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Judicial control in the system of mutual recognition – the ECJ's Judgment in *Mantello*

Seven years have passed since the ECJ first pronounced on the transnational application of the *ne bis in idem* principle in its landmark judgment in *Gözütök and Brügge*.[1] So far, nine judgements interpreting the *ne bis in idem* principle have been delivered.[2] With the exception of the most recent *Mantello* case, all judgments concerned the scope and nature of obligations flowing from Art. 54–58 of the Convention on the Implementation of the Schengen Agreement [CISA]. These judgments fleshed out the meaning of *idem*[3] and *bis*[4] and resulted in transforming the *ne bis in idem* principle from a traditional principle strongly linked to national sovereignty and the state`s *ius puniendi* to a human right of European citizens in a European criminal justice area.[5]

With the advancement of integration in the Area of Freedom, Security and Justice based on mutual recognition it was foreseeable that in the absence of European legislation the ECJ would receive other preliminary questions on the interpretation of the *ne bis in idem* principle as contained in the various mutual recognition instruments. The *Mantello* case[6] is the first reference for a preliminary ruling that concerns the *ne bis in idem* principle as a ground for non-recognition in the system of the European Arrrest Warrant [EAW].[7] The referring German court raised the question whether the concept of *ne bis in idem* as developed by the Court in the context of Art. 54 of the CISA does

1 C-187/01 and C-385/01 *Gözütök and Brügge* [2003] ECR I-1345.

2 C-187/01 and C-385/01 *Gözütök and Brügge* [2003] ECR I-1345; C-469/03 *Miraglia* [2005] ECR I-2009; C-436/04 *Van Esbroek* [2006] ECR I-2333; C-150/05; *Van Straaten* [2006] ECR I-9327; C-467/04 *Gasparini and Others* [2006] ECR I-9199; C-288/05 *Kretzinger*, [2007] ECR I-6441; C-367/05 *Kraaijenbrink*, Judgement of 18 July 2007; C-297/07 *Bourquain*, Judgement of 11 December 2008; C-491/07 *Turanský* [2008] ECR I-11039.

3 According to the ECJ the only relevant criterion for the defining the "same acts" is that there should be an "identity of the material facts, understood in the sense of the existence of a set of concrete circumstances which are inextricably linked together in time, in space and by their subject matter." C-436/04 *Van Esbroek* [2006] ECR I-2333, para. 38. Recalled in C-150/05 *Van Straaten* [2006] ECR I-9327, para. 48.; C-467/04 *Gasparini and Others* [2006] ECR I-9199, para. 54.; C-367/05 *Kraaijenbrink*, Judgement of 18 July 2007, para. 26.

4 According to the case law of the ECJ, the *ne bis in idem* principle applies not only to final convictions and aquitals, but all national decisions which bars further prosecution under national law. C-187/01 and C-385/01 *Gözütök and Brügge* [2003] ECR I-1345, para. 48.; C-469/03 *Miraglia* [2005] ECR I-2009, para. 34.; C-150/05 *Van Straaten* [2006] ECR I-9327, para. 61.; C-467/04 *Gasparini and Others* [2006] ECR I-9199, para. 33.

5 For a general assessment of the case law of the ECJ on *ne bis in idem* see *K. Ligeti*, Rules on the Application of ne bis in idem in the EU, Eucrim 2009/1-2, p. 37-42.; *J.A. E. Vervaele*, Fundamental rights in the European space for freedom, security and justice: the praetorian *ne bis in idem* principle of the Court of Justice, in: M. Sancho (ed.), Criminal proceedings in the European Union: essential safeguards, Lex Nova, Valladolid, 2008, p. 78-101.

6 *Mantello*, Judgement of 16 November 2010.

7 Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and surrender procedures between Member States, OJ No. L 190, 18 July. 2002, p. 1.

also apply to the EAW.[8] As it will be explained below in detail, the Court came to the fairly unsurprising conclusion that its standing case law on *ne bis in idem* should be also applied in the context of the EAW.[9] More interesting aspects of the case relate to the possibilities and responsibilities of the EU Member States' judicial authorities to control respect for fundamental rights when applying mutual recognition.

