



# A NEW CRACK IN THE WALL OF MUTUAL RECOGNITION AND MUTUAL TRUST: *NE BIS IN IDEM* AND THE NOTION OF FINAL DECISION DETERMINING THE MERITS OF THE CASE

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**ABSTRACT:** The *Insight* considers the case law of the Court of Justice concerning the notion of “finally disposed”, i.e. a constitutive element of the European *ne bis in idem* principle. In order to trigger the right not to be tried or punished twice, a national decision must be final and has to contain a sufficient determination of the merits of the case. So far, the Court of Justice has interpreted these requirements extensively, by identifying mutual recognition and mutual trust as the engines of the European *ne bis in idem*. Nonetheless, the Court’s recent preliminary ruling in *Kossowski* clarifies that a lack of an adequate investigation can amount to limiting the scope of the principle at stake. Mutual trust is not blind and national judicial authorities are entitled to make a critical appraisal on the foreign authority’s activity, insofar as the reasons stated in its decision closing a case evidently show the lack of a detailed investigation. Following the recent judgment *Aranyosi and Căldăraru*, *Kossowski* adds a new crack in the wall of mutual recognition and mutual trust. However, the Court shows a clear *favor integrationis*: these principles can be limited only in exceptional circumstances, where it is necessary to provide a cure for severe pathologies affecting the foreign decision.

**KEYWORDS:** *ne bis in idem* – national procedural law – finally disposed – determination of the merits – mutual trust – mutual recognition..

## I. A WAY OUT OF THE RUSH TO PROSECUTE: THE PRINCIPLES OF MUTUAL RECOGNITION AND MUTUAL TRUST AND THE EUROPEAN *NE BIS IN IDEM*

*Ne bis in idem* is widely accepted as a general principle of law, barring multiple prosecutions or punishments against the same defendant, on the basis of the same facts. The principle plays a key role in the EU legal order, where it applies to several domains,

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ranging from competition to criminal law.<sup>1</sup> As such, it has both a structural and individual dimension, since it ensures legal certainty and the accused's protection "*vis-à-vis* the *jus puniendi*".<sup>2</sup>

At the EU level, the principle is enshrined in Art. 50 of the Charter of Fundamental Rights of the European Union and Art. 54 of the Convention Implementing the Schengen Agreement (CISA) and has an autonomous meaning.<sup>3</sup> Since the threat of a second prosecution in another Member State may discourage circulation, the European *ne bis in idem* is deemed a corollary of the freedom of movement of persons.<sup>4</sup> This principle is even more important due to the absence of rules common to all Member States for determining jurisdiction in criminal matters. In fact, it requires foreign final decisions to be recognized as a last word on the merits of a case which could fall under the State's jurisdiction.<sup>5</sup>

The need to prevent or solve conflicts between national judicial authorities has urged the Court of Justice to uphold an extensive interpretation of the scope of application of the principle. For instance, the Court reads the notion of *idem* from a factual and historical perspective, irrespectively of legal qualification of a conduct under national law.<sup>6</sup> A similar substantive approach is followed in relation to the concept of sanction: even administrative penalties can be criminal in nature and amount to limiting further exercise of *jus puniendi*.<sup>7</sup>

Nonetheless, the assessment of the notion of "*bis*" has proven to be particularly difficult, since the cross-border applicability of the principle can be hampered by the set of highly fragmented national procedural laws. Seeking a way forward, the Court of Justice has identified mutual recognition as the engine of the European *ne bis in idem*.<sup>8</sup> De-

<sup>1</sup> On the conceptual fragmentation of the principle, B. VAN BOCKEL, *The ne bis in idem principle in the European Union legal order: between scope and substance*, in *ERA Forum*, 2012, p. 325 *et seq.*

<sup>2</sup> Opinion of AG Jarabo Colomer of 8 April 2008, case C-297/07, *Bourquain*, para. 48.

<sup>3</sup> Court of Justice, judgment of 16 November 2010, case C-261/09, *Mantello*, para. 38. Art. 50 enshrines both national and European *ne bis in idem*, while Art. 54 only covers transboundary situations.

