

Maja Munivrana Vajda, PhD, Associate Professor

University of Zagreb, Faculty of Law
Trg Republike Hrvatske 14, Zagreb, Croatia
maja.munivara@pravo.hr

THE TRUST IS NOT BLIND – REVIEWING THE IDEA OF MUTUAL TRUST IN THE EU IN THE CONTEXT OF CONFLICTS OF JURISDICTION AND *NE BIS IN IDEM* PRINCIPLE*

ABSTRACT

*This paper will deal with the positive conflicts of jurisdiction in the EU. At the outset, as an introduction, it will seek to identify the reasons which may lead to positive conflicts of jurisdiction in the EU and explain why such conflicts may create problems on different levels; foremost for concerned individuals, who may face prosecutions in different states, but also for the efficiency of judiciary of the member states and the rule of law in the EU. The existing legal framework has so far remained unsuccessful in addressing this issue, although several initiatives have tried to provide some guiding principles and solutions aimed at avoiding positive conflicts within the joint Area of Freedom, Security and Justice. Despite these efforts, to date the only binding mechanism which can conclusively settle conflicts of jurisdictions in the EU is the *ne bis in idem* principle.*

*The issue of *ne bis in idem* has received a lot of scholarly attention, so the purpose of this paper is not to analyze the transnational application of *ne bis in idem* principle in detail, as this has been done elsewhere, but to look at the most recent decisions of the CJEU. Some of these decisions cast doubt on the idea of mutual trust on which this principle lies. Furthermore, this mechanism is far from perfect and there are many problems surrounding its application, indicating that conflicts of jurisdiction should be solved in another, more principled and forward looking manner. The paper will conclude with the set of proposals for preventing and solving conflicts of jurisdictions and assessment of their viability.*

Keywords: *positive conflicts of jurisdiction, extraterritorial jurisdiction, *ne bis in idem*, parallel proceedings, mutual trust, AFSJ*

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1. INTRODUCTION – OR WHY SHOULD POSITIVE CONFLICTS OF JURISDICTION BE AVOIDED WITHIN THE EU

Conflicts of jurisdiction can have different faces – they can either be positive, when two or more state bodies or national jurisdictions believe to have jurisdiction over a case, or negative, when no one is willing to prosecute, either because no one has jurisdiction to prosecute, or when those with jurisdiction choose not to exercise it.¹ This paper will only deal with the former type of conflict, with focus on its transnational dimension. At the international level conflicts of jurisdiction often arise not from misinterpretation of jurisdictional rules, but even from consistent adherence to international law, i.e. jurisdictional provisions of international conventions and other regional and EU legislative documents. A number of international conventions and sources of EU criminal law require states both to harmonize the offences in question and to prosecute and punish the perpetrators of these offences, not only according to the territorial principle, but also when these offences are committed abroad, pursuant to principles of active or passive personality, protective principle or even principle of universal jurisdiction (in its form of *aut dedere aut judicare* principle).² Moreover, states often independently extend their jurisdiction extraterritorially. Although positive conflicts of jurisdiction are not an entirely new phenomenon, due to technical progress and increased mobility of people, which is especially visible within the EU,³ positive conflicts of jurisdiction have become more and more common.⁴

This issue, however, has drawn the attention of scholars and the general public only fairly recently, following the creation of the European common area of freedom, security and justice (AFSJ), which is based on mutual recognition and the underlying principle of mutual trust.⁵ The desire to avoid positive conflicts of jurisdiction within the AFSJ can be seen already from the primary sources of the EU law, i.e. from the Treaty on the Functioning of the European Union. Accord-

¹ The latter type is often mentioned in the context of universal jurisdiction, as only when no state is willing or able to prosecute is there a danger of impunity, which could trigger universal jurisdiction

² See e.g. different jurisdictional ground stipulated in article 19 of the Directive 2017/541 of 15 March 2017 on combating terrorism and replacing Council Framework Decision 2002/475/JHA and amending Council Decision 2005/671/JHA

³ Since the basic foundation of the EU single market are four freedoms: free movement of goods, services, labor and capital

⁴ Zimmerman, F., *Conflicts of Criminal Jurisdiction in the European Union*, Bergen Journal of Criminal Law and Criminal Justice, Vol. 3, Issue 1, 2015, pp. 3-4