The present article focuses on this second aspect. Taking as a starting point the reasoning of the Advocate General and of the Court in the *Mantello* case, the role played by the issuing and executing judicial authorities in safeguarding fair trial principles such as the *ne bis in idem* principle will be examined. With a view to the present stage of integration, it is argued in the following that the mutual recognition instruments in general and the EAW in particular provide incomplete rules for judicial control. In order to build a true Area of Freedom, Security and Justice further legislative action is required in order to strengthen judicial control in the EU.

I. The facts of the case

On 13 September 2005, Gaetano Mantello was arrested by the Italian railway police for carrying two packets of cocaine. The Tribunale di Catania sentenced Mantello on 30 November 2005 to imprisonment and a fine for unlawful possession of cocaine intended for resale. He subsequently served 10 months and 20 days in prison.

On 7 November 2008, the Tribunale di Catania issued an EAW in respect of Mantello, alleging that between January 2004 and November 2005 he had participated in organised drug trafficking in a number of Italian towns and in Germany. It was alleged furthermore that during that period and in the same places he also unlawfully possessed, retained, transported, sold or disposed of cocaine to third parties.

According to the information contained in the Italian arrest warrant, from January 2004 onwards various Italian authorities investigating drug trafficking in cocaine taped the telephone calls made by Mantello. Based on the information received this way, Mantello's participation in the drug trafficking organization was confirmed.

Based on the EAW, Mantello was arrested in Germany on 29 December 2008. The German court before executing the EAW asked the Italian authorities for additional information whether the judgment of the Tribunale di Catania of 30 November 2005 precluded execution of the EAW. The Italian issuing judicial authority declared that the judgment of 30 November 2005 did not preclude the criminal proceedings referred to in the EAW under Italian law and therefore the case was not subject to the *ne bis in idem* principle. This explanation, however, did not convince the German court which decided to refer the case for a preliminary ruling to the ECJ. The German judge asked whether the execution of the EAW issued in respect of organised drug trafficking may violate the *ne bis in idem* principle as contained in Article 3(2) of the Framework Decision on the EAW[10] since the Italian investigating authorities, at the time of the investigation which led to Mantello's conviction for possession of cocaine intended for resale,

8 *Mantello*, Judgement of 16 November 2010, para. 30.
9 *Mantello*, Judgement of 16 November 2010, para. 40.
10 Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and surrender procedures between Member States, OJ No. L 190, 18 July. 2002, p. 2.

had sufficient evidence to charge and prosecute him in respect of the offences referred to in the EAW. In order not to jeopardize the investigations and to be able to discover that trafficking network, the investigators decided not to pass on the existing evidence to the investigating judge. Therefore the German court asked the ECJ whether the notion of "the same acts" is to be determined in accordance with the law of the issuing or the executing Member State, or according to an autonomous interpretation of EU law. This was of particular relevance since according to German law an offence relating to participation in a criminal organisation could form the subject-matter of subsequent proceedings only if two conditions are met: first that only single acts of the member of such an organisation formed the subject matter of the previous indictment and second that the accused does not have a legitimate expectation that the previous proceedings encompassed all the acts carried out in the context of the organisation. The referring court was of the opinion that it would also be necessary that, at the time of the decision by the court concerning the single act, the investigating authorities had no knowledge that other individual offences and an offence relating to participation in a criminal organisation had been committed.

Furthermore, the referring German court also sought clarification as to whether the acts in question – the illegal possession of drugs and the membership of a drug trafficking organisation – were "the same acts" when the authorities had imposed a sentence with respect to the former but had chosen not to pursue the latter.

II. The opinion of Advocate General Yves Bot[11]

The Advocate General started its opinion by examining whether Article 3(2) of the Framework Decision on the EAW according to which the *ne bis in idem* principle is a mandatory ground for refusal of the execution of the EAW is applicable to a decision delivered in the issuing Member State.

Indeed, the Framework Decision on the EAW refers to the *ne bis in idem* principle on two occasions. First in Art. 3(2) as a mandatory ground for non-execution, and in Art. 4(5) as a facultative ground for non-execution. Whereas Art. 4(5) treats those cases where the person against whom an EAW was issued had been sentenced for the same acts in a third country, Art. 3(2) refers to cases where the person had already been finally judged in one of the Member States for the same acts as those underlying the EAW. In the preliminary reference in the *Mantello* case, the German judge in fact asked, whether Art. 3(2) would also prevent the execution of the EAW, if the executing judicial authority assesses that the person sought by the EAW had already been finally judged in the issuing Member State for the same acts as those underlying the EAW.

