КРИМІНАЛЬНИЙ ПРОЦЕС ТА КРИМІНАЛІСТИКА; СУДОВА ЕКСПЕРТИЗА; ОПЕРАТИВНО-РОЗШУКОВА ДІЯЛЬНІСТЬ

UDC 343.13
DOI https://doi.org/10.32782/TNU-2707-0581/2024.1/28

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REGARDING THE ISSUE OF IMPLEMENTATION OF EUROPEAN STANDARDS OF HUMAN RIGHTS AND FREEDOMS IN LAW ENFORCEMENT ACTIVITIES

The presented article is dedicated to the research of particular European standards in the field of protection of fundamental human rights and freedoms by judicial and law enforcement agencies of states, primarily, members of the European Union. A wide range of necessary guarantees is provided for in thematic multilateral agreements, in particular, in the Convention for the Protection of Human Rights and Fundamental Freedoms of 1950, and in other normative acts of an international nature. In addition, the Framework Decision of the European Council "On the European arrest warrant and procedures for the transfer of offenders between the member states" (2002/584/JHA) dated June 13, 2002 has its own unique human rights functionality, which, for example, does not allow the transfer of a person between the member states of the European Union in cases where he threatens a significant violation of fundamental rights.

It was established that the facts of prohibited forms of treatment are systematically established in the countries of the association, this is evidenced, among other things, by the conclusions of the European Court of Human Rights regarding the correctness of the implementation of the requirements of various articles of the European Convention. In this regard, some mandatory and optional grounds for non-execution of a European arrest warrant are considered.

In the work, extraordinary attention is focused on content of the structural components of the standardized principle "ne/non bis in idem" through the prism of the provisions of Art. 54 Convention from 19 June 1990 Applying the Schengen Agreement of 14 June 1985 Between the Governments of the States of the Benelux Economic Union, The Federal Republic of Germany and The French Republic, On The Gradual Abolition of Checks At Their Common Borders; Art. 50 Charter of Fundamental Rights of the European Union; Art. 4 of Protocol No. 7 to the Convention on the Protection of Human Rights and Fundamental Freedoms, as well as relevant case law of the Court of the European Union and the European Court of Human Rights. The specified sources provide a thorough explanation of such terminological constructions as "the same act/offence", "final decision"; established criteria, which are the basic guidelines for answering the question of whether there was a duplication of proceedings, etc.

Key words: *European arrest warrant, European standards, "non bis in idem" principle, law enforcement activity, Court of the European Union, European Court of Human Rights.*

Statement of the problem. The introduction into the legal practice of the institution of the European arrest warrant (hereinafter referred to as the EAW), as a simplified mechanism for the transfer of accused and convicted persons, could not fail to touch such an important issue as ensuring human rights [2].

In this regard, Susie Alegre emphasizes that it is not by chance that the conclusion of the European Council of September 21, 2001 stated that the replacement of the existing system of extradition with an arrest warrant should be carried out in parallel with the provision of guarantees of basic rights

and freedoms of individuals. By the way, it is the possibility of violation of human rights due to the application of the procedure of the European warrant caused the greatest criticism of this innovation [1].

Analysis of recent research and publications. The study of the peculiarities of the implementation of both international and European standards for the protection of individual rights and freedoms in various spheres of relations is devoted, first of all, to the theoretical and applied work of foreign legal scholars: Alegre S., Bradley A., Fuchs H., Guild E., Janis M., Jegouzo I., Jimeno-Bulnes M., Kay R., Keijzer N., Lagodny O., Leaf M., Lesieur G., Naert F., Plachta M., Tomuschat S., Van Ballegooij W., Wouters J.

The subject of research by domestic lawyers can be attributed with confidence to certain topical problematic issues from the proposed topic, which were popularized in their scientific publications by Bench N. V., Dovgan G. V., Drozdov O. M., Zuev V. V., Ovcharenko O. M., Sviatun O. V., Traskevich M. I., Turchenko O. G., Falaleeva L. G. and others.

