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The Doctrine of Equivalent Protection - Accessory Conventional Standard for Failure to comply with the European Arrest Warrant

This article reviews the doctrine of equivalent protection, process of its origin and development, sphere of effect and extradition quasi-effects of the spread over the European system. The doctrine of Equal Protection regardless of granting privileges to the European Union and its member states in the European Convention System, it is also conventional mechanism for non-compliance with the European arrest warrant. This, as an instrument enables extradition quasi-European Court of Human Rights shall consider a case in concreto for violation of the European Convention by fulfilling the obligations under the European system, on the one hand and shall impose a responsibility on the Member State of the Union, and the national court shall not enforce the European arrest warrant in accordance with the Convention's standards, on the other hand. Authorial test of non-compliance with the European arrest warrant is proposed in the article based under the doctrine of Equal protection.

Key words: Extradition, the Doctrine of Equivalent Protection, European Union, European arrest warrant.

1. Introduction

The modern doctrine of equivalent protection is a concept developed by the European Court of Human Rights in relation to EU law aimed at establishing a constructive relationship between the European Court of Justice and the European Court of Human Rights by granting immunity to EU law.¹ *O'Meara* considers the doctrine as a privilege of the European Union within the framework of the European Convention system.² *Hert and Korenica* review the doctrine as a compromise of the European Court of Human Rights, which was achieved at the expense of reducing the effectiveness of the protection of fundamental rights however for the purpose of maintaining own reputation.³ They deem it as a rational solution to the problems between the Union, its member states and the legal systems of the Council of Europe.⁴ In their view, doctrine is not an instrument of elimination of the confrontation between these two international courts.⁵ According to *Chronowski*, the doctrine of equivalent protection the relationship between the European Court of Justice and the European Court of Human Rights has

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¹ *Pirtskhalashvili A., Mirianashvili, G.*, Human Rights Policy in European Union Law, Tbilisi, 2018, 106 (in Georgian).

² *O' Meara N.*, More Secure Europe of Rights - The European Court of Human Rights, the Court of Justice of the European Union and EU Accession to the ECHR, German Legal Journal, Vol. 12, 2011, 1817.

³ *Hert P., Korenica F.*, Doctrine of Equivalent Protection: Its Life and Legitimacy before and after the European Union's Accession to the European Convention on Human Rights, German Legal Journal, Vol. 13, 2012, 875.

⁴ *Ibid*, 894.

⁵ *Ibid*.

transferred to renewed stage of cooperation,⁶ that has been expressed by granting confidence in a broad and not absolute mandate in the field of protection of fundamental rights. However, abstract and unclear content of the doctrine do not always allow defining the scope of such a mandate which has positive impact on the autonomy of the EU legal system, however negatively affects the effectiveness of the European Convention.⁷ According to *Christou*, the doctrine of equivalent protection promotes the passive, indifferent attitude of the European Court of Human Rights in point of the Union law.⁸

An idea is developed in the article that the doctrine of equivalent protection regardless of giving privileges to the EU and its member states in the system of the European convention, is also conventional mechanism for non-compliance with the European Order. This, as an instrument enables extradition quasi-European Court of Human Rights shall consider a case *in concreto* for violation of the European Convention by fulfilling the obligations under the European system, on the one hand and shall impose a responsibility on the Member State of the Union, and the national court shall not enforce the European arrest warrant in accordance with the Convention's standards, on the other hand. The below given is a test of non-compliance with the European Arrest Warrant under the doctrine of equivalent protection.

To represent these opinions dynamically, discussion of the origin of the doctrine of equivalent protection is being carried out to establish in a modern way and to introduce the concept of one of its key elements- “manifestly deficient” protection of fundamental right and to formulate extradition quasi of this concept - conventional standard for non-compliance with the European Arrest Warrant.

2. Origin of the Doctrine of Equivalent Protection

The doctrine of equivalent protection was developed by the Federal Constitutional Court for the *Solange II case* - in 1986.⁹ According to the Constitutional Court, the European Court of Justice generally ensures effective protection of human rights; correspondingly acts of secondary EU law should be considered substantially similar system to the human rights protection model as provided by the Basic Law for the Federal Republic of Germany.¹⁰ Therefore, the court refused to exercise of jurisdiction. In addition, the Constitutional Court stated that in the future it would not consider submissions, lawsuits of European Union secondary law sources on compliance with human rights standards set by the Basic Law for the Federal Republic of Germany and would recognize them inadmissible.¹¹ Thus, the Federal Constitutional Court has showed its favour with regard to the integration law and has acknowledged the

⁶ *Chronowski N.*, Integration of European Human Rights Standards - Accession of EU to the ECHR, Law of Ukraine Legal Journal, 2013, 269.

