THE QUESTIONABLE INDEPENDENCE OF POLISH ASSESSORS AND ITS EFFECTS ON THE EUROPEAN LEGAL ORDER

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This article critically analyses the Polish institution of assessor (junior judge) and the impact of hampering this institution's independence on decisions of other European courts. Using the dogmatic-legal method, the authors conclude that procedures of nominating assessors and ending their periods of service do not respect the right to a fair trial guaranteed in the European Convention on Human Rights, and in EU law. Assessors adjudicate mainly in a one-person bench. Thus, although under EU law states should only exceptionally verify if decisions made by other states respect fundamental rights, such verifications may become routine.

Keywords: right to a fair trial; assessor (junior judge); independence and impartiality of judges; EU fundamental rights

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1. INTRODUCTION****

This article is dedicated to a critical analysis of the Polish institution of junior judge (hereinafter: assessor)[1] and the impact of possible obstacles to the independence of this institution on decisions of other EU Member States (hereinafter: the EUMS). Under EU law the EUMS's courts should respect decisions of other EU courts and only in exceptional circumstances verify if these decisions respect fundamental rights.

The authors verify whether the new law which has re-established assessors has corrected the deficiencies of its predecessor which had been contested by the Constitutional Tribunal (hereinafter: the CT) and the ECtHR. The text compares rules which have been in force in 2009 and since 2015 up until now. Analyses are focused on the procedure of nominating assessors, and the rules of ending their service. These are essential elements in ensuring the independence of assessors. They touch the "internal" and "external" independence of the courts[2] and persons administering justice[3]. Other elements of securing judicial independence e.g. the right to initialize court procedure, an adequate standard of court procedure (including the right to appeal) are not covered in this article, because they address deficiencies of the whole system of justice. The Polish rules have not been verified by the Human Rights Committee established by the International Covenant on Civil and Political Rights, so the Covenant has not been analysed.

From the 1920s until 2009 the institution of assessor in Poland served mainly to prepare an assessor to perform the function of a judge. The assessor, not being a judge, performed the functions of a judge to a somewhat limited extent. This institution was restored in 2015[4] and modified during the so-called

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1 The term "assessor" was used by the European Court of Human Rights (hereinafter: the ECtHR) in *Henryk Urban and Ryszard Urban v. Poland*, 23614/08, ECtHR, 30 November 2010, 23614/08. Decisions of the Luxembourg judges are cited after CURIA, and of the ECtHR – after HUDOC.

2 Sillen, J., *The concept of 'internal judicial independence' in the case law of the European Court of Human Rights*, European Constitutional Law Review, *vol*. 15, no. 1, 2019, pp. 104–133.

3 Polański, S., *Wykonywanie przez asesorów sądowych czynności sędziowskich*, Gdańskie Studia Prawnicze, *vol*. 3, 2008, p. 198.

4 Act of 10 July 2015 amending Law on the system of common courts, Polish Journal of Laws (hereinafter: the PJL) of 2015, item 1224.

"judiciary reform". Assessors always were and are there to relieve judges in their work and prepare for promotion to the position of a judge.

One of the reasons for removing the institution of an assessor from Polish law was the incompatibility with international law of the way it was constituted. Doubts of the CT[5] and the ECtHR[6] were raised on the mechanism for appointing and dismissing assessors (regarding the independence of the assessor from the executive). According to the legislator, the new approach to the assessor's institution eliminated these shortcomings.[7]

The dogmatic-legal analysis carried out in this article shows that although assessors have the same duties as judges[8], their guarantees of independence are significantly weaker: they are not appointed for an apparently indefinite period, and their appointment by the President from among the candidates indicated by the National Council of the Judiciary (hereinafter: the NCJ) requires a countersignature of the Prime Minister (hereinafter: the PM). There are disputes in the doctrine over the legality of such an act of appointment. Some authors indicate that the politicized NCJ[9], does not fulfil its constitutional obligations (does not safeguard the independence of judges and assessors), cannot legally nominate candidates for the positions of judges and assessors, so the President's act cannot validate such illegal activities.[10] Others indicate that the nomination procedure is strictly defined in law, so the President' decision on appointment meets the criteria of assessors' independence.[11]

Polish courts cooperate with courts of other EUMS, if the case contains a trans-border element. Collaboration is possible only if there is mutual trust

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5 S 3/06, the CT, 30 October 2006, OTK ZU 2006, Series A, No. 9, item 146 and SK 7/06, the CT, 24 October 2007, OTK 2007, Series A, No. 9, item 108.

6 ECtHR, *Urban*, *op. cit.* (fn. 1); *Garlicki v. Poland*, 36921/07, ECtHR, 06 2011, 36921/07; *Stoklosa v. Poland*, 32602/08, ECtHR, 3 November 2011, 32602/08; *Pohoska v. Poland*, 33530/06, ECtHR, 10 January 2012, 33530/06.

7 Uzasadnienie przedstawionego przez Prezydenta Rzeczypospolitej Polskiej projektu ustawy o zmianie ustawy - Prawo o ustroju sądów powszechnych oraz niektórych innych ustaw, Sejm VII kadencji, Druk nr 2299.

8 Górnicz-Mulcah, A.; Bieniek, B., *Ustrojowe gwarancje niezawisłości asesora sądu powszechnego w sprawowaniu wymiaru sprawiedliwości*, Państwo i Prawo, no. 6, 2022, p. 38.

9 Act of 8 December 2017 amending Act on the National Council of the Judiciary and certain other acts, PJL of 2018, item 3.

10 Kmieciak, Z., *Konsekwencje powołania do pełnienia urzędu sędziego sądu administracyjnego lub asesora w wojewódzkim sądzie administracyjnym po przeprowadzeniu postępowania, które może być dotknięte wadą prawną. Glosa do wyroku NSA z 4.11.2021 r., III FSK 3626/21*, Państwo i Prawo, no. 4, 2022, pp. 158–166.

11 Górnicz-Mulcah, A.; Bieniek, B., *op. cit.* (fn. 8).

(which includes respecting the right to a fair trial) between those legal systems. Still, Polish law attempts to limit the number of preliminary questions asked by Polish courts, what may be perceived by some assessors as an incentive to restrictively interpret the term "acting within EU law". This in turn may question the supremacy of EU law and the direct effect of that law in Poland, which can lead to judgments contradicting EU law.

The first part briefly presents the importance of international human rights legal sources to Polish legislation. In the next part, the aims for which an institution of assessor has been established are briefly explained. It also describes the competencies of junior judges, and critically contests their nomination procedure, the execution of assessor's powers and expiry of assessor's terms of office, claiming their incoherence with the Polish Constitution and international law. The final part assesses the impact of decisions made by assessors on other European countries. The text ends with a brief summary and conclusions.

2. RELATIONSHIP BETWEEN EUROPEAN LAW AND POLISH LAW

According to Article 87 of the Polish Constitution[12] the hierarchy of legal sources starts with the Polish Constitution. It is followed by international agreements signed with a prior consent expressed in statutes, by-laws, and local regulations. The approval is needed in case of international norms regulating e.g. the freedoms, rights, or obligations of citizens, as specified in the Constitution, and the Republic of Poland's membership of an international organization. The European Convention on Human Rights and Fundamental Freedoms (hereinafter: the ECHR)[13], and accession to the EU were signed and ratified in that procedure because they refer to the above-mentioned themes.

Moreover, Article 9 of the Constitution expressly puts forward an obligation to comply with international law. That interpretation directive is complemented by an obligation to favour international law (which is less far-reaching than the "precedence over statute" rule) in interpreting Polish rules.

Applications to the ECtHR are submitted directly after obtaining a final national decision in their case. This availability cannot be restricted by states-signatories to the ECHR.[14] The court interprets the 1950 Convention taking into account current social, technical, and economic developments ("living instrument" doctrine), contributing to the progressive development of human

[12] PJL of 1998, item 483.

[13] PJL of 1993, No. 61, item 284, subsequently amended.

[14] *Ilgar Mammadov v. Azerbaijan*, 15172/13, ECtHR, 22 May 2014.

rights in Europe.[15] The importance of the ECHR expands also to the EU which perceives itself as an almost self-contained close regime.[16] Proclamation of the Charter of Fundamental Rights of the European Union (hereinafter: the Charter) and the giving the Charter a power equal to EU treaties brought the importance of human rights to a new level.[17] Article 52(3) of the Charter explicitly stipulates that the ECHR forms the minimal standard when interpreting EU law[18] by extending the protection of human rights guaranteed by the ECHR.