The purpose of the article is a detailed understanding of the modern mechanisms of implementation of European standards in the segment of ensuring the fundamental rights and freedoms of individuals by the competent judicial and law enforcement bodies of the state.

Presenting main material. General standards of procedural guarantees in the activities of criminal justice bodies are established in such general legal documents as the Convention on the Protection of Human Rights and Fundamental Freedoms, the Charter of Fundamental Rights of the European Union [11], as well as in relevant decisions of the European Court of Human Rights (hereinafter referred to as the ECHR) and the Court of the European Communities (European Union). At the same time, it should be taken into account that since certain standards for the protection of the rights of individuals have been formed in the extradition mechanism, there are well-founded fears that a departure from extradition principles may lead to a narrowing of the system of procedural guarantees in the process of the transfer of offenders by the countries of the European Union. Therefore, it would be quite consistent to conclude that the procedure for executing the European arrest warrant should be interpreted through the prism of the provisions of the Convention for the Protection of Human Rights and Fundamental Freedoms of 1950.

Perhaps, this not least explains the introduction of norms into the text of the Framework Decision of the Council of the European Union "On the European Arrest Warrant and Transfer Procedures between Member States" (2002/584/JHA) of June 13, 2002 (hereinafter – the Framework Decision), aimed at ensuring the rights of individuals when applying the EAW. Already in the Preamble of the document, one of the most important postulates of this act is established, according to which this decision respects basic rights and adheres to the principles recognized by Art. 6 of the Treaty on the European Union and the fundamental rights reflected in the Charter of the European Union, in particular, in its section VI "Justice" (paragraph 12) [14]. At the same time, we note that within the limits of the rights guaranteed by the specified section, the person to whom the EAW is applied can turn to various legal means or mechanisms to appeal his transfer to a member state of the European Union.

Contextually we recall: The Framework Decision does not allow the transfer of a person in cases where he is threatened with a significant violation of fundamental rights [10; 17].

First of all, according to the content of paragraph 12 of the Preamble, nothing in the Framework Decision can be interpreted as a prohibition on refusing to transfer a person of whom an EAW has been issued, if the available objective data give reason to believe that the specified warrant was issued for the purpose of criminal prosecution or punishing a person on the basis of his sex, race, religion, ethnic origin, nationality, language, political beliefs, sexual orientation, or the status of such a person because of any of these motives may cause harm.

Second, paragraph 13 of the Preamble provides that no person shall be expelled, or extradited to a State in which there is a serious threat of the death penalty, torture or other inhuman treatment or humiliation of human dignity or punishment. The given item is, in fact, a text reproduction of Part 2 of Art. 19 of the Charter of Fundamental Rights of the European Union, which, in turn, takes into account the provisions of previously adopted fundamental documents in the field of human rights protection, in particular, the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment and Punishment of December 10, 1984. The main approach outlined, applied on the European continent, in general does not present any problem for the practice of cooperation in the fight against crime within the European Union.

At the same time, individual facts of torture or other prohibited forms of treatment are systematically established in the countries of the membership, which is evidenced, among other things, by the precedent

practice of the ECHR regarding the correct interpretation of the provisions of Art. 3 of the Convention on the Protection of Human Rights and Fundamental Freedoms.

Illustrative examples in this aspect can be the decisions of the European Court in such cases as: "Z. and Others v. United Kingdom" (application no. 29392/95), May 10, 2001; "Iwanczuk v. Poland" (application no. 25196/94), November 15, 2001; "Mouisel v. France" (application no. 67263/01), November 14, 2002; "Kmetty v. Hungary" (application no. 57967/00), December 16, 2003; "Rivas v. France" (application no. 59584), April 1, 2004; "Farbtuhs v. Latvia" (application no. 4672/02), December 2, 2004 [15].

A number of other guarantees are provided for the protection of the rights of persons subject to forced transfer in connection with the application of an arrest warrant. In particular, the Preamble of the Framework Decision provides that it does not prevent member states from applying national constitutional norms regarding the appropriate legal procedure, observance of the right to a fair trial by a court, etc. The extreme importance in the system of legal remedies for offenders has Art. 5 of the Framework Decision, which enshrines the provision in certain cases of particular guarantees by the state-participant that issued the EAW.