Against this background, several Member States argued that Article 3(2) is not applicable to the *Mantello* case.[12] In their view, Art. 3(2) applies only to situations where the person against whom an EAW was issued, had already been finally judged in a Member State other than the issuing state for the same acts as those underlying the EAW. In view of these Member States, it is for the issuing judicial authorities to verify whether

11 Opinion of the Advocate General of 7 September 2010.

12 The Czech Republic, the Kingdom of Spain, the French Republic, the Italian Republic, the Kingdom of the Netherlands and the Republic of Poland.

the person against whom they want to issue an EAW has not already been sentenced in their state for the same acts. In that logic, the assessment of the issuing judicial authority that the *ne bis in idem* principle does not apply, is binding for the executing judicial authority.[13]

The Advocate General did not agree with this view; in his opinion it would go against the system of the EAW and against the fundamental right character of *ne bis in idem*, if the executing judicial authority could not assess violations of *ne bis in idem* in the issuing Member State. According to the Advocate General, "although the issuing judicial authority is supposed to have itself verified that the acts attributed to the person concerned have not already been judged, the EU legislature expressly intended, first, that the *ne bis in idem* principle should constitute not only an obstacle to a second trial of the person concerned, but also an obstacle to his surrender and, secondly, that observance of that principle should not be left solely to the discretion of the issuing judicial authority, but should also be guaranteed by the executing judicial authority." In order to support his opinion, the Advocate General recalled, that the EAW must contain all relevant information concerning the acts which are allegedly attributed to the requested person. The executing judicial authority may, if appropriate, request from the issuing judicial authority supplementary information in order to assess whether the EAW can be executed. And the executing judicial authority must hear the person prior to execution.[14]

According to the Advocate General it follows from the fundamental right character of *ne bis in idem* and from the obligation of Member States to ensure the respect for fundamental rights when executing the EAW that the executing judicial authority must be able to control the respect for *ne bis in idem* regardless in which Member State the person had allegedly been already judged for the same acts (the executing Member State, the issuing Member State or any other Member State).[15] The Advocate General pointed out, however, that it is not for the executing judicial authority to *ex officio* examine whether the issuing State, or other State, has delivered a judgment concerning the same acts as the EAW. It is only "if the executing judicial authority is informed that the requested person has been finally judged [...] in respect of the same acts" that it shall refuse execution.[16] If this is the case or if the executing authority has information which indicates that the requested person has been tried on the same acts and when asking the issuing State does not get a satisfactory answer, the executing State shall apply the ground for non recognition.

As to the first question posed by the German court, the Advocate General stated that the notion of "the same acts" should be given a uniform interpretation within EU law and suggested that it should be interpreted in the same way as Article 54 of the CISA.[17] The Advocate General also stated in respect of the second question that the law of the executing Member State is irrelevant in assessing the fact that the investigators, at the time when Mantello was prosecuted and convicted in respect of a single act of possession of narcotic drugs, already had evidence of Mantello's participation, for se-

13 This was in particular the view of Italy.
14 Opinion of the Advocate General of 7 September 2010, para. 79.
15 Opinion of the Advocate General of 7 September 2010, paras. 84-85.
16 Art. 3(2) Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and surrender procedures between Member States, OJ No. L 190, 18 July. 2002, p. 2.
17 Opinion of the Advocate General of 7 September 2010, para. 93.

veral months, in a criminal organisation for the purpose of trafficking in narcotic drugs, but failed to disclose it to the court having jurisdiction in the interests of the investigation. Only EU law is decisive in assessing whether that participation in the criminal organisation and the single act of possession of narcotic drugs constitute the same acts. In light of the standing case law of the ECJ on *idem*, the Advocate General pointed out that only the "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" counts. Therefore the Adcovate General concludes that "the fact that the Italian investigating authorities, when Mr Mantello was judged in November 2005 by the Tribunale di Catania for having possessed and transported, in Catania on 13 September 2005, cocaine with a view to its onward sale, had evidence of his participation, from January 2004 to November 2005, in a criminal organisation for the purpose of trafficking cocaine does not [..] preclude his surrender to the Italian judicial authority under a European arrest warrant referring to his participation in that organization".[18]