⁷ *Pirtskhalashvili, A., Mirianashvili, G.*, Human Rights Policy in European Union Law, Tbilisi, 2018, 106-107 (in Georgian).

⁸ *Christou T. A., Weis K.*, The European Arrest Warrant and Fundamental Rights: An Opportunity for Clarity, New Journal of European Criminal Law, 2010, 41.

⁹ See: Judgement by the Federal Constitutional Court on the case: BVerfGE 73, 339 2 BvR 197/83 Solange II-decision, №197/83, 1986.

¹⁰ *Ibid*, II, paragraph 3.

¹¹ *Ibid*, “f” subparagraph of first paragraph.

supremacy of the acts of secondary EU law in relation to the supreme law of Germany on the one hand and its sphere of effect on the other hand. However, the court has retained the sovereign right to discuss this issue. In the event if they considered that the model of human rights protection is not the system substantially similar to the Basic Law for the Federal Republic of Germany at the association level, the court would give preference to the basic law.¹²

The concept developed by the Federal Constitutional Court was shared by the European Commission on Human Rights on the *case M. & Co*. It pointed out that “the transfer of competencies by states to international organizations does not mean violation of the European Convention, if the human rights protection within such an organization is equivalent to that of the European Convention”.¹³ According to estimates of *Hert* and *Korenica*, by this approach the European Commission on Human Rights has granted the immunity to the Union law with regards to the European Commission of Human Rights and Jurisdiction of the Court.¹⁴ In this decision, discussion about the doctrine of equivalent protection has been presented in two directions. The commission considers that at the European community level convention rights were effectively protected in institutional and statutory terms. With regards to the statutory framework, the European Commission does not imply the existence of normative catalog of fundamental rights within the European communities, however attaches prime importance to the declaration adopted by Commission, Council and European Parliament on April 5, 1977,¹⁵ through which they set out the aim of protecting the rights guaranteed by the constitutions of the Member States and the European Convention of Human Rights at the level of integration.¹⁶ The institutional instrument of human rights included the European Court of Justice, which provided oversight over the implementation of human rights protection within the Union.¹⁷ The European Court of Human Rights has made a decision based on the doctrine of equivalent protection on the cases of *Waite & Kennedy*¹⁸ and *Beer & Regan*,¹⁹ however, didn't change the approach towards its content.²⁰ The European Court of Human Rights has developed a modern concept of the doctrine of equivalent protection on the *case of Bosporus* discussed below.

¹² *Hert P., Korenica F.*, Doctrine of Equivalent Protection: Its Life and Legitimacy before and after the European Union's Accession to the European Convention on Human Rights, German Legal Journal, Vol. 13, 2012, 879.

¹³ See: Judgement by the European Commission of Human Rights on 09 February 1990 on the case: *M. & Co. v. Federal Republic of Germany*, №13258/87, 1990.

¹⁴ *Hert P., Korenica F.*, Doctrine of Equivalent Protection: Its Life and Legitimacy before and after the European Union's Accession to the European Convention on Human Rights, German Legal Journal, Vol. 13, 2012, 880.

¹⁵ See web-page: <http://www.europarl.europa.eu/charter/docs/pdf/jointdecl_04_77_en_en.pdf> [11.02.2020].

¹⁶ See: Judgement by the European Court of Human Rights on 09 February 1990 on the case: *M. & Co. v. Federal Republic of Germany*, №13258/87, 1990.

¹⁷ *Ibid.*

¹⁸ Judgement by the European Court of Human Rights on 18 February 1999 on the case: *Waite & Kennedy v. Germany*, №26083/94, 1999.

¹⁹ See: Judgement by the European Court of Human Rights on 18 February 1999 on the case: *Beer & Regan v. Germany*, №28934/95, 1999.

²⁰ *Pirtskhalashvili A., Mirianashvili G.*, Human Rights Policy in European Union Law, Tbilisi, 2018, 108 (in Georgian).