Thus, execution of an arrest warrant by a competent judicial authority may, in accordance with the law of the executing Member State, depend on a specific condition. For example, if the offense for which the EAW was issued is punishable by life imprisonment/imprisonment, the execution of this warrant may potentially depend on the presence (absence) in the legal system of the Member State, which issues effective mechanisms: (1) review of the imposed punishment or preventive measure upon request or no later than after 20 years; (2) the application of amnesty measures (aimed at non-execution of the sentence or measure), in respect of which the person (offender) has the right to submit an application in accordance with the legislation or practice of the state that passed the sentence.

For the sake of justice, it should be emphasized that previously adopted extradition treaties, in particular, the European Convention on the Extradition of Offenders of December 13, 1957, did not include any provisions limiting the extradition of persons for crimes punishable by life imprisonment [4]. However, the constant development of international law indicates radical changes in approaches to mutual relations. Mention in Art. 5 of the Framework Decision on the legal guarantee of life imprisonment by the judicial body that issued the arrest warrant is a clear confirmation of that.

In addition, a similar attitude can be found in one of the popular legal instruments of the Council of Europe – the Convention on the Prevention of Terrorism dated May 16, 2005. According to Part 3 of Art. 21 entitled "Discrimination Provisions" of the mentioned document: nothing in this Convention shall be construed as requiring extradition if there is a risk that the person referred to in the request for the extradition of the offender will be punished in the form of: (a) the death penalty, if the legislation of the requested Party does not provide for life imprisonment; or (b) for life imprisonment without the possibility of early release. To the traditional exceptions of the present rule such case referee to cases where, under the applicable extradition treaties, the requested Party is required to extradite the person if the requesting Party provides an assurance that the requested Party considers sufficient to ensure that: (a) the death penalty is not will be appointed or, in case of its appointment, it will not be fulfilled; or (b) the person (offender) will not be sentenced to life imprisonment without the possibility of early release [8].

When examining the issue of legal guarantees for offenders in connection with the application of an arrest warrant to them, one cannot fail to mention Art. 11 of the Framework Decision ("Rights of the requested person"), which provides that the competent (executive) judicial body must, in accordance with national legislation, inform the detainee/arrested person about the presence of the EAW and its content, as well as about the possibility of giving consent to the transfer to the judicial body, who issued the warrant. At the same time, the requested person has the right to use the services of a lawyer and a translator in accordance with the domestic legislation of the executing Member State. In addition, the agreed system of legal guarantees for persons in respect of whom the EAW mechanism is implemented, immanently includes special rules for their further transfer.

In the context of the topic proposed for consideration, we think it expedient to emphasize the provisions that convey the normative content of the legal principle "ne/non bis in idem". Thus, according to Art. 54 Convention from 19 June 1990 Applying the Schengen Agreement of 14 June 1985 Between the Governments of the States of the Benelux Economic Union, The Federal Republic of Germany and The French Republic, On The Gradual Abolition of Checks At Their Common Borders (SCIA): "a person in respect of whom legal proceedings

have been finally completed in one Contracting Party may not be prosecuted by the competent authorities of the other Contracting Party for the same acts, provided that the prescribed punishment has been served, is currently being served or is in the future cannot be executed in accordance with the legislation of the Contracting Party that issued the sentence". Similar instructions are set out in Part 2 of Art. 3 of the Framework Decision, which, among other things, requires to notify (inform) the executing judicial body that the requested person has been finally convicted by the Member State in respect of the same acts.

