COMMON MARKET LAW REVIEW

CONTENTS Vol. 48 No. 5 October 2011

Editors and publishers 1403

Editorial comments, Towards a more judicial approach? EU antitrust fines under the scrutiny of fundamental rights 1405–1416

Articles
A. von Bogdandy and S. Schill, Overcoming absolute primacy: Respect for national identity under the Lisbon Treaty 1417–1453
P. Van Eecke, Online service providers and liability: A plea for a balanced approach 1455–1502
L. Waddington and M. Bell, Exploring the boundaries of positive action under EU law: A search for conceptual clarity 1503–1526
J. Bischoff, Just a little bit of “mixity”? The EU’s role in the field of international investment protection law 1527–1569
K. Talus, Just what is the scope of the essential facilities doctrine in the energy sector?: Third party access-friendly interpretation in the EU v. contractual freedom in the US 1571–1597
K. Koldinská, Case law of the European Court of Justice on sex discrimination 2006-2011 1599–1638

Case law
A. Court of Justice
Case C-246/07, Commission v. Sweden (PFOS), with annotation by M. Cremona 1639–1665
Case C-386/08, Brita GmbH v. Hauptzollamt Hamburg-Hafen, with annotation by R. Holdgaard and O. Spiermann 1667–1685
Case C-261/09, Criminal proceedings against Gaetano Mantello, with annotation by J. Ouwerkerk 1687–1701
Case C-285/09, Criminal proceedings against R, with annotation by A. Lenaerts 1703–1717
Joined Cases C-436 & 437/08, Haribo Lakritzen Hans Riegel BetriebsgmbH and Österreichische Salinen AG v. Finanzamt Linz, with annotation by G. Mathisen and H. Haukeland Fredriksen 1719–1736

Book reviews 1737–1767
Aims
The Common Market Law Review is designed to function as a medium for the understanding and analysis of European Union Law, and for the dissemination of legal thinking on all matters of European Union Law. It thus aims to meet the needs of both the academic and the practitioner. For practical reasons, English is used as the language of communication.
COMMON MARKET LAW REVIEW

Editors: Thomas Ackermann, Leit Armotai, Michael Dougan, Christophe Hillion, Sacha Prechal, Wulf-Henning Roth, Ben Smulders, Stefaan Van den Bogaert

Advisory Board:
- Ulf Bernitz, Stockholm
- Laurens J. Briinkhorst, The Hague
- Alan Dalwood, Cambridge
- Jacqueline Dathé de la Rochère, Paris
- Claus-Dieter Ehlermann, Brussels
- Giorgio Gaja, Florence
- Walter van Gerven, Leuven
- Daniel Halberstam, Ann Arbor
- Claire-Hélène Hulot, Paris
- Eleanore Hogan, Dublin
- Pieter Jan Kuijper, Amsterdam
- Alan Dashwood, Cambridge
- Christiaan W.A. Timmermans, Brussels
- Joseph H.H. Weiler, New York
- Armin von Bogdandy, Heidelberg
- Jacqueline Dutheil de la Rochère, Paris
- Jean-Paul Jacqué, Brussels
- Miroslaw Wyrzykowski, Warsaw
- Christel Anderegg, Bern
- Miguel Poasases Markou, Florence
- Pierre Pescatore, Luxembourg
- Gil Carlos Rodriguez Iglesias, Madrid
- Allan Rosas, Luxembourg
- Walter van Spreckelsen, Amsterdam
- Piet Jan Stel, Arnhem
- Roger Goebel, New York
- Daniel Halberstam, Ann Arbor
- Gerard Hogan, Dublin
- Laurence Idot, Paris
- Francis Jacobs, London
- Jean-Paul Jacquell, Brussels
- Pieter Jan Kaijser, Amsterdam

Associate Editor: Alison McDonnell

COMMON MARKET LAW REVIEW

Submission information

Online subscription prices for 2011 (Volume 48, 6 issues) are: EUR 682/USD 965/GPB 502 (covers two concurrent users). Print subscription prices for 2011 (Volume 48, 6 issues):

- EUR 720/USD 1018/GPB 529.

Personal subscription prices at a substantially reduced rate are available upon request. Please contact our sales department for further information at +31 172641562 or at sales@kluwerlaw.com.

Payments can be made by bank draft, personal cheque, international money order, or UNESCO coupons.

Subscription orders should be sent to: Kluwer Law International
c/o Turpin Distribution Services Ltd
Stratton Business Park
Pegasus Drive
Bedfordshire SG18 8TQ

e-mail: sales@kluwerlaw.com

For advertisement rates apply to Kluwer Law International, Marketing Department, P.O. Box 316, 2400 AH Alphen aan den Rijn, The Netherlands.

Please visit the Common Market Law Review homepage at http://www.kluwerlawonline.com for up-to-date information, tables of contents and to view a FREE online sample copy.