According to *Hert* and *Korenica*, by integrating the doctrine of equivalent protection into the system of the European Convention the European Court of Human Rights has conceded jurisdiction in favor of the Union law,²¹ however, they disagree with the considerations that the doctrine of equivalent protection has been introduced into the Convention system in view of the decision of the European Court of Justice on the case of *Hauer*.²² In this case, the European Court of Justice has expressly pointed out that the alleged violation of human rights by the institutions of the European Communities should be reviewed only in accordance with the law of the European Union,²³ and it has attempted to exclude the jurisdiction of the European Court of Human Rights in this regard.

3. The Principle of the Doctrine of Equivalent Protection under the *Case of Bosporus*

The modern doctrine of equivalent protection has been established *one the case of Bosporus*. This case is important in terms of the transformation of the doctrine. Before discussing this case, the European Court of Human Rights had considered the Union law equivalent to the Convention in the field of human rights protection, however recognized the complaint admissible for the first time.²⁴ In this case, an applicant was a Turkish charter airline leased two Boeing aircrafts from Yugoslav Airlines.²⁵ The UN has imposed a number of sanctions on Yugoslavia because of the horrific events and mass human rights violation in the former Republic of Yugoslav, implementation of which was carried out by the European Union.²⁶ On 17 April 1993, by a UN Security Council resolution²⁷ all states were required to impound all aircrafts in which a majority or controlling interest is held by a person or undertaking in or operating from the Federal Republic of Yugoslavia. That resolution was implemented by regulations of the communities within the framework of integration,²⁸ on the basis of which Ireland impounded an aircraft to the applicant in Dublin.²⁹ Turkish airline lodged an appeal twice in the Supreme Court of Ireland

²¹ *Hert P., Korenica F.*, Doctrine of Equivalent Protection: Its Life and Legitimacy before and after the European Union's Accession to the European Convention on Human Rights, German Legal Journal, Vol. 13, 2012, 880.

²² *Ibid.*

²³ Judgement by the European Court of Human Rights on 13 December 1979 on the case: *Hauer v. Land Rheinland-Pfalz*, Case №44/79, 1963, paragraph 14.

²⁴ *Pirtskhalashvili, A., Mirianashvili, G.*, Human Rights Policy in European Union Law, Tbilisi, 2018, 109 (in Georgian).

²⁵ Judgement by the European Court of Human Rights on 30 June 2005 on the case: *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland*, №45036/98, 2005, paragraph 14.

²⁶ *Pirtskhalashvili, A., Mirianashvili, G.*, Human Rights Policy in European Union Law, Tbilisi, 2018, 109 (in Georgian).

²⁷ See: UN Security Council Resolution 820, 1993.

²⁸ See: European Community Regulations: 1432/92, 3534/92, 990/93, 2472/94, 2815/95, 462/96, 2382/96.

²⁹ Judgment by the European Court of Human Rights on 30 June 2005 on the case: *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland*, №45036/98, 2005, paragraph 19.

against the judgement. In addition, the case was referred to the European Court of Justice for a preliminary ruling which established that impounding of an aircraft was under that regulation.³⁰

The applicant in the complaint lodged with the European Commission on Human Rights considered that by implementing regulation of European Community Ireland has violated the first article of the European Convention and right to property guaranteed by Article 1 of Protocol No. 1.³¹ The Court had to consider the issue whether the acts of secondary EU law is in conformity with the European Convention. Although the appeal was declared admissible, the court considered the case abstractively.³² It has pointed out once again that transfer of sovereign competences to an international organization by a Contracting Party in certain areas does not contravene the Convention, however, the absence of the competence of the contracting entity in such areas does not relieve it from its obligations under the Convention.³³ In these cases, exemption from the obligation is directly contrary to the purpose and object of the Convention.³⁴ In addition, in the Court's view in the European Communities there is an equivalent model of the system provided by Convention for the Protection of Human Rights.³⁵ By the concept of “equivalent model” the Court means “comparable” of human rights protection and not identical system.³⁶ In its view, for the purpose of identical model formation indetical to the regime established by the European Convention on Human Rights, any requirement to the European communities could counter to the interest of international cooperation pursued.³⁷ The court directly stated that impounding of aircrafts from Turkish company was related to the fulfillment of the obligations arising from membership in the community and Ireland did not have discretionary powers in the process of fulfilling its obligations on the one hand and the European community protects human rights equivalently the Convention on the other hand, presumption arises that Ireland did not depart from the requirements of the Convention.³⁸

According to the European Court, in each case it would assess the conformity of institutional and legal system of human rights protection of the community with the model of the European Convention which is fundamentally different from the general approach of the Federal Constitutional Court.³⁹

Resolution on the *case of Bosphorus* is interesting from that point of view that the European Court had found the complaint admissible presented with regards to the acts of secondary EU law and indi-

³⁰ Judgment by the Court of Justice of the European Union 30 July 1996 on the case: Bosphorus Hava Yollari Turizm ve Ticaret AS and Minister for Transport, Energy and Communications, Ireland and the Attorney General, Case №84/95, 1996, paragraph 27.