There is no EU secondary law which explicitly defines rules of organization of judiciary systems in the EUMS. Still, the purpose of those systems has been defined in particular in Article 2 TEU on the fundamental values of the EU which include "the rule of law and respect for human rights". The concept of "rule of law" was clarified in Article 19(1) of the TEU. Moreover, Article 47 of the Charter echoes Article 2 of the TEU, so it is clear that the "rule of law" includes "right to effective legal remedy".

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15 Gronowska, B., *Europejski Trybunał Praw Człowieka. W poszukiwaniu efektywnej ochrony praw jednostki*, TNOiK, Toruń, 2011.

16 Sadowski, P., *The EU's approach to the extraterritorial processing of asylum claims and its compliance with international law*, Revista General De Derecho Europeo, no. 53, 2021, pp. 40–45.

17 *Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon* (OJ C 306 of 17.12.2007).

18 Consequently, the EUMS cannot refer to its obligations stemming from EU law to claim that it does not have to respect the ECHR. Moreover, Tobias Lock correctly underlines that the ECHR "provides an important guideline for the interpretation of corresponding rights stipulating that they shall have the same *meaning and scope* [emphasis of Tobias Lock]. There are thus overlaps between the two terms and it does not make much sense trying to find definitions that would allow for a clear delineation between them.". Lock, T., *Article 51-54* in: Kellerbauer, M.; Klamert, M.; Tomkin, J. (eds.), *The EU Treaties and the Charter of Fundamental Rights: a commentary*, Oxford University Press, Oxford, 2019, p. 2255. Thus, the EUMS must take into account decisions of the ECtHR if e.g. EU law refers to "adequate accommodation" which has to respect human dignity, but it does not define these terms. Sadowski, P., *Limiting social assistance under the EU temporary protection directive to displaced persons working remotely for the public administration of a country of origin*, Review of European and Comparative Law, no. 1, 2024 (in print).

3. INSTITUTION OF ASSESSORS – POLISH AND EUROPEAN LEGAL PERSPECTIVE

3.1. Purpose of Establishing and Scope of Competence of Assessors

The office of assessor existed in Poland from the 1920s until 2009, with the exception of the World War II period. Its sphere of competence was limited to less important cases. The assessor has always been carrying out judicial functions without being a judge.[19]

Assessors adjudicate only in the district court, i.e. the court that hears all cases in the first instance. This is defined in Article 16(1) of Code on Civil Procedure of 17 November 1964 (PJL of 2021, item 1805), hereinafter: CCivP, and Article 24(1) of Code of Criminal Procedure of 6 June 1997 (PJL of 2022, item 1375), hereinafter: CCrimP. However, the most serious cases in the first instance are heard by regional courts. District courts in Poland adjudicate almost exclusively as a single judge (Article 47(1) of CCivP and Article 28(1) of CCrimP). Exceptionally, certain cases of civil proceedings are heard by one judge and two lay judges (Article 47(2) of CCivP).

On the other hand, a district court may occasionally be represented by professional judges alone, but only owing to the special complexity, significance, or precedent-setting nature of the case.[20] This means that the assessor usually adjudicates on a one-person basis. The court is extremely rarely represented by professional judges sitting with assessors.[21]

The following were excluded from the *votum*, i.e. the adjudication duties of assessors:

- the use of pretrial detention in preparatory proceedings against a detainee who has been turned over to the court with a request for pretrial detention,
- considering complaints against decisions:
  - on the refusal to initiate an investigation or inquiry,
  - on the discontinuation of the investigation or inquiry, and
  - on the entering the case in the crime register,

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19 Bojańczyk, A., *O uprawnieniach asesorów sądowych do wykonywania procesowych czynności sędziego de lege ferenda*, Krajowa Rada Sądownictwa, *vol*. 27, no. 3, 2015, p. 27.

20 Dorochowicz, M.; Serowaniec, M., *Przesłanki rozwiązania przez sąd stowarzyszenia sportowego. Studium przypadku 'Dzieci Białegostoku'*, in: Stępień-Załucka, B. (ed.), *Sędziowanie, sądownictwo i wymiar sprawiedliwości w sprawach sportowych*, Wydawnictwo Naukowe Uniwersytetu Rzeszowskiego, Rzeszów, 2021, p. 74.

21 Bojańczyk, A., *op. cit.* (fn. 19), p. 33.

- family and juvenile cases.[22]

The primary purpose of the assessors was to prepare them to serve as judges. Hence, being an assessor was only a stage on the way to becoming a district court judge.[23] The existence of the institution of an assessor intended to prepare a particular person in terms of practical experience to take office as a judge.[24] More often, however, an assessor was referred to as a "trial judge", and the period of his office as a probationary period, serving to test the candidate in action (i.e. in making decisions or adjudicating), in terms of his or her aptitude, not only with regard to intellect, but, above all, personality and morals.[25]

Training and taking the workload of judges were the basis for restoring the institution of the assessor to Polish law in 2015. However, the legislator created an institution that is analogous to the institution of a judge but gave it a different name to avoid applying the constitutional guarantees inherent in judges.[26] Such an overlap of competencies can also be observed in other Council of Europe states. Therefore, it was properly recognised that "sometimes the distinction between jurors and assessor judges is difficult to make, especially when it is a mixed panel of one or more professional judges and a limited number of non-professional judges (majority) adjudicating together on the verdict and sentence."[27]

Since an assessor performs the duties of a judge, he must demonstrate the same qualities as a judge.[28] That interpretation respects the Strasbourg judges' view that "The term 'judiciary' (…) comprises the machinery of justice or the judicial branch of government as well as the judges in their official capacity."[29] Hence, judicial independence and impartiality is not limited to judges *per se*, but it expands to include all the elements of the execution of justice, including the independence of assessors.

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22 Article 2§1a of Law on the System of Common Courts of 27 July 2001.

23 Polański, S., *op. cit.* (fn. 3), p. 203.

24 Górnicz-Mulcah, A.; Bieniek, B., *op. cit.* (fn. 8), p. 32.

25 Gonera, K., *Propozycje Krajowej Rady Sądownictwa dotyczące przywrócenia instytucji asesora sędziego (założenia wstępne)*, Krajowa Rada Sądownictwa, no. 2, 2013, pp. 5–6.

26 Czarny, P., *Glosa do wyroku Trybunału Konstytucyjnego z dnia 24 października 2007 r. (sygn. Akt SK 7/06)*, Przegląd Sejmowy, *vol*. 85, 2008, p. 245.

27 COE, *European judicial systems. Efficiency and quality of justice. Edition 2016 (2014 data)*, CEPEJ STUDIES, *vol*. 23, 2016, p. 91.

28 Polański, S., *op. cit.* (fn. 3), p. 205. On previous law: I OSK 1447/07, Supreme Court, 27 February 2008.

29 *The Sunday Times v. the United Kingdom*, 6538/74, ECtHR, 26 April 1979.

3.2. Appointment of an Assessor by the Politicized NCJ

In order to counter the allegation that the appointment of assessors is unconstitutional, it was formally adopted that assessors are not appointed and dismissed by the Minister of Justice (hereinafter: the MJ)[30]. Contrary to this, a list of candidates for assessors is prepared by the NCJ but (based on that list) assessors are appointed by the President for an indefinite period of time.[31] The President, by virtue of the Article 179 of the Constitution, also appoints judges. It is a principle of the Polish constitutional system that official acts of the President require the signature of the PM for their validity, and the PM is accountable to the Sejm by signing the acts. However, the Constitution excludes 30 official acts of the President from this obligation. One of these is the appointment of judges (Article 144(3)(17) of the Constitution). Such an exception no longer applies for assessors, because the Constitution does not provide for this institution.[32]

Meanwhile, the Polish doctrine of constitutional law, and the CT's judicial decisions, strongly emphasize the prohibition of an expansive interpretation of this provision.[33] It is probably more appropriate to invoke the principle of *exceptiones non sunt extendendae*, as the prerogative is an exception to the principle of mandatory countersignature. In any case, the provision that removes the requirement to obtain the PM's countersignature under the President's official act that appoints judges must be strictly interpreted.