Consent to publish

In this journal entails the author’s irrevocable and exclusive authorization of the publisher to collect any sums or considerations for copying or reproduction payable by third parties (as mentioned in Article 17, paragraph 2, of the Dutch Copyright Act of 1912 and in the Royal Decree of 20 June 1974 (S.351) pursuant to Article 16b of the Dutch Copyright Act of 1912) and/or to act in or out of court in connection herewith.

Microfilm and Microfiche editions of this journal are available from University Microfilms International, 300 North Zeeb Road, Ann Arbor, MI 48106, USA.

The Common Market Law Review is indexed/abstracted in Current Contents/Social & Behavioral Sciences; Current Legal Sociology; Data Juridica; European Access; European Legal Journals Index; IBZ-CD-ROM; IBZ-Online; IBZ-International Bibliography of Periodical Literature on the Humanities and Social Sciences; Index to Foreign Legal Periodicals; International Political Science Abstracts; The ISI Alerting Services; Legal Journals Index; RAVE; Social Sciences Citation Index; SocioSciences.


Further details concerning submission are to be found on the journal’s website http://www.kluwerlawonline.com/productinfo.php?pubcode=COLA
Case C-261/09, Criminal proceedings against Gaetano Mantello, Judgment of the Court of Justice (Grand Chamber) of 16 November 2010, nyr.

1. Introduction

Adopted in 2002, the Framework Decision on the European arrest warrant (hereafter: FD EAW)\(^1\) replaced the traditional extradition system by a system of surrender, based on the principle of mutual recognition. In the relationships between Member States of the European Union, the procedures to surrender persons for the purposes of either prosecution or execution have been significantly simplified.

It follows from various evaluation reports that the instrument of the European arrest warrant is frequently used; the number of European arrest warrants issued and executed still continues to increase.\(^2\) Since its entry into force, some cases on the matter have also been brought before the Court of Justice of the European Union.\(^3\) In Mantello, the Court was again confronted with the interpretation of the FD EAW, in particular on the question how to interpret the mandatory refusal ground provided for in Article 3(2), which obliges the executing Member State to refuse the surrender of a person towards the issuing Member State if the acts for which surrender is sought have formed the subject-matter of an earlier judgment.

Here Article 54 of the Convention Implementing the Schengen Agreement (CISA) comes into view, which contains a *ne bis in idem* codification; the referring court wondered whether the interpretation of *ne bis in idem* given by the ECJ in the context of Article 54 CISA applies equally to Article 3(2) FD EAW. The incorporation of the Schengen *acquis* into the legal order of the

---

European Union brought along a ne bis in idem principle with transnational implications, aimed at protection from multiple prosecutions and multiple punishments throughout the entire territory of all Member States together. As such, Article 54 CISA has played an important role in the development of ne bis in idem from a domestic legal principle into a European transnational one. Historically, the prohibition of multiple prosecutions and multiple punishments was applied within the borders of one jurisdiction, as a result of which a German conviction for the import of drugs from Spain did not prevent the Spanish authorities from convicting the same person for export of the same drugs to Germany. Currently, however, things have changed in the mutual relationships between the EU Member States. Under the influence of European developments in the last decade, especially the improvement of judicial cooperation and the introduction of mutual recognition, the need for a uniform ne bis in idem principle has grown. This should be understood in the context of the transnational judicial area of freedom, security and justice – based on mutual recognition – in which legal principles should be logically applied transnationally as well. Because Article 54 CISA provides for a ne bis in idem principle that functions as a general barrier to institute second proceedings (a European guarantee), a uniform notion would lead to its easier, optimized application throughout the different Member States, in correspondence with the notion of one genuine European judicial area in which judicial decisions have effect Union-wide.

This annotation deals with the two concepts described above: the principle of mutual recognition and the principle of ne bis in idem. The Mantello judgment gives rise to several questions relating to these concepts, each separately as well as in their mutual relationship, in the particular context of the European arrest warrant as well as in the broader framework of judicial cooperation in criminal affairs in the European Union. Three particular issues will be dealt with: 1. the division of roles between the issuing Member State and the executing Member State; 2. the impact of ne bis in idem in situations

4. “European” in the broad sense. After all, the ECJ draws inspiration from the interpretation of Art. 4 of the 7th protocol (ne bis in idem principle) to the ECHR given by the ECtHR. The same applies vice versa: for instance, in ECtHR Feb. 10, 2009, Zolotukhin v. Russia, Application No. 14939/03, the ECtHR interpreted Art. 4 of the 7th Protocol to the ECHR explicitly in light of the interpretation of Art. 54 CISA by the ECJ. See also Van Bockel, The Ne Bis In Idem Principle in EU Law, (Kluwer Law International 2010), pp. 120, 174.

5. In this context, Lööf has explained the approach of the ECJ to the Area of Freedom, Security and Justice with the Social Contract Theory. He asserts that the ECJ considers the judicial area as constituting a single “social contractual unit, within which there can be no divergences in the normative status of individuals vis-à-vis the collective”, in other words: in which an individual cannot be a member and a non-member (because he violated the contract of the unit) at the same time. Lööf, “54 CISA and the Principles of ne bis in idem”, (2007) European Journal of Crime, Criminal Law and Criminal Justice, 320–325.
where two or more offences arise from the same act (concursus idealis); and 3. the implications for ne bis in idem in mutual recognition measures.

