

COMMUNICATING JUDICIAL DECISIONS: STEPPING OUT OF THE BLACK BOX

Daniel Askari,* Kristina Blažková,** Jan Chmel,*** Kristina Rademacherová****¹

Abstract: *The article deals with the principle of openness in the judiciary, specifically communicating judicial decisions to the public. Firstly, it discusses the relation between publicity and transparency of courts on the one hand and their legitimacy on the other. While the authors believe that the judiciary should be increasingly open to the public and point out benefits of that approach, they also recognize the risks thereof. Based on a comparative analysis of courts in a number of European states as well as the CJEU and ECHR the article analyses typical approaches to communication of judicial decisions. The final chapter contains normative conclusions which can serve as general guidelines applicable within the European judiciary.*

Keywords: *judiciary, openness, transparency, case-law databases, social media*

“What degree of openness ought to apply to the Court when it is carrying out its judicial tasks?” the Advocate General of the Court of Justice of the European Union (hereinafter as “CJEU”) asks the Advocate General Michal Bobek in his opinion delivered in the case *Commission v. Patrick Breyer*.² Bobek brought up a very important and pressing issue relating to all courts around the world, including those in Europe.³ In our paper, we elaborate on the issue of openness, asking what kind of content courts communicate to the public and what means of communication they use. Should courts use social media to present their judgments? Should judges advocate for their opinions in the media? Or should they just let their decisions to speak for themselves?

In our paper, we first explain why the principle of openness is becoming increasingly important, we clarify the concept in relation to the principle of transparency, publicity and legitimacy and consider the benefits and limits of openness (I). Secondly, we set out the standards of openness established at the European level (II) and we inquire into the current practice of selected Member States (III). Finally, we draw general conclusions from our comparative analysis and formulate some normative conclusions (IV).

* Mgr. Daniel Askari, Faculty of Law, Charles University, Prague, Czech Republic

** Mgr. Kristina Blažková, Faculty of Law, Charles University, Prague, Czech Republic

*** Mgr. Jan Chmel, Faculty of Law, Charles University, Prague, Czech Republic

**** JUDr. Kristina Rademacherová, Faculty of Law, Charles University, Prague, Czech Republic

¹ The paper was supported by the Charles University grants, Specific University Research (“SVV”) project 2017-2019, No. 260 361 (contribution of D. Askari and K. Blažková) and SVV project 2017–2019, No. 260 359 (contribution of K. Rademacherová and J. Chmel). The first draft of the paper was presented at the THEMIS competition organised by the European Judicial Training Network. We thank the competition jury as well as other participants for the discussion on the topic of the paper. We also thank Dominik Andreska, Tomáš Friedel, Jan Geryk, Michal Kuk, and Alžběta Kubitová for their comments on the draft version of the paper.

² Opinion of Advocate General Michal Bobek, *Commission v. Patrick Breyer*, C-213/15P, ECLI:EU:C:2016:994, para. 3.

³ The issue has been recently discussed by European authors (see for example BODNÁR, E. Transparency and Openness of Courts in the 21st Century. An Issue Worth Researching. *Iuris Dictio*, 2016, Vol. 18, pp. 149–160) as well as outside Europe (see for example MEYER, N. H. Jr. Social Media and the Courts: Innovative Tools or Dangerous Fad? A Practical Guide for Court Administrators. *International Journal for Court Administration*. 2014, Vol. 6, No. 1, pp. 1–27.). However, we fill focus on European legal context.

The idea for this article originates in our preparation for the THEMIS competition, a platform for young European judicial trainees to present and discuss their views on different topics relating to professional ethics and judicial activity. The article thus uses the comparative and European law analysis prepared for the competition and sets it into a deeper theoretical context. Above all we have elaborated on the reasons for the rise of the principle of openness and reflected on its wider consequences within the society. We have also developed the concept of the new judiciary and the information society and described the current changes in the way the European Court of Human Rights (hereinafter as “ECHR”) renders decisions on inadmissibility. Thanks to the discussions carried out during and after our presentation of the topic at the competition we have thought more closely about the benefits and pitfalls of the principle of openness and clarified certain theoretical concepts and their interconnection. In the concluding part we have modified the brief and practice-oriented guidelines for judicial practice with a more elaborated and balanced normative analysis.

