

The European Court of Justice Enters a New Era of Scrutiny

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Among the many unintended consequences of the PSPP judgment, the most unforeseen of all was to thrust the Court of Justice of the European Union (CJEU) into the limelight.

If the old adage ‘All publicity is good publicity’ holds true – ‘as long as they spell your name right’, *quid non!* –, the CJEU might be entering into a new era of scrutiny.

Don’t be mistaken. The media have been paying growing – yet intermittent – attention to the Court’s output in parallel to its greater impact on people’s lives and businesses. Yet – if the Court is indisputably no longer blessed “by the benign neglect of the media” [as presciently revealed](#) by Eric Stein – the focus of public scrutiny may now be broadening, its very nature shifting and duration set to endure.

All of a sudden, the media coverage is no longer limited to *what* the CJEU decides but *how* it decides and operates.

For a good illustration, look at this week’s [The Economist column](#) – “The Wizards of Luxembourg” – entirely devoted to the CJEU. While the *casus belli* for the Court’s exceptional coverage is the PSPP judgment, not a word is actually spent on the ruling itself. The article offers instead a socio-political analysis of the CJEU and its members, by focusing in particular on the Court’s overall openness vis-à-vis the public-at-large including a reference to the modalities of appointment. But there’s more. In the aftermath of (and most probably due to) the PSPP’s decision, also a less flattering older story about the [Court’s members use of chauffeurs](#) found its way through the media. This and many more stories originate from the [discharge procedure](#) by the European Parliament Committee of Budgetary Procedure. This consists of a “*cahier de doléances*”, which flags a patchwork of issues affecting the Court’s operation, from the lack of a policy on conflict of interest and gender balance for the administrative personnel, unpaid internships, high number of burnout cases, to its environmental performance.

As a result, questions that have remained confined to the internal cuisine of the EU machinery, and in the hands of very few chefs, are set to draw unprecedented public attention. To paraphrase Bismarck, it is no longer about the sausage alone, but the kitchen.

The PSPP judgement as a catalyst for the opening up of the CJEU?

If the publicization of the Court's work has been accelerated by the extraordinary antagonistic nature of the PSPP ruling – within the broader COVID-19 context –, this is also partly the result of CJEU's own making.

By breaking with tradition, the Court of Justice published a press release in reaction to the German's judgment. This move was as exceptional as the [number of retweets](#) that such a press release gained on the otherwise low-traffic Twitter account of the Court. Likewise, by departing from the tacit rule according to which judges speak through their judgements, even the Court's President – Professor Koen Lenaerts – had little choice but enter the media sphere, by giving [an interview](#) (in his mother language) to the Dutch press. While he refrained from commenting on the PSPP judgment (the press release did the job already), his answers have been read by many as an indirect response to the multiple interviews given by the tradition-breaking Andreas Voßkuhle and Peter Michael Huber, two of the German Constitutional Court judges behind the ruling. By speaking ultra-judicially about their own ruling, the judges added a few sub-titles to their rather inaccessible text for broader popular consumption. This inevitably fueled an escalating exchange that has also contributed to bringing the public scrutiny of the CJEU – and more broadly EU legal order – to a different level.

Today's greater public scrutiny is therefore qualitatively different from previous CJEU's public exposure.

To many, this sudden spike of public attention into the Court's inner work is long overdue. How the court's governance could remain virtually unaffected despite its gaining in importance, influence and size over time? How could it remain insulated from external scrutiny at the time of a publicity Zeitgeist?

Yet this process of public must be handled with great care, all the more so as the struggle for supremacy becomes a public affair. It is undisputed that the judiciary typically presents different legitimacy credentials than the legislature: courts are not parliaments, judges are not politicians. However, both the legal framework governing the Court's openness vis-à-vis society – the Union's institutions conduct their work ["as openly as possible"](#) – and societal preferences raise expectations that remain largely unmatched today.

Amid growing public scrutiny, the question facing the CJEU is therefore how to reconcile its historical, institutional reticence to open up to the public with its legally mandated requirement to actually do so.

Let's first discuss the legal framework governing the Court's openness before discussing the new conditions under which the court might respond to such external demand for greater scrutiny.

The principle of openness and the CJEU

It is fair to argue that the Court has deliberately stayed in the shadow over its first 68 years, by playing down its importance, and resisting any attempt to be thrown into the public eye. This resistance has historically been motivated by the concern to preserve the serenity of its proceedings while discharging its duty of *dicere legem*.

Yet since the Lisbon Treaty [the principle of openness](#) applies today to *all* EU institutions – including the CJEU – and imposes on them [an autonomous duty to ‘open’ their activities to the public](#). In particular, such a principle – as enshrined in Article 15 (1) TFEU – consists not only of the rather passive right of every citizen to have access to information but also of a more pro-active institutional duty to ensure that all its actions, as well as the information about these actions, are provided in an accessible and understandable way. However, opening the activities of the Court to the public has to be done within the limits set by Article 15 (3) TFEU: The rules on access to documents apply to the CJEU only when it exercises administrative functions, and do thus not apply to the exercise of judicial activities. This exception is justified by the necessity to ensure that the act of judgment is protected from external interference.

Yet, by extending the principle of openness to the CJEU, Article 15 (1) 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.

Most of the issues currently coming under the public eye today, ranging from administrative issues – such as the lack of clearly defined, public policies on the use of cars by members, conflict of interest for the personnel, unpaid internships – to those more judicial in nature, such as the [lack of streaming of public hearings](#) or the [modalities of judicial appointment](#) – do fall into this space. Yet ten years after the entry into force of the Lisbon Treaty and despite mounting public attention, the CJEU continues [to lack a fully fledged publicity policy](#) as required by the principle of openness in relation to the public-at-large.

Think about it. What if someone should claim that the CJEU breaches the principle of openness by not streaming one of its public hearing? What if someone should challenge the rejection by the CJEU [to release of one or more](#) of its ‘administrative’ documents ?

Ultimately, the judge of the CJEU’s compliance with the principle of openness is the Court itself. As for the competence of the EU Ombudsman in verifying alleged maladministration by the Court (the ‘Court administration’), this is also ultimately a matter for the Court to judge to decide.

In these circumstances, it doesn’t appear entirely surprising that the CJEU, unlike many other EU institutions – which are subject to the Court’s own judicial scrutiny – has been systematically eluding [many hard questions](#) regarding its own governance, operation and publicity.

There are however signs suggesting that the CJEU may be entering – willing or unwillingly – a new era of public scrutiny. This might enable the Court to realign itself to both EU law and the *Zeitgeist*. Stay tuned. The Court’s Twitter account might soon reveal some news.