2. Factual and legal framework

In the autumn of 2008, an Italian judicial authority issued a European arrest warrant for the arrest and surrender of an Italian citizen, Mr Mantello, who at the time resided in Germany. The Italian authorities had instituted criminal proceedings against Mantello, who allegedly participated in a cocaine-trafficking criminal organization, already in 2004. Pending this criminal investigation against him (and against tens of other people), Mantello was sentenced to a term of imprisonment and to a fine in September 2005 for the unlawful possession of cocaine, discovered by the railway police on a train trip from Esslingen (Germany) to Catania (Italy). Although at that time the Italian authorities had sufficient evidence to charge and prosecute Mantello for the offences of organized cocaine-trafficking, the Italian authorities only decided to issue a national arrest warrant for these offences in September 2008.

The European arrest warrant was based on this national arrest warrant. In December 2008, a competent German authority arrested Mantello at his home in Stuttgart. Immediately, questions were raised as to whether the Italian judgment of 2005 prevented the execution of this European arrest warrant by Germany. The Italian authorities answered in the negative. However, to the Stuttgart Oberlandesgericht it remained a moot point how to judge the exact relationship between, on the one hand, the 2005 conviction of Mantello for the unlawful possession of cocaine (an individual act) and, on the other hand, the investigation into the cocaine-trafficking network and Mantello’s (and several others’) participation therein (organized crime acts). Can a person who allegedly is a member of a criminal organization be prosecuted for all acts committed in the framework of this organization if he was previously prosecuted and convicted for several individual acts only – even if at that time the organized crime acts have already come to the knowledge of the judicial authorities?

The Oberlandesgericht started from the position that at the time Mantello was prosecuted for the unlawful possession of cocaine (which led to the conviction in 2005), the Italian authorities must have had sufficient evidence to charge and prosecute Mantello for the offences underlying the European arrest warrant; for tactical reasons, however, they decided then not to already prosecute for those acts. Now, those acts form the subject-matter of the European arrest warrant. Would this violate the principle of ne bis in idem, in
particular the idem component, thereby constituting a mandatory ground to refuse surrender?6 And, according to which law – the issuing State’s law, the executing State’s law, or EU law – should the idem component be determined? The Oberlandesgericht Stuttgart decided to suspend proceedings and ask the Court of Justice for a preliminary ruling on these questions.

3. Advocate General’s Opinion

In his Opinion, Advocate General Bot first addressed the widespread assumption that Article 3(2) FD EAW only applies where the acts underlying the European arrest warrant have previously formed the subject-matter of a final judgment in a Member State other than the issuing Member State. Advocates of this viewpoint claim that it would be incompatible with the principle of mutual recognition and the high level of trust amongst the Member States to explain Article 3(2) as also applying where a final judgment on the acts referred to in the European arrest warrant has earlier been delivered in the issuing Member State. As the Court did not pay any attention to this issue, it must suffice to mention here the Advocate General’s main argument. As pointed out by the Advocate General, the EU legislature itself has adopted grounds for refusal, thereby expressing the notion that under certain circumstances, exceptions should be made to the principle of mutual recognition. By obliging the executing Member State to refuse surrender if informed of an earlier final judgment on the acts underlying the European arrest warrant, it appears that both the issuing and executing judicial authorities are responsible for the observance of the ne bis in idem principle. Whether the earlier final judgment was handed down in the national legal order of the issuing Member State or of a third Member State makes no difference. This applies not only because Article 3(2) FD EAW itself gives no cause to this position, but also in view of the fundamental nature of a principle such as ne bis in idem, which forms part of all Member States’ legal systems.7

Having concluded this, the Advocate General went on to examine whether the concept of “the same acts” must be interpreted according to the law of

6. Art. 3(2) of the Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between the Member States, O.J. 2002, L 190/1 states that: “The judicial authority of the Member State of execution … shall refuse to execute the European arrest warrant … 2. If the executing judicial authority is informed that the requested person has been finally judged by a Member State in respect of the same acts provided that, where there has been sentence, the sentence has been served or is currently being served or may no longer be executed under the law of the sentencing Member State” (emphasis added).

