Judicial media power? Transparency and communication at the Court of Justice of the European Union (CJEU)

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Panu Minkkinen https://orcid.org/0000-0001-6721-8213
Professor of Jurisprudence, Faculty of Law, University of Helsinki, Finland
E-mail: panu.minkkinen@helsinki.fi

Abstract
This paper discusses how the the Court of Justice of the European Union (CJEU) responds to calls for institutional transparency by issuing media artefacts that it produces itself as an independent media actor. The paper hypothesises that the CJEU's *judicial communication*, i.e. the production of artefacts such as press releases, is a *factual* (i.e. *non-legal*) dimension of judicial power that can potentially strengthen the authority of the Court both within the institutional architecture of the EU and in relation to civil society more generally. The paper then proceeds to discuss the framework of transparency and openness that regulates the CJEU's information and communication obligations and how the Court responds to those obligations. Drawing on semi-structured interviews conducted with the Court's media officers in the spring of 2023, the paper concludes that a multi-layered and 'incoherent' regulatory framework provides the CJEU with a flexible toolbox with which it can legitimise a 'managed openness' that may be considerably more restricted than what the EU's fundamental values and basic principles on institutional transparency require.

Keywords: Court of Justice of the European Union; judicial power; transparency; communication

1. Judicial communication

Advances in judicial media technology like online portals giving quick access to court decisions and social media handles managed by the courts themselves have become so commonplace that most of us take them for granted, regardless of whether we are curiosity-driven academics, practicing lawyers with a professional interest, or lay members of the public. Some exceptions manage to grab our attention. An example is the buzz that the German Federal Constitutional Court created by opening an Instagram account, a social media platform that is usually associated with popular culture and visual communication.[1] The Court has since decided to close that account. And yet, judicial communication and the media activities that are associated with it have seldom been studied in any focused way. This paper investigates how the Court of Justice of the European Union (CJEU) has evolved from a relatively closed legal technocracy into an independent media actor in its own right. In other words, by using media artefacts in judicial communication, the CJEU departs from the classical model of an adjudicating court that merely applies the law in individual cases

[1] See Silvia Steininger, 'Swipe Up for the German Federal Constitutional Court on Instagram', *Verfassungsblog: On Matters Constitutional*, 19 August 2021 (2021), available at https://verfassungsblog.de/the-gfcc-on-instagram/ (accessed 12 July 2024).

and adds a novel and perhaps more subtle touch of 'activism' to its roster.

Judicial power is usually studied from a constitutional perspective that equates that power with a corresponding competence. The competence, in turn, is inferred from the constitutional norms of a given polity.[2] The most rudimentary definition of the competence of the CJEU can be found in Article 19(3) of the Treaty on European Union (TEU) according to which the CJEU 'rules' in specified cases. The somewhat ambiguous English verb 'rule' gets further clarification if we consider it in light of the words offered in the other so-called 'procedural languages':[3] in French '*statuer*' as in 'to adjudicate', and in German '*entscheiden*' as in 'to decide'. As a competence, 'to rule' is, then, a delimited power equivalent to 'adjudicating' and 'deciding'. Because our understanding of the nature of judicial power is so enveloped in the traditions of legal thinking, we tend to assume that those competence-specific limits concern the types of cases that the CJEU has jurisdiction over, specified in Article 19 TEU and elsewhere. Or, *vice versa*, that the competence determines the specific types of cases over which the CJEU has a monopoly of 'ruling'.

What remains less clear is whether the competence to 'rule' also defines what the CJEU may *not* do, perhaps limiting its activities to the specific task of 'ruling'. All competences are, namely, also limited domains of public power. So, for example, a competence to 'rule', 'adjudicate' and 'decide' in legal cases will seldom allow for governing in more political ways. In this way, the competence as per Article 19(3) TEU may at least implicitly also preclude judicial activities that are other than 'ruling'. If we use as a guide the traditional notions of competences used in Member State environments, we can assume that when the CJEU 'rules' within its competence, it is using its prescribed judicial power understood in a narrow sense by applying and interpreting EU law in individual cases. This narrow understanding brackets out the more 'informal' expressions of judicial power that, using Max Weber's well-known vocabulary,[4] might be understood as 'authority' or 'rulership' ('*Herrschaft*') rather than as 'power' ('*Macht*') *per se*.[5]

In other words, focusing on competences runs the risk of limiting our understanding of judicial power to the rulings that courts make, that is, to the caselaw, and leaving aside the more factual aspects of their activities. By doing so, we emphasise *what* the courts 'rule' on in the caselaw leaving the question of *how* they exercise their authority in other ways aside. Consequently, we also concentrate on rulings in individual cases at the expense of other activities that may well be only related to the caselaw but that, nonetheless, should be noteworthy with regard to the given court's overall power. The little research that is

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[2] On the CJEU post-Lisbon, see e.g. René Barents, 'The Court of Justice after the Treaty of Lisbon' (2010) 47 *Common Market Law Review* 709.

[3] 'English, French and German – i.e. the "procedural" languages, meaning those in which the Commission conducts its internal business …' Directorate-General for Translation, *Translating for a Multilingual Community* (European Commission 2009), 3.

[4] Max Weber, *Economy and Society. A New Translation* (Keith Tribe tr, Harvard University Press 2019), 134-35.

[5] A good example of how judicial communication can be used in the exercise of authority is the CJEU's press release (No 58/20) issued following the controversial decision made by the German Constitutional Court in early May 2020 regarding the European Central Bank's PSPP programme. In the press release, the CJEU stated that it never comments judgements of national courts, and yet in the subsequent text it proceeded to do just that.

available on the factual aspects of judicial activities such as the personal authority of charismatic judges[6] will treat these as distinct from judicial power proper rather than as something belonging to it. In this paper, I propose to cross the dividing line made between what is considered *legal*, that is, a court's competence, and what is considered *factual*, that is, its authority, and to integrate the factual aspects into a more comprehensive understanding of judicial power.

In addition to issues related to competence, a second limitation arises from the way in which we define media and communication. Media power and the various ways in which media is used by institutions and social actors have been studied in abundance.[7] But there is little systematic research available on how the judiciary,[8] let alone the CJEU,[9] uses it. This scarcity of research-based knowledge is, perhaps, at odds with the fact that the use of media has become a common enough feature of judicial activities. In this paper, I understand the judiciary's use of media and communication, its 'judicial media power', as a factual aspect of its judicial power more generally speaking that affects its relational position in the institutional environments in which it operates and in civil society more generally.

In terms of disciplinary identity, the paper cannot be said to unequivocally represent EU legal scholarship even if its object of study, that is, the CJEU, belongs to it. Broadly speaking, it is a *qualitative socio-legal*[10] investigation of the judicial power of the CJEU. In this case, 'socio-legal' should not be conflated with *sociological constitutionalism*[11] although certain overlaps exist. The study of the relevant EU legal norms is conducted as a non-doctrinal *qualitative content analysis*, an interpretive method seldom used in legal research.[12] If we focus on phenomena like the judicial power of the CJEU through the most common 'constitutional' and doctrinal lenses, we usually smuggle into our assumptions a 'statist' paradigm that has originated in the legal sciences. The emphasis on competences is part and parcel of this paradigm, and it applies to transnational entities like the EU, as well, albeit with adjustments.[13] The studied phenomena are subsequently treated as elements of

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[6] In general, e.g. Carlo Guarnieri and Patrizia Pederzoli, *The Power of Judges. A Comparative Study of Courts and Democracy* (Oxford University Press 2002).