⁵ See art. 67. of the Treaty on the Functioning of the EU, OJ C 326 from 26 October 2012 (hereinforth TFEU). According to para. 1. „The Union shall constitute an area of freedom, security and justice with respect for fundamental rights and the different legal systems and traditions of the Member States.“ See also art. 82(1), according to which judicial cooperation in the field of criminal law shall be based on the principle of mutual recognition of judgments and judicial decisions

ing to Article 82(1)(b) of the TFEU, the European Parliament and the Council are in charge of the measures aiming to prevent and settle conflicts of jurisdiction between member states. On the other hand, the resolution of existing conflicts of jurisdiction according to the Treaty is entrusted to Eurojust.⁶ Even before the Lisbon Treaty entered into force, the issue of conflicts of jurisdictions was recognized, first in the Green paper on conflicts of jurisdiction and the principle of *ne bis in idem* in criminal proceedings,⁷ and later in the Framework decision on prevention and settlement of conflicts of exercise of jurisdiction in criminal proceedings.⁸

Why do positive conflicts of jurisdiction create specific problems within the EU? The AFSJ is not just an area of freedom and security, but also of justice, within which it is necessary to secure the fundamental rights of all people, including the perpetrators of criminal offences.⁹ One of the rights that has lately emerged in national legal systems as a basic human right is the right of every individual not to be tried two or more times for the same criminal offence.¹⁰ The so called *ne bis in idem* principle (or in common law, prohibition of double jeopardy) has been expressed in both primary and secondary sources of the EU law.¹¹ It is obvious that the single market and the four freedoms cannot be secured if the final judgment rendered in one Member State does not prevent prosecution and punishment in another member state. Additionally, positive conflicts of jurisdiction open up the risk of different outcomes of criminal proceedings in different Member States, which is inconsistent with the very idea of a common area of freedom, security and justice.

Although due to the principle of *ne bis in idem*, which applies horizontally within the EU, as will be elaborated further *supra*, the perpetrator cannot be punished twice, this principle cannot prevent parallel proceedings, which can also put the defendant in a much more difficult situation compared to an individual prosecuted within a single state. For example, parallel or consecutive prosecutions in different Member States against the same person for the same offence (*lis pendens*)¹² can disable effective defense or significantly raise its costs and, in the end, constitute

⁶ See art. 85(1)(c) TFEU

⁷ European Commission, 23 December 2005

⁸ Council Framework decision 2009/948/JHA of 30 November 2009

⁹ Art. 67. TFEU

¹⁰ This right, in its internal dimension, has been expressed in international conventions as well. See e.g. art. 4. of the Protocol 7 to European Convention on Human Rights

¹¹ Art. 51(1)(2) of the Charter of Fundamental Rights of the European Union (2012/C 326/02) as well as art. 54. and 55. of Convention Implementing the Schengen Agreement, OJ L 239 of 22 September 2000 (CISA), pp. 19-62

¹² Peers, S., *EU Justice and Home Affairs Law*, Oxford EU Library, 2011, p. 828

irrational use of time, financial resources, police and judicial apparatus. Parallel proceedings further raise the issue of the principle of legality. Courts of different MS apply not just different procedural laws, but also substantive criminal codes, which may have particular implications for the sentencing regimes (having in mind significant differences between the states in this field). In extreme cases it is even possible that a certain conduct will not be a criminal offence in all the involved states.¹³ Bearing in mind all of the above, the potential for forum shopping, not just by the defense, but also by the prosecution,¹⁴ seems significant, since the choice of jurisdiction may easily affect the outcome of proceedings. Yet, despite all the negative effects of positive conflicts of jurisdiction, the EU has still not effectively responded to this problem, with an instrument which would provide binding coordination of prosecutions or determine competence.¹⁵ Some limited efforts, made so far, will be described below.

