

To : Professor Koen Lenaerts, President of the Court of Justice of the European Union, Palais de la Cour de Justice. Boulevard Konrad Adenauer, Kirchberg, L-2925 Luxembourg

From: Professor Alberto Alemanno, HEC Paris, Law Department, 1 Rue de la Libération, 78351 Jouy en Josas, France

Paris, 5 October 2021

Dear Mr. President, Cher Monsieur,

The Court of Justice of the European Union's hearings are public<sup>1</sup>. Yet to attend one requires to be physically present in *Kirchberg*. To travel to Luxembourg is however not an option for most Court's observers, and even less by the average EU resident interested in the Court's judicial activity and its subsequent impact on her/his life.

It is against this legal and factual backdrop that I take the liberty to write you today in the most constructive spirit.

With this letter, I would like to ask for the Court's permission to stream the public hearing in cases C-156/21 and C-157/21, scheduled on October 11-12, 2021. I would like to do so from the *salle d'audience* through my personal 4-G mobile phone. Given the high-profile nature of the cases at hand and risk of misinformation that might stem from the lack of publicity of such a hearing, I intend to travel to Luxembourg – together with several other academic colleagues as well as civil society organization representatives. In so doing, we intend to:

- enable a wider community of citizens to gain direct access to the exchanges and information provided during the hearing;
- provide a direct, and gratuitous account of what will be asked and discussed;
- contribute to a more informed media reporting by acting as fact-checkers. Being present during the hearing, we will be able to not only get the record straight but also pedagogically illustrate what will be debated during the hearing itself;
- ultimately, mitigate the risks stemming from the Court's lack of publicity of the hearing. The latter situation does not only render the access to the Court's hearing unequal within society, but also feed misperceptions, thus potentially exposing the Court to unfounded criticism.

While considering my request, I would like you to consider the following:

### *Legal arguments*

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<sup>1</sup> Article 47 of the Charter of Fundamental Rights and Article 31 of the Statute.

1. Access to the oral hearings of the CJEU is public. This is expressly stated in Article 31 of the Statute as well as Article 47 of the Charter of Fundamental Rights (CFR). However, attendance at a hearing and access to the information herewith exchanged presupposes physical presence, and therefore a trip to Luxembourg.
2. This situation characterized by unequal access to the information presented and exchanged during a Court's hearing contrasts with Article 15 TFEU, which requires the Court of Justice of the European Union – like any other EU institutions – to “conduct [its] work as openly as possible”. Indeed, following the entry into force of the Lisbon Treaty and the re-writing of Article 255 TCE, the principle of openness has acquired the status of an autonomous and legally enforceable principle. If the judicial activity of the Court – being non-administrative – is exempted from the safeguards of Article 15 (3), this activity does not escape all requirements imposed by the principle of openness. Indeed, by extending the principle of openness to the CJEU, Article 15 (1) TFEU illustrates that there exists an autonomous area of openness that should be guaranteed regardless of the nature, administrative or non-administrative, of the activity undertaken by the CJEU. This duty of openness extends to and covers the Court's public hearings.
3. To fully comply with Article 31 of the Statute read in conjunction with Article 15 TFEU, the Court should either directly ensure the broadcast of its public hearings or allow – upon request – citizens and or other third-parties present to the hearing to stream – via their private equipment – those hearings.
4. Failing to do so, the Court puts itself in conflict with the principle of openness governing its action within the limits established by Article 15 TFEU. Yet, being the only judge over its compliance over such a principle, it puts itself outside of its own administrative and judicial scrutiny.

#### *Policy considerations*

5. Livestreaming of the Courts' hearings has become common practice in many national courts, and as it is already the case in France (i.e. *Conseil Constitutionnel*), in Poland (i.e. *Trybunał Konstytucyjny*), the UK (e.g. the Supreme Court) or other international judicial institutions, like the European Court of Human Rights. It remains unclear why the CJEU's hearings would deserve a different treatment than these established judicial institutions.
6. The experience gained by the Court during the pandemic has demonstrated the technical feasibility of relying on new technologies to facilitate access to justice, and its limited costs.
7. The absence of a dedicated policy governing the broadcasting of its 'public' hearings is causing several unintended consequences, such as:
  - a. the physical attendance is de facto reserved to a handful of individuals – be they academics, students, close observers, and journalists –, who are essentially the 'lucky few' able to make the trip to Luxemburg.
  - b. This has been leading to the creation of a cottage industry of professional journalists, lawyers and corporate consultants who attend the hearings to then inform their paying clients about the questions posed by the members of the Court, the responses that were provided as well as precious information, such as

for instance the expected day of publication of the opinion of the Advocate General.

- c. None of this information exchanged during a ‘public’ hearing is made public by the Court itself, by thus remaining a prerogative of the few who can either travel to Luxembourg or pay someone to go there.
  - d. In the absence of full publicity of the Court’s hearings (as would be guaranteed by streaming), there is a risk that the accounts of those hearings offered by a few selected gate-keepers – be they commercial (such as the specialized media) or institutional (such as the governments involved) ones –, may not reflect what it actually occurred. Conversely, the broadcasting of the hearing itself would enable greater public scrutiny, thus preventing all unintended consequences previously identified from manifesting themselves, and in particular by mitigating the risk of distortive (be it selective, incomplete or deliberately deceiving) reporting.
8. Today there is a decisive, compelling argument for the Court to embrace public openness of its hearings – be it guaranteed by the Court itself or by third parties. As the awareness of the social costs of climate change increases, the Court can’t realistically expect carbon cost-minded citizens, companies and all other stakeholders to travel to Luxemburg to attend ‘public’ hearings. Streaming its hearings, would be a small but significant, tangible step towards a greener EU administration.

### *Conclusions*

Despite being aware of the historical reticence of the Court to limit publicity of its judicial activities – largely motivated by the legitimate desire to preserve the ‘serenity’ of its judicial work –, the new political, social and technological environment calls on the Court to re-assess its own role in, and contribution to, the democratic life of the Union. At a time in which the rule of law is challenged across the Union, livestreaming of the EU courts’ hearings would not only help the EU to be better understood by its own citizens. It would also mark a major, highly symbolic step in defending the rule of law. Only with the public watching, the promise to “hear the other side” is subject to effective oversight, what may in turn neutralize any (forthcoming) accusation of lack of impartiality.

Ultimately, to stream its public hearings should be the first in a long series of measures aimed at opening the Court to its citizens at a time of growing, and worrisome, populist attacks on the judicial branch across the EU.

I look forward to hearing from you, possibly before Monday October 11, 2021 when the ‘public’ hearings in cases C-156/21 and C-157/21 are scheduled to take place in Luxembourg.

Thank you in advance and warm wishes,

A handwritten signature in black ink, appearing to be 'A. G. Bot', written in a cursive style.