

Dr Katarzyna Sznajder -Peroń LL.M.  
Judge, Regional Court in Katowice

**The grey zones of judicial independence**  
in light of EU law - from the perspective of a Polish judge.

Tallinn - 2024



Co-funded by the  
European Union

# 1. The common EU concept of judicial independence

## Treaties

The notion of **judicial independence**, based on **Article 19(1) TUE**, is part of a broader concept of **rule of law provided for in Article 2 TUE**.

**Article 2 TUE**: the Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities (...).

Second subparagraph of **Article 19 (1) TUE**: Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law.

**Article 47 of the Charter of Fundamental Rights of the European Union** provides for the right to an effective remedy and to a fair trial granted to everyone whose rights and freedoms guaranteed by the law of the Union are violated.

Failure to comply with the principles of the rule of law by national courts can have potentially far – reaching effects, including the non-recognition of judgements and refusal to carry out European Arrest Warrants in other Member States (i.a. C-216/18 PPU, C-562/21 PPU, C-563/21 PPU).

## Judicature

The CJEU has worked out an **autonomous and uniform notion of judicial independence** as part of the system of effective legal protection to be granted to persons by EU Member States. As it consequently points out, judicial independence presupposes, in particular, 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, and that it is thus protected against external interventions or pressure liable to impair the independent judgment of its members and to influence their decisions (i.a. C-506/04, C-503/15, C-64/16).

## **Competence of CJUE to apply Article 267 TFEU**

There is no dispute as to the Member States' constitutional autonomy in creating their judicial structures. However, in performing this task they are obliged to comply with Articles 2 and 19 (1) TUE and to guarantee a functioning system of legal protection – thus fulfilling the requirements set out Article 47 of the Charter of Fundamental Rights of the EU (Right to an effective remedy and to a fair trial).

These matters are subject of review by CJUE under Article 267 TFEU (e.g. C-896/19), irrespective of whether the case in question involves the implementation and application of EU law in the meaning of Article 51(1) of the Charter (C-487/19, C-619/18). The obligation of Member States to provide sufficient legal protection is always considered as covered by EU law and thus subject to rulings by CJEU.

## 2. The grey zones – where we can find them

- Looking more closely at the legal and factual status of judges, one can think of **two general spheres - aspects** of their situation, which need to be considered combined. Together they contribute to creating the conditions requisite for judicial independence to be effective and for allowing the court system to provide proper administration of justice as set out in Article 19 (1) TEU. They can be defined roughly as the **internal and external** aspect of independence.
- It is worth discussing where infringements of judicial independence are most likely to appear (the **grey zones**).

## a) Conduct / actions of the judge her/himself

- This “internal” sphere of independence is shaped by judges in their everyday work. There, the integrity of the judge and perception by parties/the general public is subject to procedural provisions allowing in certain cases for judges to be excluded from a case (recusal of their own motion or as demanded by a party). The **judges’ integrity** as freedom from being influenced and doubtful connections to parties must in the first place be protected and displayed by the judges themselves.
- It is the **public trust** that ensures conditions needed for the proper administration of justice (C-132/20).

However, the judge’s integrity and independence might be put to a test by circumstances mentioned below in section b).

## **b) Outside interference by public bodies, judicial authorities, state policies, legislation**

**First**, there can be direct or indirect influence by the state in creating a legal framework which can potentially provide room for interference in judicial independence. Here are some examples:

- nomination and promotion procedures (e.g. C-216/21 – promotion of judges in Romanian legal system),
- determining and extending retirement age of judges (in the Polish judiciary, C-718/21),
- disciplinary responsibility (C-204/21 Commission v. Poland),
- statutory rules of conduct in private life, requirement of “impeccable character”,
- limitations on the rights to take part in political life and to express views publicly,
- obligation to disclose property (in Poland to the public), membership in associations.



**Second**, there have been cases of attempted interference by way of administrative directions from the judge's superiors or - as was the case in Poland - of other bodies such as disciplinary institutions or the National Council of the Judiciary.

**The essential questions are:**

how far the national legislation is ready to interfere and where the competence to give administrative directions is overstepped. In the individual case of a Polish judge (C – 487/19, W.Ż.) the CJEU stated that judges should be protected from outside interference or pressure – this includes indirect forms of influence that can weigh on the decisions of the judges in question. In this case the newly nominated president of the court i.a. transferred the judge from one department to another without a right to question the decision.

### **3. A judge confronted by attempts at infringements of independence**

What actions can an individual judge (or within an organisation of judges) take to protect their integrity in their judicial capacity and to counteract attempts at interference in judicial independence?

Should such attempts be undertaken by private individuals/parties, the judge has the duty to counteract and report illegal actions aimed at disrupting the court decision or violate the judges right to privacy.

As for cases of actions by public bodies and state authorities – in Poland there has been a vivid dispute as to the legality of acts of the state which were considered contrary to EU Law.

Coherent CJEU case-law grants the judges the right to contend such attempts by formulating requests for preliminary rulings when there is a procedural framework for such steps (i.a. C-487/19, C-216/21, C-718/21, C-53/23).

Particularly in Poland much controversy arose concerning the judges' right to speak out publicly in cases of judicial independence being violated in their perception. It should be noted that as far as voicing the judges' concerns is **directed at the protection of the rule of law**, it cannot be deemed as political activity as such, rightly prohibited by law.

## **4. Independence of public prosecutors**

Unlike judges, the legal status of public prosecutors in Poland is not directly covered by constitutional guarantees (apart from the general principle of the rule of law stated in Article 2 of the Constitution). Their status and work environment are determined by national legislation, currently making them part of a broader body of public authorities, directly subordinate to the Ministry of Justice. Until 2016 public prosecution was a more independent body, headed by the Prosecutor General. There are plans again to introduce more autonomy in this area of the state.

Thank you!