2. THE EXISTING LEGAL FRAMEWORK

First steps to eliminate positive conflicts of jurisdiction have been taken already in the 1970s, within the Council of Europe. European Convention on the Transfer of Proceedings in Criminal Matters in part IV deals with “Plurality of Criminal Proceedings”.¹⁶ Article 31(1) introduced the duty of a state, whenever aware of proceedings pending in another contracting state against the same person in respect of the same offence, to consider whether to either waive or suspend its own proceedings, or transfer them to the other state. However, if the state decided not to waive or suspend its own proceedings, the only obligation was to notify the other state (Article 30(2)) and to strive with that other state “as far as possible” to determine, after evaluation in each of the circumstances mentioned in Article 8, which of them alone should continue to conduct proceedings (Article 31(1)).¹⁷ Clearly this Convention did not provide for any binding solution to positive conflicts of jurisdiction, but instead insisted on consultations between the states.

¹³ An interesting example is offered by Zimmerman, *op.cit.* note 4, p. 8

¹⁴ Even by the EPPO

¹⁵ Eurojust news, Issue no. 14, January 2016, p. 4

¹⁵ [http://www.eurojust.europa.eu/doclibrary/corporate/newsletter/eurojust%20news%20issue%2014%20\(january%202016\)%20on%20conflicts%20of%20jurisdiction/eurojustnews_issue14_2016-01.pdf](http://www.eurojust.europa.eu/doclibrary/corporate/newsletter/eurojust%20news%20issue%2014%20(january%202016)%20on%20conflicts%20of%20jurisdiction/eurojustnews_issue14_2016-01.pdf) Accessed 1 April 2018

¹⁶ The text of the treaty is available at [<https://rm.coe.int/1680072d42>] Accessed 1 April 2018

¹⁷ Some of the criteria mentioned in Article 8 are the residence or nationality of the defendant; whether he or she is undergoing or is to undergo a sentence involving deprivation of liberty in any of the involved states, would transfer of proceedings to one of the involved states contribute to determination of truth and where the most important items of evidence are located

Within the EU, the first efforts to address positive conflicts of jurisdiction have been made through different sectoral instruments, such is the Framework decision on terrorism.¹⁸ Whereas this instrument clearly aimed at centralizing proceedings in one state and provided for a sequence of criteria to be taken into consideration in order to achieve this objective,¹⁹ again this sequence was not binding on the states and neither was the objective of centralization.²⁰ Similar approach has been endorsed in several other framework decisions,²¹ which either explicitly endorsed territorial jurisdiction, or encouraged state cooperation with the aim to centralize criminal proceedings.²²

Effort to avoid conflicts of jurisdictions can also be seen in the establishment of Eurojust, which was given authority to request the states to coordinate prosecutions and to accept that one may be in a better position to prosecute certain offences; but again without any binding force.²³ Its Guidelines from 2003 seek to establish the jurisdiction in a state in which a “majority of criminality” occurred or “where the majority of the loss was sustained”.²⁴ The Guidelines further provide for several additional criteria, such as location of the suspect, availability and admissibility of evidence, interests of victims, etc. Yet, as the name of the document clearly indicates, all the criteria are serving merely as guidance. No significant change has been brought about with the decision to strengthen Eurojust in 2009.²⁵ Collegium of Eurojust was entrusted with a written opinion on how a conflict should be solved in the absence of agreement between the involved states,

¹⁸ Council Framework Decision of 13 June 2002 on combating terrorism, OJ L 164, 22/06/2002, p. 3–7

¹⁹ According to the FD on terrorism the territorial principle should have primacy, followed by the active and passive personality, and only then by the state in which the perpetrator was found/arrested

²⁰ The aim of centralized proceedings has been taken over in the new Directive of 15 March 2017 on combating terrorism and replacing Council Framework Decision 2002/475/JHA and amending Council Decision 2005/671/JHA. See art. 19(3)

²¹ See e. g. art. 7(2) of the Council Framework decision of 24 October 2008 on the fight against organized crime, art. 7(3) of the Council Framework decision of 29 May 2000 on increasing protection by criminal penalties and other sanctions against counterfeiting in connection with the introduction of the Euro

²² Peers, *op. cit.* note 12, p. 829

²³ Council decision of 28 February 2002 setting up Eurojust with a view to reinforcing the fight against serious crime (2002/187/JHA)

²⁴ Eurojust, Guidelines for deciding ‘Which jurisdiction should prosecute?’
[http://www.eurojust.europa.eu/doclibrary/Eurojust-framework/Casework/Guidelines%20for%20deciding%20which%20jurisdiction%20should%20prosecute%20%282016%29/2016_Jurisdiction-Guidelines_EN.pdf] Accessed 1 April 2018

²⁵ Council decision 2009/426/JHA of 16 December 2008 on the strengthening of Eurojust and amending Decision 2002/187/JHA setting up Eurojust with a view to reinforcing the fight against serious crime, OJ L138/14, 4 June 2009., p. 14

but again without any possibility to secure that such opinion is followed by the states.