The provisions of Article 50 of the Charter of Fundamental Rights of the European Union also regulate the right not to be convicted or punished twice for the same criminal offense. Not a single person may be re-convicted or punished in criminal proceedings for an offense for which he or she has already been finally acquitted or convicted within the European Union according to law. We should especially note that the Court of the European Union (hereinafter – the Court of the EU, EU Court) in the decision on the *Spasic* case, C-129/14 PPU dated May 27, 2014 stated: "(1) Article 54 of the Convention Implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders, signed on 19 June 1990 and entered into force on 26 March 1995, which makes the application of the *ne bis in idem* principle subject to the condition that, upon conviction and sentencing, the penalty imposed 'has been enforced' or is 'actually in the process of being enforced', is compatible with Article 50 of the Charter of Fundamental Rights of the European Union, in which that principle is enshrined. (2) Article 54 of that convention must be interpreted as meaning that the mere payment of a fine by a person sentenced by the self-same decision of a court of another Member State to a custodial sentence that has not been served is not sufficient to consider that the penalty 'has been enforced' or is 'actually in the process of being enforced' within the meaning of that provision" [7].

In addition, the EU Court issued a number of decisions in cases regarding the interpretation of the "ne bis in idem" principle in the implementation of Art. 54 of the Convention on the Implementation of the Schengen Agreement (CISA). Formulated conclusions are applicable to the Framework Decision, respectively. For example, following the results of the *Mantello* case, C-261/09 of November 16, 2010, clarification of such terminological constructions as "final decision" and "the same act" was provided: "For the purposes of the issue and execution of a European arrest warrant, the concept of 'same acts' in Article 3(2) of Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States constitutes an autonomous concept of European Union law. In circumstances such as those at issue in the main proceedings where, in response to a request for information within the meaning of Article 15(2) of that Framework Decision made by the executing judicial authority, the issuing judicial authority, applying its national law and in compliance with the requirements deriving from the concept of 'same acts' as enshrined in Article 3(2) of the Framework Decision, expressly stated that the earlier judgment delivered under its legal system did not constitute a final judgment covering the acts referred to in the arrest warrant issued by it and therefore did not preclude the criminal proceedings referred to in that arrest warrant, the executing judicial authority has no reason to apply, in connection with such a judgment, the ground for mandatory non-execution provided for in Article 3(2) of the Framework Decision" [6].

In case C-436/04, *Van Esbroeck* (judgment of 9 March 2006), the Court of the EU declared: "The *ne bis in idem* principle, enshrined in Article 54 of the CISA, must be applied to criminal proceedings brought in a Contracting State for acts for which a person has already been convicted in another Contracting State even though the Convention was not yet in force in the latter State at the time at which that person was convicted, in so far as the Convention was in force in the Contracting States in question at the time of the assessment, by the court before which the second proceedings were brought, of the conditions of applicability of the *ne bis in idem* principle" [5, p. 116].

The conclusion of the Court of the European Union in case C-150/05, *Van Straaten* (judgment of 28 September 2006) looks more concrete, namely: "(1) Article 54 of the CISA, must be interpreted as meaning that: (a) the relevant criterion for the purposes of the application of that article is identity of the material acts, understood as the existence of a set of facts which are inextricably linked together, irrespective of the legal classification given to them or the legal interest protected; (b) in the case of offences relating to narcotic drugs, the quantities of the drug that are at issue in the two Contracting States concerned or the persons alleged to have been party to the acts in the two States are not required to be identical; (c) punishable acts consisting of exporting

and of importing the same narcotic drugs and which are prosecuted in different Contracting States party to that Convention are, in principle, to be regarded as 'the same acts' for the purposes of Article 54 of the Convention, the definitive assessment in that respect being the task of the competent national courts. (2) The *ne bis in idem* principle, enshrined in Article 54 of that Convention, falls to be applied in respect of a decision of the judicial authorities of a Contracting State by which the accused is acquitted finally for lack of evidence" [5, p. 117].