7. Opinion, paras. 84–94.
either 1) the issuing or 2) the executing Member State, or 3) whether it is an autonomous concept of EU law (the first question referred). He first remarked that the second option cannot apply, as Article 3(2) FD EAW nowhere refers to the law of the executing Member State. Furthermore, though mentioning the law of the issuing Member State, this reference only concerns the question whether the earlier final judgment may no longer be executed; the first option cannot apply either. As a result, the concept of “the same acts” of Article 3(2) FD EAW constitutes an autonomous concept of EU law. The Advocate General supported this view by referring to settled case law, including case law regarding the framework decision at issue on the terms “staying” and “resident”, terms which have been given an autonomous and uniform interpretation as well.8

The Advocate General argued that the concept of “the same acts” mentioned in Article 3(2) FD EAW, being an autonomous concept of EU law, must be given the same interpretation as the concept of “the same acts” in Article 54 CISA. After all, in most of the official languages of the European Union, the concept is expressed in identical terms in both provisions. Besides, both provisions share a similar objective. According to the Advocate General, Article 3(2) FD EAW can be said to complement Article 54 CISA. The latter provision aims at ensuring that a person who has already been judged can move and reside freely on the territory of the European Union without having to fear a second trial for the same acts. Article 3(2) FD EAW has the additional goal to prevent this person’s stay in another Member State being disturbed due to the obligation of that Member State to execute an incoming European arrest warrant.9

Applying these conclusions to the situation of Mantello, the question remained whether the illegal possession of cocaine as a single act (leading to a conviction in 2005) constituted “the same acts” as the alleged offence of participation in a cocaine-trafficking criminal organization, especially in light of the fact that evidence for Mantello’s participation could have been produced already at the time Mantello was prosecuted for the single act (the second question referred). In reply to this question, the Advocate General repeated the relevant criterion, developed by the Court in the context of Article 54 CISA: “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”.10 Building on this interpretation, he argued that the offences Mantello was sentenced for in 2005 do not

constitute “the same acts” as those underlying the European arrest warrant. Even if both (sets of) acts shared the same criminal intention, it has already been decided by the Court that this mere factor is not solely decisive in assessing the idem component of the ne bis in idem principle.\textsuperscript{11} Besides, all other factors that were raised in support of the view that the idem condition was fulfilled regard purely national matters.\textsuperscript{12}

In a nutshell: the Advocate General concluded that Article 3(2) FD EAW must be interpreted to mean that the concept of “the same acts” constitutes an autonomous concept of EU law which has the same meaning as the concept referred to in Article 54 CISA. In light of this, the various offences (allegedly) committed by Mantello cannot be indicated as constituting “the same acts”.

4. Judgment of the Court

The Advocate General deemed it necessary to treat in advance the question whether Article 3(2) FD EAW excluded previous judgments in the Member State in which the arrest warrant was issued. The Court, however, ignored this point, and immediately started to answer the questions referred.

With regard to the first question, the Court was very clear that the concept of “the same acts” referred to in Article 3(2) FD EAW constitutes an autonomous concept of EU law. Since Article 3(2) makes no reference to the national laws of the Member States as to the concept of “the same acts”, it would be unjustified to leave the interpretation of this concept to the discretion of the Member State involved. Such an approach would deny the “need for uniform application of European Union law”\textsuperscript{13}.

The Court followed the Advocate General in recalling the “shared objective” of Article 3(2) FD EAW and Article 54 CISA, which is to ensure that persons will not face multiple prosecutions or trials for the same acts. The Court therefore held that the interpretation of the concept of “the same acts” as developed in the context of Article 54 CISA is “equally valid” for the context of surrender.\textsuperscript{14}

Before, however, examining whether the acts for which Mr Mantello was convicted in 2005 differed from the acts underlying the European arrest warrant, the Court remarked that the referring court in fact wanted to know whether these latter acts have previously been “finally judged” (the bis component). For that reason, the Court went on to consider the irrevocability

of the decision taken by the Italian authorities not to submit the already
available evidence on the acts referred to in the European arrest warrant, to the
Catania tribunal at the time it ruled on the single act committed by Mr
Mantello (unlawful possession of cocaine). 15 The Court stated — with
reference to the interpretation of the concept of “finally judged” given in the
context of Article 54 — that a person is considered to have been finally judged
where a further prosecution is definitively barred, 16 or where the accused has
been finally acquitted, 17 according to the law of the Member State in which
criminal proceedings were followed and the judgment was delivered. 18

The Court pointed out that the executing Member State — if unsure whether
the earlier decision handed down in the issuing Member State does
definitively bar further prosecution according to the issuing Member State’s
national law — is allowed to request the issuing Member State to deliver further
information on the legal consequences of its earlier decision (Art. 15(2) FD
EAW). In the present case of Mantello, Germany used this possibility and Italy
answered in the negative: the decision not to submit the available evidence on
the acts underlying the European arrest warrant to the Italian judge at the time
Mantello stood trial for another offence did not constitute a final judgment.
The Italian authorities expressly stated and explained that the offence
Mantello proved to be guilty of in 2005 was an act individually committed and
consisting of the unlawful possession of cocaine, whereas the acts referred to
in the European arrest warrant constituted organized crime offences as well as
offences of unlawful possession of drugs intended for resale; these latter acts
were not covered by the 2005 judgment. According to the Court, the only
conclusion to be drawn by the executing Member State was that there was no
reason to invoke the mandatory refusal ground of Article 3(2) FD EAW.