[7] See e.g. Des Freedman, *The Contradictions of Media Power* (Bloomsbury 2014), and Nick Couldry, *Media, Society, World. Social Theory and Digital Media Practice* (Polity 2012).

[8] See however Leslie James Moran, 'Managing the News Image of the Judiciary: the Role of Judicial Press Officers' (2014) 4 *Oñati Socio-Legal Series* 799.

[9] See however Julian Dederke, 'Media Attention for CJEU Case Law: Measurement, Data Collection, and Analysis of Case Salience Data' in Antoine Vauchez, Fernanda Nicola, and Mikael Rask Madsen (eds), *Researching the European Court of Justice. Methodological Shifts and Law's Embeddedness* (Cambridge University Press 2022).

[10] E.g. Dermot Feenan (ed), *Exploring the 'Socio' of Socio-Legal Studies* (Palgrave Macmillan 2013), and David Cowan and Daniel Wincott (eds), *Exploring the 'Legal' in Socio-Legal Studies* (Palgrave Macmillan 2016).

[11] E.g. Alberto Febbrajo and Giancarlo Corsi, *Sociology of Constitutions. A Paradoxical Perspective* (Routledge 2016), and Paul Blokker and Chris Thornhill (eds), *Sociological Constitutionalism* (Cambridge University Press 2017).

[12] See however Mark A. Hall and Ronald F. Wright, 'Systematic Content Analysis of Judicial Opinions' (2008) 96 *California Law Review* 63.

[13] On the 'paradoxical' nature of the European polity, see Jo Shaw and Antje Wiener,

a legal framework that is modelled around the unitary fiction of a state or transnational entity. So contrary to the epistemological requirements inherited from the legal sciences, socio-legal approaches readily acknowledge the benefits of the kind of 'methodological syncretism' that Hans Kelsen specifically wished to 'purify' the discipline of law from.[14] This resonates well with Päivi Leino-Sandberg's recent battle call encouraging EU legal scholarship to 'maintain a greater distance from the institutions that form a key part of its subject matter, and re-define its self-identity as a reflective and critical force, rather than one mainly focusing on legitimating EU action'.[15]

In the first main section of the paper, I map the strained relationship between judicial transparency and judicial independence, a tension that determines how and why the judiciary would wish to define its own communicative agenda. As Wim van de Donk observes, the judiciary is to a large extent '"a closed shop", characterised by all kinds of barriers that guarantee its institutional independence'.[16] Seen from this perspective, one way to restrict transparency is to communicate on your own terms. I continue to provide an 'archaeological' account of the rules that make up the EU's transparency culture and how that culture specifically applies to the CJEU. The main observation is, perhaps not surprisingly, that as we descend from the lofty principles supporting openness and transparency enshrined in the Treaties to lower-level institutional norms regulating exceptions and conditions, the area of application becomes narrower. Next, I present findings from interviews conducted with the staff of the CJEU's Media and Communication Unit that would seem to support some of my main hypotheses. I conclude by briefly speculating on how the CJEU uses some of its main media artefacts to not only communicate, but also to manage its independence by warding off external demands for more openness and transparency.

2. Judicial transparency and independence

Judicial communication, that is, the various ways in which the judiciary communicates with the outside world to provide information about itself through various media artefacts, takes place at a pressure point where judicial independence meets external demands for openness and transparency. Judicial power has traditionally been used in an environment of relatively low transparency. Indeed, courts are not the first institutions that come to mind when talking about the open and transparent use of public power.[17] At first, this claim

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'The Paradox of the "European Polity"' in Maria Green Cowles and Michael Smith (eds), *The State of the European Union. Risks, Reform, Resistance, and Revival* (Oxford University Press 2000).

[14] Hans Kelsen, *Pure Theory of Law* (Max Knight tr, University of California Press 1967), 1.

[15] Päivi Leino-Sandberg, 'Enchantment and Critical Distance in EU Legal Scholarship: What Role for Institutional Lawyers?' (2022) 1 *European Law Open* 231, 234.

[16] Wim B.H.J. van de Donk, 'The Transparent Judge: Will Lady Justice Lose Her Blindfold?' in Marco Fabri and Philip M. Langbroek (eds), *The Challenge of Change for Judicial Systems. Developing a Public Administration Perspective* (IOS Press 2000), 238.

[17] See e.g. Robert G. Vaughn, 'The Associations of Judicial Transparency with Administrative Transparency' in Padideh Ala'i and Robert G. Vaughn (eds), *Research*

may seem counterintuitive. For example, the requirement for the public nature of judicial hearings, sometimes also called 'open justice' or the 'open court principle',[18] is a central principle entrenched into the constitutions of most Western democracies. With its origins in the German procedural principle of *Öffentlichkeit,* it has later expanded and developed into a more general cornerstone of transparent government and the rule of law.[19] Publicity is, in other words, clearly the rule to which only rare exceptions can be made. The principle is no stranger in the common law world, either. As Jeremy Bentham famously claimed:

> In the darkness of secrecy, sinister interest and evil in every shape have full swing. Only in proportion as publicity has place can any of the checks applicable to judicial injustice operate. Where there is no publicity there is no justice. Publicity is the very soul of justice. It is the keenest spur to exertion and the surest of all guards against improbity. It keeps the judge himself while trying under trial.[20]

The principle of a 'fair and public hearing' is entrenched into Article 6(1) of the European Convention on Human Rights (ECHR). It is also enshrined in Article 10 of the Universal Declaration of Human Rights (UDHR) and in Article 14(1) of the International Covenant on Civil and Political Rights (ICCPR). As such, it would be fair to claim that it is 'universally accepted'.

The occasional lack of openness or, perhaps, even the reluctance of some courts to fully embrace the principle can be seen as a possible nod towards judicial independence understood as a counter-principle. Full transparency and openness may, namely, make the judiciary susceptible to undue external influence. On the other hand, the lack of openness and transparency can also jeopardise the perceived accountability of the judiciary.[21] In Western democracies, the media oversight of judicial matters creates a tension between the judiciary's sense of its own independence understood as freedom from external influence and the democratic values that are associated with openness and transparency.[22]

At this pressure point where the independence of the judiciary meets demands for openness and transparency, the judiciary itself has gradually evolved into an independent media actor that offers information of its own making and communicates it through

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Handbook on Transparency (Edward Elgar 2014).

[18] E.g. Burkhard Hess and Ana Koprivica Harvey, *Open Justice. The Role of Courts in a Democratic Society* (Nomos 2019).

[19] See e.g. Arthur Strum, 'A Bibliography of the Concept *Öffentlichkeit*' (1994) 61 *New German Critique* 161.

[20] Jeremy Bentham, 'Bentham's Draught for the Organization of Judicial Establishments, Compared with that of the National Assembly, with a Commentary on the Same' in Jeremy Bentham, *The Works of Jeremy Bentham, published under the Superintendence of his Executor, John Bowring. Vol. 4* (William Tait 1843), 316. For a critical assessment, see Joseph Jaconelli, *Open Justice. A Critique of the Public Trial* (Oxford University Press 2002).

[21] Colin Scott, 'Accountability in the Regulatory State' (2000) 27 *Journal of Law and Society* 38.