³¹ Judgment by the European Court of Human Rights on 30 June 2005 on the case: Bosphorus Hava Yollari Turizm ve Ticaret Anonim Şirketi v. Ireland, №45036/98, 2005, paragraph 107.

³² Pirtskhalashvili, A., Mirianashvili, G., Human Rights Policy in European Union Law, Tbilisi, 2018, 110 (in Georgian).

³³ Judgment by the European Court of Human Rights on on 30 June 2005 on the case: Bosphorus Hava Yollari Turizm ve Ticaret Anonim Şirketi v. Ireland, №45036/98, 2005, paragraph 154.

³⁴ Ibid.

³⁵ Ibid, paragraph 155.

³⁶ Ibid.

³⁷ Ibid.

³⁸ Ibid, paragraph 156.

³⁹ See: *Flaherty J. P., Lally-Green E.*, Fundamental Rights in the European Union, Duquesne Law Review, Vol. 36, 1998, 313.

rectly discussed its compliance with the European Convention.⁴⁰ In addition, sphere of effect of the doctrine of equivalent protection has been specified, namely not only the Union has immunity related the Convention, but also a Member State of the Union in the event where it has no discretion in the process of implementation of the secondary legislation of the Union.⁴¹ The European Court has spread the doctrine only over the acts of secondary EU law and those spheres referred to in the first column of so-called “the structure of the temple”, e.i supranational dimension.⁴²

The European court has discussed the compliance with the primary EU law convention on the of Matthews⁴³ and found violation of the European Convention. In this case, the applicant was a citizen of Gibraltar who didn't have an active right to vote in the European Parliament under the Treaty on European Union on membership into the European Community of the United Kingdom. She lodged complaint against the treaty on membership into the European Community of the United Kingdom taken alone or in conjunction with Article 14 of the Convention and Article 3 of the First Additional Protocol to the European Convention. The applicant was of the view that because the European Parliament was legislature for the purposes of active suffrage under the European Convention and Founding Treaties of European Integration, acts of secondary EU law was extended to the territory of Gibraltar, absolute prohibition of vote in the European Parliament elections for the citizen of Gibraltar violated the suffrage under the First Additional Protocol to the European Convention and depending on the place of residence put her unequal position with respect to the citizen of Gibraltar who lived in the United Kingdom.⁴⁴ The European Court of Human Rights has shared these arguments. It did not spread the doctrine over the primary legislation of the Union because the Member States were freely entered into Founding Treaties of the Union on the one hand⁴⁵ and the European Court of Justice does not have competence to abolish Founding Treaties and acts with identical legal norms, on the other hand.⁴⁶ The court reiterated that the transfer of the part of their sovereignty to international organisations, do not exempt them from their rights under the Convention.⁴⁷ It should be noted that this resolution of the European Court of Human Rights has not been enforced for 7 years.

Based on the cases discussed above, it should be mentioned that the legal system of the Union is considered equivalent to the Convention, because there are effective legal and institutional mechanisms

⁴⁰ *Pirtskhalashvili A., Mirianashvili G.*, Human Rights Policy in European Union Law, Tbilisi, 2018, 111 (in Georgian).

⁴¹ *Ibid.*

⁴² *Hert P., Korenica F.*, Doctrine of Equivalent Protection: Its Life and Legitimacy before and after the European Union's Accession to the European Convention on Human Rights, German Legal Journal, Vol. 13, 2012, 883.

⁴³ Judgment by the European Court of Human Rights on 18 February June 1999 on the case: *Matthews v. The United Kingdom*, №24833/94, 1999, paragraph 33, see also: Judgment by The Court of Justice of the European Union on 12 September 2006 on the case: *Kingdom of Spain v. United Kingdom of Great Britain and Northern Ireland*, Case №145/04, 2006.

⁴⁴ See: Judgment by the European Court of Human Rights on 18 February 1999 on the case: *Matthews v. The United Kingdom*, №24833/94, 1999, paragraphs 27 and 46.

⁴⁵ *Ibid.*, paragraph 33.