According to the materials of the case C-288/05, *Kretzinger* (judgment of 18 July 2007) the Court of the European Union summarized: "For the purposes of Article 54 of the CISA, a penalty imposed by a court of a Contracting State: (a) 'has been enforced' or is 'actually in the process of being enforced' if the defendant has been given a suspended custodial sentence; (b) is not to be regarded as 'having been enforced' or 'actually in the process of being enforced' where the defendant was for a short time taken into police custody and/or held on remand pending trial and that detention would count towards any subsequent enforcement of the custodial sentence under the law of the State in which judgment was given. The fact that a Member State in which a person has been sentenced by a final and binding judgment under its national law may issue a EAW for the arrest of that person in order to enforce the sentence under the Framework Decision on EAW cannot affect the interpretation of the notion of 'enforcement' within the meaning of Article 54 of the CISA" [5, p. 118].

Analyzing the specifics of the application of Part 2 of Art. 3 of the Framework Decision, namely, the mandatory grounds for non-fulfillment of the EAW, it should be emphasized that in the presence of one or more normative grounds for non-fulfillment, enshrined in Art. 3 of the above-mentioned document, the competent judicial body of the participating state is obliged to refuse the execution of the EAW.

In correlation with these imperative provisions, it is appropriate to refer to separate optional grounds for non-fulfillment of the EAW, defined by Article 4 of the Framework Decision. Thus, the executing judicial authority may refuse to execute the arrest warrant if: (a) the person for whom the EAW is issued is being prosecuted in the executing Member State for the same act on which the warrant is based (part 2); (b) a final sentence has been passed against the requested person in the participating state regarding the same acts, which, in turn, prevents further proceedings (part 3), since the criminal (judicial) prosecution for the same offenses is prohibited in the executing Member State; (c) the competent/executive judicial authority is informed that the requested person has been finally convicted by a third state in respect of the same acts, subject to the general condition: if a sentence has been passed, the sentence has actually been served, is currently being served or, for objective reasons, cannot be served for by the legislation of the country of sentencing (part 5) [14].

The practical significance of the above prescriptions of the Framework Decision is confirmed by the decision of the Court of the European Union in the case C-486/14, *Kossowski* (judgment of 29 June 2016), according to which: "The *ne bis in idem* principle laid down in Article 54 of the CISA, read in the light of Article 50 of the Charter of Fundamental Rights of the European Union, must be interpreted as meaning that a decision of the public prosecutor terminating criminal proceedings and finally closing the investigation procedure against a person, albeit with the possibility of its being reopened or annulled, without any penalties having been imposed, cannot be characterised as a final decision for the purposes of those articles when it is clear from the statement of reasons for that decision that the procedure was closed without a detailed investigation having been carried out; in that regard, the fact that neither the victim nor a potential witness was interviewed is an indication that no such investigation took place" [5, p. 120].

Relevant legal positions of the European Court of Human Rights have both doctrinal and applied significance in terms of the researched issues. We will remind: Article 4 of Protocol No. 7 to the Convention on the Protection of Human Rights and Fundamental Freedoms (hereinafter referred to as the Convention on the Protection of Human Rights and Fundamental Freedoms, Convention) regulates the right not to be brought to court or punished twice for the same act *(non bis in idem)*, namely: "No one may be tried or punished for the second time in criminal proceedings under the jurisdiction of the same state for an offense for which he has already been finally acquitted or convicted in accordance with the law and criminal law procedures of this state (part 1).

The provisions of paragraph 1 do not prevent the resumption of proceedings in the case in accordance with the law and criminal procedure of the relevant state in the presence of new or newly discovered facts, or in the case of the discovery of significant deficiencies in the preliminary trial, which could affect the results of the trial (part 2). No deviations from the provisions of this article are allowed on the basis of Article 15 of the Convention (part 3)" [13].

This fundamental right is also guaranteed by the provisions of the Basic Law of our country – "no one can be held twice to the same type of legal responsibility for the same offense" (Part 1, Article 61 of the Constitution of Ukraine) [9].

As O. Drozdov rightly points out in this regard, "the principle of *"non bis in idem"*, which, in its essence, is one of the oldest principles of Western civilization, the roots of which go back to the times of Ancient Rome, and until now, in general, has not changed its meaning , received wide recognition both at the domestic (for example, in the fields of criminal, criminal procedural and administrative law) and international levels" [3, p. 111].

