outside their country of origin), UN Doc. CRC/GC/2005/16, paras 27–28.

[47] Charter of Fundamental Rights of the European Union OJ C 202, 7.6.2016, p. 389–405 (EUCFR).

[48] For example: Recital 3, Recital 48 and Article 21 of QDr and Recital 3 and Article 28(2) PDr.

[49] Case C-369/17, *Shajin Ahmed v Bevándorlási és Menekültügyi Hivatal*, Judgment of the Court (Second Chamber) of 13 September 2018, para 40. See also, Case C-181/16, *Sadikou Gnandi v État belge* judgment of the Court (Grand Chamber) of 19 June 2018, paras 51-58.

[50] Case C-36/20 PPU, *Ministerio Fiscal v VL*, Judgment of the Court (Fourth Chamber) of 25 June 2020, para 97 and C‑175/17, *X v Belastingdienst/Toeslagen*, Judgment of the Court (Fourth Chamber) of 26 September 2018, para. 33.

[51] See e.g. Applications nos. 40503/17, 42902/17 and 43643/17, *M.K. and others v Poland*, judgment of the European Court of Human Rights (First Section), 23 July 2020, para 167 and Application no. 46410/99, *Üner v. the Netherlands*, judgment of the European Court of Human Rights (Grand Chamber), 18 October 2006, para 54;

[52] See, Applications nos. 8675/15 and 8697/15, *N.D. and N.T. v Spain*, judgment of the European Court of Human Rights (Grand Chamber), para 103 and Application no. 48787/99, *Ilaşcu and Others v. Moldova and Russia*, judgment of the European Court of Human Rights (Grand Chamber), 08 July 2004, paras 311-312.

[53] Application no. 59793/17, *M.A. and others v Lithuania*, judgment of the European Court of Human Rights Rights (Fourth Section), 11 December 2018, para 70 and Applications nos. 40503/17, 42902/17 and 43643/17, *M.K. and others v Poland*, judgment of the European Court of Human Rights (First Section), 23 July 2020, para 130.

[54]Application No. 30696/09, *M.S.S. v Belgium and Greece*, judgment of the European Court of Human Rights (Grand Chamber), 21 January 2011, para 268 .

[55] *M.K. and others v Poland*, para 173.

40. In *D.A. v Poland*[56] and *M.A. v Poland*,[57] the European Court of Human Rights held that the failure of Polish border guards to admit at the border persons who had (on several occasions) sought access to international protection, violated Article 3 of the ECHR. The European Court of Human Rights was of the view that Poland had an obligation to properly assess the applicants' international protection claims, and the refusal to do so exposed the applicants to a real risk of torture or inhuman and degrading treatment. The European Court of Human Rights held that Poland had knowingly subjected the applicants to a serious risk of chain-*refoulement.* The European Court of Human Rights also held in both cases that the processes and procedures at the Polish border were collective expulsions, prohibited by Article 4, Protocol 4 of the ECHR.[58]

41. As described in paras 29-34 above, the Draft Amendments allow for the expulsion of individuals who may have crossed the border with a view to seek international protection. At the same time they lack effective safeguards to ensure the state's international obligations of *non-refoulement*. Although the Draft Amendments give the discretion to the Head of the Office of Foreigners to examine a protection claim if a person has "come directly from territory" where his/her life may be in danger, this may not be sufficient to preclude indirect *refoulement* in violation of international law. It is also not immediately clear what criteria will be used to define whether or not individuals seeking protection are in danger if they are pushed back to the territory from where they have crossed the border. Such decision could and should be made on the basis of individual assessment and evaluation of risks, rather on the basis of geographic location of a border crossing. **In any case, as already mentioned, indirect *refoulement* is also prohibited. It is therefore recommended that the Draft Amendments be substantially revised or dropped in their entirety.**

3.2 Expulsion and Decision Making at the Border

42. The Charter of Fundamental Rights of the European Union (EUCFR) protects the right to asylum[59] and the principle of *non-refoulement*.[60] EU Member States' powers (often exercised by EU border guards) under the Schengen Border Code[61] are premised on respect for the right of individuals to claim international protection[62] and respect of fundamental rights at external borders.[63] Penalties for irregular border crossing must not

[56] Application no. 51246/17, *D.A. and others v Poland,* judgment of the European Court of Human Rights (First Section), 08 July 2021, paras 60-70, see also (Application no. 47287/15) *Ilias and Ahmed v. Hungary*, Judgment European Court of Human Rights, 14 March 2017, para 113. See also the latter judgment par 83 for the relevance of the general context in which the case arose.