⁴⁶ *Ibid.*

⁴⁷ *Ibid.*, paragraph 32.

for human rights protection within the Union ensuring development and protection of the standards similar to the Convention on Human Rights.⁴⁸ The court considers common constitutional traditions of the Member States of the Union and the laws of the Union in a legal instrument and the Court of Justice of the Union as an institutional mechanism, which reviews the cases of alleged human rights violation including within the framework of Preliminary decision procedures.⁴⁹

From the theoretical point of view, the European Court of Human Rights is entitled to declare on particular case that there is no model under the European Convention on Human Rights in separate spheres of Union law or to establish violation of the Convention in the process of fulfilling the obligation arising from the membership of the Union, however, the practical mechanism for such a resolution by the European Court is not clear.⁵⁰ According to the court, the doctrine of equivalent protection will be rebutted, if it considers that the protection of rights under Convention will be “manifestly deficient” within the union.⁵¹ In this case, the interest of international cooperation would be outweighed by the Convention's role and objectives as a “constitutional instrument of European public order” in the field of human rights.⁵²

Consideration of the European system of fundamental rights protection as an equivalent model to the European Convention does not conform to the practice of the European Court of Human Rights over the years. In the *Bosphorus* case the concept “equivalent” implies “relatively similar”, not identical, system of human rights protection. If the Union law does not protect human rights identically the Convention, It should set higher standards than the European Convention. In the opposite case, EU law should be considered incompatible with the Convention, as the European Convention is the minimum level of protection of rights. Despite that the content of the doctrine of equivalent protection differs significantly from the essence of the European Convention and European Court of Human Rights from the case law, the European Court has made a pragmatic decision. It couldn't pointed out that EU regime for the protection of fundamental rights is identical to the Conventional standards because the acts of secondary EU law as well as the prospect of considering compliance with the Convention on the Conduct of Obligations from Membership of the Union would be excluded. Granting absolute immunity to EU law in the field of human rights would violate balance between the Council of Europe and the European Union.

4. The Extradition Quasi of the Doctrine of Equivalent Protection-Spread Across the European System to Reduce the Effect of the Principle of Mutual Trust

The European Court of Human Rights has spread the doctrine of equivalent protection over the extradition quasi-European system, e.i. criminal case in the field of Justice Cooperation. In this case, the applicant impugned his extradition to Italy under a European arrest warrant issued by the Belgian court in

⁴⁸ *Pirtskhalashvili A., Mirianashvili G.*, Human Rights Policy in European Union Law, Tbilisi, 2018, 112 (in Georgian).

⁴⁹ Ibid.

⁵⁰ Ibid, 112-113.

⁵¹ See: Judgment by the European Court of Human Rights on 30 June 2005 on the case: *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland*, №45036/98, 2005, paragraph 156.

⁵² Ibid.

enforcement of the judgment *in absentia*. In 1998, the Brescia District Court found Mr. Pirozzi guilty of drug trafficking and sentenced him to 18 years' imprisonment and a fine of up to 250,000 euros.⁵³ In 2002, the Brescia Court of Appeal reduced the 18-years' imprisonment to three years and ordered him to pay a fine of 80,000 euros.⁵⁴ Pirozzi had been unable to take part in appellate proceedings for medical reasons, however was presented by the lawyer.⁵⁵ Later, 15-years' imprisonment was reduced by one year.⁵⁶ In 2010, the Naples Public Prosecutor's Office issued an European arrest warrant with a view to enforcing the sentence imposed as a result of *in absentia* proceedings and Belgian authorities had surrendered him to the Italian authorities.⁵⁷ Before surrender, Pirozzi declared before the Belgian courts that the law of Italy does not give him an effective and clear opportunity to re-hearing of the case and by execution of European arrest warrant, the Article 6 of the Convention – Right to a fair trial would be violated.⁵⁸

The European Court of Human Rights has also considered the case in the abstract, applied the doctrine of equivalent protection with regards to the right to a fair hearing and found no violation of the Convention. This case is precedent in view of the fact that the European Court of Human Rights has introduced a Convention mechanism for non-fulfillment of the European Arrest Warrant, in which rebutting element of the doctrine of equivalent protection - a "manifestly deficient" standard of protection of fundamental rights has been used.

The European Court used so-called *Soering test* as an instrument for assessing the alleged violation of the right to a fair hearing under Enforcement of European arrest warrant, according to which the article 6 of the European Convention in the process of Deportation or Extradition of a Person is then violated when there is a serious threat to have rough rebutment of the right to a fair trial to another State.⁵⁹ This circumstance indicates that the European Court of Human Rights considers Extradition Quasi-European System variety of extradition. However, the court did not apply this test practically. It didn't discuss the standard of the right to re-hearing of the case in the legal system of Italy. *Pirozzi* case is more important in the context of the introduction of the Conventional instrument for non-compliance with European arrest warrant.