I. OPENNESS AS A RISING PRINCIPLE OF THE EUROPEAN JUDICIARY

The principle of openness consists of cooperation and active communication between the judiciary and the public. Openness of judiciary, as we understand it, means a transparent decision-making process, where the verdict is shared with as well as explained to the public.⁴

Although it is an old and well settled principle that „*justice should not only be done, but it should manifestly and undoubtedly be seen to be done*“,⁵ the focus on openness of judiciary is a relatively new phenomenon. The issue of openness is becoming more and more important due to several factors: increasing influence of courts on society, transformation of the relationship between individuals and state, and the emergence of information society.

Firstly, the power of courts and their influence on important societal issues has been increasing since the second half of the 20th century.⁶ Due to the increased complexity of legal systems and the mass of legal norms, judicial decisions gain on importance even in the continental legal system.⁷ Judiciaries and judges nowadays do not only play a role of independent arbiters of disputes applying law in a neutral way, but also fulfil important law-making, and occasionally even policy-making functions.⁸ This is why

⁴ We are aware of the fact, that we define the principle of openness in a broad way, while some other authors use narrower definitions – compare for example ALEMANNINO, A. Unpacking the Principle of Openness in EU Law, Transparency, Participation and Democracy. *European Law Review*. 2014, Vol. 39, No. 1, pp. 72–90.

⁵ Lord Chief Justice Hewart, *R v Sussex Justices, Ex parte McCarthy* ([1924] 1 KB 256, [1923] All ER Rep 233).

⁶ See TATE, C. N., VALLINDER, T. (eds.). *The Global Expansion of Judicial Power*. New York and London: New York University Press, 1995.

⁷ See the distinction of law in the material and formal meaning; in the formal meaning law is only what the legal system marks so, while in the material meaning law is considerably influenced by the courts' interpretation. See BOBEK, M., KÜHN, Z. et al. *Judikatura a právní argumentace*, 2nd edition. Praha: Auditorium, 2013, p. 32.

⁸ See for example KOROUTAKIS A. E. Judges and Policy Making Authority in the United States and the European Union. *Vienna Journal on International Constitutional Law / ICL Journal*. 2014, Vol. 8, No. 2, pp. 186–200.

they are sometimes called “new judiciaries”⁹ and why the problems such as judicial activism or judicialization of politics are vividly debated.¹⁰ With the new responsibilities of the judiciary there is also an increased need for its transparency facilitating its public control.¹¹ As the number of societal issues dealt with by courts increases,¹² there is an objective need to inform the public about judicial decisions. On the other hand, courts can actively strengthen their position through the greater dissemination of their judgments. According to our opinion, the wider audience it reaches and the more trust it generates, the more powerful courts become *vis-a-vis* other national and international courts and other public bodies.¹³

Secondly, there is a general shift in modern society from the culture of authority towards the culture of justification.¹⁴ Public power can no longer be exercised on the mere basis of ruler’s authority; instead, it must be justified. And this affects the judiciary as well. Judges traditionally used various tools, such as wigs, to conceal their individuality and to enhance the authority of the judicial institution. Nowadays the trend is towards transparency and discursiveness. The public expects thorough justification of decisions from the judiciary, i.e. making the decisions public, explaining and defending them. Public officials can no longer hide behind their functions. Their decisions are expected to pass the test of persuading the public.¹⁵

Thirdly, recent developments in information and communication technologies introduced the idea of information society. Or, put more precisely, the developments in technology have enabled to further develop the natural trend in our society towards higher levels of informativeness. According to Polčák, precondition of any organised society is the need for information. Any organised society has therefore a unique tendency to strengthen its informational structures and foster information society services. Today, nevertheless, the term information society denotes rather a society in which the importance of information is recognised; a society which uses the possibilities given by the developments in modern information and communication technologies. The use of modern information and communication technologies in the field of social interaction, including the performance of public power, may be considered as an indicator of social development.¹⁶

⁹ See MALLERSON, K. *The New Judiciary: The Effects of Expansionism and Activism*. Brookfield, VT: Ashgate/Dartmouth, 1999.