[22] Mitchel Lasser, *Judicial Deliberations. A Comparative Analysis of Judicial Transparency and Legitimacy* (Oxford University Press 2004), and Harry (Lord) Woolf, 'Should the Media and the Judiciary Be on Speaking Terms?' (2003) 38 *The Irish Jurist* 25.

artefacts that it offers either through mass media outlets or directly to the public. Good judicial communication is a way to build trust that can strengthen the overall socio-political authority of the judiciary in the societal environments in which it operates.[23] First, as one 'person' in Immanuel Kant's *trias politica* or in the 'political trinity',[24] the judiciary can strengthen its position in relation to the legislative and executive branches by proactively communicating to the public about how it oversees the constitutionality and legality of government activities.[25] Second, by effectively disseminating information about decisions through various media artefacts, especially appellate and apex courts can optimise the value of those decisions as potential precedents for future adjudication. As a transnational court, the CJEU can also communicate its rulings and reasonings to Member State judiciaries through communication ensuring that the primacy of EU law is respected. Communication originating from the courts themselves is, then, a subtle form of judicial activism[26] typical of the 'new judiciary'[27] that has expanded its powers into areas that were previously considered as the reserve of politics and government.[28]

Taking the democratic scrutiny involved in the principle of openness and transparency as a starting point, the relationship between the judiciary and media can be viewed from two interrelated perspectives.

The first perspective understands media as an independent sector – as 'the media' – with an important societal role to play. The media has with good reason been called the 'fourth branch of government'.[29] One task of the 'fourth branch' is to contribute to the democratic scrutiny implied in the 'checks and balances' of separated powers. A democratic media would, then, oversee the activities of the judiciary as one of the main branches of government in ways that would improve the accountability of the courts.[30] The media oversight of judicial activities can be illustrated with two metaphors.[31] As a *gatekeeper*, the media decides what judicial information is circulated in the public domain, and it chooses the broader narrative frameworks around which this information is structured. The media

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[23] Anne Wallace and Jane Goodman-Delahunty, 'Measuring Trust and Confidence in Courts' (2021) 12 *International Journal for Court Administration* [article No. 3].

[24] Immanuel Kant, *The Metaphysics of Morals* (Mary Gregor tr, Cambridge University Press 1991), 138.

[25] On the complex position of the judiciary in the EU's 'political trinity', see Päivi Leino-Sandberg and Panu Minkkinen, 'From Separated Powers to Consensual Executive Government in the EU' in Päivi Leino-Sandberg, Christina Eckes, and Wallerman Ghavanini (eds), *The Dynamics of Powers in the European Union* (Hart 2024 [in print]).

[26] Mark Dawson, Bruno de Witte, and Elise Muir (eds), *Judicial Activism at the European Court of Justice* (Edward Elgar 2013).

[27] Kate Malleson, *The New Judiciary. The Effects of Expansion and Activism* (Dartmouth 1999).

[28] Alec Stone Sweet, *Governing With Judges. Constitutional Politics in Europe* (Oxford University Press 2000).

[29] Douglass Cater, *The Fourth Branch of Government* (Houghton Mifflin 1959).

[30] Generally, see e.g. Sandra Jacobs and Thomas Schillemans, 'Media and Public Accountability: Typology and Exploration' (2016) 44 *Policy & Politics* 23.

[31] Rachel Luberda, 'The Fourth Branch of the Government: Evaluating the Media's Role in Overseeing the Independent Judiciary' (2008) 22 *Notre Dame Journal of Law, Ethics & Public Policy* 507.

will by and large decide which judicial issues are socio-politically relevant and which are not. On the other hand, the media also operates as a *watchdog* that safeguards the integrity of government,[32] even in relation to the judiciary. The media watchdog's oversight does not necessarily require a concrete ability to intervene, because the mere awareness that public power is exercised under the watchful eye of the media will usually suffice as an impediment to abuses.[33]

But the judiciary, eager to guard its own independence, will also want to participate in managing the transparency of its own activities. In this second perspective, media is not understood as a separate and independent societal sector – as 'the media' – but as a set of tools, technologies and artefacts that the judiciary uses to 'mediate' a chosen message. To an ever-larger extent, the judiciary produces information independently with the intention of controlling its own narrative and, consequently, also of managing its own relational position in its institutional frameworks and in society more generally. As media actors, courts will often have their own information strategies in which the principles of media output are outlined, as well as designated media officers to execute these strategies. The resulting openness will, no doubt, also contribute towards the public's perception of accountability and enhanced democratic values. But the central motive for the judiciary to handle its own media is, nonetheless, its wish to 'correct' the information allegedly misrepresented by the gatekeeper or to manage its own public image in relation to the watchdog.

In other words, there are two interrelated and 'paradoxical'[34] perspectives from which the relationship between the judiciary and the media can be approached.

The first emphasises the media sector's role in enhancing the accountability of the courts by illuminating the use of judicial power. In Western democracies, the judiciary must comply with a minimum standard of judicial transparency that involves both granting access to ongoing trials (i.e. the 'open court principle' with possible exceptions stipulated in law) and the publication of or providing access to decisions made. The media sector will then disseminate information on judicial decisions that the courts have given access to. The media sector will also go beyond the decisions themselves in order to, for example, contextualise the use of judicial power socio-politically or to investigate suspicions of misconduct.

The second perspective, for its part, focuses on the judiciary's own role as an independent producer of media as it proactively responds to demands for information from both the media sector and from the public. Going beyond the minimum standards of judicial transparency, the judiciary will, for example, ease public access to its decisions by summarising the most important cases in press releases. In addition, courts regularly publish annual reports and financial statements. This enhanced openness no doubt improves the accountability of the judiciary, but it is also a way to inform the public about issues that the courts themselves see fit and in ways that the courts themselves deem appropriate. This concern for controlling judicial transparency is clearly audible in, for

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[32] Julianne Schultz, *Reviving the Fourth Estate. Democracy, Accountability and the Media* (Cambridge University Press 1998).

[33] This is the crux of the idea implied in the Bentham quote cited above.

[34] Nick Couldry and James Curran, 'The Paradox of Media Power' in Nick Couldry and James Curran (eds), *Contesting Media Power. Alternative Media in a Networked World* (Rowman & Littlefield 2003).

example, the recommendations that were put forward in a 2012 report issued by the European Network for Councils of Justice (ENCJ).[35]

The emergence of new media and digital media technologies has even accelerated the judiciary's development into an independent media actor. Courts have enthusiastically embraced the artefacts of the digital age.[36] Digital caselaw databases like the CJEU's Curia including their well-designed and comprehensively indexed online portals, institution-specific websites, social networking services like the CJEU Press Service's twin X (formerly Twitter) handles at @EUCourtPress and @CourtUEPresse, the streaming of the delivery of a selection of judgments of the European Court of Justice (ECJ) and the reading of the opinions of the Advocates General, these are all part and parcel of the everyday operations of contemporary judicial information and media services.

Without totally disregarding the more traditional questions about the media sector's democratic functions in relation to the judiciary, the emphasis here will be more on the second perspective and on the CJEU's own communicative agenda as a factual dimension of its judicial power. I treat the CJEU as a case study. Bearing in mind the CJEU's unique position in the institutional architecture of the EU,[37] its integrative role as a 'transnational supreme court of Europe',[38] as well as its multilingual and multicultural nature,[39] two further points support the case study approach.