[57] *M.K. and others v Poland*, paras 174-186.

[58] *D.A. and others v Poland*, paras 78-84 and *M.K. and others v Poland*, paras 197-211.

[59] Article 18 EUCFR.

[60] Article 19(2) EUCFR.

[61] Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code) OJ L 77, 23.3.2016, p. 1–52, Regulation (EU) 2017/458 of the European Parliament and of the Council of 15 March 2017 amending Regulation (EU) 2016/399 as regards the reinforcement of checks against relevant databases at external borders and Regulation (EU) 2019/817 of the European Parliament and of the Council of 20 May 2019 on establishing a framework for interoperability between EU information systems in the field of borders and visa and amending Regulations (EC) No 767/2008, (EU) 2016/399, (EU) 2017/2226, (EU) 2018/1240, (EU) 2018/1726 and (EU) 2018/1861 of the European Parliament and of the Council and Council Decisions 2004/512/EC and 2008/633/JHA OJ L 135, 22.5.2019, p. 27–84. All references to the Schengen Borders Code are as amended. The current unofficial consolidated version of the Schengen Borders Code can be accessed here.

[62] Article 3(b) of the Schengen Borders Code.

[63] Article 4 of the Schengen Borders Code. The EUCFR, the 1951 Convention, obligations regarding international protection and non-refoulement are all explicitly stated.

be applied where this contravenes Member States' "international protection obligations".[64] Refusal of entry for third country nationals under the Schengen Borders Code[65] is *"without prejudice to the application of special provisions concerning the right of asylum and to international protection.*"[66] Annex VI of the Schengen Borders Code provides that within Member States' territory,[67] or where Union border guards are within 'a shared border crossing point'[68] where a third country national has passed exit control of a third-country, and requests international protection from EU external border guards, "shall be given access to relevant Member State procedures in accordance with Union asylum *acquis*".[69] The Schengen Border Code, while not explicitly dealing with situations where there is no formal cooperation between EU border guards and third country border guards, clearly privileges the rights to claim international protection. **The Draft Amendments fail to meet these requirements of the Schengen Border Code and Cooperation and should not be adopted.**

43. The importance of access to a protection procedure potentially engages obligations under non-derogable Article 2 (right to life) and Article 3 (prohibition of torture) of the ECHR. As noted in *Hirsi v. Italy*[70], potential removal measures must be subject to effective scrutiny. [71] As is clear from *Shadaz v Hungary*, there is a requirement to ensure that Convention rights are effective, which may require a State to "make available genuine and effective access to means of legal entry."[72] This requires contracting states to the ECHR to ensure entry points into the State secure the right to request protection, under Article 2 or 3, in a "genuine and effective manner".[73] The European Court of Human Rights decisions in *D.A. and others v Poland* and *M.K. and others v Poland* are most instructive on the interplay between the Schengen Border Code and human rights obligations under the ECHR. The case of *D.A.* related to pushbacks of persons who sought to make an international protection claim at the Polish-Belarusian border.[74] On all occasions, these persons were turned away from the border crossing, after decisions were issued which stated they were economic migrants.[75] In response to claims by Poland that it had an obligation to protect the external EU border,[76] the European Court of Human Rights noted that the Schengen Borders Code and the EU Procedures Directive[77] categorically protect the right to asylum, consideration of an international protection

[64] Article 5(3) of the Schengen Borders Code.

[65] See Article 6 on entry conditions and Article 14 on refusal of entry of the Schengen Borders Code.

[66] Article 14(1) of the Schengen Borders Code.

[67] Annex VI, Rule 1.1.4.2 (a) of the Schengen Border Code.