¹⁰ See HIRSCHL, R. The Judicialization of Politics. In: Goodin, R. E. (ed.). *The Oxford Handbook of Political Science*. New York: Oxford University Press, 2009, p. 253.

¹¹ See VOERMAN, W. Judicial Transparency Furthering Public Accountability for New Judiciaries. *Utrecht Law Review*. 2007, Vol. 3, No. 1, pp. 148–160.

¹² This is rather an ongoing trend, than a new observation. See for example SHETREET, S. On Assessing the Role of Courts in Society. *Man. L.J.* 1979–1980, Vol. 10, pp. 357–414.

¹³ See GAROUPA, N., GINSBURG, T. *Judicial Reputation: a Comparative Theory*. Chicago: The University of Chicago Press, 2015; or YADAV, V., MUKHERJEE, B. *Democracy, Electoral System and Judicial Empowerment in Developing Countries*. Ann Arbor: The University of Michigan Press, 2014, p. 40.

¹⁴ MUREINIK, E. Bridge to Where? Introducing the Interim Bill of Rights. *South African Journal of Human Rights*. Vol. 31, No. 10, 1994, p. 32.

¹⁵ COHEN-ELIYA, M., PORAT, I. Proportionality and the Culture of Justification. *The American Journal of Comparative Law*. 2011, Vol. 59, p. 463 et seq.

¹⁶ POLČÁK, R. *Internet a proměny práva* [“Internet and the Metamorphosis of Law”]. Praha: Auditorium, 2012, pp. 274–275. The title translated by the authors.

Modern communication tools change our world, where living one's own life in a virtual space has become a real possibility.¹⁷ In a virtual space without any borders, the concept of publicity reaches yet another dimension. Courts, as important institutions performing the powers of state, become able to share as much as they please to promote their ideas. With modern technologies, thousands and thousands of judicial decisions are being processed by computers, facilitating data collection. Masses of judicial decisions have become accessible and virtual collections of case law, statistical summaries, online databases, or even software predicting a court's ruling has become a reality. The level of accessibility of courts' work to the public increases continuously and the Internet, globally accessible virtual network, has greatly contributed to the publicity of judicial decisions.¹⁸

The abovementioned factors have also influenced the way the judges themselves perceive their role. Traditionally, judges believed that decisions should speak for themselves. For example, one of the most prominent former judges of the Czech Constitutional Court, Pavel Holländer, never commented or explained his decisions to the media.¹⁹ Nowadays, judges of the Constitutional Court regularly appear in the media commenting on their concrete judgments or giving interviews.²⁰

I. 1. Publicity, transparency and legitimacy of the judiciary

Before developing the issue further, it is important to clarify that the concept of openness of the judiciary, as it is understood in this paper, covers both the issue of transparency as well as publicity. While publicity concerns chiefly the availability and visibility of judicial decisions, transparency guarantees an opportunity to see the path leading to the result reached, together with the reasoning behind it.

We understand transparency as disclosing the way the judge reached his or her decision to the public. The elements of transparency include: public hearings (additionally web streaming of the hearings), justification of decisions (including extra-legal arguments), publication of dissenting opinions, information about decision-making process and identity of judge rapporteur, presentation of judges on court's website (including photos and biographical information), access to documents and possibility of obtaining information about particular steps taken by a court in an individual case according to the law on the free access to information, disclosure of old judicial files through their placement in

¹⁷ POLČÁK, R. *Internet a proměny práva* ["Internet and the Metamorphosis of Law"]. Praha: Auditorium, 2012, pp. 71–72.

¹⁸ VELICOGNA, M. Use of Information and Communication Technologies (ICT) in European Judicial Systems. European Commission for the Efficiency of Justice (CEPEJ), Council of Europe. In: *Council of Europe* [online]. [2018-02-19]. Available at: <https://www.coe.int/t/dghl/cooperation/cepej/series/Etudes7TIC_en.pdf>.

¹⁹ KYSELA, J., BLAŽKOVÁ, K., CHMEL, J. a kol. *Právnícký Olymp. Portréty vybraných soudců Ústavního soudu ČR*. Praha: Leges, 2015, p. 81.