Within the framework of mutual trust of the cooperation in the field of justice, freedom and security the specific expression of which is the European arrest warrant mechanism, the Court itself does not consider incompatible with the European Convention.⁶⁰ However, it deems that any instrument for such a space shall not be contrary to conventional right of extraditable person.⁶¹ According to the European Court, the doctrine of equivalent protection applies even when a Member State's court enforces European arrest warrant by virtue of the principle of mutual trust – e.i. implements Union law without

⁵³ Judgment by the European Court of Human Rights on 17 April 2018 on the case: *Pirozzi v. Belgium*, №21055/11, 2018, paragraph 7.

⁵⁴ *Ibid*, paragraph 8.

⁵⁵ *Ibid*.

⁵⁶ *Ibid*, paragraph 11.

⁵⁷ *Ibid*, paragraph 12.

⁵⁸ *Ibid*, paragraph 21.

⁵⁹ *Ibid*, paragraph 57.

⁶⁰ *Ibid*, paragraph 60.

⁶¹ *Ibid*, paragraph 61.

discretionary power because there is a presumption that fundamental rights are sufficiently protected in the State issuing European arrest warrant.⁶² Absoluteness and permanence of such presumption is unacceptable to the European Court of Human Rights. It therefore offers a mechanism for the national courts which must be applied before making a decision on Enforcement of European Arrest Warrant under the obligations of the principle of mutual trust. According to the European Court of Human Rights, the national court should have a favorable attitude towards the principle of mutual trust, however it should not automatically use the presumption of sufficient protection of fundamental rights in another Member State to the detriment of fundamental rights.⁶³ According to the European Court, based on the mutual trust the national courts may only enforce European arrest warrant when the rights protected under the Convention are not protected “manifestly deficient” in the issuing State.⁶⁴ If the national court finds that there is a substantial and serious violation of fundamental rights in the State issuing European arrest warrant, it will be equal to insufficient protection of the rights under the Convention and it should comply with the standards set by the European Convention.⁶⁵

When executing European arrest warrant the European Court of Human Rights could not have considered the convention test to be used by the national court and to discuss the case only abstractly, *as in the case of the Bosporus*. However it emphasized extradition quasi – necessity of compatibility check with the system of the European Convention at the national level and reduced the sphere of effect of the principle of mutual trust under the European Convention. *Pirozzi’s* case is constructive opposition to the European Court of Human Rights, institutional reaction expressed in the case of Mellon and in response to the positions presented by the European Court of Justice on the accession to the European Convention on Human Rights.

Introduction of Convention mechanism for the non-fulfillment of the European Arrest Warrant was necessary to maintain the function and role of the European Convention. However, because, from now on, there are two conflict approaches of non-compliance with European Arrest Warrant, Conventional and EU instruments are meant, the national courts found themselves in an even more difficult situation with great legal misunderstanding.

As noted above, the European Court of Justice calls upon the national courts that failure to respect the European Arrest Warrant at the request of the principle of mutual trust is admissible only by decision frame in the cases of lack of any grounds directly established or in exceptional cases for the protection of fundamental rights, but the European Court of Justice determines such cases and the instruments of protection of rights.

According to the European Court of Human Rights, the presumption developed under the principle of mutual trust that other member state of the Union protects the fundamental rights under the convention is not of absolute nature, therefore enforcement of European arrest warrant should not be carried out

⁶² Judgment by the European Court of Human Rights on 17 April 2018 on the case: *Pirozzi v. Belgium*, №21055/11, 2018, paragraph 62.

⁶³ *Ibid.*

⁶⁴ *Ibid*, paragraph 63.

⁶⁵ *Ibid*, paragraph 64.

automatically and the degree of protection of fundamental rights needs to be verified in other member states of the Union. It calls upon the national courts to apply the European Convention standard if it appears that the fundamental rights in the State issuing the European arrest warrant are “manifestly deficient” protected and there is no proper mechanism at EU level to restore this right.

It is unambiguous that the national courts considering enforcement of European arrest warrant should rely on two different instruments. If they use convention instrument, the extradition quasi- effectiveness of the European system may be gradually undermined and will resemble the European system of extradition. If the courts, considering the issue of enforcement of European arrest warrants are guided by EU standards, the process of reducing the Conventional standards of fundamental rights protection will be continued.