III. The reasoning of the Court

Following the opinion of the Advocate General, the ECJ emphasised that the concept of 'same acts' in Article 3(2) of the Framework Decision is an autonomous concept of European Union law which, as such, may be the subject of a reference for a preliminary ruling. The Court went on to state that "in view of the shared objective of Article 54 of the CISA and Article 3(2) of the Framework Decision, which is to ensure that a person is not prosecuted or tried more than once in respect of the same acts, it must be accepted that an interpretation of that concept given in the context of the CISA is equally valid for the purposes of the Framework Decision".[19] However, in the Court's view, the question of the referring court is rather a question on *bis* than on *idem*.[20] In other words, the German court asks whether the fact that the investigating authorities held evidence concerning acts which constituted the offences referred to in the EAW, but did not submit that evidence for consideration to the Tribunale de Catania when that court ruled on the individual acts of 13 September 2005, makes it possible to treat the judgment as if it were a final judgment in respect of the acts set out in the EAW.

In order to assess whether the Decision of the Tribunal die Catania of 30 November 2005 can be regarded as "finally judged" for the purposes of Art. 3(2) of the Framework Decision, the ECJ recalls its case law on the interpretation of *bis* in the context of Art. 54 of the CISA. Accordingly, a requested person is considered to have been finally judged in respect of the same acts within the meaning of Article 3(2) of the Framework Decision where, following criminal proceedings, further prosecution is definitively barred[21] or where the judicial authorities of a Member State have adopted a decision by

18 Opinion of the Advocate General of 7 September 2010, para. 130.
19 *Mantello*, Judgement of 16 November 2010, para. 40.
20 *Mantello*, Judgement of 16 November 2010, para. 43.
21 C-187/01 and C-385/01 *Gözütök and Brügge* [2003] ECR I-1345, para.30.; C-491/07 *Turanský* [2008] ECR I-11039, para. 32.

which the accused is finally acquitted in respect of the alleged acts.[22] The Court reaffirms that for determining whether a person has been 'finally' judged for the purposes of Article 3(2) of the Framework Decision, the law of the Member State in which the judgment was delivered is decisive.[23]

By drawing an analogy with its judgment in *Turansky*, the Court reaffirms that a decision which, under the law of the Member State which instituted criminal proceedings, does not definitively bar further prosecution at national level in respect of certain acts does not constitute a procedural obstacle to the possible opening or continuation of criminal proceedings in respect of the same acts in one of the Member States of the European Union. Since in the *Mantello* case, the Italian issuing judicial authority expressly stated and explained that its earlier judgment did not cover the acts referred to in the EAW and therefore did not preclude the criminal proceedings referred to in the EAW in Italy, the "executing judicial authority was obliged to draw all the appropriate conclusions from the assessments made by the issuing judicial authority in its response".[24] The Court made clear that the executing authority is not in a position to overrule the assessment of the issuing judicial authority.

The Court did not consider the opinion put forward by the Advocate General according to which the executing judicial authority must be able to assess violations of *ne bis in idem* in the issuing Member State. Thereby the Court avoided to rule on the sensitive question of the extent of control the executing judicial authority is authorized to perform in the system of the EAW. Since both for the daily practice and future development of mutual recognition judicial control is of utmost importance, we shall proceed in examining the respective arguments of the Advocate General more in detail.

IV. The powers of the executing authority to perform judicial control

The EAW is the first instrument implementing the principle of mutual recognition. The principle of mutual recognition was introduced in the Tampere Conclusions as the cornerstone of judicial cooperation in criminal matters[25] in order to ensure effective cooperation between the judicial authorities of the EU Member States in combating cross-border crime. According to the mutual recognition principle, the judicial authorities of one Member State recognise and execute the decisions of judicial authorities of other Member States with a minimum of formality and on the basis of mutual trust. In other words, the decision of the issuing state takes effect as such within the legal system of the executing state. The principle of mutual recognition constitutes, therefore, a developed form of cooperation mechanisms as it principally provides for the automatic execution of foreign decisions.

22 C-150/05 *Van Straaten* [2006] ECR I-9327, para. 61.; C-491/07 *Turanský* [2008] ECR I-11039, para. 33.

23 *Mantello*, Judgement of 16 November 2010, para. 46.

24 *Mantello*, Judgement of 16 November 2010, para. 50.

25 Tampere European Summit, 15 and 16 Oct. 1999, Presidency Conclusions, SN 200/99, § 33. *K. Ligeti*, The principle of mutual recognition – prerequisites, principles and exemption, in: Proceedings of the 5th European Jurists Forum, Budapest, 2009, p. 55-72.