First, the CJEU operates within the relatively well-developed transparency regime of the EU, but its own openness is considerably more restricted.[40] For example, in her comparison of the openness cultures of the ECJ and the European Court of Human Rights (ECtHR), Maija Dahlberg[41] claims that the ECJ justifies its more restrictive attitude towards judicial transparency by claiming that it contributes positively to both the sound administration of justice and to the equality of arms principle. In the so-called *API* cases

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[35] *Justice, Society and the Media. ENCJ Report 2011-2012* (European Network for Councils of Justice 2012).

[36] See generally Richard E. Susskind, *Tomorrow's Lawyers. An Introduction to Your Future* (Oxford University Press 2013).

[37] Susanne K. Schmidt, *The European Court of Justice and the Policy Process. The Shadow of Case Law* (Oxford University Press 2018).

[38] See e.g. Anne-Marie Slaughter, J.H.H. Weiler, and Alec Stone Sweet (eds), *The European Court and National Courts – Doctrine and Jurisprudence. Legal Change in its Social Context* (Hart 1998).

[39] Karen McAuliffe, 'Language and Law in the European Union: the Multilingual Jurisprudence of the ECJ' in Lawrence M. Solan and Peter M. Tiersma (eds), *The Oxford Handbook of Language and Law* (Oxford University Press 2012).

[40] E.g. Christoph Krenn, *The Procedural and Organisational Law of the European Court of Justice. An Incomplete Transformation* (Cambridge University Press 2022), 102-54, and Leonardo Pierdominici, *The Mimetic Evolution of the Court of Justice of the EU. A Comparative Law Perspective* (Palgrave Macmillan 2020), 149-228.

[41] Maija Dahlberg, 'Increasing Openness of Court Proceedings - Comparative Study on Public Access to Court Documents of the European Courts' (2019) 132 *Tidsskrift for Rettsvitenskap* 307. See also Maija Dahlberg and Daniel Wyatt, 'Is There a Public Interest in Knowing What Is Going on in Society? A Comparative Study of the European Courts' (2019) 26 *Maastricht Journal of European and Comparative Law* 691.

from 2010,[42] the ECJ seemingly interprets 'sound administration' as an expression for the need to respect the 'serenity of judicial proceedings', while the latter would safeguard the Court's independence from external influence, that is, its own independence. In a somewhat facile manner, Dahlberg accredits this conservative transparency culture to the French legal tradition on which the systemic aspects of the EU judiciary are allegedly built. Dahlberg offers no real evidence to support this claim, and, moreover, the same should apply to the ECtHR, as well. In her analysis, the ECJ has, however, of lately taken a more positive approach to openness, but only by demanding transparency from other EU institutions. At the same time, the ECJ paradoxically continues to maintain its own exceptional status for which only weak justifications can be presented.[43] The tension between 'strong' principle and 'weak' implementation allows a more highlighted identification of the most disputed issues related to openness and transparency.

Second, in the EU environment, the digitisation of judicial communication has already reached a highly evolved state. Indeed, in this respect, the CJEU can even be called a forerunner, and as such, it calls for a better understanding of both the extent and particularities of digitisation as well as its socio-political effects.[44] As of 2012, the CJEU Court Reports have been published exclusively in digital format and made available through the Curia website. At the same time as the CJEU has digitised its reporting, the EU Publications Office has gone to great lengths to develop its more comprehensive EUR-Lex database which also serves as an access point to CJEU caselaw. So in the EU environment, the digitisation of judicial activities has reached such an evolved state that it would merit a closer analysis. The CJEU also provides a well-developed media service by keeping the media sector and the public informed of its rulings through digitised press releases that are published on its website and further disseminated through mailing lists and its X handles.

The development of the CJEU's judicial media culture takes place under the direction of its Directorate-General for Information.[45]

3. The regulatory framework

The EU has its own rather muddled way of dealing with the notions of legal coherence and legal consistency.[46] In the traditional legal thinking that is dominant in national jurisdictions, one would not consider the two concepts to be completely interchangeable even though we can detect similarities at the level of nuances. Article 13(1) TEU stipulates that the EU shall have an institutional framework to 'ensure the consistency, effectiveness

[42] Joined cases C-514/07 P, C-528/07 P, and C-532/07 P.

[43] See also Alberto Alemanno and Oana Stefan, 'Openness at the Court of Justice of the European Union: Toppling a Taboo' (2014) 51 *Common Market Law Review* 97, and Alberto Alemanno, 'Unpacking the Principle of Openness in EU Law: Transparency, Participation and Democracy' (2014) 39 *European Law Review* 72.

[44] Antoine Vauchez, 'Methodological Europeanism at the Cradle: Eur-lex, the Acquis and the Making of Europe's Cognitive Equipment' (2015) 37 *Journal of European Integration* 193.

[45] Memorandum Ref. ACE/44/J7, issued by the Registrar.

[46] E.g. Sacha Prechal and Bert van Roermund (eds), *The Coherence of EU Law. The Search for Unity in Divergent Concepts* (Oxford University Press 2008).

and continuity of its policies and actions'.[47] Similarly, Article 7 of the Treaty on the Functioning of the EU (TFEU) restates the requirement of 'consistency' in EU policies and activities.[48] Although in legal studies the two concepts are related, the nuances are quite different.[49] Consistency refers primarily to the formal characteristics of a legal system in the sense that in order for the system to be considered a unitary whole, there should be no internal contradictions. If a particular state of affairs leads to a specific consequence in one place within the legal system, it should do so in other places as well provided that the circumstances are identical. Coherence, on the other hand, is a more fluid concept that refers to a normative kinship that can be inferred from principles such as, for example, the rule of law. In a coherent legal system, lower-level norms are expected to comply with the more general principles embedded in hierarchically higher-level norms. The tide in legal thinking has gradually moved from consistency to coherence.[50]

This interpretation would enable us to alter our starting point in the sense that our usual scholarly toolbox is not necessarily applicable here. Using 'legal methods', the lawyer's mindset will normally proceed from identifying the inconsistencies and incoherencies to creating logical and normative 'patches' that will restore and secure the non-contradictory nature of the unitary legal system.[51] In this particular instance, I depart from these customary methodological approaches by applying a non-doctrinal form of qualitative document analysis. Such an analysis neither assumes EU law to be consistent or coherent nor strives to make up for or 'patch' any internal contradictions. Taking its cue from Michel Foucault's archaeological signposts, the analysis approaches law as discursive formations with the aim to 'write a history of discursive objects that does not plunge them into the common depth of a primal soil, but deploys the nexus of regularities that govern their dispersion'.[52]

What this means in practice is to 'liberate' EU law, now understood as a collection of discursive formations rather than as a normative system, from any foundational requirements that legal coherence may imply and to observe and describe the regularities that consequently emerge. The analysis does not, then, assume that individual EU legal norms and rules cohere with the Union's fundamental values or other similar foundational principles, or, indeed, that they even should do so. As said, seen from this perspective,

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[47] The connotations are somewhat different in the other so-called procedural languages. The French version of the same paragraph speaks of '*cohérence*' and the German of '*Kohärenz*' even though more literally equivalent concepts are available in both languages ('*consistance*', '*Konsistenz*').

[48] The French and German versions speak again of '*cohérence*' and '*Kohärenz*' respectively.