²⁰ Judges appear regularly in the national news. See, for example, ČT24. Hrozba fyzického násilí je stejná jako manipulace rodičů. Soud se zastal muže, který nemohl vidat své děti. In: *Česká televize*. [online]. 7. 8. 2017. [2018-02-19]. Available at: <<http://www.ceskatelevize.cz/ct24/regiony/2203660-riziko-fyzickeho-nasili-je-stejne-jako-manipulace-rodicu-soud-se-zastal-muze-ktery>>.

the archives available to the public upon request²¹ and, eventually, disclosure of the votes of the judicial panel.²²

Publicity, in our opinion, means making the content of individual decisions public together with the knowledge of the state of law. As the German Federal Administrative Court put it, “*publication of judicial decisions is a public task. It is a direct constitutional duty of the judicial branch and therefore every court. All decisions, on whose publication there is or could be public interest, are to be published*”.²³ The basis of publicity is public announcement²⁴ of the operative part of the judgment and its justification. The elements of publicity may include accessibility of decisions through internet databases, issuance of press releases, existence and activity of press service, communication through social media (i.e. Facebook, Twitter etc.), RSS feeds and media interviews given by individual judges.

The principle of openness strengthens the legitimacy of courts.²⁵ Nevertheless, Mitchel Lasser in his work *Judicial Deliberations*²⁶ questions this assumption through a comparative analysis on how French and American judiciary, which are traditionally placed on opposite ends of the transparency scale, approach the issue of publicity of decisions and transparency of judicial process. While a decision of a French court is collective and anonymous, an American one is individually signed, discloses votes of the judicial panel and publishes dissenting opinions. The French model consists of sheltered judicial deliberations and public, but succinct and syllogistic final decision, which tells the public what the law is and omits the reasons leading to the result. The American model, on the contrary, integrates all the arguments into a public judicial decision.²⁷

Lasser explains how the two different systems generate public trust by developing two different concepts of judicial legitimacy: the substantive and the institutional legitimacy.²⁸ The substantive legitimacy, of which the American judicial system is an example, focuses on discursiveness of judicial decisions, as they must provide sufficient reasoning to con-

²¹ The Court of Justice of the European Union has placed historical files in the archives at the European University Institute in Florence and provides access to documents which date from more than 30 years ago. For more information, see the webpage of Court of Justice of the European Union. CURIA. Historical Archives. In: *Court of Justice of the European Union* [online]. [2018-02-19]. Available at: <https://curia.europa.eu/jcms/jcms/P_184874/en/>.

²² See the opinion of Czech Constitutional Court judge Eliška Wagnerová and of International Criminal Court judge Robert Fremr: WAGNEROVÁ, E. Tajnosti soudní... [“Judicial Secrets...”]. In: *Jiné právo* [online]. 1. 11. 2007 [2018-02-19]. Available at: <<http://jinepravo.blogspot.cz/2007/11/tajnosti-soudn.html>>; FREMR, R. Nenastal čas odtajnit hlasování soudců? [“Is it Time to Declassify the Judicial Votes?”]. In: *Jiné právo* [online]. 14. 1. 2010 [2018-02-19]. Available at: <<http://jinepravo.blogspot.cz/2010/01/robert-fremr-nenastal-cas-odtajnit.html>>.

²³ Judgment of the Federal Administrative Court of Germany of 16 February 2017, BVerwG 6 C 3.96.

²⁴ Public announcement may take various forms, as it will be further discussed.

²⁵ Opinion of Advocate-General Michal Bobek, *Commission v. Patrick Breyer*, C-213/15P, ECLI:EU:C:2016:994, para. 96.

²⁶ LASSER, M. *Judicial deliberations: a comparative analysis of transparency and legitimacy*. New York: Oxford University Press, 2009.

²⁷ LASSER, M. *Judicial deliberations: a comparative analysis of transparency and legitimacy*. New York: Oxford University Press, 2009.