The already mentioned Green paper on conflicts of jurisdiction and the principle of *ne bis in idem* in criminal proceedings from 2005 puts focus on exchange of information, negotiations through an intermediary such as Eurojust and the possibility of judicial supervision. The ideas of the Commission, however, were met with considerable criticism, not just by the member states, but also by the European Criminal Bar Association, which is why legislative initiatives in this field were halted for several years.²⁶

The first more comprehensive effort to address positive conflicts of jurisdiction may be found in the Framework decision on prevention and resolution of conflicts of jurisdiction from 2009.²⁷ Yet, neither this document is overly ambitious. It essentially boils down to creation of contacts between the states and exchange of information in order to try to reach a consensus between the states on “any effective solution aimed at avoiding the adverse consequences arising from such parallel proceedings” (Article 2(1)(a) and b)). Still, the consensus need not be achieved and there is no possibility to impose a binding solution in its absence. The only obligation is to exchange the information and not to centralize the prosecution in one state. Interestingly furthermore, this Framework decision does not clarify how the consensus should be reached and which jurisdictional principles and criteria should prevail.²⁸ Also, it does not specifically regulate the role of the Eurojust, but refers to other relevant documents, which emphasize its role. However, the 2016 Report from the Commission warned about the ineffective implementation of this Framework decision and the limited role of Eurojust in practice.²⁹

Finally, the recently established European Public Prosecutor’s Office (hereinafter EPPO) needs to be at least mentioned in this context.³⁰ When it comes to offences under the subject-matter jurisdiction of the EPPO, defined in Article 22

²⁶ Peers, *op. cit.* note 12, p. 830

²⁷ Framework Decision 2009/948/JHA on the prevention and settlement of conflicts of exercise of jurisdiction in criminal proceedings from 15 December 2009

²⁸ Only par. 9 of the Preamble refers to the criteria set forth by the 2003 Eurojust guidelines

²⁹ Report from the Commission to the European Parliament and the Council on the implementation by the Member States of Framework Decision 2009/948/JHA of 30 November 2009 on prevention and settlement of conflicts of exercise of jurisdiction in criminal proceedings
[http://ec.europa.eu/justice/criminal/law/files/report_conflicts_jurisdiction_en.pdf] Accessed 10 April 2018. In 2016 there were only about 30 cases of conflicts of jurisdiction solved through the Eurojust (Eurojust news 2016/1, p. 2-3)

³⁰ Council regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor’s Office (‘the EPPO’)

of the Regulation, as a rule the case will be initiated and handled by an European Delegated Prosecutor from the Member State where “the focus of the criminal activity is” or, if several connected offences within the competences of the EPPO have been committed, the member state where “the bulk of the offences has been committed” (Article 26(4)). In duly justified cases, another European Delegated Prosecutor (from a different Member state) may initiate an investigation, taking into account the following criteria, in order of priority: (a) the place of the suspect’s or accused person’s habitual residence; (b) the nationality of the suspect or accused person; (c) the place where the main financial damage has occurred. Additionally, the Permanent Chamber may, in a case concerning the jurisdiction of more than one member state, decide to reallocate the case to a European Delegated Prosecutor in another member state, merge or split cases and for each choose another European Delegated Prosecutor. Such decision must be in the general interest of justice and in accordance with the criteria specified above (in para. 4, Article 26(5)). Since the Permanent Chamber is not a judicial body,³¹ and there is no judicial supervision over a decision allocating jurisdiction to a particular state, this solution has already been justly criticized.³²

3. RESOLVING POSITIVE CONFLICTS OF JURISDICTION THROUGH *NE BIS IN IDEM*?

3.1. The development of *ne bis in idem* rule as a transnational principle

Since the legal framework on preventing and settling positive conflicts of jurisdiction so far offers only soft guidelines, the only binding mechanism which can conclusively settle conflicts of jurisdictions in the EU remains to date the *ne bis in idem* principle.³³ Obviously, the reach of this principle in this context is limited, since it can resolve conflicts of jurisdiction at a relatively late point, only once a case is finally disposed of in one member state. *A contrario*, it cannot prevent parallel proceedings.