In conclusion, the Court held that Article 3(2) FD EAW must be interpreted
to mean that the concept of “the same acts” constitutes an autonomous concept
of EU law which has the same meaning as the concept referred to in Article 54
CISA. Furthermore, it appeared from the explanation provided by the issuing
Member State that the earlier judgment handed down in its domestic legal
order did not constitute a final judgment related to the acts underlying the
European arrest warrant, and consequently did not bar further prosecution
referred to those acts. Therefore, the mandatory ground to refuse surrender
provided for in Article 3(2) FD EAW cannot be invoked.

15. Judgment, paras. 42–44.
5. Comment

The Mantello case contains several issues that deserve particular attention. The first regards the division of roles between the issuing Member State and the executing Member State in the context of the European arrest warrant. A second point that requires consideration concerns ne bis in idem in relation to the situation that two or more offences arise from the same act (concursus idealis). Thirdly, this comment discusses whether the Mantello judgment may have broader implications in view of the fact that a violation of ne bis in idem constitutes a ground of refusal in other mutual recognition instruments as well.

5.1. Division of roles between issuing and executing authorities

The Court passed over an issue which received ample treatment in the Advocate General’s conclusion. It concerns the question whether and to what extent Member States that are confronted with incoming European arrest warrants are allowed to review compliance with the principle of ne bis in idem. The Advocate General elaborated on this because of the widespread assumption amongst Member States that Article 3(2) FD EAW excludes previous judgments handed down in the issuing Member State; according to them, this provision would only allow Member States to refuse incoming European arrest warrants if the acts referred to have previously formed the subject-matter of a final judgment in a third Member State.

In fact, this issue regards the division of roles between Member States involved in the surrender of suspects and convicted persons in the European Union. The aforementioned widespread assumption on the scope of Article 3(2) FD EAW is based on the claim that it is incompatible with the principle of mutual recognition to include previous judgments handed down in the issuing Member State itself. After all, mutual recognition builds on a high level of mutual confidence amongst the various jurisdictions in the EU. As a consequence, the executing Member State has to assume that the acts referred to in an incoming European arrest warrant have not previously been tried in the issuing Member State itself and that surrender is compatible with the principle of ne bis in idem in that State.

As described above, the Advocate General did not agree with this viewpoint. With reference to the exceptions on mutual recognition in the FD EAW itself (several refusal grounds are provided for) and the fundamental nature of an EU-wide protection against multiple prosecutions for the same acts, he argued that the issuing and the executing Member State are both responsible for ensuring observance of the ne bis in idem principle, indifferent
of whether a possible previous judgment was handed down in the issuing Member State or in another Member State.

At first sight, such a shared responsibility with regard to the protection of fundamental rights might indeed seem contrary to the rationale behind mutual recognition. However, according to the Advocate General, the exact responsibility of the two parties differs. The issuing Member State, on the one hand, is obliged to verify pro-actively whether a final judgment has been delivered earlier in the domestic legal order on the same acts that underlie the European arrest warrant. The executing Member State, on the other hand, is “only” obliged to attach legal consequences (a refusal of surrender) reactively, namely “if informed” of an earlier final judgment on the same acts in the issuing Member State or a third Member State.

It is regrettable that the Court did not pay attention to this issue, especially because in my view, the Advocate General struck a golden mean, with which the executing Member State would be satisfied. Already from the introduction of the FD by the European Council in 1999, the scope of the executing Member State’s discretion in surrender procedures had been discussed, especially in relation to fundamental rights. At present, it still remains unanswered how far the executing authorities may in abstracto go. Article 3(2) FD EAW, however, offers a concrete suggestion: instead of allowing a pro-active verification of compliance with rules and rights, the executing Member State could be enabled to take action if informed that rules have been ignored and rights have been violated (reactively). The argument that such a division of roles would undermine the principle of mutual recognition cannot persist. On the contrary, tying the hands of the executing authorities by obliging them to surrender a person against whom a final judgment in any other Member State has already been delivered on the same acts referred to in the European arrest warrant is much more likely to undermine the level of trust amongst the Member States. In turn, it may impact the Member States’ willingness to recognize foreign arrest warrants. Even though Member States may have, generally spoken, much confidence in one another’s criminal justice system, problems may always occur in individual cases.19

To illustrate that a too absolute interpretation of mutual recognition may backfire on cooperation in practice, one may refer to the ongoing discussion