5. What is Meant by the “Manifestly Deficient” Protection of the Fundamental Rights for the Purposes of the Extradition Quasi-European System?

The case law of the European Court of Human Rights does not explain the concept of “manifestly deficient” protection of the fundamental rights. Abstractiveness of this concept is convenient given that the European Court has the opportunity to customize its content to each case.

Different opinions related to the results of the *Bosphorus case* are expressed in the legal literature. Some scientists doubt the effectiveness of the concept of “manifestly deficient” protection of the fundamental rights, and the other part views it as an effective mechanism for declaring the acts of secondary EU law, or considering an effective mechanism for declaring an action incompatible with the Convention for the fulfillment of its obligations under membership of the Union.

Hoffmeister deems that by developing this concept the European Court of Human Rights has acquired the power of intervention in Union law that will use as the ultimate instrument for exercising own powers.⁶⁶ *Kuhnert* disagree with this view, in his opinion, the resolution made on the Bosphorus case does not indicate that the European Court of Human Rights has a “final word” with regards to EU human rights law and mechanisms.⁶⁷ According to *Hert and Korenica*, the concept of ‘manifestly deficient’ is more superficial, ambiguous instrument for reviewing the Union legal act than a practical mechanism.⁶⁸ In their view, if it is found that Human rights protection is not equivalent to the Convention within the EU and institutional-legal mechanisms of integration are considered “manifestly deficient”, it is unclear whether the Union or the Member State will be liable for breach of the Convention.⁶⁹ It should be mentioned contrary to this position that If the European Court of Human Rights finds violation of the

⁶⁶ *Hoffmeister F.*, Bosphorus Hava Yollari Turizm v. Ireland, App. №45036/98, American Journal of International Law, Vol. 100, 2006, 447.

⁶⁷ *Kuhnert K.*, Bosphorus - Double Standards in European Human Rights Protection?, Utrecht Legal Review, Vol. 2, 2006, 188.

⁶⁸ *Hert P., Korenica F.*, Doctrine of Equivalent Protection: Its Life and Legitimacy before and after the European Union’s Accession to the European Convention on Human Rights, German Legal Journal, Vol. 13, 2012, 886.

⁶⁹ *Ibid*, 886-887.

Convention, Contracting Party to the Convention -Member State of the Union shall be liable only, because the European Court has no personal jurisdiction over the European Union. However, enforcement of the European Court's ruling may encounter a problem. If violation of the European Convention is caused by the action taken by a Member State to implement a directive, regulation or framework decision and it didn't have discretion in this process, only the efforts of the member states will not be enough, because only EU authorities have the power to adopt or amend such acts. Correspondingly, the perspective of the enforcement of the judgment of the European Court of Human Rights will also be depended on the will of the Union authorities.

Judges of the European Court of Human Rights also speak about the ambiguity of the criterion of "manifestly deficient" protection of fundamental rights and, in some respects, their incompatibility with the Convention system. In their judgment on the Bosphorus case, Judges Rozakis, Tulkens, Traja, Botoucharova, Zagrebelsky Botoucharova and Garlicki stated in joint concurring opinion that based on the concept of "manifestly deficient" protection of the fundamental right, the prospect of reviewing the case related to the secondary legislation of EU *in concreto* had been maintained.⁷⁰ Despite its unclear essence, by introducing a criterion of "manifestly deficient" protection of fundamental rights, much lower threshold was established for the purpose of examination of violation of a Convention right contradicting the supervision mechanisms of the European Convention of Human Rights.⁷¹ Since the European Convention sets a minimum level of protection, any equivalence between the Convention and European Union standards of fundamental rights may be expressed in means of protection, not in the effects.⁷²

Although the decision on the Bosphorus case does not include the content of "manifestly deficient" protection of the fundamental right, Judge Ress of the European Court of Human Rights attempted to develop his concept in concurring opinion. Opinions of the Judge deserve to be shared. It is somewhat useful to the national courts when considering the non-compliance with the European Arrest Warrant under the Convention standard.