The principle of *ne bis in idem* has received a lot of scholarly attention, both in Croatia and abroad,³⁴ so this paper will only give a very brief overview of the de-

³¹ See Art. 10. of the Regulation

³² Mitsilegas, V., *EU Criminal Law after Lisbon. Rights, Trust and the Transformation of Justice in Europe*, Hart Publishing, Oxford and Portland, Oregon, 2016, p. 93 with further references in note 57

³³ Similarly, Simonato, M., *Ne bis in idem in the EU: Two important questions for the CJEU (opinion of the AG in C-486/14 Kussowski)*, European Law Blog, [<http://europeanlawblog.eu/?p=3071>] Accessed 16 April 2018

³⁴ See e.g. Ivičević Karas, E., *Načelo ne bis in idem u europskom kaznenom pravu*, HLJKP 21, 2/2014, pp. 271-294; Burić, Z., *Načelo ne bis in idem u europskom kaznenom pravu - pravni izvori i sudska praksa*

velopment of this principle as a transnational principle within the EU and then focus on the most recent interpretation of this principle by the CJEU.

For a long time the *ne bis in idem* was recognized solely as a rule prohibiting double punishment within one jurisdiction.³⁵ Its transnational application became a major issue only with the development of the EU and its AFSJ. According to Article 54 of CISA: “A person whose trial has been finally disposed of in one Contracting Party may not be prosecuted in another Contracting Party for the same acts provided that, if a penalty has been imposed, it has been enforced, is actually in the process of being enforced or can no longer be enforced under the laws of the sentencing Contracting Party.”³⁶ In addition to its transnational dimension, Article 50 of the Charter of Fundamental Rights also emphasizes its internal dimension by simply proclaiming that: “No 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.”³⁷ Furthermore, in contrast to CISA, the Charter does not contain any reference to the so-called enforcement clause, which makes the application of the *ne bis in idem* principle contingent on the enforcement of sentence in the state which has rendered the final judgment. The Charter also does not provide for the exception contained in the Article 55 of the CISA, according to which states may decide not to apply the *ne bis in idem* principle on the offences which took place at least in part in their own territory as well as offences against their national interests.

3.2. No more blind trust? – Recent Case Law of the CJEU

Detailed contours to the principle of *ne bis in idem* in AFSJ have been given by the CJEU,³⁸ which has continuously emphasized that the transnational dimension

europskog suda, Zbornik Pravnog fakulteta u Zagrebu, 60(3-4), 2010, pp. 819-859; Gutschy, M., *Tumačenje načela ne bis in idem – interakcija Europskog suda pravde i Europskog suda za ljudska prava nakon stupanja na snagu Lisabonskog ugovora* (paper published on an internal network of the Faculty of Law in Zagreb in 2014), Ligeti, K., *Rules on the Application of ne bis in idem in the EU, Is Further Legislative Action Required*, Eucrium, 1-2/2009, pp. 37-42 and Vervaele, J., *Ne bis in idem: Towards a Transnational Constitutional Principle in the EU*, *Utrecht Law Review*, vol. 9., issue 4, 2013

³⁵ As such, for example, it is proclaimed by the International Covenant for Civil and Political Rights, art. 14(7)