²⁸ LASSER, M. *Judicial deliberations: a comparative analysis of transparency and legitimacy*. New York: Oxford University Press, 2009.

vince the public of the provided solution being right. The legitimacy of the French judiciary, on the contrary, rests on its meritocratic and hierarchical institutional system rooted in the French republican ethos and the idea of the sovereignty of also legislator. Both approaches are naturally influenced by the differences of two distinct legal systems too, i.e. the system of common law and the continental legal system.

Lasser thus argues that the principle of openness is not a necessary prerequisite for judicial legitimacy. In some legal cultures lack of disclosure of arguments which led to the result reached may be substituted by a strong institutional system. Yet we believe that convincing justification of judicial decisions is nowadays necessary for maintaining legitimacy of courts in difficult cases. This was demonstrated by the case *Perruche*²⁹ where the French *Cour de Cassation* dealt with a very controversial topic of unlawful births.³⁰ Although the case was thoroughly discussed within the court, with all (legal and factual) aspects of the case,³¹ the court's justification did not reflect any of it. Consequently, the decision was strongly criticised by legal professionals, the public opposed it and the legislator changed the law afterwards, completely opposing the judgment.³² We are convinced that if the *Cour de Cassation* was more transparent in its decision-making, i.e. admitted that the question is difficult and controversial and that the judges considered a wide variety of arguments, the decision would be better accepted.

I. 2. Benefits and pitfalls of openness

Traditionally, publicity of judicial proceedings was viewed as a check against the misuse of judicial power, aimed to limit unfair prosecutions by those who held power in society.³³ Current trend towards more transparency allows the public to control the judiciary and increases the courts' responsibilities towards citizens, making the courts more accountable.³⁴ Moreover, openness improves the quality of judicial decisions as it places a greater argumentative burden on the judge,³⁵ and produces more predictable and consistent ju-

²⁹ Cour de Cassation, Nicolas Perruche 1 et 2 (26 mars 1996, D. 1997, Jur. P. 35, 17 November 2000, D. 2001, Jur. P. 332).

³⁰ Mother of Nicolas Perruche got Rubella infection during her pregnancy. She informed the doctor that if her child was to be disabled, she wanted an abortion. The hospital staff misanalysed the situation, failing to identify disability of her child. After the child was born death, half blind and with a heart disease, the mother brought damage claims against the hospital.

³¹ CANIVET, G. Formal and Informal Determinative Factors in the Legitimacy of Judicial Decisions: The Point of View of the French Cour de Cassation. In: Huls, N., Adams, M., Bomhoff, J. (eds.). *The Legitimacy of Highest Courts' Rulings. Judicial Deliberations and Beyond*. The Hague: T. M. C. Asser Press, 2009, p. 478.

³² LOTH, M. Courts in a Quest for Legitimacy: A Comparative Approach. In: HULS, N., ADAMS, M., BOMHOFF J. (eds.). *The Legitimacy of Highest Courts' Rulings. Judicial Deliberations and Beyond*. The Hague: T. M. C. Asser Press, 2009, p. 478.

³³ WINN, A. P. Online Court Records: Balancing Judicial Accountability and Privacy in an Age of Electronic Information. *Washington Law Review*. 2004, Vol. 79, p. 307 et seq.

³⁴ Opinion of Advocate General Michal Bobek, Commission v. Patrick Breyer, C-213/15P, ECLI:EU:C:2016:994, para. 99.

³⁵ KÚHN, Z. České lustrační rozhodnutí – role srovnávacího práva a nedostatky v soudcovské argumentaci, In: Novotný, O. (ed.). *Pocta Vladimíru Mikule k 65. narozeninám*. Praha: ASPI Publishing, 2002, p. 370.

dicial decisions.³⁶ Through its influence on judicial work, openness thus improves both the quality of rulings as well as the party pleadings.³⁷ Publicity, as a particular aspect of openness, increases legal knowledge and public awareness, contributing to legal certainty and stability of the legal system,³⁸ as well as increasing public trust in the judiciary.³⁹ Publicity additionally helps to generate public debate on important social and legal issues.