Through the institution of countersignature, the PM has actual influence over the appointment of judges. The ECtHR has already stressed that the "appointment of judges by the executive or the legislature is permissible under the Convention, provided that appointees are free from influence or pressure when carrying out their adjudicatory role".[34] This means that "no pressure is exerted on them after their appointment and they do not receive any instructions in the performance of their judicial duties".[35] A similar view can be derived from the CJEU's decisions.[36] This was also stressed in relation to previous

30 This was challenged in SK 7/06, CT, 24 October 2007.

31 Article 1061(1) The law on the system of common courts of 27 July 2001, PJL of 2020, item 2072.

32 Jasiński, W., *Charakterystyka zmian w ustroju i organizacji sądownictwa powszechnego w Polsce w latach 2016-2018*, Krajowa Rada Sądownictwa, no. 1, 2018, p. 66.

33 K 25/99, CT, 28 June 2000, OTK of 2000, No. 5 item. 141.

34 *Guðmundur Andri Ástráðsson v. Iceland*, 26374/18, ECtHR, 1 December 2020, hereinafter: *Guðmundur.*

35 *Sacilor-Lormines v. France*, 65411/01, ECtHR, 9 November 2006, para. 67.

36 *European Commission v. Republic of Poland*, C-619/18, CJEU, 24 June 2019,

Polish rules on assessors. The ECtHR reiterated that when deciding whether a given body can be considered "independent" in relation to the executive power and the parties to the dispute, account should be taken in the assessment of *inter alia*: the method of appointing members of such a body and the duration of their terms of office, the existence of guarantees against any pressure being exerted on them, and the question of whether the authority presents itself (to the public) as an independent authority.[37] Thus, two elements constitute independence: proper nomination procedure and independence in executing the assessors' powers.

Referring to the procedure of nominating assessors, doubts were raised years ago about eliminating the participation of the NCJ in the procedure of assigning judicial activities to assessors. This is because the NCJ, being a constitutional body, upholds the independence of the courts and autonomy of judges.[38] Functionally, the NCJ is related to the judicial power and the President's authority to appoint judges.[39] The CT emphasised the need to ensure the influence of the NCJ on the career of a judge *in spe*. The currently applicable Article 106i(1) of the Law on the System of Common Courts has equipped the NCJ with the authority to submit an application for the appointment of an assessor. Nonetheless, the NCJ is incapable of fulfilling its constitutionally entrusted function of upholding the independence of the courts and autonomy of judges owing to the method of appointing members of the NCJ specified by law.[40]

The composition of the NCJ is set forth in Article 187(1) of the Constitution, which indicates that the NCJ consists of the First President of the Supreme Court, the MJ, the President of the Supreme Administrative Court, a person appointed by the President, fifteen members chosen from among the judges of the Supreme Court, common courts, administrative courts, and military courts, four members chosen by the Sejm from among deputies, and two members chosen by the Senate from among senators. All throughout the democratic

ECLI:EU:C:2019:531; *A.K. and Others v. Sąd Najwyższy, CP v. Sąd Najwyższy and DO v. Sąd Najwyższy*, C-585/18, CJEU, 19 November 2019, ECLI:EU:C:2019:982; *A.B. and Others v. Krajowa Rada Sądownictwa and Others*, C-824/18, CJEU, 2 March 2021, ECLI:EU:C:2021:153.

37 ECtHR, *Urban*, *op. cit.* (fn. 1); ECtHR, *Garlicki*, *op. cit.* (fn. 6); ECtHR, *Pohoska*, *op. cit.* (fn. 6).

38 Soloman Jr., P. H., *Transparency in the Work of Judicial Councils: The Experience of (East) European Countries*, Review of Central and East European Law, *vol*. 43, no. 1, 2018, pp. 43–62.

39 Polański, S., *op. cit.* (fn. 3), p. 208.

40 See III PO 7/18, the Supreme Court, 5 December 2012, OSNP of 2020, No. 4, item 38.

functioning of the Republic of Poland, these fifteen judges, who are members of the NCJ, have been elected by judges. This was not *expressis verbis* stated in the wording of the Constitution (the phrase "from among themselves" was missing), but it was clear that this was the only way the NCJ would be able to uphold the independence of the courts and autonomy of judges. Meanwhile, under the Law of 8 December 2017 amending the Law on the National Council of the Judiciary and certain other laws (PJL of 2018, item 3) 20 of the 25 members of the NCJ are being appointed by the Sejm. Thus, in no way is the NCJ independent of the legislative[41], so it is unable to uphold the independence of the courts and autonomy of judges.

Finally, a question should be asked about a right to contest the President's nominations at national court. A reasoning which grants a power to appoint assessors to the Head of the State goes beyond an explicit reading of Polish Constitution. However, if this interpretation is valid, then a person nominated by the NCJ should have the right to appeal to an independent and impartial national court from the President's decision. This is because the nomination procedure has been stipulated in law and it is only part of this procedure (since the NCJ gets involved) when the constitutionality of the law should be contested. This issue has not been solved yet by the judiciary and jurists.

This means that Polish law should at least provide a possibility to question nominations of assessors (this possibility was lifted by Act of 20 December 2019 amending the law on the system of common courts, the law on the Supreme Court, and other laws (PJL of 2020, item 190)), if not to declare nominations "null and void" as in the case of Polish judges nominated by the politicized NCJ. This is because the European standard on an "appointment of judges by the executive or the legislature" has not been met in the part referring to the assessor's nomination procedure. The process is dependent on the government and its political and parliamentary base, limiting its independence. Therefore, Zbigniew Kmieciak correctly noted that "it is obvious that the defectiveness of the proceedings leading to the appointment of the judge's office also translates into the attributes of the court as an authority administering the administration of justice".[42]

41 Witkowski, Z.; Witkowska-Chrzczonowicz, K.; Serowaniec, M., *Legislative and executive powers in Poland*, Wydawnictwo Naukowe Uniwersytetu Mikołaja Kopernika, Toruń, 2021, p. 110.

42 Kmieciak, Z., *op. cit.* (fn. 10), p. 161.

3.3. Independence and Impartiality in Decision Making by an Assessor

The CT negated the constitutionality of the regulation on the institution of assessors[43], because the authority of the MJ to entrust assessors with the function of carrying out justice was not accompanied by the establishment of adequate guarantees of their autonomy. The absence thereof violates the constitutional right to a hearing in a court of law. This right includes not only the right to turn to an authority called "court of law", but to an authority constituted in line with the standards prescribed in law[44], including in international law.

These standards cover, above all, the right to have a case decided by an "independent" and "impartial" body. These are undefined terms. However, interpretation guidelines have been provided by the ECtHR in *Guðmundur*. Among others, the Strasbourg judges repeatedly stress a close connection between those terms and usually analyse conformity of the state's laws and practices with the ECHR, looking at the same time at both terms. Judicial independence was also analysed by the CJEU[45], the European Commission[46], and by the courts[47].

For the purposes of this article suffice it to say that the criterion of perceiving a judge as an independent is assessed traditionally on the basis of subjective and objective independence tests. When the results of both tests are positive, then the courts are "accepted by the public at large as being (…) the proper forum for the ascertainment of legal rights and obligations and the settlement of disputes relative thereto; (…)[and] the public at large have respect for and confidence in the courts' capacity to fulfil that function."[48] The Strasbourg court has already declared that judges may not be subject to instructions, orders, or any other pressure from within the judiciary, including from other judges or

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43 Signalling decision of the CT of 30 October 2006, and Judgment of CT of 24 October 2007.

44 Like in *Rywin v. Poland*, 6091/06, 4047/07 and 4070/07, ECtHR, 18 February 2016.

45 CJEU, *A.K. and Others*, *op. cit.* (fn. 36); CJEU, *A.B. and Others*, *op. cit.* (fn. 36).

46 European Commission, *Communication from the Commission to the European Parliament, the European Council and the Council, Further strengthening the Rule of Law within the Union-State of play and possible next steps* (COM (163) final); European Commission, *Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions, Strengthening the rule of law within the Union - A blueprint for action* (COM (2019) 343 final).