According to *Judge Ress*, "manifestly deficient" protection of fundamental rights will happen in the event if: 1. The European Court of Justice have limited competence over the acts of secondary EU law; 2. The European Court of Justice restrict access to EU justice mechanisms more than sufficiently by explaining the Union law; 3. Non-use of conventional guarantees or inappropriate interpretation are really apparent by the European Court of Justice;⁷³ or 4. The European Court of Justice deviates from the standards of application or interpretation of the European Convention or its protocols set by the case law of the European Court of Human Rights.⁷⁴ He validly disagree with the opinions of other judges that the equivalence between Convention and EU standards of fundamental rights protection should only be expressed in means of protection. It is crucial for Ress that the result of the protection of convention rights

⁷⁰ Joint Concurring Opinion of Judges Rozakis, Tulkens, Traja, Botoucharova, Zagrebelsky Botoucharova and Garlicki, paragraph 4.

⁷¹ Ibid.

⁷² Ibid.

⁷³ Concurring Opinion of Judge Ress, paragraph 3.

⁷⁴ Ibid.

in the EU legal order should be equivalent to that of the Convention system.⁷⁵ At the procedural level of the European Convention e.i. institutional protection to be measure of equivalence is not enough. The European Convention exists as a constitutional instrument of European public order because its rights are real, practicable and not illusory.

Based on the opinion of Rens and joint analysis of the Conventional Mechanism for failure to comply with the European Arrest Warrant in the case of Pirozzi it is possible to form such a judicial instrument of the concept of “manifestly deficient” protection of fundamental rights which will be used by the national court considering the enforcement of European arrest warrant. Since the European Convention on Human Rights sets a minimum level of the protection of fundamental rights, the national court considering the enforcement of European arrest warrant:

- Shall evaluate the status of fundamental rights protection in the Member State issuing European arrest warrant *in abstractio* and shall rely on the findings and conclusions of authoritative organizations, including the case law of the European Court of Human Rights;
- Shall evaluate *in concreto* the quality of protection of the Convention rights in the Member State issuing the European arrest warrant, alleged breach of which extraditable person appeals. At this stage, the ultimate practice of the European Court of Human Rights shall be taken into account with regard to the relevant article of the Convention with respect to the Member State of the Union;
- Shall evaluate extradition quasi- European system, whether the national law defines the standard lower than the European Convention;
- Shall analyze extradition quasi –the practice of the European Court of justice with respect to the European system in the context of (for example: the right to dignity or the right to a fair hearing) unusability or misinterpretation of Convention guarantees (*The first criterion of “manifestly deficient” protection of the fundamental rights*);
- Shall judge whether the European Court of Justice in the context of extradition quasi- the European system deviated from the standards of the use or interpretation of the Convention right set by the case law of the European Court of Human Rights (the second criterion of “*manifestly deficient” protection of fundamental rights*).

If the national court, after completion of the above stages, is convinced that extradition is in breach of the European Convention of Human Rights, shall make a decision on non-compliance with the European arrest warrant. This mechanism is applicable with regards to all Convention rights that protects a person from extradition against the convention. In its turn, this instrument is also useful for the European Court of Human Rights. By enforcing the European Arrest Warrant, the Court may evaluate, in the event of violation of the European Convention, to what extent and how the this mechanism was used by the national court.

⁷⁵ Ibid.

6. Conclusion

The doctrine of equivalent protection is the concept developed by the European Court of Human Rights related to secondary EU law, which facilitates the coexistence of EU law and European Convention, informal constructive cooperation between the European Court of Justice and the European Court of Human Rights by granting immunity to EU law.

The doctrine of equivalent protection considers the EU model of protection of fundamental rights as equivalent, relatively similar system to the European Convention from an institutional-legal point of view. It applies to the secondary legal sources of the Union and the actions of the Member States of the Union when they don't have discretion in the implementation of secondary legislation of the Union.⁷⁶ The doctrine is not used in assessing compliance of founding or equivalent acts of the European Union with the European Convention.

The European Court of Human Rights rejects the doctrine of equivalent protection if it considers that the protection of Convention rights under the Union would be "manifestly deficient". In this case, roles and objectives of the European Convention will outweigh the interest of international cooperation.

The European Court of Human Rights the doctrine of equivalent protection spread over the extradition quasi-european system and created convention mechanism for non-compliance with the European arrest warrant in the framework of mutual trust, which can be used in reviewing of complaints concerning the European arrest warrant and by the national courts in the enforcement of the European arrest warrant. If based on this mechanism the national court finds that there is a substantial and serious violation of the fundamental rights in the State issuing the European Arrest Order, it will be deemed to be manifestly deficient protection of the rights under the convention and the national court shall be obligated to comply with the standards set by the European Convention and to refuse to comply with the European arrest warrant.

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