Nevertheless, it is necessary to keep in mind the limits of openness as well. Court must remain the independent third party and be perceived as such – an umpire who solves the dispute.⁴⁰ In order to do that, the judge must keep a certain distance from the dispute and its parties, as disclosing too much of their mental process or the non-public part of the judicial process could undermine its apparent impartiality and legitimacy of the decision. The judge is also bound by professional deontology. Therefore, he cannot, for example, comment on pending cases. The issue of the right to privacy or to protection of intellectual property of the parties is also involved, as openness may sometimes run counter to the parties' interests.⁴¹ In our opinion, transparency may also jeopardize the intellectual freedom of a judge as they need some sheltered area to search for and contemplate the right decision. A judicial panel needs to discuss the case at issue and within that discussion any judge must have room for making an error - to express an opinion which will not be reflected in the decision in the end, as the judge was be persuaded by the other judges in the panel. If we were, in extreme cases, to make judicial deliberations open to the public, the real deliberations would surely move away from deliberation rooms into less formal places, such as private premises. Thus, judicial deliberations would be at risk of being emptied of their purpose as judges would have discussed the case somewhere else, coming afterwards with statements already prepared. Moreover, too much transparency, manifested through discussion of all the considered arguments, might generate misunderstanding of the final decision or its core meaning as it would be too complex and difficult to understand for the addressees of the decision. Also, if the judges were to meet the demands for publicity in an excessive way and actively present every single one of their decisions and legal opinions, they might overwhelm the public space with information (sometimes even contradictory) and in the end undermine their reputation.

³⁶ UNITED NATIONS. Resource Guide on Strengthening Judicial Integrity and Capacity. In: *United Nations Office on Drugs and Crime* [online]. 2011 [2018-02-19]. Available at: <https://www.unodc.org/documents/treaties/UNCAC/Publications/ResourceGuideonStrengtheningJudicialIntegrityandCapacity/11-85709_ebook.pdf>. See p. 85.

³⁷ Opinion of Advocate General Michal Bobek, *Commission v. Patrick Breyer*, C-213/15P, ECLI:EU:C:2016:994, para. 103.

³⁸ UNITED NATIONS. Resource Guide on Strengthening Judicial Integrity and Capacity. In: *United Nations Office on Drugs and Crime* [online]. 2011 [2018-02-19]. Available at: <https://www.unodc.org/documents/treaties/UNCAC/Publications/ResourceGuideonStrengtheningJudicialIntegrityandCapacity/11-85709_ebook.pdf>. See p. 85.

³⁹ URBAN, M. Development of Trust in Courts in the Czech Republic and Other Visegrad Countries. *Charles University in Prague Faculty of Law Research Paper No. 2014/III/3*. 2014, p. 14, [2018-02-19]. Available at: <<https://ssrn.com/abstract=2540556>> or <<http://dx.doi.org/10.2139/ssrn.2540556>>.

⁴⁰ SHAPIRO, M. *Courts: A Comparative and Political Analysis*. Chicago: University of Chicago Press, 1981, pp. 1–64.

⁴¹ WINN, A. Peter. Online Court Records: Balancing Judicial Accountability and Privacy in an Age of Electronic Information. *Washington Law Review*. 2004, Vol. 79, p. 307 et seq.

As empirical findings show, judicial openness strengthens the public trust in courts in general.⁴² Nevertheless, in searching for the right level of openness there is an inherent tension between the requirements for transparency and publicity that facilitate informing the public and controlling the judiciary by the public on one hand, and the need to maintain the intellectual freedom of judges, their authority as well as their role of impartial third party resolving the legal disputes. Therefore, the rest of this paper inquires into the European legal requirements as well as practise of several European courts concerning the issue of judicial openness in order to identify common standards.

II. EUROPEAN LEVEL

Within the framework of European institutions, such as the European Court of Human Rights (hereinafter as “ECHR”) or CJEU, there is an established consensus on minimal standards of judicial openness which stems from the right to a fair trial according to article 6 of the Convention on Protection of Human Rights and Fundamental Freedoms (hereinafter as “Convention”) as well as freedom of information according to article 10 of the Convention. Article 6 of the Convention, as it is interpreted by ECHR, requires courts to pronounce their judgments publicly and to give sufficient reasons for their decisions. ECHR ruled in *Axen v. Germany* that while judgments must be made available to the public in some form, they do not need to be literally publicly pronounced.⁴³ In *Ryakib Biryukov v. Russia* ECHR held that it is insufficient for a court to only pronounce the operative provisions of its decision without making its basic reasoning available to the public. The public must be able to understand what the judgment means materially.⁴⁴