[49] See e.g. J.M. Balkin, 'Understanding Legal Understanding: The Legal Subject and the Problem of Legal Coherence' (1993) 103 *The Yale Law Journal* 105.

[50] Kaarlo Tuori, among others, notes a change in the continental European notion of legal systematisation in the sense that 'the objective is no longer a substantive-classificatory system of norms [i.e. consistency] but a looser, principle-based coherence'. Kaarlo Tuori, *Ratio and Voluntas. The Tension between Reason and Will in Law* (Routledge 2016), 166.

[51] E.g. Karl Larenz and Claus-Wilhelm Canaris, *Methodenlehre der Rechtswissenschaft* (3rd edn, Springer 1995), 191-223.

[52] Michel Foucault, *The Archaeology of Knowledge* (A.M. Sheridan Smith tr, Routledge 2002), 53.

inconsistencies and incoherencies are not accidental but, rather, structural reflections of the factual power relations and policy emphases behind the legal logic of the framework. The analysis merely accounts for the detectable irregularities between the discursive elements that make up EU law and describes them in as much detail as possible.[53] As David Webb points out, Foucault's archaeology 'takes little interest in contradictions between different propositions that arise from the same discursive formation [e.g. Treaty-level norms], according to the same conditions, or those that enter into opposition with one another while arising from distinct discursive formations'[54] but, rather, in complex contradictions that are 'distributed over different levels of the discursive formation'.[55]

The basic Treaty-level principle covering judicial transparency at the CJEU can be inferred from Article 1(2) TEU according to which all decisions made by EU institutions are to be taken as openly as possible and as closely as possible to the citizen. Article 11(2) TEU further obliges EU institutions to promote an open and transparent dialogue with the public, and Article 11(3) TEU appoints the Commission as the guardian of that transparency. Judicial transparency relates to the fundamental values in other ways, as well. Article 2 TEU on, among other principles, the rule of law can only make sense if openness and transparency facilitate the monitoring of the actors involved. For example, in its 2010 draft report, the Venice Commission clearly associated transparency with the rule of law principle although it did not elaborate on the matter in more detail in its concluding checklists.[56]

More specifically, the open court principle and the right to a fair and public hearing are enshrined in Article 47(2) of the Charter of Fundamental Rights of the European Union (CFR). The same principle can, as said, also be found in Article 6(1) ECHR. Although the EU itself is not a signatory, the Convention, no doubt, provides additional weight even in the EU context as all Member States are also members of the Council of Europe. Especially in relation to transparency, Article 42 CFR establishes a general right of access to documents of all EU institutions, bodies, offices and agencies 'whatever their medium'. This would also concern the CJEU.

One could well claim that through these fundamental values, judicial transparency has been established as a cornerstone of EU legal decision-making. But reading the Treaties and other legislation in the suggested way, we can just as well attest that the internal coherence of the overall system is compromised through specifications and exceptions that are made in either the Treaties themselves or in lower-level legislation or decisions. Article 15 TFEU is the prime example of 'internal incoherence'. In Paragraph 1, the principle of openness is restricted by a discretionary teleology in the sense that any principle of openness must be

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[53] Due to this emphasis on the description of relations of exteriority instead of transcendental foundations, Foucault is 'quite happy' to be considered a positivist. Foucault, *The Archaeology of Knowledge*, 141. On the virtues of description, see Anne Orford, 'In Praise of Description' (2012) 25 *Leiden Journal of International Law* 609.

[54] David Webb, *Foucault's Archaeology. Science and Transformation* (Edinburgh University Press 2012), 130.

[55] Foucault, *The Archaeology of Knowledge*, 171.

[56] *Draft Report on the Rule of Law. Study No. 512/2009* (European Commission for Democracy through Law [Venice Commission] 2010). See also Allan Rosas, Juha Raitio, and Pekka Pohjankoski (eds), *The Rule of Law's Anatomy in the EU. Foundations and Protections* (Hart 2023).

seen to promote good governance and ensure the participation of civil society. The interpretation of when openness promotes 'good governance' is basically left to the institutions themselves. As far as the judiciary is concerned, withholding documents by referring to the requirement to respect the 'serenity of judicial proceedings' as in the *API* cases mentioned above indicates how this mechanism might work to the detriment of judicial transparency.

In Subparagraph 1 of Article 15(3) TFEU, the right to access documents is restated, but this time explicitly making that right conditional on what follows in the subsequent subparagraphs. According to Subparagraph 2, the conditions must be determined by the Parliament and the Council through regulations. This would mean instruments like (the much criticised) Regulation No 1049/2001 on public access to Parliament, Council and Commission documents.[57] Subparagraph 3, for its part, obliges each institution to ensure that its proceedings are transparent and to include in their Rules of Procedure specific provisions on access to documents in accordance with the principles and conditions referred to the previous subparagraph. Finally, Subparagraph 4 stipulates that the CJEU, among a few other institutions like the European Central Bank, is required to grant access to its documents only when exercising its administrative tasks. No definition of what constitutes the 'administrative tasks' of the CJEU is given which, again, suggests that this is left to be interpreted by the Court itself. It also perhaps counterintuitively excludes the core of what is traditionally thought to be the scope of judicial power, that is, adjudication, from the openness and transparency that would apply to the CJEU.

More conditions watering down the main principle of judicial transparency are defined in lower-level rules and decisions. According to Article 31 of the Statute of the Court of Justice of the European Union, the hearing in court is in principle public unless the Court either of its own motion or based on an application made by the parties decides otherwise for 'serious reasons'. No doubt, similar 'serious reasons' like protecting vulnerable parties have also been specified in Member State judicial environments. But here the definition of what constitutes such a reason is exceptionally vague leaving the Court itself a broad range for interpretation. Article 20(2) of the Statute specifies that in the written procedure of the hearing, communicating the case-related documents is limited to the parties and to the EU institutions whose decisions are in dispute. This rules out third-party access from, for example, scholars and the media which would be a necessary condition for the full realisation of judicial transparency.

Articles 253(6) TFEU and Article 254(5) TFEU require the ECJ and the General Court to establish Rules of Procedure subject to approval by the Council. The ECJ's Rules of Procedure seem to include no mention about the right of access or limitations that might apply. The General Court, for its part, must establish its own rules 'in agreement with' the ECJ. Article 38(2) of the Rules of Procedure of the General Court states that no third party may have access to the file in a case without the express authorisation of the Court's President. The authorisation is made conditional upon a written request that must include a detailed explanation of the third party's 'legitimate interest' in having access. Similarly, Article 257(5) TFEU requires the EU's specialised courts to establish their own rules of procedure, once again 'in agreement with' the ECJ giving the ECJ a central role in defining

[57] See e.g. Deirdre Curtin and Päivi Leino-Sandberg, *Openness, Transparency and the Right of Access to Documents in the EU: In-depth Analysis* (The European Parliament's Policy Department for Citizens' Rights and Constitutional Affairs 2016).

both its own conditions for judicial transparency as well as other members in the CJEU 'family of courts'. The Rules of Procedure of the European Union Civil Service Tribunal, the specialised administrative court that was dissolved in 2016, restricted in a next-to identical way third party access to a case file without the express authorisation of the Tribunal's President, and only after a detailed explanation of a 'legitimate interest'. There is a certain absurdity to these formulations. If judicial transparency is, indeed, a fundamental value of the EU, then that should be sufficient for establishing a 'legitimate interest', and the discretionary powers of the Presidents should be regulated accordingly: access is the main principle to which exceptions can only be made for legitimate reasons.