19. Rozemond has distinguished between formal trust (“formeel vertrouwen”) and trust in concreto (“materieel vertrouwen”): whereas a formal interpretation derives trust from fixed facts and figures – such as the fact that the foreign State in question is party to a certain treaty or agreement – the deciding factor to determine substantive trust is the particular circumstances of an individual case. See Rozemond, Begrensde vertrouwen. Mensenrechtenbescherming bij uitlevering en overlevering (preekdien voor de vergadering van de Christen Juristen Vereniging op 15 mei 2009), (Uitgeverij Paris, 2009), p. 43 (see also <www.christenjuristen.org/content/preekdien>).
on proportionality in the context of surrender; this discussion, too, touches the margins of examination left to the Member States involved in surrender cases. In a recent evaluation of the FD EAW, the Commission pays particular attention to the systematic issue of European arrest warrants in relation to very minor offences. Though these offences do fall within the scope of the FD EAW, they are commonly regarded as not serious enough to start surrender proceedings. The Commission observes that this has undermined confidence in the application of the European arrest warrant.\(^{20}\) The Commission, supported by a significant number of Member States, proposes the introduction of a proportionality check. This implies that several aspects should be considered before issuing a European arrest warrant (e.g. the seriousness of the offence, the length of the sentence). It is true that in this specific situation, if the Commission’s proposal is followed, the additional proportionality check will fall within the responsibility of the issuing Member State; it remains unclear whether the executing Member State is allowed to refuse surrender on the ground that a proportionality check has not been applied, or has wrongly been applied (which would be quite difficult to assess). How to divide the responsibilities between cooperating Member States in the framework of surrender is certainly not a foregone conclusion. But this discussion shows again that a too rigid allocation of responsibilities to the issuing Member State is likely to prove unfavourable for the actual level of trust between the Member States and possibly also, in turn, for the degree of mutual trust in abstracto.

5.2. \textit{Ne bis in idem and concursus idealis}

According to the Court, the second question referred for a preliminary ruling by the German \textit{Oberlandesgericht} in fact regarded the interpretation of the concept of “finally judged” instead of the concept of “the same acts”. This may be so, but it is, in our view, also true that the German referring court still wished to know what the exact relationship is between the individual acts committed by Mantello and the acts underlying the European arrest warrant which related to Mantello’s alleged participation in a criminal organization. With regard to this question, it is justified to simply refer to earlier case law of the ECJ on the concept of the “same acts”, which shows an approach based on the “objective, historical facts”.\(^{21}\) the relevant criterion is the “identity of the material acts, understood as the existence of a set of facts which are inextricably linked together”. Therefore, the legal classifications given to


\(^{21}\) Van Bockel, op. cit. supra note 4, p. 160.
these acts or the protected legal interests are not relevant. Whether or not in
this particular situation the offences Mantello was sentenced for in 2005
constitute “the same acts” as those underlying the European arrest warrant,
has to be determined by the competent national courts. It is improbable that
the competent national court would have found that the 2005 judgment
constituted a mandatory ground for the German authorities to refuse the
surrender of Mantello. The 2005 conviction related to a single act of unlawful
possession of cocaine, whereas the acts referred to in the European arrest
warrant concerned the alleged participation in a cocaine-trafficking criminal
organization. There are no indications that the illegal possession of cocaine
formed part of the suspicion that induced the Italian authorities to issue the
European arrest warrant. I therefore expect that the competent national court
would have agreed with the Advocate General that the various offences cannot
be indicated as “the same acts”.

It is nonetheless regrettable that the Court did not elaborate on the idem
component, because it would probably have shed more light on the margins of
judicial review to be applied by the Court of Justice in relation to the national
laws of the Member States. After all, with relation to the exception to ne bis in
idem provided for in the Italian code of criminal procedure, the question arises
whether this exception can be upheld in the context of surrender, in view of
earlier case law on Article 54 CISA. In the framework of the case in hand, the
Italian authorities communicated that the prohibition against a second
prosecution for the same act does not apply if this act concerns a case of
concurrus idealis. As a result, even if the single act committed by a person at
the same time was to fall within the scope of more than one penalization, or if
this single act was to be redefined and classified within a broader category of
criminal offences, fresh criminal proceedings can nonetheless be brought
against the convicted person according to Italian law. In view of the decisive
criterion with regard to the concept of the “same acts” – which reveals an
approach based on the facts – this national exception seems to infringe Article
54 CISA.

However, national courts seem to maintain an approach based on the legal
qualification. The Dutch Supreme Court, for instance, recently ruled that
applying a standard purely based on the facts would lead to “unacceptable
results”. The Supreme Court referred to a 1932 judgment, in which a person
was accused of disturbing the public order by assaulting – being drunk – a

22. Case C-436/04, criminal proceedings against Leopold Henri van Esbroeck, [2006]
ECR I-2333, para 42.
23. This follows from Van Esbroeck, cited previous note, para 38.
24. See judgment, para 14.
2011, Landelijk Jurisprudentienummer BM9102, para 2.8.
police officer. After he was convicted of assaulting the police officer in a public place, the regional court declared inadmissible the subsequent institution of proceedings against this person for the offence of disturbing the public order. This decision, however, was quashed by the Supreme Court.  Although it is, in my view, very doubtful whether this Supreme Court decision would be in line with the standard of the ECJ – which focuses on the objective facts – the Dutch Supreme Court appears to maintain its old case law.