Without resorting to a thorough analysis of the problems of the correctness of the application by the national courts of the Member States of the outlined provisions of Art. 4 of Protocol No. 7 of the Convention, but directing the research within the framework of the presented topic to the formation of a reliable reference point to ensure the consistency, stability and unity of current law enforcement practice, we consider it appropriate to focus on some key aspects of the implementation of the main rules by the European Court of Human Rights.

So, answering the basic questions, whether the offenses for which the applicant was prosecuted were the same acts *(idem)*, and whether there was a duplication of proceedings *(bis)*, we will use the multi-component decision of the ECHR in the case "Sergey Zolotukhin v. Russia" dated February 10, 2009 (application no. 14939/03), where the evaluation of the actual circumstances and the formulation of the legal position of the international institution took place according to an established algorithm.

Coordinating the development of a universal approach to adaptation, the ECHR emphasized: "The Court considers that the existence of a variety of approaches to ascertain whether the offence for which an applicant has been prosecuted is indeed the same as the one of which he or she was already finally convicted or acquitted engenders legal uncertainty incompatible with a fundamental right, namely the right not to be prosecuted twice for the same offence. It is against this background that the Court is now called upon to provide a harmonised interpretation of the notion of the "same offence" – the *idem* element of the *non bis in idem* principle – for the purposes of Article 4 of Protocol No. 7. While it is in the interests of legal certainty, foreseeability and equality before the law that the Court should not depart, without good reason, from precedents laid down in previous cases, a failure by the Court to maintain a dynamic and evolutive approach would risk rendering it a bar to reform or improvement" (p. 78).

"An analysis of the international instruments incorporating the *non bis in idem* principle in one or another form reveals the variety of terms in which it is couched. Thus, Article 4 of Protocol No. 7 to the Convention, Article 14 § 7 of the United Nations Covenant on Civil and Political Rights and Article 50 of the Charter of Fundamental Rights of the European Union refer to the "[same] offence" ("*[même] infraction*"), the American Convention on Human Rights speaks of the "same cause" ("*mêmes faits*"), the Convention Implementing the Schengen Agreement prohibits prosecution for the "same acts" ("*mêmes faits*"), and the Statute of the International Criminal Court employs the term "[same] conduct" ("*[mêmes] actes constitutifs*"). The difference between the terms "same acts" or "same cause" ("*mêmes faits*") on the one hand and the term "[same] offence" ("*[même] infraction*") on the other was held by the Court of Justice of the European Union and the Inter-American Court of Human Rights to be an important element in favour of adopting the approach based strictly on the identity of the material acts and rejecting the legal classification of such acts as irrelevant. In so finding, both tribunals emphasised that such an approach would favour the perpetrator, who would know that, once he had been found guilty and served his sentence or had been acquitted, he need not fear further prosecution for the same act" (p. 79).

"The Court considers that the use of the word "offence" in the text of Article 4 of Protocol No. 7 cannot justify adhering to a more restrictive approach. It reiterates that the Convention must be interpreted and applied in a manner which renders its rights practical and effective, not theoretical and illusory. It is a living instrument which must be interpreted in the light of present-day conditions … . The provisions of an international treaty such as the Convention must be construed in the light of their object and purpose and also in accordance with the principle of effectiveness … . The Court further notes that the approach which emphasises the legal characterisation of the two offences is too restrictive on the rights of the individual, for if the Court limits itself to finding that the person was prosecuted for offences having a different legal classification it risks undermining the guarantee enshrined in Article 4 of Protocol No. 7 rather than rendering it practical and effective as required by the Convention. Accordingly, the Court takes the view that Article 4 of Protocol No. 7 must be understood as prohibiting the prosecution or trial of a second "offence" in so far as it arises from iden-

tical facts or facts which are substantially the same" (pp. 80–82).