In 2019, responding to Subparagraph 3 of Article 15(3) TFEU that requires EU institutions to ensure that their practices comply with the requirement of openness, and perhaps also as a reaction to criticisms concerning the EU judiciary's inadequate commitment to judicial transparency, the CJEU updated its decision concerning public access to documents prepared in the exercise of its administrative functions[58]. The first thing to be noted about the decision – and its 2016 forerunner[59] – is that, as per Article 1(1) of the Decision, access only applies to documents relating to the CJEU's administrative tasks. So no progress is made in relation to judicial matters proper. Second, the decision once again begins with a broad statement of a 'right of access' in Article 2(1) of the Decision, but then proceeds to define a broad range of exceptions to that right in Article 3. The broad categories leave much room for interpretation which, one can only assume, is left to the discretion of the CJEU itself. Article 3(4) does, however, make a concession to an 'overriding public interest', but what such an interest might be is, once again, left undefined.[60]

The remainder of the Decision is, perhaps, the most significant aspect from this point of view. In principle, the Decision regulates access to documents within the limitations of the Treaties and other legislation. But the remaining articles of the Decision create an almost impenetrable labyrinthine bureaucracy for making that right of access actionable. The strategy is similar to e-government 'service designs' in the public sector that claim to be facilitating an application process but which, in fact, discourage individuals from, for example, seeking social benefits that they might otherwise be entitled to. Such designs are often used to limit the number of applications to ensure that the budgetary aims of the benefit-awarding authority are reached. The complexity of the design wears applicants down so that they either decide not to apply at all or to withdraw their application midway.[61] A concrete fairly recent example is the UK's 'hostile environment' policy in relation to migration, originally coined by Home Secretary Theresa May in 2012, and later

[58] Decision of the Court of Justice of the European Union of 26 November 2019 concerning public access to documents held by the Court of Justice of the European Union in the exercise of its administrative functions (2020/C 45/02).

[59] Decision of the Court of Justice of the European Union of 11 October 2016 concerning public access to documents held by the Court of Justice of the European Union in the exercise of its administrative functions (2016/C 445/03).

[60] See e.g. Daniel Wyatt, 'The Anaemic Existence of the Overriding Public Interest in Disclosure in the EU's Access to Documents Regime' (2020) 21 *German Law Journal* 686.

[61] E.g. Guy Julier and Lucy Kimbell, 'Keeping the System Going: Social Design and the Reproduction of Inequalities in Neoliberal Times' (2019) 35 *Design Issues* 12.

consolidated into both immigration legislation and practices.[62] With its unnecessarily arduous procedure for exercising a 'right of access' that has, nonetheless, been established in the Treaties, the CJEU creates its own 'hostile transparency environment' that is seemingly at odds with the EU's fundamental values and the Court's obligations as per Subparagraph 3 of Article 15(3) TFEU.

There are two obvious shortcomings in this analysis.

First, it deals only with the most obvious aspect of judicial transparency, namely access to documents. Even if access to documents is what we usually associate with judicial transparency, it is hardly the only thing worth considering. Withholding documents or, more precisely, granting access to them in an unnecessarily controlled and economic way obviously obscures the workings of judicial power. Judicial decision-making has always been conducted mainly *in camera* hidden away from the eyes of civil society. Even if we have access to documents, we know little about the deliberations that take place before a decision is reached. Especially at apex court level, there appears to be a drive towards consensual reasoning which in the documentation camouflages the more nuanced underlying disagreements. A fully fledged analysis includes all possible aspects of judicial transparency and not merely those that the judiciary itself deems significant.

Second, the norms analysed here do not cover all the 'lower' levels of micropower that play an important part in the final decision about what is made public and how. This requires looking at intra-institutional guidelines that are not found in the public domain, and even fleshing out established patterns of what is considered 'good governance' that the actors themselves experience as binding but that can only be detected though empirically observable regularities in the actors' everyday work routines.

4. Two cultures of communication

The Court's Communications Directorate is made up of two units: Press and Information, and Publications and Electronic Media. The units work both independently and in collaboration with each other, and they are responsible for all internal and external communication and information services of the Court. Over the years, the personnel has grown from a single press officer to about 40 working in both Units of the Directorate.[63] The focus here is on the first mentioned Unit. According to its webpage,[64] the Press and Information Unit 'provides information available on the case-related activity of the Court of Justice and the General Court'. The page continues to emphasise that because the two Courts of the CJEU rule exclusively through their decisions, the Unit does not – and cannot – speak for the Courts. This marching order makes it clear that the information about the rulings provided by the Unit through its press releases and other artefacts are not to be equated with the rulings themselves. In addition to the press releases, the Unit manages two handles on X (formerly Twitter), one in English and another in French, a LinkedIn account mainly targeted for legal professionals, it provides together with its sister-unit for Publications and Electronic Media the streaming of a selection of rulings of the Court of

[62] E.g. Frances Webber, 'On the Creation of the UK's "Hostile Environment"' (2019) 60 *Race & Class* 76.

[63] Respondent 5 (former Head of Unit), interviewed 19 April 2023.

[64] https://curia.europa.eu/jcms/jcms/Jo2_7053/en/.

Justice and the reading of the opinions of the Advocates General, as well as shorter and more unofficial releases known as '*info rapides*' distributed through the individual media officers' personal mailing lists. Even though the press releases are the most important, they currently take up only a fraction of the personnel resources available to the Unit.[65] According to the Annual Reports of the CJEU,[66] the Unit has produced on average about 190 press releases per annum which have then been translated into several languages.

Over the course of six weeks in the spring of 2023, seven of the then fourteen press officers of the Unit including the Head of Unit were interviewed.[67] In absolute numbers, the small sampling is inadequate. But as a proportion of the overall pool of eligible respondents available – 50% of all press officers involved in producing press releases – it is passable. The Unit itself likes to present itself as representative of key geographical areas in the EU, but as far as the everyday work is concerned, the linguistic and legal skills of the press officers are more important. In addition to the Unit's staff, an interview was conducted with the former Head of Unit with whom I had earlier corresponded about the possible research visit and who had since been appointed judge. The duration of the individual interviews ranged from 40 minutes to 85 minutes. Appropriate permission was obtained from all respondents, and all interviews were recorded. In addition to the actual interviews, additional information was gained at an introductory discussion with the Head of Unit, and I also presented myself and my research project to all the press officers of the Unit at one of their weekly 'Monday morning' meetings where the working agenda of the upcoming week is discussed. All members of the Unit are lawyers who have had experience in national and EU settings as, for example, civil servants, practicing lawyers, and legal linguists. The only exception is the Head of Unit who has a background in journalism. Although controversial at the outset, the appointment of a non-legal communications expert has since proved to be beneficial in developing the operations of the Unit.[68]

According to one respondent[69] – a description echoed by other colleagues, as well – the Unit's press officer begins her work on a press release with a case that has either been chosen at the Monday meeting following the press officer's own suggestion or has been assigned to her by the Head of Unit. First, she must identify the *point fort* of the ruling, that is, its legally relevant content, and balance the potentially complex legal arguments with more accessible language. The resulting draft, no longer than a page, is then sent for internal approval within the Unit, then to the Director of Communications, and finally to the judge's Cabinet and/or the President of the Court for external approval. Even if the changes requested in the external review are in principle mere proposals, in practice they

[65] Circa 15% according to one informant. Respondent 4 (Press Officer), interviewed 19 April 2023.