<sup>4</sup> Court of Justice, judgment of 9 March 2006, case C-436/04, *Van Esbroeck*, paras 33-34. The principle also prevents the risk of absconding, which is inherent to a space without internal borders: Court of Justice, judgment of 27 May 2014, case C-129/14 PPU, *Spasic*, paras 63-65.

<sup>5</sup> It has been underlined that the principle strengthens the so called fifth freedom of movement, namely the circulation of national judicial decisions in the EU: C. AMALFITANO, *Conflitti di giurisdizione e riconoscimento delle decisioni penali nell'Unione europea*, Milano: Giuffrè, 2006, p. 102.

<sup>6</sup> Such interpretation has been confirmed even if Art. 50 of the Charter uses the word "offence". *Van Esbroeck*, cit., para. 36; Court of Justice, judgment of 28 September 2006, case C-150/05, *Van Straaten*, paras 48-50. The same reading applies in the domain of competition law: Court of Justice, judgment of 10 May 2007, case C-328/05 P, *SGL Carbon AG*.

<sup>7</sup> Court of Justice, judgment of 5 June 2012, case C-489/10, *Bondaz*; judgment of 26 February 2013, case C-617/10, *Åkerberg Fransson*.

<sup>8</sup> A. WEYEMBERGH, *La jurisprudence de la CJ relative au principe ne bis in idem: une contribution essentielle à la reconnaissance mutuelle en matière pénale*, in A. ROSAS, E. LEVITS, Y. BOT (eds), *La Cour de*

spite significant discrepancies among national legal orders, domestic judicial authorities are required to accept a decision delivered in another Member State, whatever the outcome of the determination of the merits of the case is.

A foreign judicial decision can be recognized for the purposes of the *ne bis in idem* principle only insofar as it finally disposes of the proceeding. The opposing interests underpinning mutual recognition and the implications of the notion of final decision lock swords here. The core issue is the scope and width of the scrutiny which the national judicial authority is entitled to make while assessing the finality of a foreign decision. An in-depth analysis is essential for the operation of the European *ne bis in idem*, but is capable of unduly restricting mutual trust and mutual recognition.

Clarifications on this matter have come from a handful of judgments by the Court of Justice. Such case law has been further specified by the recent preliminary ruling in *Kossowski*,<sup>9</sup> where the referring court asked whether an order of discontinuance of investigative proceedings for lack of sufficient grounds issued by a Polish authority could prevent a German prosecutor's office from starting investigations against the same person, for the same material facts. The recent judgment goes into the notion of final decision for the purposes of Arts 50 of the Charter and 54 CISA and offers the opportunity for an overall analysis of the subject. What is more, it sheds light on the implications of this constitutive element of the *ne bis in idem* for the national judicial authorities' activity, in light of the principles of mutual recognition and mutual trust.

## II. HAS THE TRIAL BEEN "FINALLY DISPOSED"? THE CASE LAW OF THE COURT OF JUSTICE AND THE RECENT CLARIFICATIONS PROVIDED IN *KOSSOWSKI*

The presence of a final decision is featured as an essential element of the *ne bis in idem*. Art. 50 of the Charter refers to any person who "has already been finally acquitted or convicted",<sup>10</sup> while Art. 54 CISA bars further prosecution if the "trial has been finally disposed".

Despite the textual differences, the notion of final judicial decision has the same meaning under both provisions. In particular, the Court has clarified that Art. 54 and the other provisions of the CISA concerning *ne bis in idem* are to be interpreted in accord-

*Justice et la construction de l'Europe: analyses et perspectives de soixante ans de jurisprudence*, Den Haag: Asser Press, 2013, pp. 542-544.

<sup>9</sup> Court of Justice, judgment of 29 June 2016, case C-486/14, *Kossowski*.

