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EUROPEAN COMMITTEE ON CRIME PROBLEMS
(CDPC)

COMMITTEE OF EXPERTS
ON THE OPERATION OF EUROPEAN CONVENTIONS
ON CO-OPERATION IN CRIMINAL MATTERS
PC-OC

**The European Commission's amended proposal for a New Directive
on Common Procedures for granting and withdrawing International Protection Status
– relation between Asylum and Extradition in the European Union**

**Discussion paper proposed by Mr Jakub PASTUSZEK
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In the European Union, the common rules regulating asylum proceedings are contained in the Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status¹. The current wording of its Article 7 reads²:

Article 7

Right to remain in the Member State pending the examination of the application

1. Applicants shall be allowed to remain in the Member State, for the sole purpose of the procedure, until the determining authority has made a decision in accordance with the procedures at first instance set out in Chapter III. This right to remain shall not constitute an entitlement to a residence permit.

2. Member States can make an exception only where, in accordance with Articles 32 and 34, a subsequent application will not be further examined or where they will surrender or extradite, as appropriate, a person either to another Member State pursuant to obligations in accordance with a European arrest warrant or otherwise, or to a third country, or to international criminal courts or tribunals.

The above-quoted provision allows Member States of the European Union to extradite persons to third countries even before finalizing concurrent asylum (international protection³) proceedings.

As part of the proposals concerning the creation of the Common European Asylum System (CEAS) in the European Union, the above-quoted Procedural Directive is to be changed ("recast"). The European Commission has submitted a proposal of the new (recast) Procedural Directive on 1 June 2011⁴. In this proposal, the right of the asylum (international protection) seeker to remain in the territory of the Member State of the European Union is significantly strengthened and in light of the average length of asylum proceedings could, in the opinion of the Ministry of Justice of the Czech Republic, lead to impossibility hold the person sought in custody for the duration of extradition (and asylum) proceedings. Moreover, the proposal would require Member States of the European Union to allow an asylum (international protection) seeker, whose extradition is also sought, to remain in their territories not only for the duration of the proceedings on his/her first application, but also for the duration of the proceedings on at least one subsequent application.

Wording of the relevant Articles, as proposed by the European Commission reads:

Article 9

Right to remain in the Member State pending the examination of the application

1. Applicants shall be allowed to remain in the Member State, for the sole purpose of the procedure, until the determining authority has made a decision in accordance with the procedures at first instance set out in Chapter III. This right to remain shall not constitute an entitlement to a residence permit.

2. Member States can make an exception only where a person makes a subsequent application referred to in Article 41 or where they will surrender or extradite, as appropriate, a person either to another Member State pursuant to obligations in accordance with a European arrest warrant or otherwise, or to a third country, with the exception of the country of origin of the applicant concerned, or to international criminal courts or tribunals.

3. A Member State may extradite an applicant to a third country pursuant to paragraph 2 only where the competent authorities are satisfied that an extradition decision will not result in direct or indirect *refoulement* in violation of international obligations of the Member State.

¹) so-called "Procedural Directive"

²) emphasis added

³) i.e. including subsidiary protection

⁴) document COM(2011) 319 final

Article 41

Specific rules following the rejection or inadmissibility of a subsequent application

Where a person makes a new application for international protection in the same Member State after a final decision to consider an application inadmissible pursuant to Article 40(5) or after a final decision to reject a previous subsequent application as unfounded, Member States may do any of the following:

- (a) make an exception to the right to remain in the territory, provided the determining authority is satisfied that a return decision will not lead to direct or indirect refoulement in violation of international and Union obligations of that Member State,
- (b) provide that the examination procedure be accelerated in accordance with Article 31(6)(f); in such case, Member States may also derogate from the time limits normally applicable in accelerated procedures, in accordance with national legislation,
- (c) derogate from the time limits normally applicable to admissibility procedures provided for in Articles 33 and 34, in accordance with national legislation.

Article 46

The right to an effective remedy

5. Without prejudice to paragraph 6, Member States shall allow applicants to remain in the territory until the time limit within which to exercise their right to an effective remedy has expired or, when this right has been exercised within the time limit, pending the outcome of the remedy.

6. In the case of a decision to consider an application unfounded where any of the circumstances listed in Article 31(6)(a) to (g) apply or of a decision to consider an application inadmissible pursuant to Article 33(2)(a) or (d), and where, in such cases, the right to remain in the Member State pending the outcome of the remedy is not foreseen under national legislation, a court or tribunal shall have the power to rule whether or not the applicant may remain on the territory of the Member State, either upon request of the concerned applicant or acting on its own motion.

This paragraph shall not apply to procedures referred to in Article 43.

7. Member States shall allow the applicant to remain in the territory pending the outcome of the procedure to rule whether or not the applicant may remain on the territory, laid down in paragraph 6.

The Czech Republic would like to invite delegations represented in the PC-OC, both from the Member States of the European Union and other States, to share their views on the European Commission's proposal and on the possible effects of the proposed provision (if adopted) on the ability to follow the obligations under the European Convention on Extradition.