[66] Available at https://curia.europa.eu/jcms/jcms/Jo2_11035/en/.

[67] On the method adopted, see e.g. Alexander Bogner, Beate Littig, and Wolfgand Menz (eds), *Interviewing Experts* (Palgrave Macmillan 2009), and Emilia Korkea-aho and Päivi Leino-Sandberg, 'Interviewing Lawyers: A Critical Self-Reflection on Expert Interviews as a Method of EU Legal Research' (2019) 12 *European Journal of Legal Studies* 17.

[68] The benefits reportedly include the contacts that a communications expert can use to temper media outlets in advance if there is a rumour of the institution receiving 'bad press'. Respondent 5 (former Head of Unit), interviewed 19 April 2023.

[69] Respondent 3 (Press Officer), interviewed 30 March 2023..

are expected to be followed.[70] If changes are requested during the external approval process, the draft may possibly have to go through a second round of internal approval. The Unit decides internally the languages into which the press release will be translated, and all translations are also rigorously checked. The moment at which the President or Advocate General makes the ruling public is colloquially known as the *feu vert*, the 'green light', and after that the press release can also be uploaded to the Curia website and sent out to the press officers' mailing lists. Each press officer has an extensive mailing list including journalists, academics, civil servants and other interested parties through which the Unit communicates. The press officers' personal mailing lists are a privileged form of communication, so their contacts may receive the press release even slightly before the official upload, but never before the Court first publishes its ruling officially.

In addition to servicing the media, the respondents often recognised a more general advantage of the press releases.[71] Representatives of civil society who follow the rulings of the Court as an essential part of their work will neither have the time nor the energy to read every ruling in full. So the press releases also function as a 'filtering system' that helps these actors economise their workload when following EU caselaw. The press officers work on the premise that such representatives – actors other than representatives of the media – will first familiarise themselves with a press release. If the press release indicates that the ruling is relevant to their interests, they may proceed to an abstract of the legal arguments that can be found in the summary of the ruling that is written by the Court. Finally, if the summary confirms the importance of the ruling, the representatives will acquaint themselves with the full text of the ruling. In this way, the press officers of the Unit do not write press releases merely for the media, but for the benefit of other social actors, as well. This idea is supported by the variety of actors included in the press officers' personal mailing lists.

Over the past five years, the workload of the Court has included nearly 1700 cases resolved on average per year.[72] Only about a tenth of those cases resolved end up being communicated further with a press release. Because staffing resources allow the Unit to only produce a limited amount of press releases, certain conventions apply as to which cases are given priority. First, all Grand Chamber rulings receive a press release by default. This is quite understandable as these rulings are generally considered the most complex and significant cases that the Court must decide upon. Second, the request for a press release made by the President, an individual judge, or a judge's cabinet is usually respected. In the general culture of the CJEU, the judges and their cabinets have a lot of authority even if they have no formal powers over the operation of the Unit. Third, expressions of interest presented by the media about an upcoming case communicated either directly to the Unit or discussed in national media outlets will 'earmark' particular cases for further communication.

After the priority cases have been singled out, there is only room for a limited amount of further press releases. This is where the selection can even get quite competitive, because every press officer will want to have cases from her representative area included. But she will have to make her arguments against colleagues who are doing the same thing. There

[70] Respondent 6 (Press Officer), interviewed 19 April 2023.

[71] E.g. respondent 8 (Press Officer), interviewed 24 April 2023.

[72] These calculations have been made based on data in the Annual Reports of the CJEU, available at https://curia.europa.eu/jcms/jcms/Jo2_7015/en/.

are no quotas for Member States or even for regions, so the selection process is dependent on other factors. As in all matters EU, a distinction between key Members States and lesser Member States factually favours the 'Franco-German axel' when deciding on which press releases will be chosen.[73] One respondent, however, wished to contextualise this favouritism in the sense that themes that are important for smaller Member States may, perhaps, not command as much interest generally.[74] For the Head of Unit,[75] the distinction between key Member States and lesser Member States was not as significant because from his point of view rulings are primarily chosen for press releases on journalistic grounds, that is, if they can be packaged into a good narrative, and if the rulings are expected to have an impact on the lives of 'citizens'.[76] Similarly, there are good journalistic reasons for preparing a press release on a ruling even if that ruling merely repeats already existing caselaw.

The interviews suggested that the Court's information practices and policy were undergoing a transformation. Several respondents referred to a working group that was in the process of reviewing the ways in which the press releases were written.[77] Within this transformation, we can provisionally identify two ideal-typical cultures of communication.[78]

The first could be called the *cabinet culture of judicial communication*. It highlights the interest (and control) of the CJEU judges over the press releases that are produced by the Unit. This may at least partly be the result of a misunderstanding within the Court as to what the role of the Unit is in relation to the judges and their cabinets.[79] The distinction between press releases and the summaries of the actual rulings becomes blurred which means that within this culture, communication between legal actors is considered a priority. We can only speculate as to why a judge may wish to control the contents of a press release. Perhaps she wishes to be seen as more active from the outside. Perhaps it is just an expression of a more old-fashioned judicial ideology emphasising the authority of the individual judge. Be that as it may, this data can only suggest the existence of such a judge-led culture but not explain the reasons for its existence.

A second ideal-typical culture, supported by members of the Unit itself, could be called the *transparency culture of communication*. Individual press officers often hinted that they were aware of a lack of transparency that is seen to plague the institution. This lack of transparency can be either real or merely an impression, but whichever the case, it does no favours for the democratic pedigree of the institution. In a powerful EU institution, and notwithstanding the rulings themselves, the different media artefacts that the unit produces are the rare windows through which civil society can acquaint itself with the Court and

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[73] Respondent 4 (Press Officer), interviewed 19 April 2023. This view was also expressed by a justice representing a smaller Member State in an informal lunch discussion.

[74] Respondent 6 (Press Officer), interviewed 19 April 2023.

[75] Respondent 7 (Head of Unit/Acting Director of Communications), interviewed 21 April 2023.

[76] There was a certain 'citizen fetishism' in all of the discussions I had with Court officials. As if the Court's decisions had no impact on 'non-citizens' or 'paperless' individuals.

[77] E.g. respondent 7 (Head of Unit/Acting Director of Communications), interviewed 21 April 2023, and respondent 4 (Press Officer), interviewed 19 April 2023.

[78] On the use of such 'composite narratives', see Rebecca Willis, 'The Use of Composite Narratives to Present Interview Findings' (2018) 19 *Qualitative Research* 471.