Technically speaking the application of mutual recognition means a shift of power away from the executing state to the issuing state; criminal decisions of the issuing state should be enforced in the executing state without additional checks. Such shift is remarkable and very sensitive from the point of view of judicial control, i.e. the control of respect for fundamental rights. The philosophy of mutual recognition implies namely that most of the judicial control in respect to cooperation should be performed in the issuing state and not in the executing state.

It was foreseeable from the very beginning that this shift of power inherent to the founding idea of mutual recognition will be opposed by Member States. Already during the negotiations on the EAW, the Member States voiced their unwillingness to accept the surrender of suspects and defendants on the basis of total automaticity.[26] Member States feared the breach of the suspect's rights, in particular the right to a fair trial.[27]

Concerns about the automatic character of the mutual recognition principle made the Commission incorporate a number of mandatory and facultative grounds for refusal into the Framework Decision on the European arrest warrant. Subsequent mutual recognition instruments retained this practice, and they all contain grounds for refusal that allow a national judicial authority to refuse to execute the foreign judicial decision. As a result, mutual recognition in criminal law became limited by expressly enumerated grounds for refusal. Grounds for refusal represent the agreed and stipulated confines of mutual recognition and indicate the scope of judicial control retained by the executing state.

Concerns on the weakening of the safeguards of the defendants by the automatic character of the mutual recognition principle on the one hand and the need to render cooperation in criminal matters more simple and efficient, on the other hand, are not easy to reconcile. The difficulty of finding the right balance between the simplification of cooperation and the safeguarding of fundamental rights is evidenced by the unsystematic treatment of refusal grounds in the various framework decisions on mutual recognition. This situation is further complicated by the national implementing legislations, many of which have gone beyond the contours of the permissible conditions and exceptions and have invented additional grounds for refusal.[28] Stipulating additional grounds for refusal not only runs counter to the objectives of mutual recognition, but also clearly reflects the desire of Member States to allocate as much power as possible to the national judge to refuse cooperation.

In alleviating concerns on the weakening of the safeguards, it is of crucial importance to define the extent of control the executing judicial authority is authorized to perform by the principle of mutual recognition.[29] In general terms, in the system of mutual recognition the decision of the issuing Member State – manifested in the warrant to be recognized and executed by the other Member State – can be contested only in the issuing

26 On the legislative history of the European arrest warrant, see *E. van Sliedregt*, The Dual Criminality Requirement, in: N. Keijzer/E. van Sliedregt (eds.), The European Arrest Warrant in Practice, TMC Asser Press, The Hague, 2009, p. 54.

27 For an illustration of the concerns in respect of the European arrest warrant, see *V. Mitsilegas*, EU Criminal Law, Hart Publishing, Oxford, 2009, p. 124.

28 Report from the Commission on the implementation since 2005 of the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, COM(2207) 407 final, 11 July 2007, p. 8–9.

29 *A. Weyembergh*, Transversal report on judicial control in criminal matters (manuscript).

state. In accordance with the principle of mutual recognition, it is not for the executing Member State to check the grounds on which the foreign decision was based. Mutual recognition can achieve its goals in the criminal justice field only – namely rendering judicial cooperation more efficient – if the executing state supports without further formalities the criminal procedure conducted in the issuing state.

The limited powers of the executing judicial authorities to control the facts underlying the foreign decision they are expected to recognize and enforce is mirrored in the wording of several mutual recognition instruments which clearly exclude such control. So does e.g. Art. 8(2) of the Framework Decision on financial penalties state that "only the issuing State may determine any application for review of the decision".[30] Similarly, Art. 9 (2) of the Framework Decision on confiscation provides that "only the issuing State may determine any application for review of the confiscation order".[31] In light of this clear foundation, the arguments of the AG – which would allow at least a partial "re-examination" of the decision of the issuing authority by the executing authority – are somewhat astonishing.

The restriction of the competence of the executing state to control the decision of the issuing state represents a significant shift in comparison to traditional cooperation in criminal matters. According to the traditional instruments of judicial cooperation based on the request principle, the requested state takes a decision whether to assist the requesting state. This decision is limited by several positive requirements and grounds for refusal stipulated in treaties related to international cooperation. Although even in the system of traditional cooperation in criminal matters, the requested state is not supposed to perform a complete "re-examination" of the case forming the basis of the request, the powers of the requested state are much larger than those of the executing state.