<sup>10</sup> This wording is identical to the text of Art. 4 of Protocol no. 7 of the European Convention on Human Rights and has the same meaning and scope as regards the application of the principle within a Member State: Explanations relating to the Charter of Fundamental Rights, Explanations on Art. 50. See also Court of Justice, judgment of 27 May 2014, case C-129/14 PPU, *Spasic*.

ance with the Charter, the primary source concerning the protection of fundamental rights in the EU legal order.<sup>11</sup>

No reference is made to a specific kind of judicial decision, so that any outcome of the first proceeding is in principle capable of preventing the subject from being tried or punished twice. However, according to the Court of Justice, such judicial decision must fulfil two criteria: it must have acquired finality and contain a determination on the merits of the case.

## II.1. THE PROCEDURAL CRITERION: THE FINAL NATURE OF A DECISION

The requirement of finality is met when the judicial decision is irrevocable, that is to say when no more ordinary remedies are available under the law of the State.<sup>12</sup> It follows that, in principle,<sup>13</sup> the *ne bis in idem* does not preclude parallel proceedings, as long as they are ongoing. This holds true also for the European dimension of the principle, which *per se* is not intended to protect a suspect from parallel or subsequent investigations undertaken in different Member States.<sup>14</sup> The current legal background increases the risk of conflicting and overlapping jurisdictions, as national authorities often take part in a rush to prosecute.<sup>15</sup> From this point of view, as underlined by AG Sharpston,<sup>16</sup> the *ne bis in idem* is a mere complement to a set of comprehensive rules on the allocation of criminal jurisdiction between Member States.

Whether a procedural obstacle to the opening or continuation of criminal proceedings exists is determined by the law of the State of the issuing authority. Therefore, the main term of reference is the national legal order,<sup>17</sup> with regard to the specific consequences it attaches to a certain decision. At the same time, domestic laws are to be interpreted in light of EU law and of the autonomous meaning of Arts 54 CISA and 50 of the Charter. For instance, according to the Court, the sole fact that a national criminal

<sup>11</sup> Court of Justice, judgment of 5 June 2014, case C-398/12, *M.*, para. 31. On the need to interpret EU secondary law in light of the Charter: F. BESTAGNO, *I rapporti tra la Carta e le fonti secondarie di diritto dell'UE nella giurisprudenza della Corte di giustizia*, in *Diritti umani e diritto internazionale*, 2015, p. 259 *et seq.*

<sup>12</sup> Exceptional judicial remedies neither preclude the *ne bis in idem* principle under the European Convention on Human Rights: European Court of Human Rights, judgment of 10 February, application no. 14939/03, *Zolotoukin v. Russia*, para. 108.

<sup>13</sup> Art. 58 CISA allows the application of broader national provisions on the *ne bis in idem* principle with regard to judicial decisions taken abroad.

<sup>14</sup> Court of Justice, judgment of 22 December 2008, case C-491/07, *Turanský*, para. 44.

<sup>15</sup> The attempts to regulate the matter at EU level have failed so far and have eventually resulted in the adoption of merely soft-law mechanisms: Framework Decision 2009/948/JHA of the Council of 30 November 2009 on prevention and settlement of conflicts of exercise of jurisdiction in criminal proceedings.

<sup>16</sup> Opinion of AG Sharpston of 6 February 2014, case C-398/12, *M.*, para. 53: "Unless and until the legislature addresses the issue of parallel proceedings more comprehensively, the principle of *ne bis in idem* in Article 54 CISA will, of necessity, have to be pressed into service to fill the gap".