47 Since *John Joseph Cambell and Patrick Fell v. the United Kingdom*, 7819/77 and 7878/77, ECtHR, 28 June 1984 and CT judgment (24 October 2007), *op. cit.* (fn. 43), para. 5.14.

48 ECtHR, *The Sunday Times*, *op. cit.* (fn. 29).

persons performing administrative functions in the court.[49] That view has been shared by the CJEU which "established a fundamental principle: that courts in [the EU] member states must be: 'protected against external interventions or pressure liable to impair the independent judgement of its members and to influence their decisions'."[50] The Luxembourg court further clarified "that the body concerned exercises its judicial functions wholly autonomously, without being subject to any hierarchical constraint or subordinated to any other body and without taking orders or instructions from any source whatsoever."[51]

Under previous Polish regulations both aspects have been infringed. An assessor could be ordered to change the court in which he was sitting. He could also be removed from the office e.g. by the MJ. A new law has lifted the possibility of changing the place of performing service by assessors. Still, it has not removed a feeling of being under pressure from persons who decide on an assessor's professional career. Two aspects have to be analysed in this context: a wide margin of deciding on the expiry of an assessor's term of service (which will be discussed in 3.4.), and the political pressure forcing assessors to narrowly interpret international law.

An important part of the reform of the Polish judiciary is associated with narrowing the options to make a request for a preliminary ruling to the CJEU by the above-cited law of 2017. That legislation does not provide individualization of newly nominated assessor's cases and it almost forbids to verify legality of their nominations *in abstracto*. If the law is read in a context of its adoption, then it becomes clear that assessors are under political pressure from persons who decide on their future career. This does not meet a standard of independent jurisdiction, so from EU law point of view assessors are not "a court".

It is important to note that in individual court cases judges nominated by a previously sitting NCJ initiated procedures to verify the legality of the nomination of judges nominated by the politized NCJ. Still, international courts have not made similar decision on nomination of assessors. However, the Supreme Administrative Court applied the CJEU's interpretation on judges' nomination also to assessors' cases. This decision was made, although Monique Hazelhorst correctly stated that "according to the ECtHR, the absence of procedures for requesting the withdrawal of judges suspected of bias may amount to an obje-

[49] *Parlov-Tkalčić v. Croatia*, 24810/06, ECtHR, 22 December 2009, para. 86.

[50] Batory Foundation, European Stability Institute, *Under Siege. Why Polish courts matter for Europe*, https://obserwatoriumdemokracji.pl/wp-content/uploads/2019/05/ESI-Batory-Polish-Courts-under-siege-Preview-20-March-20192.pdf (05 July 2023).

[51] *Associação Sindical dos Juízes Portugueses*, C-64/16, CJEU, 27 February 2018, EU:C:2018:117.

ctive factor giving rise to legitimate doubt about the judges' impartiality."[52] Also the CJEU "relies on the criterion of independence to determine whether an organ can be regarded as 'a court or a tribunal' for the purposes of Article 267 TFEU"[53] which Luxembourg judges has qualified "as the 'cornerstone of the judicial system'".[54] According to Bernchard Schima this is "the most important criterion to distinguish courts or tribunals from administrative agencies of the [EU]MS. (…) [This criterion includes] protection against external intervention or pressure liable to jeopardize the independent judgement of its members as regards proceedings before them (…) [and another] aspect is linked to impartiality and seeks to ensure a level playing field for the parties to the proceedings and their respective interests with regard to the subject-matter of those proceedings."[55]

The CJEU delegated the verification of independence of judges to national courts. This is because only these courts can properly assess the functioning of their national judicial system.[56] That reasoning is correct and it respects a division of competencies between the EU and its Member States. However, there is no independent authority in Poland which could make such an assessment. Therefore, individual assessors in that EUMS lack protection from accusations on the lack of their independence. Those of them who feel to be under political pressure (which voices an intention to favour national law over international law) may try to avoid submitting any requests for a preliminary ruling in cases which they are deciding. Hence, "the freezing effect" of the law of 2017 is not

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52 Hazelhorst, M., *Mutual Trust Under Pressure: Civil Justice Cooperation in the EU and the Rule of Law*, Netherlands International Law Review, *vol.* 65, no. 2, 2017, p. 114.

53 Garot, M.-J., *The European Union has created a host of EU laws, but appears to be have been late in realising the fundamental importance of an independent judiciary*, https://lawahead.ie.edu/the-eu-and-the-principle-of-judicial-independence/ (28 April 2023). The CJEU has repeatedly referred to the notion of "a court and a tribunal" e.g. in *Associação Sindical dos Juízes Portugueses*, C-64/16, CJEU, 27 February 2018, EU:C:2018:117, para. 37, and *Minister for Justice and Equality (Deficiencies in the system of justice)*, C-216/18 PPU, CJEU, 25 July 2018, EU:C:2018:586, para. 52. It is clear that the name of the body which is "a court or a tribunal" is irrelevant when the CJEU decides if that body can ask for preliminary reference. Thus, also authorities which were not considered as courts in national law were allowed to submit a request for preliminary ruling.

54 Garot, M.-J., *op. cit.* (fn. 53).

55 Schima, B., *Article 267*, in: Kellerbauer, M.; Klamert, M.; Tomkin, J. (eds.), *The EU Treaties and the Charter of Fundamental Rights: a commentary*, Oxford University Press, Oxford, 2019, p. 1829.

56 Winczura, M., *Wymiar sprawiedliwości w Polsce – perspektywa przyszłości (ogólnopolska konferencja naukowa*, Państwo i Prawo, no. 9, 2022, p. 72.

limited to the verification of legality of nominations of assessors, but also to interpretation of the law which is at the heart of the legal case. There are two methods of avoiding submitting requests for a preliminary ruling: to narrowly interpret the law in the case (so to decide that there is no EU competence in the matters under assessor's decision) or to claim that the EU law is clear.

Even though national court is not bound by a party's request to submit that request, judges and assessors must be able to objectively consider it. An individualised justification which has to be given to the party which submits the request must confirm that the court took into account e.g. properly identified EU law and national law, as well as relationships between these laws. Nevertheless, as it was indicated in the above, Polish law does not provide for an individualisation of newly nominated assessor's cases. To the contrary, it almost forbids the verification of the legality of their nominations. Consequently, it is almost impossible to question impartiality of assessors. Hence, it would be easier for non-Polish courts to decide that there is a systemic deficiency of judicial independence in Poland.[57]

A lack of a possibility to verify in a request for a preliminary ruling a nomination of an individual assessor clearly does not conform with the "procedure (…)[which] reflects the nature of the EU law most closely (…) [and in which the CJEU] has provided (…)[itself] with important arguments regarding the fundamental principles of EU law – direct effect and its primacy over national law".[58] Therefore, Polish assessors are unable to objectively identify if EU law should apply to a case which is addressed by a national court, so to ensure the uniform application of EU law and its "effective legal protection in the fields covered by Union law". This is because "if the judge deciding the case is prejudiced as to the outcome of the case, then the trial itself, elaborate though it may be, can amount to nothing more than going through the motions."[59]

Therefore, legally improper nominations (due to the politization of the NCJ, and a political impact on the careers of assessors) infringe a right to a fair trial. An interpretation of what constitutes that right has to take into account "the constitutional traditions common to the [EU] Member States".[60] This makes it

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[57] The fact that assessment would be easier if a lack of an independence is "immediately apparent from legislation" was stressed in Hazelhorst, M., *op. cit.* (fn. 52), p. 115.

[58] Schima, B., *op. cit.* (fn. 55), p. 1823.

[59] Hazelhorst, M., *op. cit.* (fn. 52), p. 114.

[60] *Dieter Krombach v. André Bamberski*, C-7/98, ECJ, 28 March 2000, ECLI:EU:C:2000:164, para. 38. This view was expressed in relations to a right to be defended.

clear that a right to a fair trial is based on fundamental values of European legal order. Therefore, a "manifest" infringement of that right may justify an application of a public policy exception and, consequently, it may in extreme cases allow the refusal to recognise decisions of courts of other EUMS.[61] However, Luxembourg judges have not defined what amounts to the "manifest" infringement of the law.