³⁶ *Op.cit.* note 11

³⁷ *Ibid.*

³⁸ Indirectly also by the jurisprudence of the ECtHR, at least in its internal dimension. See art. 52(3) of the Charter according to which „[i]n so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection.“

of the *ne bis in idem* rests on the concept of mutual recognition and mutual trust, meaning that every member state recognizes the criminal law in force in the other member state even when the outcome would be different if its own national law were applied.³⁹ The ECJ relied on the concept of mutual trust in order to back up its position that the application of Article 54 of CISA is not dependent on harmonization or at least approximation of criminal laws of member states.⁴⁰ Grounding transnational dimension of the *ne bis in idem* on mutual trust has far reaching consequences on the interpretation of various aspects of this principle, foremost on the meaning of the final decision - whether the decision terminating proceedings in a member state is final is judged according to the national law of the state in which the decision was rendered.⁴¹ According to the CJEU, the purpose of the *ne bis in idem* within the AFSJ is to ensure that a person whose trial has been finally disposed of is not prosecuted in several member states for the same acts on account of his having exercised his right to freedom of movement. The aim, according to the CJEU is “to ensure legal certainty – in the absence of harmonization of the criminal laws of the member states – through respect for decision of public bodies which have become final.”⁴² A prerequisite is, however, that a final decision in another member states includes a determination as to the merits of the case.⁴³

As highlighted by the CJEU in one of its most recent judgments on *ne bis in idem*, in the case of *Kossowski* the interpretation of the final nature of a decision in criminal proceedings must be undertaken in the light “not only of the need to ensure the free movement of persons but also of the need to promote the prevention and combating of crime within the area of freedom, security and justice”.⁴⁴ In that light, according to the Court, the decision terminating proceedings in Poland taken by the prosecuting authority due to lack of evidence, but without conducting a detailed investigation, cannot constitute a final decision including a determination as to the merits, even though it is considered as such according to the national law of the state (Poland) in which the decision was rendered.⁴⁵ The Court further clarified that “mutual trust can prosper only if the second Contracting State is in a position to satisfy itself, on the basis of the documents provided by

³⁹ Judgment of 11 December 2008 in *Bourquain*, C-297/07, par. 37

⁴⁰ *Ibid.*

⁴¹ More in Ivičević Karas, *op. cit.* note 34, p. 286

⁴² Judgment of the Court (Grand Chamber) of 29 June 2016, *Kossowski*, C-486/14. (hereinafter: *Kossowski*) para. 44

⁴³ See Judgments of the Court, of 10 March 2005, *Miraglia*, C-469/03, para 30. and of 5 June 2014, *M*, C-398-12, par. 28

⁴⁴ *Kossowski*, par. 47

⁴⁵ *Ibid.*, par. 48. The Court based its assessment on the ineffective investigation on the fact that the Polish prosecuting authorities did not interview neither the victim nor a (hearsay) witness in that case

the first Contracting State, that the decision of the competent authorities of that first State does indeed constitute a final decision including a determination as to the merits of the case”,⁴⁶ which was not the instance in the case at hand.

The decision of the CJEU in *Kossowski* could be seen as a further step in the process of undermining the concept of mutual trust, the process which has started with the decision of the CJEU in the case of *Spasić*.⁴⁷ This judgment has already been described as transformation of the presumption of mutual trust into “institutionalization of mutual distrust.”⁴⁸ In the case of *Spasić*, the CJEU found that the enforcement clause from Article 54 of CISA is compatible with Article 50 of the Charter, meaning that the person finally convicted in one member state could be consecutively prosecuted in another member state if the punishment had not been enforced. Instead of relying on the premise of mutual trust, the Court emphasized the need to avoid impunity. It obviously considered the possibility of consecutive prosecution for the same offence as a more efficient way of achieving this goal than to rely on other mechanisms such as the European Arrest Warrant and enforcement of foreign decisions based on mutual recognition.⁴⁹ Many scholars see the *Spasić* judgment as inconsistent with the previous jurisprudence of the CJEU, throwing the new light on the role of mutual trust as foundation of the AFSJ.⁵⁰

The reason why the *Kossowski* judgment further dilutes mutual trust lies in the fact that the earlier premise, expressed in several judgments of the CJEU, including the case of *M*, was that if a member state considers an internal decision on the merits as final, other member states must trust that assessment and accept it.⁵¹

In the *Kossowski* case, however, the notion of the merits has been significantly stretched. Unlike in the case of *Miraglia*, in which the decision to terminate pro-

⁴⁶ Par. 52

⁴⁷ Judgment of the Court (Grand Chamber) of 27 May 2014 *Spasić* case, C-129/14 PPU