<sup>17</sup> *Mantello*, *cit.*, para. 46.

procedure would necessitate the reopening of the proceedings in relation to a judgment delivered *in absentia* does not *per se* impede to consider a decision as final, for the purposes of the European *ne bis in idem*.<sup>18</sup> Likewise, the reopening of criminal investigation founded on the availability of new evidence or facts does not affect the finality of an order making a finding of *non lieu*. On the one hand, the right not to be tried or punished twice allows for “the mere continuation” of the proceedings in the State where the order was made, in order to assess the new elements. On the other hand, it precludes “the exceptional bringing of separate proceedings based on new evidence”, in another State.<sup>19</sup>

Moreover, neither the nature of the national authority involved,<sup>20</sup> nor the formal qualification of a certain decision under domestic law should be taken into account. In fact, the relevant provisions make no specific reference to these aspects, so the Court of Justice urges national authorities to attach primary importance to the procedural effects coming from a decision. The Court of Justice has acknowledged that even decisions taken by a public prosecutor, without the involvement of a court, can bar new investigations or proceedings in another Member State. In *Gözütok and Brügge*, the Court was confronted with two out-of-court settlements, through which a German and a Dutch public prosecutors discontinued proceedings in return of payment of a certain sum definitively. In light of the relevant domestic procedural laws, the Luxembourg Court contended that the literal interpretation of Art. 54 CISA and the need to preserve its useful effect required such decisions to be considered as finally disposing of the proceedings.<sup>21</sup> In the same way, the recent preliminary ruling in *Kossowski* confirms that even an order of discontinuance delivered during criminal investigations for lack of evidence can fulfil the requirement under consideration.<sup>22</sup> Once again, it all depends on the specific procedural consequences that the national legal order attaches to that decision.

## II.2. THE SUBSTANTIVE CRITERION: THE DETERMINATION OF THE MERITS OF THE CASE

As we have seen, the notion of “finally disposed” requires an assessment of the procedural implications of a national decision concerning the same defendant and the same facts. However, such appraisal sits at odd with those decisions that are not intended to settle a matter, but amount to a (merely) procedural interruption or termination of proceedings. Orders of discontinuance issued by a public prosecutor, decisions delivered

<sup>18</sup> *Bourquain*, cit. para. 40.

<sup>19</sup> *M.*, cit. para. 40.

<sup>20</sup> The Court of Justice often refers to “decisions of public bodies which have become final”: *Kossowski*, cit., para. 44.

<sup>21</sup> *Gözütok and Brügge*, cit., paras 38-40.

<sup>22</sup> *Kossowski*, cit., paras 35-38.

during the investigative phase, judgments declaring lack of evidence or acquitting the accused because prosecution is time-barred are potential vivid examples.

Therefore, the Court of Justice also urges national authorities to consider whether an adequate evaluation of the merits of the case has occurred. Besides the procedural requirement of finality, the right not to be tried or punished twice is further conditioned upon a sufficient substantive determination of the accused's criminal liability.

This additional and cumulative condition is necessary in order to avoid a side effect of the freedom of movement of persons and decisions in the European judicial area. Overreliance on the notion of procedural finality would in fact increase the risk of impunity, as prosecution in another Member State would be precluded despite the absence of an assessment whatever of the unlawful conduct.<sup>23</sup> Such a solution would allow for an abuse of the protection granted by the principle. Moreover, it would hamper the prevention and combating of crime within the area of freedom, security and justice,<sup>24</sup> a primary objective of the European legal order, enshrined in Art. 3, para. 2, TEU.

The early case law on the interpretation of Art. 54 CISA addressed this requirement as an ancillary concern. In *Gasparini*, the Court stated that an acquittal grounded on the expiration of the statute of limitation period was capable of barring further prosecution, but did not take into consideration the substance of the case. In particular, it was satisfied by the explanations provided by the national court in the order for reference, according to which coherent evidence on the criminal liability of the accused had been collected.

The Court was soon and more directly confronted with this problem in relation to decisions issued by public prosecutors during investigations. In the afore-mentioned *Gözütok and Brügge* joined cases, the two out-of-court settlements at stake were conditioned on the determination of the accused's liability. On that basis the offender was entitled to negotiate with the public prosecutor, barring further prosecution. On the contrary, a decision to discontinue prosecution only on the grounds of the initiation of similar investigations in another Member State was considered insufficient in order to trigger Art. 54 CISA.<sup>25</sup> Due to the early stage of investigations, the prosecutor had no opportunity of assessing the available evidence and his decision was only intended to prevent a conflict of jurisdictions.