As mentioned, the Italian exception, provided for in the national code of criminal procedure, also seems to be highly problematic in view of steady case law on the concept of “the same acts” in Article 54 CISA. If on the basis of its national law, the Italian authorities had classified the unlawful possession of cocaine (for which Mantello was convicted in 2005) within a broader category of criminal offences, and new criminal proceedings as a result had been started (including the issuing of a European arrest warrant), there would have been a mandatory ground to refuse surrender. But what about the possibility provided in Italian law to act in this way? Is it not plausible that the application by the Italian authorities of this exception to ne bis in idem must be considered a violation of the obligations resulting from Article 54 CISA, at least where it is applied in the framework of EU law? After all, the relevant criterion is the identity of material acts, irrespective of the legal classification and a shared criminal intent. It would have been interesting to see how far the Court would have been gone with mentioning this.

5.3. The relationship between mutual recognition and ne bis in idem

A final topic that deserves further consideration relates to the broader implications of the Court’s conclusion that the concept of “the same acts” in Article 3(2) FD EAW constitutes an autonomous concept of EU law and has to be interpreted similarly to the same concept in Article 54 CISA. This outcome is not as such very surprising in view of the textual similarities between Article 3(2) FD EAW and Article 54 CISA, combined with the equal purposes of both provisions. However, it remains unclear what role the principle of mutual recognition plays in this context.

The FD EAW is based the principle of mutual recognition, thereby replacing – in the relationships between the EU Member States – the traditional system of extradition with a system of surrender. The swift adoption of the FD EAW prompted the Commission and the Member States to initiate a number of other instruments in order to further implement the mutual recognition principle on several kinds of judicial decisions and judgments.

(such as pre-trial supervision measures, custodial sanctions, alternative sanctions, probation decisions, financial penalties, etc.). Today, mutual recognition can be said to be a leading principle within the framework of judicial cooperation between the EU Member States. It basically requires that judicial decisions and judgments handed down at any stage of criminal proceedings in any Member State must be given legal force in any other Member State, without many possibilities to apply intermediate measures (e.g. conversion procedures), and with a restricted number of refusal grounds.

The question arises what consequences the Mantello judgment has for the relationship between ne bis in idem and mutual recognition, even outside the context of surrender. Most of the other instruments on mutual recognition do contain a ne bis in idem provision, enabling the executing Member State to decline recognition on the ground that it would violate the prohibition of multiple prosecutions for the same acts.27 As none of these provisions refer to the national laws of the Member States, the Mantello judgment justifies the assumption that these various ne bis in idem provisions constitute autonomous concepts of EU law. As a result, it may be supposed that these provisions have to be interpreted in the same way as Article 54 CISA.

There is, however, an important difference between the various ne bis in idem provisions provided for in the relevant framework decisions and directives: the FD EAW is the sole mutual recognition instrument that obliges the executing Member State to refuse surrender for bis in idem reasons (Art. 3(2) FD EAW states “shall refuse”). If the executing Member State itself were involved in a previous trial or a simultaneous prosecution for the same acts however, refusal of surrender is allowed, rather than obliged (Art. 4(2) and (3) FD EAW). Such an optional refusal ground is provided for in most of the other instruments on mutual recognition as well, as these instruments simply state that recognition “may” be refused if execution would infringe the principle of ne bis in idem.28 This also applies to the draft directive on the application of mutual recognition to investigation orders.29


28. See previous note.

29. Though it was open to debate whether the final text would contain a provision on this issue initially, agreement has recently been reached on including a violation of ne bis in idem as an optional ground for non-recognition, see Council document 11735/11, 17 June 2011.
In my view, the optional aspect of most refusal grounds relating to ne bis in idem infringes the Article 54 CISA obligation. Here, I would like to recall the explicit connection made by the Court in 2003 between mutual recognition, mutual trust and ne bis in idem. In Gözütok and Brügge, the Court interpreted the concept of “finally judged” in Article 54 CISA. It held that, in principle, any decision discontinuing further proceedings should be considered a “final decision” in the sense of Article 54 CISA. This also applies where the discontinuance followed without the involvement of a court and after the fulfilment of certain conditions (e.g. the payment of a sum of money imposed by the Public Prosecutor) by the suspect. The Court pointed out that the absence of such a procedure in the second Member State is irrelevant, because the application of Article 54 CISA was not made conditional upon harmonization or approximation of the criminal laws of the various Member States. Therefore, the Court concluded that the ne bis in idem principle in Article 54 CISA necessarily implies “that the Member States have mutual trust in their criminal justice systems and that each of them recognizes the criminal law in force in the other Member States even when the outcome would be different if its own national law were applied”. According to the Court, any other interpretation runs counter to the very purpose of Article 54 CISA, and, more generally, obstructs establishing an area of freedom, security and justice in which Union citizens would be able to exercise their right to move and reside freely on the territory of the entire Union, without fearing multiple prosecutions and trials for the same acts.