Mutual trust applies in areas covered by EU law. Nevertheless, Marcus Klamert and Bernhard Schima correctly state that "the Treaties do not specify what 'the law' is".[62] Still, it is beyond any doubt that "the law" includes general principles and the case law of the CJEU. National courts by respecting that law meet the requirements of Article 19 of the TFEU which guarantees an "effective legal protection in the fields covered by Union law".[63] This explains why, if the manifest infringement of core EU values would be identified, the public policy exception may be applied, although "the effects of its application are radical. Refusing enforcement to a foreign judgement negates the judgement creditor's right to enforcement and is contrary to the principle of *res judicata*."[64] From recognising state's court point of view that judgement would, therefore, non-exist, so it will not have legal effect in that country. Polish District Court in Poznań has correctly called such decisions "null and void".[65]

Finally, the restrictions imposed by Polish law which arbitrarily reject the submission of a preliminary question are infringing Article 6 of the ECtHR. This is because, owing to the above-mentioned, intended by law-makers, "freezing effect", assessors are not impartial in deciding on submitting a request for preliminary ruling and the ECtHR has already stressed that a lack of an individualized decision denying submission contests a right to have the case be objectively decided, so that decision may be questioned by the Strasbourg judges.[66] The ECtHR would not, therefore, decide if there was a need to ask for a preliminary ruling, but it would verify if a decision of the national court lacked arbitrariness.

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61 Hazelhorst, M., *op. cit.* (fn. 52), pp. 111-112.

62 Klamert, M.; Schima B., *Article 19*, in: Kellerbauer, M.; Klamert, M.; Tomkin, J. (eds.), *The EU Treaties and the Charter of Fundamental Rights: a commentary*, Oxford University Press, Oxford, 2019, p. 176.

63 *Ibid.*, para. 37, and *Minister for Justice and Equality (Deficiencies in the system of justice)*, C-216/18 PPU, CJEU, 25 July 2018, EU:C:2018:586, para. 52. See *supra* fn. 53.

64 Hazelhorst, M., *op. cit.* (fn. 52), p. 112.

65 II Ca 1542/2, Sąd Okręgowy in Poznań, 25 November 2021.

66 Sadowski P., *Gloss on the judgment of the Polish Supreme Administrative Court of 10 October 2018, II OSK 2552/16*, Ius Novum, no. 14, 2020, pp. 186-187.

Performing the functions of a judge while not being endowed with guarantees of autonomy cannot be considered as meeting the criterion of an autonomous court (ECtHR, *Guðmundur*). Autonomy is therefore the *sine qua non* of judicial independence and impartiality.[67] It consists in the judge acting solely on the basis of the law, according to his conscience and inner conviction.

3.4. Expiry of the Assessor's Term of Office

When determining whether a given judicial authority is independent within the meaning of Article 6(1) of the ECHR, the ECtHR takes into account *inter alia* the duration of the authority's term of office. That Court has explicitly stated that the above-mentioned term cannot be too short, and it must be long enough to maintain the essential elements of judicial independence – as minimum: 3 years[68] or 4 years[69]. This was also stressed by the CT in para 5.5. of the judgment of 24 October 2007. Polish judges explicitly referred to the 3-years period indicated in the above and concluded in that part of their decision that "if judges or persons exercising judicial power are not appointed for life, they may be appointed for a specific period of time, and that they must benefit from a certain stability and not be dependent on any authority". To strengthen its interpretation, Polish CT has explicitly cited two decisions of the ECtHR.[70] That reasoning is correct. Still, in the case of nominations for a definite term of office the ECtHR would examine guarantees of independence and impartiality to an even greater extent than it does in the case of judiciary nominated for an indefinite term. That court would also analyse in detail the possibilities of the discretionary dismissal of judges (and assessors) before the end of their term of office.

When reinstating the office of the assessor in 2015, the idea was to avoid the allegations of unconstitutionality with regard to the appointments to administer justice on a temporary basis.[71] This includes the provisions that cause the expiration of the assessor's term of office. Nonetheless, it seems that the institution of assessors was re-created to administer justice *de facto* for a limited period of time. This by itself does not infringe international law. However, Strasbourg judges assumed that assessors nominated under previous Polish ru-

67 Polański, S., *op. cit.* (fn. 3), p. 204.

68 ECtHR, *Cambell*, *op. cit.* (fn. 47); *Scalzo v. Italy*, 8790/21, ECtHR, 6 December 2022.

69 *Benthem v. the Netherlands*, 8848/80, ECtHR, 23 October 1985.

70 ECtHR, *Cambell*, *op. cit.* (fn. 47) and *Sramek v. Austria*, 8790/79, ECtHR, 22 October 1984.

71 Bojańczyk, A., *op. cit.* (fn. 19), p. 32.

les could not be independent owing to the possibility of dismissal at any time of their term of office by the representative of the executive (the MJ).[72] Also, the Polish CT indicated that Polish law "did not ground the public's conviction that the judiciary was independent from the executive".[73]

New legislations have modified the rules on dismissal of assessors. Still, the law entrusts assessors with the *votum* only for a period of four years from the date of becoming an assessor. Secondly, an assessor's service expires if the assessor fails to apply for an appointment to a judicial position within four years.

A resolution of the combined chambers of the Supreme Court that indicated the incompatibility of these solutions with the principle of a separation of powers and balancing of powers, the separateness and independence of the courts and the autonomy of judges has the force of law.[74] However, the NCJ request to appoint an assessor to a judicial position within four years of entrusting him with the *votum* does not increase the guarantee of the assessor's autonomy. This is because the absence of such a request causes *ex lege* termination of the assessor's service relationship. The assessor is therefore dependent on this politicized entity also after being appointed as an assessor.

4. AN IMPACT OF DECISIONS MADE BY ASSESSORS ON EUROPEAN COUNTRIES

Polish courts are European courts. Their decisions must be recognised[75] by courts of other European states, including the EUMS courts, if international law provides so. In some cases, however, recognition covers also administrative decisions, because under the rule of law they can be verified by independent judicial authorities.[76] Therefore, a problem of the recognition of judicial decisions

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72 ECtHR, *Urban*, *op. cit.* (fn. 1); ECtHR, *Pohoska*, *op. cit.* (fn. 6).

73 CT Judgment of 24 October 2007, *op. cit.* (fn. 43). Compare with *Brudnicka and Others v. Poland*, 54723/00, ECtHR, 3 March 2005, para. 41.

74 BSA I-4110-1/20, Uchwała składu połączonych Izb: Cywilnej, Karnej oraz Pracy i Ubezpieczeń Społecznych Sądu Najwyższego, 23 January 2020.

75 This term is used e.g. in Article 2 letter f of European Parliament, Council, *Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast)* (OJ (EU) L 351, 20.12.2012).

76 See Committee of Ministers of the Council of Europe, *Committee of Ministers' Recommendation Rec(2004)20 of the member states on judicial review of administrative acts*, https://www.coe.int/en/web/cdcj/recommendations-resolutions-guidelines (4 July 2023).

should not be limited to the European Arrest Warrant (hereinafter: the EAW)[77], because of the growing expansion of the competencies of the EU. Currently EU law regulates e.g. asylum, animal control, civil and commercial matters, as well as matrimonial and parental responsibility matters. Courts issue different types of decisions when they decide on these themes. For the purposes of this chapter we would jointly call them "judgments" or "decisions", and those terms should be understood widely, as has been defined in Article 2(a) of the Council Regulation 1215/2012 to cover "a decree, order, decision, or writ of execution, as well as a decision on the determination of costs or expenses by an officer of the court [and] (…)provisional, including protective, measures ordered by a court or tribunal". Such a wide interpretation proves an increased likelihood that the issues raised in this chapter would be decided in Poland by assessors. Thus, at least some of judgments which they make may appear in courts of other EUMS. It also confirms that interpretations from cases focusing on the EAW or asylum policy can be applied to a wider context. It is, therefore, important to ask what consequences restraints to assessors' independence may have for other EUMS's courts.