The factual and procedural background was slightly different in *Kossowski*, where a Polish authority started investigation soon after a similar file had been opened in Germany. It didn't take too long before the detrimental effects of such a rush to prosecute became evident. The unlawful acts had been committed in Germany and the Polish public prosecutor was not in a position to gather sufficient evidence: the accused re-

<sup>23</sup> *Kossowski*, cit., paras 47-50.

<sup>24</sup> Court of Justice, judgment of 10 March 2005, case C-469/03, *Miraglia*, paras 33-34.

<sup>25</sup> *Miraglia*, cit., paras 28-35.

fused to give a statement, while both the victim and a hearsay witness lived in Germany and therefore couldn't be interviewed. Consequently, investigation in Poland was terminated for lack of evidence, by the means of an order of discontinuance having final nature under Polish procedural law. In this context, the Luxembourg Court contended that the lack of a detailed evidence had prevented an adequate appraisal on the merits of the case: the substantive condition for invoking the *ne bis in idem* principle was not fulfilled.

This finding ultimately clarifies the position of the Court in relation to definitive decisions on the inadequacy of evidence and distinguishes from the precedents on the subject.<sup>26</sup> The Court of Justice underlines that the requirement of a sufficient determination of the merits of the case has on its part procedural roots, since it implies the availability of adequate evidence and a diligent investigation. A sufficient body of evidence constitutes a minimum threshold which has to be reached in order to consider that a careful examination of the conducts has occurred.

Consequently, on the one hand, any decision delivered on these bases should in principle trigger the right not to be tried or punished twice in another Member State, whatever the outcome is and whatever grounds it is based on. Moreover, this solution should apply even in case of primarily procedural decisions, such as judgments or orders declaring the unfruitful expiration of the statute of limitation period. On the other hand, any decision declaring lack of evidence should be handled carefully for the purposes of the European *ne bis in idem*, as it may give shape to either a poor investigation or an incomplete assessment of the case.

Such statement bears potential systemic implications for the functioning of judicial cooperation mechanisms in the EU, in particular as far as the national authorities' role is concerned.

### III. MUTUAL TRUST IS NOT BLIND: THE LACK OF A DETAILED INVESTIGATION AS A LIMIT TO THE APPLICATION OF THE *NE BIS IN IDEM* PRINCIPLE

Mutual recognition and mutual confidence are widely acknowledged as general principles of the EU legal order<sup>27</sup> and founding pillars of judicial cooperation in criminal matters.<sup>28</sup> Accordingly, as we have seen, the Court of Justice has identified mutual recognition as the engine of the European *ne bis in idem*. In a spirit of mutual trust, despite the fragmentation of national procedural laws, domestic judicial authorities must rely on the outcome of the proceedings conducted abroad. In particular, they have to accept at

<sup>26</sup> *M.*, cit., para. 30.

<sup>27</sup> Court of Justice, opinion 2/13 of 18 December 2014, para. 161. Mutual trust is founded on Art. 2 TEU.

<sup>28</sup> C. JANSSENS, *The principle of mutual recognition in EU law*, Oxford: Oxford University Press, 2013, p. 132 *et seq.*

face value the final nature and the assessment of the merits of the case made by the authorities of another Member State. Recognition and trust apply even if national criminal procedural or substantive law would have led to a different solution of the case concerned.<sup>29</sup>

However, the assessment of the “finally disposed” constitutive element of the *ne bis in idem* is particularly delicate. In relation to the final nature of a decision, the authority before which the principle is invoked benefits from guidance from the foreign issuing authority concerning the precise procedural implications of its activity. In case of incomplete or unclear information, a duty to ask for additional explanations flows from mutual recognition and mutual trust. In any event, the receiving authority has limited discretion, because its evaluation stems from the wording of another domestic procedural law, which he is not entitled to interpret or elaborate on. The criterion at stake therefore requires such authority to serve as *bouche de la loi étrangère*.