The Mantello case did not induce the Court to decide on the exact scope of Article 54 CISA in view of the obligations related to mutual recognition. In fact, the Court was asked to decide on a mandatory refusal ground. As a result, it remains to be seen what the Court would decide in case of an optional refusal ground in one of the mutual recognition instruments. I believe the Mantello judgment justifies the statement that the optional character of most refusal grounds relating to ne bis in idem hinders Article 54 CISA from developing into a strong protection against multiple prosecutions for the same acts within the external borders of the EU. It is obvious that the ongoing development of ne bis in idem into a principle with transnational implications further limits national sovereignty; in those cases where the same offence was already

30. Gözütok and Brügge, cited supra note 16.
31. Ibid., paras. 32–33.
32. Ibid. paras. 35–38.
33. Possibly superfluously, I would like to note that Art. 4 of the 7th Protocol to the ECHR has a limited scope in comparison to Art. 54 CISA; while the latter protects against multiple prosecutions for the same acts within the entire Union, the first “only” protects against multiple prosecutions within the borders of one joining State (“under the jurisdiction of the same state”).
prosecuted in another Member State, the national prosecution service of the second Member State can no longer fully exercise its own discretionary powers. However, an approach other than described above would be unjustified, in view of the ongoing European integration and the growing emphasis on mutual cooperation and loyalty. How would it be possible to give real substance to these notions if Member States were on the one hand obliged to apply mutual recognition of judicial decisions and judgments, while at the same time were allowed to initiate a second prosecution for offences already prosecuted or finally disposed of in another Member State?

If the optional ground for non-recognition in most mutual recognition instruments should actually be considered a mandatory refusal ground, the question arises how to realize such a conversion. With regard to this question, it should be emphasized that the protection against multiple prosecutions and trials is a fundamental principle of EU law and thus belongs to primary EU law. This applies even more clearly since the entry into force of the EU Charter of Fundamental Rights in 2009: Article 50 of this Charter binds all institutions and bodies of the EU as well as its Member States in applying EU law by the obligation to guarantee that “[n]o one shall be liable to be tried or punished again in criminal proceedings for an offence for which he or she has already been finally acquitted or convicted within the Union in accordance with the law”. I believe that as such the Mantello decision urges the Member States to interpret secondary legislation (framework decisions and directives) as well as national implementation law in conformity with the Court’s decision.

Obviously, the obligation to decline recognition and execution for bis in idem reasons can only be effected when it is immediately clear to the executing Member State that the principle of ne bis in idem is actually violated. It may also be the case, for instance in the context of evidence gathering, that it remains unclear to the executing Member State if the prosecution initiated in the issuing State relates to acts for which the person accused has already been judged. In such a situation, in my opinion, Article 54 CISA obliges the executing Member State to either request the issuing Member State to deliver further information, or to halt the execution of the evidence warrant as soon as it appears to relate to acts that already formed the subject-matter of a previous judgment in any other Member State.

Jannemieke Ouwerkerk*

---

34. O.J. 2010, C 83/389. In comparison to Art. 54 CISA its scope is limited to acquittals and convictions only.

* Assistant Professor, Department of Criminal Law at Tilburg Law School (Tilburg University, the Netherlands).
Subscription information

Online subscription prices for 2011 (Volume 48, 6 issues) are: EUR 682/USD 965/GBP 502 (covers two concurrent users). Print subscription prices for 2011 (Volume 48, 6 issues): EUR 720/USD 1018/GBP 529. Personal subscription prices at a substantially reduced rate are available upon request. Please contact our sales department for further information at +31 172641562 or at sales@kluwerlaw.com.

Payments can be made by bank draft, personal cheque, international money order, or UNESCO coupons.

Subscription orders should be sent to: All requests for further information and specimen copies should be addressed to:

Kluwer Law International
Kluwer Law International
c/o Turpin Distribution Services Ltd
P.O. Box 316
Stratton Business Park
2400 AH Alphen aan den Rijn
The Netherlands
fax: +31 172641515

e-mail: sales@kluwerlaw.com

or to any subscription agent

For advertisement rates apply to Kluwer Law International, Marketing Department, P.O. Box 316, 2400 AH Alphen aan den Rijn, The Netherlands.

Please visit the Common Market Law Review homepage at http://www.kluwerlawonline.com for up-to-date information, tables of contents and to view a FREE online sample copy.

Consent to publish

In this journal entails the author’s irrevocable and exclusive authorization of the publisher to collect any sums or considerations for copying or reproduction payable by third parties (as mentioned in Article 17, paragraph 2, of the Dutch Copyright act of 1912 and in the Royal Decree of 20 June 1974 (S.351) pursuant to Article 16b of the Dutch Copyright act of 1912) and/or to act in or out of court in connection herewith.

Microfilm and Microfiche editions of this journal are available from University Microfilms International, 300 North Zeeb Road, Ann Arbor, MI 48106, USA. The Common Market Law Review is indexed/abstracted in Current Contents/Social & Behavioral Sciences; Current Legal Sociology; Data Juridica; European Access; European Legal Journals Index; IBZ-CD-ROM; IBZ-Online; IBZ-International Bibliography of Periodical Literature on the Humanities and Social Sciences; Index to Foreign Legal Periodicals; International Political Science Abstracts; The ISI Alerting Services; Legal Journals Index; RAVE; Social Sciences Citation Index; Social Scisearch.