International law establishes standards on the rule of law, including on judicial independence. These standards should be spread top-down: from international law to national law and practices.[78] Still, the organization of the judicial system is mainly in the hands of the national authorities.[79] A decision not to recognise another state's judgment could, therefore, be seen as contesting the execution of that state's competencies within that state's jurisdiction. In that way Polish politicians attempt to present the infringement procedure initiated by the European Commission (supported by the European Parliament), because they claim that the Commission intervenes in the Polish area of competencies. Those views, however, ignore the fact that the right to establish and modify national law cannot be interpreted as an ability to "successfully invoke Article 4(2) TEU in connection with their [EUMS] national constitutional law where this (being against the principle of loyalty) would detract from the su-

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77 Council, *Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States - Statements made by certain Member States on the adoption of the Framework Decision* (OJ (EC) L 190, 18 July 2002).

78 CJEU, *European Commission v. Republic of Poland*, *op. cit.* (fn. 36), para. 62.

79 *PJSC Rosneft Oil Company v. Her Majesty's Treasury and Others*, C-72/15, CJEU, 28 March 2017, EU:C:2017:236, para. 73; CJEU, *A.B. and Others*, *op. cit.* (fn. 36), para. 68.

premacy of EU law"[80] or deviate from the common interpretation of EU law[81], and refrain from taking steps hindering achievement of the EU's aims. The above-mentioned principle is "inherent in the Community legal order".[82]

Such considerations should be made in the country in which the law on the organization of the judicial system is adopted. However, "[r]ecognition or enforcement of a foreign judgment breaks the principle of territoriality of the legal value of a judgment (…), which means that court judgments are binding in the territory of the country in which they were issued."[83] The above-mentioned citation was made in civil matters. However, the idea of a recognition of decisions started with judicial cooperation in criminal matters. The recognition is based on a presumption of an expansion of mutual trust to other areas which do not refer to mutual recognition or mutual trust.[84] This confirms that the assumption to focus on a wide area of themes is correct.

This is the moment when the main argument should be formulated: "Mutual trust can (…) be regarded as a prerequisite for the principle of mutual recognition, or its 'twin brother'."[85] This explains why the more automatic the recognition process is, the better it serves the purpose for which that process was established.[86] In the *Diego Costa* case, the CJEU correctly underlined that "the Member States should be in accord with one another's legal systems and judicial institutions or with their criminal justice systems respectively".[87] The same view applies also to other branches of EU law.

Diego Costa also referred to the "functioning of the legal system as such". This should be read in the context of the EU Treaties. This is because the importance of mutual trust increased when the CJEU stressed that the trust is

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80 Klamert, M., *Article 4*, in: Kellerbauer, M.; Klamert, M.; Tomkin, J. (eds.), *The EU Treaties and the Charter of Fundamental Rights: a commentary*, Oxford University Press, Oxford 2019, p. 44.

81 CJEU, *A.B. and Others*, *op. cit.* (fn. 36), para. 90.

82 *Brasserie du Pêcheur SA v. Federal Republic of Germany and The Queen v. Secretary of State for Transport, ex parte Factortame Ltd and Others*, C-46/93 and C-48/93, ECJ, 5 March 1996.

83 Morwiński, J., *Uznawanie orzeczeń zagranicznych w Unii Europejskiej*, in: Mik, C. (ed.), *Studia z prawa międzynarodowego i prawa Unii Europejskiej*, TNOiK 'Dom Organizatora', Toruń, 2005, p. 282.

84 Prechal, S., *Mutual Trust Before the Court of Justice of the European Union*, European Papers - A Journal on Law and Integration, *vol*. 2, 2017, p. 77.

85 Losy, O.; Podolska, A., *The Principle of Mutual Trust in the Area of Freedom, Security and Justice. Analysis of Selected Case Law*, Przegląd Prawniczy Uniwersytetu im. Adama Mickiewicza, *vol*. 8, 2020, p. 185.

86 *Ibid.*.; Prechal, S., *op. cit.* (fn. 84), p. 76.

87 Prechal, S., *op. cit.* (fn. 84), p. 83.

grounded in values shared by the EUMS.[88]

The ECtHR stressed that mutual trust should be a rule, but sometimes stepping from the application of that rule may be justified.[89] This interpretation was also manifested when the Luxembourg judges underlined that control of the legality of the laws of other EUMS should be made exceptionally.[90] The CJEU has developed its reasoning when judges explicitly stressed that "where recognition or enforcement of the judgment given in another Member State would be at variance to an unacceptable degree with the legal order of the State in which enforcement is sought inasmuch as it would infringe a fundamental principle."[91] This onus is, therefore, high.

Subsequently the CJEU ruled that "[EU]MS, save in an exceptional case, may not check whether that other [EU]MS has actually, in a specific case, observed the fundamental rights guaranteed by the EU."[92] This reasoning was developed in the *N.S.* in which Luxembourg judges noted clearly that "a presumption of compliance"[93] can individually be verified. This is the reason why the phrase "almost automatic recognition" has been used in this publication. It is important to underline that the *N.S.* case was cantered on an interpretation of the EU's regulation 343/2003.[94] This type of the secondary EU law automatically binds the EUMSs since an entry into force. Hence, it is directly applicable and it does not require to be transposed to national legislation. Consequently, firstly – there is no doubt that an application of this regulation qualifies as acting within the EU law and, secondly, the EUMSs must draw special attention not only to the regulation itself, but they must interpret it having in mind TEU, TFEU, and the Charter.

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88 *Opinion 2/13*, CJEU, 18 December 2014, ECLI:EU:C:2014:2454.

89 Cf. *M.S.S. v. Belgium and Greece*, 30696/09, ECtHR, 21 January 2011.

90 *Rewe-Zentral AG v. Bundesmonopolverwaltung für Branntwein*, C-120/78, ECJ, 20 February 1979, ECLI:EU:C:1979:42. More in Hazelhorst M., *Mutual Trust, op. cit.* (fn. 52), pp. 111-112.

91 *Trade Agency v. Seramico Investments Ltd*, C-619/10, CJEU, 6 September 2012, ECLI:EU:C:2012:531, para. 51.

92 Storgaard, L. H., *EU Law Autonomy versus European Fundamental Rights Protection - On Opinion 2/13 on EU Accession to the ECHR*, Human Rights Law Review, *vol*. 15, no. 3, 2015, para. 192.

93 *N.S. v. Secretary of State for the Home Department and C-493/10 M.E. and Others v. Refugee Applications Commissioner and Minister for Justice, Equality and Law Reform*, C-411/10, CJEU, 21 December 2011, ECLI:EU:C:2011:865.

94 Council, *Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national*, OJ L 50, 25.2.2003.

The reasoning stemming from the *N.S.* is still valid, although EU law which was analysed by the Luxembourg judges has been amended. This is because legislation which has repealed regulation 343/2003 has maintained a humanitarian clause[95] and has allowed to consider to examine an application for international protection lodged with it by a third-country national or a stateless person, even if such examination is not its responsibility under the criteria laid down in this regulation. That discretionary power of the EUMS should be used if a transfer of the asylum seeker would contradict with a need to observe fundamental rights which are referred to in the motives of these regulations. In the *N.S.* judgement Luxembourg judges explicitly declared that such an infringement "precludes the [transfer] operation of a conclusive presumption that the responsible State will observe the claimant's fundamental rights under European Union law and/or the minimum standards imposed by (…) directives"[96] in the destination country. This confirms that a possibility to refuse to recognise other EUMS's decision has been maintained in the Area of Security and Justice in which competencies between the EUMSs and the EU are shared.[97] Therefore, if such a far-going exception to the rule has been reiterated in this sensitive area of law, then one can apply that reasoning also to other areas of the EU competencies.

This approach to mutual trust can be contrasted with a trend to establish an unquestionable recognition of civil judgements, so "without the possibility of refusing recognition or enforcement (…) even when (…) there are severe doubts concerning the impartiality or independence of the court handing it down".[98] Therefore, other EUMS's decisions can be questioned only if this is allowed by EU law. However, Monique Hazelhorst's view that "concerns about the current

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95 Article 17 of European Parliament and of the Council, *Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast)*, OJ L 180, 29.6.2013. It has changed its name into a "discretionary clause".

96 *N.S. v. Secretary of State, op. cit.* (fn. 93), para. 71 and paras. 105-108.

97 The Area of Freedom Security and Justice is a shared competence of the EU as stated in Article 4(2) TFEU. Cf. Chamon, M.; Govaere I., *EU External Relations Post-Lisbon: The Law and Practice of Facultative Mixity*, Brill, Nijhoff, Leiden, Boston, 2020 (esp. Matera, C.; Gatti, M., *Facultative Mixity in the Area of Freedom Security and Justice*, p. 187).