[68] Defined by Article 2.9 of the Schengen Borders Code as "any border crossing point situated either on the territory of a Member State or on the territory of a third country, at which Member State border guards and third-country border guards carry out exit and entry checks one after another in accordance with their national law and pursuant to a bilateral agreement."

[69] Annex VI, Rule 1.1.4.3(a) of the Schengen Border Code.

[70] *Hirsi Jamaa and Others v Italy* [GC], Application No. 27765/09, 23 February, 2012

[71] Application no. 27765/09, *Hirsi Jamma and others v Italy*, judgment of the European Court of Human Rights, 23 February 2012, para 204 [*Hirsi*].

[72] Application no. 12625/17, *Shadaz v Hungary*, judgment of the European Court of Human Rights (First Section), 08 July 2021, para 62.

[73] *Shadaz v Hungary*, para 62. See also, Applications nos. 8675/15 and 8697/15, *N.D. and N.T. v Spain*, judgment of the European Court of Human Rights (Grand Chamber), para 210.

[74] *D.A. and others v Poland*, para 1.

[75] *D.A. and others v Poland*, para 8.

[76] *D.A. and others v Poland*, para 49.

[77] 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 (Asylum Procedures Directive)

claim for persons who lodge it with border guards of an EU member state, and respect for the principle of *non-refoulement*.[78] In *M.K*, the European Court of Human Rights held that despite any legal protections that purportedly exist in Polish law, in practice the border guards are:[79]

"…holding very brief interviews, during which the foreigners' statements concerning the justification for their seeking international protection were disregarded; emphasis being placed on the arguments that allowed them to be categorised as economic migrants; and misrepresenting the statements made by the foreigners in very brief official notes, which constituted the sole basis for issuing refusal-of-entry decisions and returning them to Belarus, even in the event that the foreigners in question had made it clear that they wished to apply for international protection in Poland."

44. The Common European Asylum System (CEAS) provides the clearest indication of legal obligations upon EU Member States regarding information on and access to asylum procedures at borders and in transit zones.[80] Focusing strictly on requests for protection at the border, once a person indicates their wish to make an application for international protection, a third country national acquires all rights under the EU Procedures Directive, as well as under other instruments of the EU asylum *acquis*.[81]

45. While strongly connected with the principle of *non-refoulement*, expulsion is the subject of a separate article of the UN Refugee Convention (Articles 32 and 33) and prohibits expulsion of those refugees already on the territory of a State, as explained above. It is in violation of international law and the absolute principle of *non-refoulement* to expel a person (as proposed by provision 2a and 2b of the Ministerial Regulation) based on a written protocol which merely documents the illegal crossing of the person onto the territory of Poland. While the Regulation allows for an appeal of the protocol documenting the illegal border crossing to a higher administrative authority (Head of Border guard), there is no further redress available while the consequences for the migrant are dire. A complaint against the said protocol does not amount to an asylum claim and neither suspends expulsion. It is merely the questioning of whether the border has or has not been legally crossed. **These provisions are strongly recommended to be removed from the Ministerial Regulation as they not only allow forced expulsion but may also lead to collective expulsion. Last but not least, the proposed Draft Amendments and the Regulation result in a violation of the right to an effective remedy for any person seeking international protection in Poland**.

3.3. Access to Asylum Status Determination Procedures

46. The EU Procedures Directive governs the examination of a claim for international protection at the border or in transit zones.[82] There is an obligation to inform a person

[78] *D.A. and others v Poland*, para 65.

[79] *M.K. and others v Poland*, para 208.

[80] See Recital 28, Article 6 and Article 8(1) PDr. See also, Article 3 of Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person OJ L 180, 29.6.2013, p. 31–59.

[81] This interpretation is confirmed by *Ministerio Fiscal v VL*, Judgment of the CJEU (Fourth Chamber) of 25 June 2020, paras 91-92.