⁴⁸ Mitsilegas, *op. cit.* note 32, p. 90. For a similar account of *Spasić* Case see Marletta, A., *The CJEU and the Spasić case: Recasting Mutual Trust in the Area of Freedom, Security and Justice?*, European Law Blog [<http://europeanlawblog.eu/?p=2655>] Accessed 16. April 2018

⁴⁹ In par. 70. the CJEU stated that: “although Framework Decision 2008/909 envisages the execution of a custodial sentence in a Member State other than that in which the court which imposed the sentence is located, it must be pointed out that, under Article 4 thereof, that option arises only where the sentenced person has consented and the sentencing State has satisfied itself that the execution of the sentence by the executing State will serve the purpose of facilitating the social rehabilitation of the sentenced person. It follows that the main aim of the system established by that framework decision is not to prevent the impunity of persons definitively convicted and sentenced in the European Union and it is not capable of ensuring the full realization of that aim.”

⁵⁰ Mitsilegas, *op. cit.* note 32, p. 90; Marletta, *op.cit.* note 48

⁵¹ Simonato, *op. cit.* note 33

ceedings was of purely procedural nature,⁵² it cannot be denied that the decision of the Polish prosecutor in the case against Piotr Kossowski was based on assessment of evidence (though on the basis of insufficient available information) and, hence, constituted a decision on the merits.⁵³ It seems that the decision of the CJEU in this case recognized the notion of positive obligations of states to conduct efficient investigation, as developed in the case law of the ECtHR.⁵⁴ This means that the previous request that the final decision must include assessment of the facts relating to the merits of the case, has been supplemented with the request that the assessment of fact during the investigation must be detailed and efficient, which is subject to review by another member state. In other words, this judgment implies the possibility to challenge the investigations conducted in other member states. This judgment will surely have far reaching consequences on the protective function of the *ne bis in idem* as well as on the interpretation of the notion of mutual trust on which the *ne bis in idem* rule rests.

Based on all of the above, it can be concluded that instead of relying on the *ne bis in idem* to solve conflicts of jurisdiction, the better way forward would be prevention of conflicts through allocating jurisdiction to the most adequate one in a case at hand. There is no guarantee that the prosecuting authorities of the state which were first in the position to decide on the merits is best placed to pronounce on the guilt of the defendant.⁵⁵ Therefore, even leaving aside all the above sketched problems surrounding the application of *ne bis in idem*, this mechanism cannot serve as the main, and let alone the only mechanism to solve positive conflicts of jurisdiction.⁵⁶ As the advocate general Sharpston, sensibly observed in her opinion on M.: "There is clearly an underlying issue, worthy of serious consideration, about the 'race to prosecute' and possible conflicts of jurisdiction in criminal matters. At present, there are no agreed EU-wide rules on the allocation of criminal jurisdiction. The application of the *ne bis in idem* principle resolves the problem in

⁵² The Public Prosecutor has decided not to pursue the prosecution on the sole ground that criminal proceedings have been started in another Member State against the same defendant and for the same acts, without any determination whatsoever as to the merits of the case. See Judgment of 10 March 2005, Case C-469/03

⁵³ Evidence is nothing short of the merits of the case. Simonato, M., *Ne bis in idem in the EU: Two important questions for the CJEU (opinion of the AG in C-486/14 Kussowski)*, European Law Blog, [<http://europeanlawblog.eu/?p=3071>] Accessed 16 April 2018

⁵⁴ Similarly Gutschy, *op. cit.* note 34, pp. 21-22

⁵⁵ *Ibid.*, p. 6

⁵⁶ On the contrary, preventing conflicts of jurisdiction in a principled manner would have the effect of reducing the problems associated with the *ne bis in idem* and its infringement. See the Preamble of the Framework Decision on prevention and settlement of conflicts of exercise of jurisdiction in criminal proceedings, par. 3

a limited, sometimes an arbitrary, way. It is not a satisfactory substitute for action to resolve such conflicts according to an agreed set of criteria.”⁵⁷

4. A WAY FORWARD – SOME POSSIBLE SOLUTIONS

Bearing in mind the soft law nature of the existing EU instruments dealing with the conflict of jurisdiction and the shortcomings of the *ne bis in idem* rule as an only tool for resolving conflicts of jurisdiction,⁵⁸ it is unsurprising that some initiatives for the new legislative instrument in this field have already emerged. Perhaps the most elaborated one is the European Law Institute’s “Draft Legislative Proposals for the prevention and resolution of conflicts of jurisdiction in criminal matters in the European Union”.⁵⁹