98 Hazelhorst, M., *op. cit.* (fn. 52), p. 118. The trend is exemplified by e.g. European Parliament and of the Council, *Regulation (EC) No. 805/2004 of the European Parliament and of the Council of 21 April 2004 creating a European Enforcement Order for uncontested claims,* OJ L 134 of 30.04.3004.

fundamental rights situation in another Member State are essentially of no importance, unless the CJEU rules otherwise"[99] cannot be fully supported. This is because the need to respect a rule of law, which includes (among others) a right to have a case decided by an independent and impartial court, has been explicitly referred to in Article 2 of TEU and Article 47 of the Charter. Therefore, a manifest infringement of a rule of law may by itself constitute a reason not to recognise other EUMS's decision even if the CJEU has not declared so, what was discussed in 3.3. Consequently, we do not support the opinion that "if (…) [the national court which recognises a decision of Polish assessors] believes that a fundamental principle is at risk, the only route is to request a preliminary ruling from the CJEU, asking whether that principle may indeed stand in the way of recognition or enforcement".[100]

This perspective is actually partially visible in Monique Hazelhorst's article in which she explicitly stated that a well-known deficiencies in Polish judiciary can legitimize utilization of the exception to a mutual recognition rule.[101] That view has been presented in a context of the expansion of the power of the Supreme Court, but owing to the legal nature and an importance of the politicized nominations of assessors it is adequate also to these cases. She repeatedly stresses that questioning Polish courts' decisions by other EUMSs' courts would amount to "a refusal to apply EU law". This perspective cannot be supported. This is because her views underappreciate the primacy of the importance of TEU, the Charter and general principles of EU law over the EU secondary law, as well as on a need to interpret directives and regulations having in mind the aims and purposes for which the EU has been established. This explains why so much importance has been paid in this article to the hindering impact of Polish law on assessors' right to submit requests for a preliminary ruling and to identify that EU law should be applied in individual cases.

The analysed situation should also be seen from the perspective of the recognising court, which may have difficulties in questioning mutual trust. Therefore, it should be explicitly stated that the *M.S.S.* confirms that membership of an international organization cannot be seen as a possibility to rely on this membership to mitigate a need to respect the ECHR. In para 223 of that judgement judges explicitly referred to the above-discussed Regulation 343/2003. The Court has also explicitly noted the importance of human rights to the EU's legislation. Obviously, the ECtHR referred to an individual situation of the applicant. However, the importance of that decision expands and it should

[99] Hazelhorst M., *op. cit.* (fn. 52), p. 118.
[100] *Ibid.*, p. 119.
[101] *Ibid.*, pp. 122-123.

be seen as a precedence also for the EU. This is because an interpretation of the Charter should be coherent with the interpretation of the ECHR (and the ECtHR's judgements as outlined in Article 6 of TEU and Article 52(3) of the Charter). What follows from the ECtHR's judgement is, therefore, an obligation of every individual judge and assessor to verify an existence of those manifest infringements of human rights in states which issued a decision which is to be recognised. Consequently, Strasbourg judges have made another step in questioning an absolute nature of a mutual recognition rule. It can, therefore, be said that what EU law had seen as "a possibility to verify" has been declared by the ECtHR as "an obligation to verify".

The above-mentioned view is supported by the fact that more recently, the ECtHR confirmed that "where the [EUMS's] courts (…) are called upon to apply a mutual recognition mechanism established by EU law, they must give full effect to that mechanism where the protection of Convention rights cannot be considered manifestly deficient".[102] So, even if EU law provides for the "almost automatic" recognition, the EUMS which recognises the decision in some cases must check if recognition would not amount to an infringement of e.g. Article 6 of the ECHR. Although a high burden of the deficit has been kept by the ECtHR which has referred to (again) a "manifest" infringement, judges have explicitly stated that every national court must verify the existence of that deficit. This has limited the almost absolute nature of mutual trust, making what was supposed to be an exception a rule.

The idea of mutual trust should expand beyond a strictly interpreted mutual recognition.[103] Having in mind that a respect for the mutual trust rule includes respecting the right to a fair trial, it should be stressed that the concept of a "fair trial" is built on, *inter alia*, an equality of arms. Referring to this issue the CJEU[104] has already "refused to recognise and enforce a judgment on the application of an interim precautionary measure, which had been issued without the possibility of ruling on its validity by the party against whom it was ordered and on whom it had not been served."[105] Hence, "if the defendant was not served with the document at all or in time, with the consequence that he could not arrange for his defence"[106], then such a decision cannot be recognised

[102] *Avotiņš v. Latvia*, 17502/07, ECtHR, 23 May 2016, para. 116.

[103] Prechal, S., *op. cit.* (fn. 84), p. 77.

[104] *Bernard Denilauler v. SNC Couchet Frères*, C-125/79, ECJ, 21 May 1980, ECLI:EU:C:1980:130, para. 11.

[105] Morwiński, J., *op. cit.* (fn. 83), p. 298.

[106] *ASML Netherlands BV v. Semiconductor Industry Services GmbH (SEMIS)*, C-283/05, CJEU, 14 December 2006, ECLI:EU:C:2006:787, paras. 35–40; Prechal, S., *op. cit.* (fn. 84), pp. 83–84.

by other EUMS. These examples confirm that rule of law can be ensured only by independent and impartial judicial authorities, including assessors. Such reasoning can be found e.g. by the CJEU.[107]

Examples presented above confirm also the incoherence of Monique Hazelhorst's view that "until now, the CJEU has (…) shown itself reluctant to review the compatibility of mutual recognition mechanism with fundamental rights".[108] Firstly, the list of cases in which the court confirmed the importance of a need to verify if fundamental rights are respected in the EUMS which recognises other EUMS's decision is already long. Secondly, Luxembourg judges have developed their reasoning on a need to verify if mutual trust rule can be applied in case of manifest infringements to e.g. values envisaged in Article 2 of TEU. This view has been confirmed when the CJEU identified a systemic breach to the rule of law in Poland. Moreover, *ex post* control procedures which have been established by the Treaties, including the infringement procedure and an action for annulment[109], and their practical applications[110] confirm that the burden for suspending the application of the mutual trust is still high. Still, they have increased the likelihood that the other court's decision would not be recognised in other EUMS. However, this procedure should be used exceptionally, what has been later confirmed in the CJEU judgements.

A wide interpretation of the mutual recognition leads to the conclusion that "the competent authority in a Member State (…) has to make a proper assessment of the facts which are relevant for the application of the social secu-

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107 *Minister for Justice and Equality v. L.M*, C-216/18 PPU, CJEU, 25 July 2018, ECLI:EU:C:2018:586.

108 Hazelhorst, M., *op. cit.* (fn. 52), p. 120.

109 Klamert, M.; Schima, B., *op. cit.* (fn. 62), p. 177.

110 Infringement procedures are reported in the European Commission's official database at https://ec.europa.eu/atwork/applying-eu-law/infringements-proceedings/infringement_decisions/?lang_code=en (16 October 2023). The European Commission's Directorate-General for Justice and Consumers (JUST) has initiated two procedures (based on Article 258 TFEU): INFR(2020)2182 of 31/03/2021 ("Rule of Law: European Commission refers Poland to the European Court of Justice to protect independence of Polish judges and asks for interim measures", https://ec.europa.eu/commission/presscorner/detail/en/IP_21_1524 (16 October 2023) and – owing to a non-implementation of temporary measures by Poland an non-respecting the CJEU judgement of 15 July 2021 (*Commission v. Poland (Régime disciplinaire des juges)*, C-791/19, CJEU, 15 July 2021 ECLI:EU:C:2021:596) – INFR(2019)2076 of 7/09/2021 ("Independence of Polish judges: Commission asks European Court of Justice for financial penalties against Poland on the activity of the Disciplinary Chamber", https://ec.europa.eu/commission/presscorner/detail/en/IP_21_4587 (16 October 2023).

rity legislation (…) and to make sure that the information contained in the documents at issue is correct".[111] A similar view has been presented in a case focusing on inspections carried out initially by the veterinary and public health departments of the EUMS from which animals are exported.[112] Those examples confirm that the need to ensure proper standards of assessment applies to different branches of EU law. Therefore, a need to verify an existence of a manifest breach of human rights, which Monique Hazelhorst has portrayed as an exception to mutual recognition rule[113], has become a widely-spread test which has to be made by every court sitting at the case which falls within EU law. Therefore, even though recognition of other EUMS's judgements should be a rule, a right not to apply that procedure owing to structural deficiencies in that EUMS has been gaining an increasing importance in the CJEU decisions. Hence, what was an exception to exceptions has become an increasingly precisely defined rule which can be applied exceptionally.