The assessment concerning the requirement of the sufficient determination of the merits of the case is, instead, much more elusive. Being inextricably linked to the outcomes of the first trial, it bears the risk of opening Pandora’s box of the procedural and substantive adequacy of the foreign authority’s activity. A lack of self-restraint on the part of the judicial authority in charge of the second proceeding may then result in a critical appraisal blocking the recognition of the foreign decision for the purposes of the *ne bis in idem* principle. In short, it could increase mutual distrust.

At the same time, dwelling on such analysis wouldn’t necessarily be detrimental for judicial cooperation in criminal matters. The factual background of *Kossowski* highlights that inefficient coordination between national authorities and poor investigation can result in the risk of impunity in the European judicial area. A lack of diligence or efficiency on the part of the winner of the rush to prosecute is capable of hampering the effectiveness of crime prevention and prosecution in Europe as a whole. Therefore, a critical appraisal of the first trial could unveil inconsistencies or evidentiary lacunas affecting the (final) decision, in particular in the event of either orders delivered during the investigation phase or acquittals for lack of evidence. Moreover, negative effects for either the accused or the victim could ensue. On the one hand, the final word on the alleged offender’s criminal liability would be based on incomplete evidence. On the other hand, in the event of an acquittal, the victim would not be able to obtain compensation for the damages arising from the crime.<sup>30</sup>

Mutual recognition can have high costs and a balance between opposing interests underpinning judicial cooperation in criminal matters has to be made. In the end, in

<sup>29</sup> Court of Justice, judgment of 11 February 2003, joined cases C-187/01 and C-385/01, *Gözütok and Brügger*, para. 33; judgment of 28 September 2006, case C-467/04, *Gasparini*, para. 30.

<sup>30</sup> In his opinion in *Kossowski*, AG Bot stressed the importance of the “basic rights of the victim”: order of discontinuance issued by the Polish authorities showed that the victim was not heard and did not receive information on the proceeding. Opinion of AG Bot, *Kossowski*, cit., paras 80-83.



particular, such search for a balance reflects the dilemma on the scope and range of the powers left to the authority before which the *ne bis in idem* principle is invoked.

From this point of view, the recent case law of the Court of Justice has clarified that, as a rule, mutual recognition is not absolute and that trust between Member States is not blind.<sup>31</sup> Albeit in exceptional circumstances, the duties flowing from such principles can be limited. Nonetheless, so far, the Court of Justice has been mainly confronted with fundamental rights issues. In the joined cases *Aranyosi and Căldăraru*,<sup>32</sup> the Court has identified the protection of absolute fundamental rights from a manifest violation as a source of potential limits to these structural principles.<sup>33</sup>

The question raised in *Kossowski* is different and lays at the core of the mechanisms of judicial cooperation across the national borders. In this context, the quest for a limit to mutual trust and mutual recognition derives from a critical appraisal of the quality of the Polish public prosecutor's investigation. Even if inherent to the notion of mutual trust, such question adds new elements to the Court's discourse on the subject. In accordance with AG Bot, the Court applies by analogy its recent precedents and identifies a new category of situations where mutual recognition and mutual trust must be restricted. In particular, it underlines that a decision cannot be characterised as final "when it is clear from the reasons [...] that there was no detailed investigation".<sup>34</sup>

Two adjectives give an idea of the opposing driving forces at stake: "clear" and "detailed".

The former embodies the preference for mutual trust and mutual recognition. Since they can be limited only in exceptional circumstances, a lack of sufficient determination on the merits of the case must manifestly transpire from the reasons stated in the foreign decision. Such lacuna must be clearly highlighted in the foreign decision and the receiving authority has to be satisfied with the information provided therein. Interestingly enough, the Court underlines that the sole source of information is the authority that delivered the first and final decision allegedly determining the merits of the case. The second judicial authority, in principle, cannot rely on external sources of information: whether a limit has to be imposed on mutual recognition and mutual trust is a matter of transparent and effective judicial dialogue. The purpose of the establishment of the European judicial area in itself implies that judicial dialogue should come first,

<sup>31</sup> Opinion 2/13, cit., para. 191.