[82] Confirmed in Case C-808/18, *European Commission v Hungary*, Judgment of the CJEU (Grand Chamber) of 17 December 2020, para 88.

presenting at the border with information on how to make and lodge[83] an application for international protection. The making of an international protection claim does not entail "any administrative formalities".[84] All persons who have expressed a wish to claim international protection benefit from rights under the EU Procedure Directive and other EU asylum directives.[85] Member States must register this claim as soon as possible.[86] Member States, in strictly defined circumstances, may provide admissibility or substantive status determination procedures for a protection claim at the border or in a transit zone.[87] An application for asylum may be inadmissible,[88] where in a third country, the applicant is recognised as a refugee and can avail of refugee protection in that country *or* enjoys sufficient protection including benefit from *non-refoulement* and they will be readmitted to the third country.[89] In such circumstances where a decision is made that an application is inadmissible, an applicant is entitled to "...a full *ex nunc* examination of both facts and points of law, including, where applicable, an examination of the international protection need…"[90]

47. If a decision cannot be taken within four weeks, the applicant "shall be granted entry to the territory of the Member State in order for his or her application to be processed in accordance with" the EU Procedures Directive.[91] In situations involving large numbers of persons attempting to lodge applications, the border procedure can be applied where the third country nationals are accommodated in proximity to the border or transit zone.[92] The right to a full *ex nunc* examination of both facts and points of law by a court or tribunal, must be respected.[93] If such a right to challenge the border procedure is undertaken, then it is for the court or tribunal to determine whether the applicant may remain on the territory of the Member State.[94]

48. Furthermore, as mentioned in paras. 30 and 39 above, according to the European Court of Human Rights' case law, states should allow for independent scrutiny of the claim when there is a real risk of treatment contrary to Article 3. Such independent review should be allowed even if a person actions warrant expulsion.[95] Furthermore, this implies an effective judicial appeal having an automatic suspensory effect (of *refoulment*).[96] The Draft Amendments bar the possibility to seek such protection, as Article 1 (3) states that an "*Order issued upon crossing the border in violation of the law"* shall be issued after the irregular border crossing and this order shall oblige the foreigner to leave Polish territory and shall be prohibited from returning to Poland and the Schengen Area for a

[83] Recital 26, Recital 28, Article 8(1) PDr.

[84] *Ministerio Fiscal v VL*, para 93 and *European Commission v Hungary*, para 97.

[85] Article 3(1) and Article 7 PDr, confirmed in *Ministerio Fiscal v VL*, paras 91-92 and *European Commission v Hungary*, para. 96.

[86] Recital 27, and for precise time-limits see, Article 6(1) PDr.

[87] Recital 38, Article 31(8), Article 31(9) and Article 43 PDr.

[88] Article 33(2)(b) PDr.

[89] Recital 44, Article 35 PDr.

[90] Article 46(1)(ii) PDr.

[91] Article 43 (2) PDr.

[92] Article 43(3) PDr.

[93] Article 46(1)(ii) PDr.

[94] Article 46(6) PDr. For a fuller analysis of Article 46(6) PDr, see e.g. *European Commission v Hungary*, paras 267-302 and 303-314.

[95] European Court of Human Rights, *Chahal v. The United Kingdom* (application No. 22414/93), 15 November 1996, paras. 151

[96] Case C-36/20 PPU, *Ministerio Fiscal v VL*, Judgment of the Court (Fourth Chamber) of 25 June 2020, para 97 and C-175/17, *X v Belastingdienst/Toeslagen*, Judgment of the Court (Fourth Chamber) of 26 September 2018, para. 33.

period stipulated in the order. There is technically a possibility to appeal the Order in the same article, but this is rendered moot as the appeal does not have a suspending effect on the Order and thus increasing the risk for irreparable harm. Consequently, **the Draft Amendments should be substantially revised or not adopted as they practically permit the lack of an appraisal of an asylum claim and provide no effective remedy in form of an independent review and examination of the case of the person(s) seeking the international protection. As per the** European Court of Human Rights' and EU Court's case law**, where there is no suspensive effect pending an appeal, as in the case of the proposed amendments, this is not considered an effective remedy,[97] and should therefore be rejected.**

