

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, 8 October 2021

Dear Mr President, dear Mr Maselis,

I would like to thank you for the swift response to my request for authorization (Annex 1) to livestream the hearing in cases C-156/21 and C-157/21, scheduled on October 11-12, 2021.

While I praise the Court's commitment to bring its activities closer to EU citizens – in line to what is required by Article 15 TFEU –, I would be grateful if you could provide a response to my request of October 5, 2021 in order to clarify:

- a. whether my request has been rejected;
- b. whether am I right to understand that the policy governing the publicity of the Court's hearings is the one you have described in your email to me (Annex 2), and that derives from the technical arrangement that no one is allowed to use electronic devices in the courtroom.

In the meantime, I take the liberty to address the arguments you have raised to justify the Court's lack of publicity of its hearings via live streaming.

1. Live streaming of CJEU's hearing is a complex and costly matter

While I acknowledge the costs involved, I find your interpretation of the principle of multilingualism (and what that would entail *in concreto*) rather maximalist in nature.

- a. The decision to livestream a hearing may take place on a case-by-case basis, and therefore does not necessarily presuppose the existence of a general policy, rendering all CJEU's hearings transmissible. One may for instance envision a policy that makes livestreaming conditional upon the parties' consent, or to the importance of the case.
- b. In case of livestreaming, the principle of multilingualism doesn't automatically require the Court to provide interpretation in all official languages. A more sensible approach would be to limit the streaming to the procedural language(s) of the case, at least in an initial phase. This would render the costs under control, while enabling the Court to experiment its new publicity policy of the hearings.

2. To avoid potential interference with the electronic equipment in the hearing room, participants are requested to switch their phones off during the hearing.

This argument appears difficult to reconcile with the current reality of the hearing's practice:

- a. Participants to Court's hearings routinely use their phones – by relying on the powerful *wifi* network provided by the Court itself – to communicate to the outside about inter alia the questions posed by the Court's members and responses given by the parties and do so in a variety of forms, notably 'live tweets', which tend to reproduce mechanically what is exchanged during a hearing.
 - b. When another hearing room is available (in house live retransmission), the 'interference' argument seems moot insofar as no electronic equipment is active with the consequence that no interference may occur vis-à-vis the court's proceeding.
3. Livestreaming of CJEU's hearing by a third party would interfere with the Court's general duty to ensure a fair trial

By tolerating live tweeting and other forms of live communication to the outside world, the Court has already de facto gave up control over the quality and contents exchanged during a public hearing.

It is in the light of the above that I observe that while assessing my request the Court is called upon to strike a delicate balance between its general duty to ensure a fair trial versus its Treaty obligation to be as openly as possible vis-à-vis the public.

I look forward to hearing from you and thank you very much in advance for your time, even more so in such a delicate time for the integrity of the EU legal order.

Kind regards,

A handwritten signature in black ink, consisting of a stylized first name followed by a surname and a long horizontal flourish.

ANNEX 1

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 public¹. 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:

¹ Article 47 of the Charter of Fundamental Rights and Article 31 of the Statute.

Legal arguments

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,



ANNEX 2

From: Maselis Ignace <Ignace.Maselis@curia.europa.eu>
Date: Wednesday, October 6, 2021 at 16:59
To: "alemanno@hec.fr" <alemanno@hec.fr>
Cc: Secretariat_President-Cour <Secretariat_President-Cour@curia.europa.eu>
Subject: Request to live stream public hearing in cases C-156/21 and C-157/21

Dear Professor Alemanno,

I am writing you on behalf of President Lenaerts, who thanks you for your letter.

The Court of Justice of the European Union (CJEU) continuously strives to bring its activities closer to EU citizens and the streaming of hearings in the future therefore remains high on its agenda, in order to allow the public to attend hearings without any need to travel.

Livestreaming of CJEU's hearings is, however, a complex and costly matter, specifically due to the fact that the Court operates in 24 languages. Any comparison to national courts and the European Court of Human Rights is therefore, with respect, unfair as none of those courts are faced with that specific challenge of multilingualism on the same scale as the CJEU. Without access to simultaneous interpretation, each hearing would be of interest only for a small percentage of EU citizens. Moreover, given that at least ten different languages will be used actively during the hearing to which your request relates, it is unlikely that any EU citizen would be able to understand everything that is said without attending the hearing in person and thus benefiting from the interpretation service that will be provided by the Court.

Hearings are public but Covid restrictions currently limit the number of people who may safely be seated in the hearing room itself. There will, however, be other hearing rooms available where members of the public will be able to follow the hearing on a screen and to listen to interpretation into the language of their choice. You are very welcome to attend the hearing in cases C-156/21 and C-157/21 and, in light of your request to attend, a seat will be reserved for you in the hearing room itself.

In order to avoid potential interference with the electronic equipment in the hearing room, participants are requested to switch their phones off during the hearing. In any event, the CJEU is responsible for all aspects of the organisation of its hearings, which is part of its general duty to ensure a fair trial. It cannot allow private initiatives to interfere, in any way, with that responsibility and, ultimately, with that duty, by giving up any control over the quality and contents of a possible livestream of its hearings.

Kind regards,

Ignace Maselis

COURT OF JUSTICE OF THE EUROPEAN UNION | Chief of Staff
Chambers of President Koen Lenaerts

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