<sup>32</sup> Court of Justice, judgment of 5 April 2016, joined cases C-404/15 and C-659/15 PPU, *Aranyosi and Căldăraru*.

<sup>33</sup> S. GÁSPÁR-SZILÁGY, *Joined cases Aranyosi and Căldăraru. Converging human rights standards, mutual trust and new grounds for postponing a European Arrest Warrant*, in *European Journal of Crime, Criminal Law and Criminal Justice*, 2016, p. 197 *et seq.* It is important to underline that the Court qualifies such risk of a manifest violation as a ground for postponement of execution of a request for judicial cooperation.

<sup>34</sup> *Kossowski*, cit., para. 53.

besides formalities and blind automatism. From this point of view, the Court seems to detach itself from its findings on the limits to mutual recognition arising from violations of fundamental rights, where qualified external sources of information concerning the deficiencies on the protection of a right play a key role.<sup>35</sup>

Consequently, the receiving authority is entitled to prosecute the same person for the same facts only insofar as the foreign one evidently failed to perform its evidentiary tasks. The Court also seems to imply that, in the event of a doubt, the receiving authority should in principle rely on the activity and the assessment made abroad, in order not to undermine mutual trust. Of course, such conclusion would be regrettable in case of a lack of transparency on the part of the issuing authority, where the reasons stated in its decision on the evidentiary background and on the assessment of the merits made were elusive.

The latter adjective seems to leave room for further implications. By referring to “a detailed investigation”, the Court appears to set a high standard for a determination of the merits to have occurred, in particular in the event of out-of-court decisions. The early stage of the proceeding and the frequent lack of a domestic court’s assessment of the evidence collected suggest that only a truly complete investigation and a carefully reasoned decision can trigger the right not to be tried or punished twice. Reading between the lines, also in light of the factual background of the case, this finding warns national authorities to ensure an effective coordination of jurisdictions. Besides theoretical criteria for determining jurisdiction, the authority that is in practice best placed in order to perform a detailed investigation should in principle be awarded the case. Preventive judicial dialogue on the allocation of a case should then include a cost-benefit assessment concerning the availability of evidence, in terms of rapidity, ease and evidentiary value.<sup>36</sup>

In conclusion, *Kossowski* adds a new crack in the solid wall of mutual recognition and mutual trust. These principles are not blind and entitle the receiving authority to exercise a limited scrutiny on the foreign authority’s activity. The finding of the Court of Justice is focused on the *ne bis in idem* principle under Arts 54 CISA and 50 of the Charter, and counts where no common EU rules harmonizing national legal orders are applied. However, it can arguably be extended to other aspects of judicial cooperation in criminal matters. Even national decisions founded on EU secondary acts, as long as they show a plain lack of diligence or an evidently insufficient collection and assessment of evidence on the part of the issuing authority, should in principle bar mutual recognition and mutual trust.

<sup>35</sup> *Aranyosi and Căldăraru*, cit., paras 89, 94 and 104.

<sup>36</sup> Effective collection of evidence is mentioned in recital no. 4 of Framework Decision 2009/948/JHA among the criteria which should guide national authorities during direct consultations on the allocation of jurisdiction.

Consequently, building on *Aranyosi and Căldăraru*, the Court identifies by analogy the edges of a new source of limits to mutual recognition and mutual trust. At the same time, the Court shows a manifest *favor integrationis* and once again qualifies the limit to the full effectiveness of judicial cooperation in criminal matters as a last resort. As it is for plain violations of fundamental rights, the lack of a detailed investigation should amount to blocking judicial cooperation only in exceptional situations. In fact, both *Aranyosi and Căldăraru* and *Kossowski* lines of case law are intended to provide a cure for severe pathologies affecting national legal orders. The application of judicial cooperation mechanisms can never result in the recognition of decisions which are manifestly contrary to essential purposes of the EU legal order, such as the protection of fundamental rights and the establishment of an area of security and justice.