49. There are ten legal grounds on which the admissibility or substantive examination at the border or transit zone is permitted under Article 31(8) EU Procedures Directive.[98] These include: (i) where facts are presented raising issues not relevant to an international protection claim,[99] including presenting inconsistent or clearly false information;[100] (ii) the applicant is from a safe country of origin;[101] (iii) evidence of presenting false documentation,[102] or the applicant has destroyed identity/nationality documentation;[103] (iv) the applicant entered the State unlawfully and has not presented themselves to relevant authorities nor made an application for international protection;[104] (v) for serious reasons, the applicant is deemed a danger to national security or public order, or had previously been expelled for such reasons.[105] Decisions taken at the border and transit zones must provide basic rights guarantees to applicants against whom Article 31(8) EU Procedures Directive is being applied. These rights include: information and counselling at border crossing points;[106] decisions are taken individually, objectively and impartially; [107] use of the services of an interpreter;[108] provision of legal information,[109] and on appeal free legal assistance.[110] **As mentioned above, the current Draft Amendments (Article 1) effectively do not allow for an asylum claim, let alone the remaining obligations, and is therefore recommended to be abandoned.**

[97] *M.K. and others v Poland*, paras 145-147; Case C-36/20 PPU, *Ministerio Fiscal v VL*, Judgment of the Court (Fourth Chamber) of 25 June 2020, para 97 and C‑175/17, *X v Belastingdienst/Toeslagen*, Judgment of the Court (Fourth Chamber) of 26 September 2018, para. 33.

[98] All ten conditions are listed in Article 31(8)(a) to (j) PDr.

[99] Article 31(8) (a) PDr.

[100] Article 31(8)(e) PDr.

[101] Article 31(8)(b) PDr.

[102] Article 31(8)(c) PDr.

[103] Article 31(8)(d) PDr.

[104] Article 31(8)(h) PDr.

[105] Article 31(8)(j) PDr.

[106] Article 8 PDr.

[107] Article 10(3)(a) PDr.

[108] Article 12(1)(b) PDr.

[109] Article 19 PDr.

[110] Article 20 PDr.

4. Final Comments

4.1 Impact Assessment and Participatory Approach

50. OSCE/ODIHR welcomes an approach in line with OSCE commitments, which requires legislation to be adopted "as the result of an open process reflecting the will of the people, either directly or through their elected representatives" (Moscow Document of 1991, par 18.1).

51. In order to be effective, consultations on draft legislation and policies need to be inclusive and to provide sufficient time to prepare and submit recommendations on draft legislation; the State should also provide for an adequate and timely feedback mechanism whereby public authorities should acknowledge and respond to contributions.[111] Public consultations should allow ample time for effective and meaningful discussion, as well as for feedback. To guarantee effective participation, consultation mechanisms must allow for input at an early stage and throughout the process,[112] meaning not only when the draft is being prepared by relevant ministries but also when it is discussed before Parliament (e.g., through the organization of public hearings). Public consultations constitute a means of open and democratic governance; they lead to higher transparency and accountability of public institutions, and help ensure that potential controversies are identified before a law is adopted.[113] Discussions held in this manner that allow for an open and inclusive debate will increase all stakeholders' understanding of the various factors involved and enhance confidence in the adopted legislation. Ultimately, this also improves the implementation of laws once adopted.

52. In light of the above, the legislator is therefore encouraged to ensure that any new legislation is subject to further inclusive, extensive and effective consultations, according to the principles stated above, at all stages of the law-making process.

53. Currently, Article 3 of the Amendments provides no *vacation legis*, thus no opportunity for discourse or debate of the topics with stakeholders, society. The Regulatory assessment accompanying the draft largely repeats the justification, with no further evidence or statistics provided and is at the time of drafting this Urgent Opinion.

[END OF TEXT]

[111] See e.g., Recommendations on Enhancing the Participation of Associations in Public Decision-Making Processes (from the participants to the Civil Society Forum organized by the OSCE/ODIHR on the margins of the 2015 Supplementary Human Dimension Meeting on Freedoms of Peaceful Assembly and Association), Vienna 15-16 April 2015, <http://www.osce.org/odihr/183991>.

[112] See e.g., OSCE/ODIHR, Guidelines on the Protection of Human Rights Defenders (2014), Section II, Sub-Section G on the Right to participate in public affairs, <http://www.osce.org/odihr/119633>.

[113] *Ibid*.