"The guarantee enshrined in Article 4 of Protocol No. 7 becomes relevant on commencement of a new prosecution, where a prior acquittal or conviction has already acquired the force of *res judicata*. At this juncture the available material will necessarily comprise the decision by which the first "penal procedure" was concluded and the list of charges levelled against the applicant in the new proceedings. Normally, these documents would contain a statement of facts concerning both the offence for which the applicant has already been tried and the offence of which he or she stands accused. In the Court's view, such statements of fact are an appropriate starting-point for its determination of the issue whether the facts in both proceedings were identical or substantially the same. The Court emphasises that it is irrelevant which parts of the new charges are eventually upheld or dismissed in the subsequent proceedings, because Article 4 of Protocol No. 7 contains a safeguard against being tried or being liable to be tried again in new proceedings rather than a prohibition on a second conviction or acquittal. The Court's inquiry should therefore focus on those facts which constitute a set of concrete factual circumstances involving the same defendant and inextricably linked together in time and space, the existence of which must be demonstrated in order to secure a conviction or institute criminal proceedings" (pp. 83–84) [16].

When clarifying the question of whether there was duplication of proceedings *(bis)*, the ECHR focuses special attention on the integral structural elements of this terminological construction. Therefore, first of all, it is necessary to establish whether the first decision made in the relevant proceedings was "final" (one that has entered into legal force). Returning to the conclusions of the ECHR made in the case "Sergey Zolotukhin v. Russia", we emphasize: "The Court reiterates that the aim of Article 4 of Protocol No. 7 is to prohibit the repetition of criminal proceedings that have been concluded by a "final" decision. According to the Explanatory Report to Protocol No. 7, which itself refers back to the European Convention on the International Validity of Criminal Judgments, a "decision is final 'if, according to the traditional expression, it has acquired the force of *res judicata*. This is the case when it is irrevocable, that is to say when no further ordinary remedies are available or when the parties have exhausted such remedies or have permitted the time-limit to expire without availing themselves of them'". … Decisions against which an ordinary appeal lies are excluded from the scope of the guarantee contained in Article 4 of Protocol No. 7 as long as the time-limit for lodging such an appeal has not expired. On the other hand, extraordinary remedies such as a request for the reopening of the proceedings or an application for extension of the expired time-limit are not taken into account for the purposes of determining whether the proceedings have reached a final conclusion. Although these remedies represent a continuation of the first set of proceedings, the "final" nature of the decision does not depend on their being used. It is important to point out that Article 4 of Protocol No. 7 does not preclude the reopening of the proceedings, as stated clearly by the second paragraph of Article 4" (pp. 107–108).

Secondly, it is necessary to give an unequivocal answer to the question "Was a new proceeding initiated?". The following follows from the precedent decision under consideration: "Like the Chamber, the Court reiterates that Article 4 of Protocol No. 7 is not confined to the right not to be punished twice but extends to the right not to be prosecuted or tried twice. Were this not the case, it would not have been necessary to add the word "punished" to the word "tried" since this would be mere duplication. Article 4 of Protocol No. 7 applies even where the individual has merely been prosecuted in proceedings that have not resulted in a conviction. The Court reiterates that Article 4 of Protocol No. 7 contains three distinct guarantees and provides that no one shall be (i) liable to be tried, (ii) tried or (iii) punished for the same offence. The applicant in the present case was finally convicted of minor disorderly acts and served the penalty imposed on him. He was afterwards charged with disorderly acts and remanded in custody. The proceedings continued for more than ten months, during which time the applicant had to participate in the investigation and stand trial. Accordingly, the fact that he was eventually acquitted of that charge has no bearing on his claim that he was prosecuted and tried on that charge for a second time. For that reason the Grand Chamber, like the Chamber, finds without merit the Government's contention that there had been no repetition of the proceedings because the applicant had eventually been acquitted of the charge under Article 213 § 2 of the Criminal Code" (pp. 110–111) [16]. Therefore, the provisions of Art. 4 of Protocol No. 7 of the Convention explicitly prohibits the initiation of the next proceeding, if the first one has already ended with a final decision at the time of the initiation of the second (repeated) proceeding. That is, the given guarantee comes into force when a new prosecution begins, and the pre-

vious decision on acquittal or conviction of a person has entered into legal force [12].