The limited possibilities of the executing state to check the decision forming the basis of the cooperation request were explained by the mutual trust characterizing the relations of the EU Member States. Mutual recognition has been defined from the beginnings as "a principle that is widely understood as being based on the thought that while another state may not deal with a certain matter in the same or even a similar way as one's own state, the results will be such that they are accepted as equivalent to decisions by one's own state. Mutual trust is an important element, not only trust in the adequacy of one's partners rules, but also trust that these rules are correctly applied."[32] The importance of mutual trust has also been confirmed by the ECJ in several judgements recalling that Member States have mutual trust in each other's criminal justice systems.[33] According to the ECJ, mutual trust means that each Member State "recognises the criminal law in force in other Member States even when the outcome would be different if its own

30 Council Framework Decision 2005/214/JAI of 24 February 2005 on the application of the principle of mutual recognition to financial penalties, OJ No. L 76, 22 March 2005, p. 16.

31 Council Framework Decision 2006/783/JHA of 6 October 2006 on the application of the principle of mutual recognition to confiscation orders, OJ No. L 328, 24 Nov. 2006, p. 59.

32 Communication from the Commission to the European Parliament and the Council, Mutual Recognition of Final Decisions in Criminal Matters, COM (2000) 495 final, 26 July 2000.

33 C-187/01 and C-385/01 *Gözütök and Brügge* [2003] ECR I-1345, para. 32. Recalled in C-436/04 *Van Esbroek* [2006] ECR I-2333, para. 29.; C-467/04 *Gasparini and Others* [2006] ECR I-9199, para. 29.; C-297/07 *Bourquain*, Judgement of 11 December 2008, para. 37.

national law were applied."[34] Mutual trust, thus, presuppose that there is an equivalent level of protection of fundamental rights offered in the different EU Member States.

Conversely to such assumption and to the rhetoric of mutual trust, the recent practice of mutual recognition instruments demonstrate that national authorities remain suspicious of one another's ability to fully comply with the requirements of fundamental rights and national courts face the dilemma of whether to refuse to cooperate with another Member State or not.[35] This dilemma is most apparent in cases of mutual recognition and the enforcement of pre-trial orders as pre-trial orders are issued in proceedings in which the affected party did not have the opportunity to raise its arguments.[36] It is, therefore, up to the court to anticipate the risk that the judicial authority of the issuing state might fail to respect human rights after its decision has been executed. The same dilemma exists in situations of mutual recognition and the enforcement of final judgements where national judicial authorities are obliged to recognise and enforce a judicial decision of another Member State based on the assumption that the decision was adopted in full compliance with fundamental rights. The mistrust between the judicial authorities of the Member States is not only linked to old tenets of national sovereignty, but is often backed by information on the malfunctioning of the administration of criminal justice in certain Member States.

The application of mutual recognition, therefore, puts national judicial authorities in a difficult situation. On the one hand, the concept of mutual recognition is founded upon the idea that the executing state should afford trust to the issuing state in that it fully respects fundamental rights. On the other hand, such trust cannot be blind. If, however, before recognising and enforcing a judicial decision, the executing state examined the substance of the decision – i.e. whether fundamental rights had been respected in the issuing state –, such examination would be a clear expression of mistrust that runs contrary to the almost automatic character of mutual recognition.

A most recent example of efforts to retain the competence of executing judicial authorities can be witnessed in the negotiations on the European Investigation Order [EIO]. The EIO aims at replacing the existing framework for gathering of evidence by setting up a comprehensive system for obtaining evidence in cases with a cross-border dimension based on the principle of mutual recognition.[37] The negotiations conducted so far reveal that several Member States are not willing to accept the shift of power from the executing to the issuing judicial authority based on mutual trust. These Member States put forward a proposal to include a rather general and vague refusal ground into the

34 C-187/01 and C-385/01 *Gözütök and Brügge* [2003] ECR I-1345, para. 33. Recalled in C-436/04 *Van Esbroek* [2006] ECR I-2333, para. 30.; C-150/05 *Van Straaten* [2006] ECR I-9327, para. 43.; C-467/04 *Gasparini and Others* [2006] ECR I-9199, para. 30.; C-297/07 *Bourquain*, Judgement of 11 December 2008, para. 37.