However, the above-discussed obligation has a limitation. It is still focused on a systemic infringement of EU law and Article 6 of the ECtHR. It does not give national court a power to analyse again the case in which a judgement, which that court is asked to recognise, has been made. Therefore, Sarah Prechal correctly declares that "in accordance with the principle of mutual trust, the court in the Member State in which recognition is sought is not allowed to substitute its own assessment for that of the court in the Member State of origin."[114] Nevertheless, based on the manifest infringement of a right to have a case decided by independent assessor, that court would be able to follow the *A.B., C.D., E.F., G.H., I.J.* and declare that the decision issued by the Polish assessor is null and void. Consequently, the court would not recognise that decision and would not give that decision legal force in the recognising court's national law.

If courts in other EUMSs were to decide otherwise, they would be left with two dilemmas:

- should they recognise a decision made by a body whose legal status has already been questioned by the CJEU and the ECtHR (hence, they would expose their decision to a likelihood of being contested by a reference to previous decisions in which these courts claimed that nominations of assessors do not guarantee respecting the rule of law, hence respecting a fundamental value on which the EU is built) in particular after the

111 Prechal, S., *op. cit.* (fn. 84), p. 77.

112 *W.J.G. Bauhuis v. The Netherlands State*, C-46-76, ECJ, 25 January 1977, ECLI:EU:C:1977:6; Prechal, S., *op. cit.* (fn. 84), p. 78.

113 Hazelhorst, M., *op. cit.* (fn. 52), p. 120.

114 Prechal, S., *op. cit.* (fn. 84), p. 80.

Polish CT ruled that Article 6 of the ECHR is in partial conflict with the Constitution in that part which made it possible to verify the legality of judicial nominations by the ECHR[115], or

- should they make an individual assessment of the legality of nominating the assessor or assessor's conduct during the procedure which resulted in issuing the decision which they have to recognise?

If they opted for the second solution, they would need to identify the proper legal tools which would enable them to conclude such an assessment. Therefore, they would need to, "*inter alia*, [identify] the possibilities of effective exchange of information and the existence of safeguards to guarantee the functioning of judicial and other public authorities"[116] in Poland. However, it is unlikely that the second option presented in the above would materialize.

A partial solution to these dilemmas can be found in the literature, because some jurists stressed that "executing judicial authorities should freeze judicial cooperation in the event that doubts arise as to respect for the rule of law in the issuing Member State".[117] This view was provided in the context of the EAW, but this reasoning should be interpreted widely because of the growing competencies of the EU and of the fact that the disposition in the above-cited sentence is valid also in assessor's cases. Hence, the sanction from that sentence should apply.

Whatever decision national courts make, they have to ensure that they thoroughly justify it. This concerns also references to mutual trust. The need to ensure proper justification is particularly important if it is accompanied by a decision not to submit a preliminary request. A lack of such a justification or insufficient justification can amount to arbitrary decision-making. Hence, it could be addressed to the ECtHR which could declare that the lack of such a justification or insufficient justification does not meet Article 6 of the ECHR standard.

5. CONCLUSIONS

States execute a wide margin of decision-making regarding organization of their judicial systems. However, international law, including EU law and the ECHR, provides guarantees regarding a need to ensure that national justice

115 *K 6/21*, CT, 24 November 2021.

116 Prechal, S., *op. cit.* (fn. 84), p. 83.

117 Bárd, P.; Ballegooij, W. van, *Judicial independence as a precondition for mutual trust? The CJEU in* Minister for Justice and Equality v. LM, New Journal of European Criminal Law, *vol*. 9, no. 3, 2018, p. 353.

systems are independent of other branches of state power. The subsidiarity rule is, therefore, losing its power after *Guðmundur* in which the ECtHR increased the protection of judicial independence. The same idea was presented in the EU context.[118]

Respect for the rule of law is particularly important in cross-border cases. These constraints are exemplified by the recognition of decisions made by Polish assessors in other EUMSs. The recognition gives them power equal to national decisions of a country in which Polish judgments are recognised. Hence, an authority which makes such a decision is liable under its own national law for ensuring that the original decision meets the standards of the rule of law. This "does not imply blind trust"[119], although a verification should be made exceptionally, as was confirmed in particular in the CJEU's Opinion 2/13. However, if the problem at stake is of a systemic nature (e.g. when there are doubts about independence of Polish assessors as a group of judicial authorities, not as individual assessors), then exceptional checks may become a routine.

A decision to conclude such checks has also policy implications. Blind trust can lead to an infringement of *inter alia* Article 6 of the ECHR and Article 19(1) of TEU read with Article 47 of the Charter. However, a denial could be contested under the mutual trust rule. Nevertheless, national courts recognising Polish assessors' decisions have very limited legal tools to verify the legality of Polish decisions, including assessors' independence. Certainly, infringement procedures which have been initiated against Poland[120] may provide some guidelines. Still, national courts in the EUMSs may have difficulties in justifying whether recognition or a denial of recognition of Polish assessors' decisions meets Article 6 of the ECHR standard. In other words, it may be difficult for these courts to analyse in every case issued by Polish assessors if Polish law guarantees a sufficient level of assessors' independence. The recognising court can rely on the CJEU cases, in particular on *A.B., C.D., E.F., G.H., I.J.*, and apply reasoning which has been outlined by Luxembourg judges. Hence, national judges in the non-Polish court would be able to refer to a manifest systemic deficit in assessors' independence, without verifying if the assessor who has been sitting at the court which has made a decision which they are expected

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118 *Unión de Pequeños Agricultores v. Council of the European Union*, C-50/00 P, CJEU, 25 July 2002, ECLI:EU:C:2002:462, para. 38.

119 Losy, O.; Podolska, A., *op. cit.* (fn. 85), p. 85.

120 The European Commission's Directorate-General for Justice and Consumers, INFR(2020)2182 of 31/03/2021, *op. cit.* (fn. 110) and The European Commission's Directorate-General for Justice and Consumers, INFR(2019)2076 of 7/09/2021, *op. cit.* (fn. 110).

to recognise has shown his impartiality and has acted in an independent way. Certainly, that standard should apply also to decisions issued in other EUMSs, because what was supposed to be an exception has become (owing to the CJEU's and the ECtHR's decisions) a standard test (although its practical outcome is limited to grave deficits in human rights protection) which every court must apply in every case.

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Sažetak

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UPITNA NEOVISNOST POLJSKIH POMOĆNIKA SUDACA I ODRAZI NAVEDENOG PROBLEMA U EUROPSKOME PRAVNOM PROSTORU

U radu se kritički preispituje ustanova pomoćnika sudaca (asesora, prisjednika, sudskih savjetnika) u Poljskoj te se analiziraju učinci ograničavanja njezine neovisnosti na odluke drugih europskih sudova. Na temelju istraživanja provedenoga korištenjem dogmatsko-pravne metode, autori zaključuju da postupci imenovanja pomoćnika sudaca i prestanka njihove službe ne poštuju pravo na pravično suđenje zajamčeno Europskom konvencijom za zaštitu ljudskih prava i temeljnih sloboda te pravom Europske unije. Pritom je važno istaknuti da pomoćnici sudaca uglavnom odlučuju samostalno, kao sud koji čini jedna osoba, zbog čega bi, iako bi prema pravu EU-a države tek iznimno trebale provjeravati poštuju li odluke sudova drugih članica temeljna prava, moglo doći do toga da takvi postupci provjere postanu pravilo.

Ključne riječi: pravo na pravično suđenje, pomoćnik sudca (mlađi sudac), neovisnost i nepristranost sudaca, temeljna prava EU-a

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