Conclusions. A thorough analysis of the content of Art. 54 Convention from 19 June 1990 Applying the Schengen Agreement of 14 June 1985 Between the Governments of the States of the Benelux Economic Union, The Federal Republic of Germany and The French Republic, On The Gradual Abolition of Checks At Their Common Borders; Art. 50 of the Charter of Fundamental Rights of the European Union; relevant provisions of the Framework Decision of the European Council "On the European Arrest Warrant and Procedures for the Transfer of Offenders between Member States" (2002/584/JHA) dated June 13, 2002; regulations of Art. 4 of Protocol No. 7 to The Convention on the Protection of Human Rights and Fundamental Freedoms, as well as the precedent practice of the Court of the European Union and the European Court of Human Rights regarding the principle of "*ne/non bis in idem*", allowed us to draw a consistent conclusion: interpretation of such concepts according to certain criteria is characteristic of each of these information sources, as "one and the same act (criminal offense)", "final decision", etc., in no way nullifies their general functional focus on ensuring the fundamental rights and freedoms of a person (persons) during criminal proceedings. In addition, it is necessary to remember that, in contrast to the prescriptions of other named documents, the provisions of Art. 4 of Protocol No. 7 of the Convention apply only to decisions of courts of one and the same state.

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Давиденко С.В., Демченко Д.І. ЩОДО ПИТАННЯ РЕАЛІЗАЦІЇ ЄВРОПЕЙСЬКИХ СТАНДАРТІВ ПРАВ І СВОБОД ЛЮДИНИ У ПРАВООХОРОННІЙ ДІЯЛЬНОСТІ

Представлена стаття присвячена дослідженню окремих європейських стандартів у сфері захисту фундаментальних прав і свобод людини судовими та правоохоронними органами держав, насамперед, учасниць Європейського Союзу. Розлогий спектр необхідних гарантій передбачений у тематичних багатосторонніх договорах, зокрема, у Конвенції про захист прав людини і основоположних свобод 1950 р., та в інших нормативних актах міжнародного характеру. Крім того, своєрідний правозахисний функціонал має Рамкове рішення Європейської Ради «Про європейський ордер на арешт та процедури передачі правопорушників між державами-членами» (2002/584/JHA) від 13 червня 2002 р., яке, приміром, не допускає передачі особи між державами-членами Євросоюзу у випадках, коли їй загрожує істотне порушення основних прав. Констатовано, що у країнах об'єднання систематично встановлюються факти заборонених форм поводження, про це свідчать, у тому числі, висновки Європейського суду з прав людини стосовно правильності реалізації вимог різних статей Європейської конвенції.

У зв'язку з цим, розглянуті деякі обов'язкові та факультативні підстави невиконання європейського ордера на арешт.

В роботі надзвичайну увагу зосереджено на змістовному наповненні структурних компонентів стандартизованого принципу «ne/non bis in idem» крізь призму положень ст. 54 Конвенції від 19 червня 1990 року про застосування Шенгенської угоди від 14 червня 1985 року між урядами держав Економічного Союзу Бенілюкс, Федеративною Республікою Німеччина та Французькою Республікою про поступове скасування перевірок на їхніх спільних кордонах; ст. 50 Хартії основних прав Європейського Союзу; ст. 4 Протоколу № 7 до Конвенції про захист прав людини і основоположних свобод, а також релевантної прецедентної практики Суду Європейського Союзу та Європейського суду з прав людини. У вказаних джерелах надано ґрунтовне роз'яснення таких термінологічних конструкцій, як «одне і те саме діяння/правопорушення», «остаточне рішення»; встановлені критерії, які є базовими орієнтирами для відповіді на питання про те, чи мало місце дублювання проваджень, тощо.

Ключові слова: *європейський ордер на арешт, європейські стандарти, принцип «non bis in idem», правоохоронна діяльність, Суд Європейського Союзу, Європейський суд з прав людини.*