[79] Respondent 4 (Press Officer), interviewed 19 April 2023.

assess its accountability, however insufficient it may be. This is why communication through press releases and other media artefacts directly or indirectly through the press is so important.[80]

The transformation mentioned above could, perhaps, best be described as a tension between these two ideal-typical cultures of communication in which the more traditional cabinet culture is gradually giving way to the transparency culture that is also advocated by the President of the Court.[81] The transformation from press releases that emulate the summaries of the rulings written by the justices and their cabinets to more 'narrative' accounts about the significance of the rulings for 'citizens' was reportedly initiated by a memo circulated by the President in 2019.[82] By 2024, a working group had put the required changes together into a proposal on how press releases should henceforth be composed. Similar tensions can be sensed in other information-related activities of the Court. The Unit began, for example, planning the live streaming of hearings at the CJEU in order to enhance the transparency of the institution in the spirit of the 'open court principle'. The initiative was, however, met with some resistance from some members of the Court, so in order to secure the 'first step' into the desired direction, the initiative was modified into a compromise that only allowed for limited streaming for the time being.[83]

But the transformation seems far from painless even for the otherwise forward-looking Unit. After the interviews had been completed, I was in contact with both the current and former Heads of Unit and asked for copies of the new instructions and other key documents that are not openly available. Despite the initial positive responses presented in person, I never received a follow-up reply. In other words, I never received the documentation that would have enabled me to verify the changes that the respondents had referred to. I can only interpret the 'ghosting' as a finding suggesting a reluctance to give out any more information than is absolutely necessary.[84]

This also calls for additional self-reflection in relation to the methods used in this study. The methodological conventions of qualitative interviews are so centred on the protection of 'vulnerable' informants that one may sometimes lose sight of how powerless the scholar is in relation to the elites that she interviews.[85] Basically the scholar's work is conducted 'at the pleasure' of her expert informants who, on the other hand, can manage access from their positions of power. They can grant access to the data or deny it. In this case, the scholar felt that granting access to the informants created a 'debt' or an expectation that the reported results can eventually be integrated into the institution's own

[80] In a private exchange outside of the interviews, the former Head of Unit pointed out that in terms of transparency and openness, the Court is bound by the laws and regulations that are in place.

[81] This tension was explicitly described by respondent 4 (Press Officer, interviewed 19 April 2023) while others like respondent 8 (Press Officer, interviewed 24 April 2023) recognised the issue but diplomatically neither confirmed nor denied.

[82] Respondent 5 (former Head of Unit), interviewed 19 April 2023.

[83] Respondent 7 (Head of Unit/Acting Director of Communications), interviewed 21 April 2023. See CJEU Press Release No 63/22 (22 April 2022).

[84] At the same time, I must thank the Unit and its staff for taking time from their extremely busy schedules to provide me with the valuable information I did receive.

[85] See Zoë Slote Morris, 'The Truth about Interviewing Elites' (2009) 29 *Politics* 209.

public relations narrative.[86] The situation is made even more complex if, as in this case, the pool of informants is made up of a mix of institutional officials and their line managers.[87]

5. 'Managed openness'

Over four decades ago, Michigan-based transnational law scholar and comparatist Eric Stein famously observed how the European Court was able to pursue its own agenda relatively freely '[t]ucked away in the fairyland Duchy of Luxembourg and blessed, until recently, with benign neglect by the powers that be and the mass media'.[88] In other words, one important reason for the Court's ability to pursue its own agenda with relatively little interference had been the 'neglect' or the absence of external scrutiny, including from the media.

Things have, of course, changed since then. Today the tension between the CJEU's judicial independence and the demands for judicial transparency can, perhaps, be better seen as an incompatibility between principle and practice. While the CJEU may agree to acknowledge the significance of judicial transparency in principle, it reluctantly fulfils the minimum of what is required. In this sense, the CJEU is no different from judiciaries of times past that preferred to adjudicate *in camera* rather than in the public eye. The norms relating to judicial transparency manage to give options for the CJEU to regulate its own openness and transparency. First, the fundamental value of judicial transparency, if, indeed, it is one, is inverted by an *over-broad application* of exceptions and conditions that are specified elsewhere, in both primary legislation and lower-level norms. Some of these norms the Court has direct control of while others are imposed by an external legislator. Second, the Court is itself given *wide discretionary powers* in interpreting how the exceptions and conditions are to be applied. If openness and transparency are fundamental values, then discretion should only be used to enhance it, not to delimit it. And third, through its service design, the Court has introduced a 'hostile transparency environment' that forces representatives of civil society such as scholars, journalists and NGOs to go through an *unnecessarily arduous process* to gain access. This even concerns the documents that the Court would be willing to share.

This is the context in which we should also assess the CJEU's status as a possible forerunner in issues relating to information and communication technology (ICT) and e-justice. Instead of opening up in response to the needs and demands of the 'citizens' and other societal actors that it serves, the CJEU develops new ways of communicating

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[86] This expectation became apparent at an event where provisional results were presented to an audience that included members of the Court. One could sense from the reactions that the results were perceived as a criticism of the institution. Even the obvious counterargument, i.e. that the aim of research is to critically assess its object of study, did not seem to soothe the disappointment.

[87] Because the results were perceived as criticism of the institution, it became even more important to protect the identity of the individual press officers on whose frankness these results were based. This is why this paper provides a minimal amount of information on the individual interviews.

[88] Eric Stein, 'Lawyers, Judges, and the Making of a Transnational Constitution' (1981) 75 *The American Journal of International Law* 1, 1.

proactively and one-sidedly. In other words, the Court does not reciprocate the requests presented by external actors but takes control of what it communicates and how. The technological innovations may facilitate the retrieval of documents that the Court has already agreed to share, but they will not enable broader access to documents that are in its possession. Think of, for example, the three ICT artefacts that the CJEU is well known for, that is, the Curia caselaw database (and its more comprehensive EUR-Lex cousin), the digital Monthly Case-law Digests, and the digital press releases.

Angioletta Sperti has made an impressive comparative probe into the communication practices of the US Supreme Court, the Supreme Court of Canada, the German Federal Constitutional Tribunal, the French *Conseil Constitutionnel* and the Italian Constitutional Court.[89] But perhaps she comes to unnecessarily optimistic conclusions about the progress made. As I have tried to argue in this paper regarding the CJEU, increased communication does not necessarily translate into enhanced transparency. Judicial communication may namely also be a *trompe-l'œil* in which we mistakenly take a court's proactive approaches for well-meaning attempts to respond to external demands for more openness. In fact, the central question may well be 'who controls the narrative'.

Judicial communication is, then, a way for the CJEU to respond to external calls for more openness and transparency while remaining cautious of the diminished independence that unhinged external scrutiny allegedly brings about. It is a form of 'managed openness', as Gunnar Grendstad, William Shaffer and Eric Waltenburg describe the Norwegian Supreme Court's approach to transparency.[90] In a similar vein but on a more theoretical level, Ida Koivisto argues that the contemporary push for the transparency of institutions using public power is premised on an idealised understanding that legitimate governance corresponds with 'truth', and that transparency manages to provide the link between the two. Koivisto, however, cautions us that in this 'truth-legitimacy trade-off', transparency can only provide either one or the other, either truth or legitimacy, but not both.[91] Judicial transparency does not, then, lend itself effortlessly towards open government in the courts but is, rather, a tool for creating and managing appearances.

[89] Angioletta Sperti, *Constitutional Courts, Media and Public Opinion* (Hart 2023).

[90] Gunnar Grenstad, William R. Shaffer, and Eric N. Waltenburg, 'Managed Openness and Transparency' in Richard Davis and David Taras (eds), *Justices and Journalists. The Global Perspective* (Cambridge University Press 2017).

[91] Ida Koivisto, *The Transparency Paradox. Questioning an Ideal* (Oxford University Press 2022), 201-10.