The Court of Justice of the EU goes (almost) public

Alberto Alemanno 2022-04-26T20:28:07

Since the entry into force of the Lisbon Treaty, the CJEU – like any other EU institution – is set, under the principle of openness, "to conduct [its] work as openly as possible". Yet this Treaty-mandated call for a 'democratisation' of the Court – both when acting as a jurisdiction and when acting as administration (on such a key distinction read here) – has found significant resistance. Thirteen years after the Lisbon Treaty, the CJEU continues to lack a fully-fledged publicity policy, albeit the growing public scrutiny over its work. This has to do with the Court's deliberate effort at staying in the shadow over its first 70 years, by playing down its importance, and resisting any attempt to be thrown into the public eye. The rationale underpinning such an approach has been the Court's well-meaning concern – acting as a counter-majoritarian institution – to preserve the serenity of its proceedings while discharging its duty of *dicere legem*. Yet, its underlying assumption – less publicity, better justice – is increasingly questioned today. Not only EU law indicates 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, but also the *Zeitgeist* acts as a constant reminder that our society increasingly expects that space to be realized and safeguarded.

Most of the issues currently coming under the public eye today, being judicial in nature – such as the lack of streaming of public hearings, access to the Court's files, administrative, such as unpaid internships, or the lack of clearly defined, public policies on the use of cars by members, or hybrid, such as the day-to-day governance of the CJEU or the modalities of judicial appointment – do fall into this space. And as a result, they continue to remain hidden to the public eye, and therefore largely unaccountable to the many.

Yet, as wishfully predicted long time ago, we might be witnessing some major changes in the Court's openness vis-à-vis the public-at-large. The Court's Twitter account (!) informed us – the public, well, the followers – of a major policy U-turn, at least when it comes to the publicity policy of (some of) its hearings.

As of today – April 26, 2022 – the Court will be streaming its Grand Chamber's cases on its website. What the Court pledged to offer is the (i) live *delivery* of judgments and corresponding Advocate Generals' opinions in those cases, as well as (ii) the delayed broadcast of the *public hearings* of these very same cases.

While the broadcasting of the delivery does not add much value (the texts are generally made available online at the time of their live reading in Luxembourg) to its declared goal of facilitating "the public's access to its judicial activity", that of the public hearings appears a major game-changer in the Court's stance vis-à-vis the public-at-large. And that despite the many precautions accompanying

the introduction of such a major rehaul of the Court's publicity policy regarding its hearings, which – in any case – it applies only "in principle", "for a pilot period of 6 months" and, in any event, only to Grand Chamber's cases.

First, this move is set to not only align the Court's judicial practice with EU law (notably Article 15.1 TEU, Article 47 of the Charter of Fundamental Rights (CFR) and Article 31 of the Statute), but also with the international standard – followed by both domestic and international courts – which requires the broadcasting of judicial hearings. Examples include the European Court of Human Rights as well as several domestic supreme courts, such as the French *Conseil Constitutionnel*.

Second, the new publicity policy is set to disrupt the status quo, which de facto conditions the access to a Court's hearing to a trip to Luxembourg. While this has historically preserved the intimacy of the judicial moment, it has also 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. As of today, none of this information exchanged during a 'public' hearing is made public by the Court itself, by thus remaining 'privileged information' of the few who can either travel to Luxembourg or pay someone to go there. By opening up (some) of its public hearings, the Court is set to not only challenge the very same industry it has contributed to create in the first place, but also to mitigate the inherent risks stemming from its very existence, i.e. the accounts of the hearings offered by a few selected gate-keepers – be they commercial or institutional (such as the governments involved) ones –, may not reflect what actually occurred. Therefore, at a time of unprecedented attacks to the EU legal order, the broadcasting of the hearing itself could enable greater public scrutiny, thus preventing – or at least limiting – the risk of distortive (be it selective, incomplete or deliberately deceiving) reporting.

Third, although the new publicity policy applies only to Grand Chamber cases – which constitute approximately to 7% of the cases decided by the Court annually – and is limited to a 6-month pilot, it may be soon be extended in terms of scope (beyond the Court's Grand Chambers to cover more cases and beyond the ECJ to cover the EU General Court), timing (to become permanent), and format (to be accessible and searchable after the hearing).

Fourth, the announcement of this new publicity policy by the Court is the outcome of a long-lasting, challenging process of internal deliberation which has been skillfully led by its own President – Professor Koen Lenaerts – over the last two decades within the Luxembourg-based judicial institution. While the genesis of this debate was initially prompted by the extension of the principle of openness to the work of the Court, it has been further spearheaded by the COVID-19 emergency – which has forced the Court, like many other organisations, to embrace technology in its day-to-day work – and, more broadly, a sudden spike of public attention into the Court's inner work. This was driven by a progressive publicization of the Court's work as witnessed by the *pathos* surrounding some of its recent judgements – lastly the PSPP judgment's follow-up –, which has in turn been fed by the increased

number of Court's members speaking ultra-judicially about their own rulings. In parallel to the ensuing, growing public scrutiny of its work, the Court's media coverage has also changed in nature. This no longer limits itself to *what* the CJEU decides but extends to *how* it decides and operates. Therefore, when measured against this changing reality, the decision to broadcast (some) of the Court's hearings appears as strong as needed and as brave as necessary. While this publicity regime will inevitably nurture this trend towards greater publicization of the Court, by contributing to render the Court's members less 'faceless' to the public-at-large, it will also contribute to making its decisions more publicly salient, and potentially more owned within and across society.

Ultimately, to be able to follow the Court's cases that might be defining people's lives within our continent is part of – and stems from – the citizens' "right to participate in the democratic life of the Union". This is not only the direction marked by the Treaty, but might also be what EU citizens and EU residents expect and deserve today.