35 *O. De Schutter*, The role of fundamental rights evaluation in the establishment of the area of freedom, security and justice, in: M. Martin, Crime, Rights and the EU?, Justice, London, 2008, p. 46.

36 *G. Stessens*, The Principle of Mutual Confidence between Judicial Authorities in the Area of Freedom, Security and Justice, in: G. de Kerchove/A. Weyembergh, L'espace pénal européen: enjeux et perspectives, Brussels, éd de l'ULB, 2002, p. 94.

37 Initiative for a Directive of the European Parliament and of the Council regarding the European Investigation Order in criminal matters, 2010/0817 (COD), council of the European Union, Brussels, 29 April 2010.

Directive on the EIO based on similar national cases and the proportionality test.[38] Should this proposal be accepted, it would constitute inconsistency in valuation in respect of mutual recognition. It is paradox to say that the execution of foreign criminal decision based on mutual recognition in the realm of the physical surrender of persons – i.e. the EAW – is subjected to less stringent criteria than the execution of investigative measures for the purposes of gathering evidence.

At the time of writing this article the negotiations on the EOI were still ongoing. It remains to be seen which compromise can be reached on the refusal grounds of the future European Investigation Order. The position of Member States in the negotiations manifest, however, the difficulty to accept the logic of mutual recognition according to which judicial control exercised in the issuing state is more important than that of the executing state. This logic will only work in practice if there is some equivalence between judicial controls performed in the different (issuing) Member States.

V. Concluding remarks

The conclusions of the Court in *Mantello* are not surprising on the interpretation of the *ne bis in idem* principle. The ECJ simply drew on its previous case law in *Turansky* according to which decisions which do not bar under national law the institution of new criminal proceedings in respect of the same acts, do not constitute a final decision for the purposes of *ne bis in idem*. In *Mantello*, the ECJ opted to answer the question of the referring German court without addressing the more fundamental issue of judicial control in the system of mutual recognition. This is astonishing as the Court did not hesitate to play an active role in shaping the mutual recognition principle on other occasions.[39]

It is already clear at the present stage that the case law of the ECJ on mutual recognition of criminal decisions goes further than what some Member States are willing to accept. So did e.g. the *Turansky* case, recalled in *Mantello*, also clarified that for the ECJ the final decision can come from a police authority that examined the merits of the case.[40] This is remarkable since one of the central points of discussions during the negotiations on the proposed Directive of the EIO focused on outlining the notion of issuing judicial authority. Due to the resistance of some Member States, at the present stage of the negotiations it seems that police authorities will not be accepted as issuing judicial authorities of an EIO.[41] Should this view be adopted in the Directive, it would again represent a step backwards in the application of mutual recognition and would run counter to the existing case law of the ECJ in that respect.

The persistent debates on the nature of issuing judicial authority (judge, investigative judge, prosecutor or police officer) as well as on their competence *vis-à-vis* the executing judicial authority may come to end if the EU adopts measures in order to ensure equivalence between judicial control exercised in the different EU Member States.

38 Council of the European Communities, Council Doc. No.16868/10 Brussels 26 November 2010.

39 Case C-303/05, *Advocaten voor de Wereld* [2007] ECR I-3633.

40 C-491/07 *Turanský* [2008] ECR I-11039, para. 39.

41 Council of the European Communities, Council Doc. No.16868/10 Brussels 26 November 2010.

For the time being, judicial control remains a controversial facet of the still emerging European mutual recognition doctrine. The *dictum* of the Advocate General that the executing authority should not investigate *ex officio,* but would rather be confined to *information* that "the requested person has been finally judged" certainly pays tribute to the dominant role attributed to the issuing authority. The principle of mutual recognition as phrased currently implies that the executing authority in scrutinising the information presented to it, must limit itself to ask the issuing authority for additional information if it maintains doubts in respect of accuracy or completeness.[42]

The current crisis of mutual trust and judicial control is orchestrated by the ongoing negotiations concerning a European Investigation Order (EIO). The fact that much more stringent criteria are about to be applied to the judicial control of investigative measures than the highly sensitive area of physical surrender of persons exposes EU judicial cooperation to the stress of a largely inconsistent valuation of obtaining cross-border evidence on the one hand and, on the other hand, the most fundamental right of personal freedom and liberty.

42 Art. 15(2) Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and surrender procedures between Member States, OJ No. L 190, 18 July. 2002, p. 6.