Within this project, three possible legislative models for the EU have been developed. As it has been explained by the authors, “[t]he three legislative models reflect different levels of approximation and thereby three distinct policy options, leaving the choice open to the EU legislator.”⁶⁰ According to the so-called horizontal mechanism, conflicts of jurisdiction should be solved between the national criminal justice authorities of the concerned Member States. This model seems to be the closest to the current state of affairs, by relying on cooperation and coordination between national criminal justice authorities. Coordination is of course impossible without the duty of national authorities to share information and notify each other about parallel proceedings in order to prevent and settle conflicts of jurisdiction. The starting point for deciding between the competing jurisdictional claims would be slightly restructured criteria expressed in 2003 Guidelines, coupled with a negative list of factors, which may not be taken into consideration. The proposal is equivocal as to the possibility of judicial review by the national judge.

The vertical mechanism, on the other hand, relies on a supranational decision (of Eurojust) in cases where coordination between the national criminal justice authorities has failed. The proposal offers two options regarding the possibility of

⁵⁷ Opinion of AG Eleanor Sharpston of 6 February 2014 in the case C-398/12 *Procura della Repubblica v. M.*, par. 51

⁵⁸ It cannot ensure the non-arbitrary choice of jurisdiction, avoid parallel prosecutions, or guarantee that the best suited jurisdiction will have primacy, etc.

⁵⁹ European Law Institute, Draft Legislative Proposals for the prevention and resolution of conflicts of jurisdiction in criminal matters in the European Union

[https://www.europeanlawinstitute.eu/fileadmin/user_upload/p_eli/Publications/Conflict_of_Jurisdiction_in_Criminal_Law_FINAL.pdf] Accessed 16 June 2018

60 *Ibid*, p. 17

judicial review. In case the decision of Eurojust would not be binding, there would be no judicial review, as it would not change the position of the affected person. If, in contrast the decision of Eurojust would be binding, there could be a limited review of the CJEU based on Article 263 of the TFEU. Under this scenario, the CJEU could annul the decision if taken arbitrarily, but it could not reassess the facts of the case and decide itself on the competent jurisdiction.⁶¹

The third mechanism according to the proposal is the so-called mechanism for the location of criminal jurisdiction in the AFSJ. Under this most ambitious model, which assumes strong harmonization, conflicts of jurisdiction would be prevented by establishing uniform European rules on the allocation of the exercise of criminal jurisdiction in the AFSJ. The aim of this model is to prevent conflicts of jurisdiction from the outset. This would be achieved by essentially eliminating extraterritorial jurisdiction within the AFSJ and by strong reliance on the principle of territoriality.⁶² In other words, under this model, territoriality would be the only recognized jurisdictional ground within the EU, but as simple as it may sound at first, this raises further questions as to how would precisely territoriality be defined,⁶³ and which jurisdiction would prevail in case when the offence is perpetrated on the territory of more than one state. Under this model judicial review would also be possible, in case of a biased decision of a territorial jurisdiction as well as based on request of a dissenting national authority.⁶⁴

Having in mind the obvious decline in the mutual trust between the states in the recent years evident from the above analyzed recent case law of the CJEU,⁶⁵ it is hard to believe that the third model, which assumes strong mutual trust between the member states, would be accepted in near future. It seems that the first model, if any, is the most feasible solution. This model, however, although more transparent, would not significantly change the existing framework, whereas the second model, by entailing a supranational binding decision would bring a more noteworthy added value. Whether any of these models will be adopted by the EU remains to be seen.

⁶¹ *Ibid.*, p. 25

⁶² *Ibid.*, p. 26

⁶³ According to the principle of ubiquity or in a narrower fashion, only where the conduct took place or where the consequence occurred

⁶⁴ *Op. cit.* note 59, p. 27

⁶⁵ On this phenomenon foremost in the context of European Arrest Warrant, see Marguery, T., *Rebuttal of Mutual Trust and Mutual Recognition in Criminal Matters: Is 'exceptional' enough?*, European Papers vol 1, no. 3, pp. 943-963

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