ECHR also held that a court decision must always include sufficient reasons as to inform not only parties to the proceedings but also the public why the court decided as it did; that applies even to cases where questions of fact are decided by lay jury. According to *Taxquet v. Belgium*, the public must always be able to understand the verdict as given by court.⁴⁵ However, in *Suominen v. Finland*, ECHR concluded that national courts are allowed a margin of appreciation in choosing arguments in a specific case. Although the obligation to give reasons cannot be understood as a requirement of detailed answer to every argument, ECHR stated that, regardless the margin of appreciation, “an authority is obliged to justify its activities by giving reasons for its decisions.”⁴⁶

It follows that while there are some minimal guarantees of judicial openness present in ECHR’s binding case law, these standards do not go so far as to guarantee extensive communication of judicial decisions to the public. ECHR does not mandate that judicial decision-making be transparent beyond providing the decision itself and its basic reasons.

⁴² GRIMMELIKHUIJSEN, S., KLIJN, A. The Effects of Judicial Transparency on Public Trust: Evidence from a Field Experiment. *Public Administration*. 2015, Vol. 93, No. 4, pp. 995–1011.

⁴³ ECHR. *Axen v. Germany*. Judgement of 8 December 1983, ECLI:CE:ECHR:1983:1208JUD000827378, §§ 25-27.

⁴⁴ ECHR. *Ryakib Biryukov v. Russia*, Judgement of 17 January 2008, ECLI:CE:ECHR:2008:0117JUD001481002, §§ 42-46.

⁴⁵ ECHR. *Taxquet v. Belgium*, Judgement of 16 November 2010, ECLI:CE:ECHR:2010:1116JUD000092605, § 90.

⁴⁶ ECHR. *Suominen v. Finland*, Judgement of 1 July 2003, ECLI:CE:ECHR:2003:0701JUD003780197, § 36.

Within EU law, openness is generally accepted as an important principle of exercising public powers.⁴⁷ According to article 1 of the Treaty of the Functioning of the European Union (hereinafter as “TFEU”) “*decisions are taken as openly as possible to the citizen*”. CJEU firstly integrated this principle into EU law in relation to the right of access to documents which was followed by treaty amendments and secondary legislation.⁴⁸ Pursuant to article 15 (1) of TFEU “*in order to promote good governance and ensure the participation of civil society, the Union’s institutions, bodies, offices and agencies shall conduct their work as openly as possible*”.⁴⁹ Article 42 of the Charter of Fundamental Rights of the European Union guarantees the right of access to documents which is further elaborated by secondary legislation on public access to documents, specifically Regulation 1049/2001 of the European Parliament and of the Council of 30 May 2001 on public access to European Parliament, Council and Commission documents.⁵⁰ To what extent this regulation applies to court documents has been recently considered by CJEU in the above mentioned case *Commission v. Patrick Breyer*.

The Council of the EU continuously promotes the idea of easier access to national case law or the information databases managed by the judicial institutions of member states.⁵¹ Recently, there has also been a concerted effort of EU Member States to increase cross-border accessibility of national courts’ case law. In 2011 the Council adopted conclusions inviting the introduction of the European Case Law Identifier (ECLI) and a minimum set of uniform metadata for case law.⁵² The aim of the database is to provide a unified system of identification of all published decisions of Member States as well as metadata which indicate the legal basis of the decision.

The topic of judicial openness is also of interest to several advisory bodies. The Consultative Council of European Judges, a Council of Europe working group, has issued a number of opinions dealing with this issue. In Opinion No. 7 the CCEJ expressed the opinion that reasonable accessibility of judiciary to the public is helpful to public trust of the courts and increases general awareness of case law:

“Integrating justice into society requires the judicial system to open up and learn to make itself known. The idea is not to turn the courts into a media circus but to contribute to the transparency of the judicial process. Admittedly, full transparency is impossible, particularly on account of the need to protect the effectiveness of investigations and the interests of the

⁴⁷ PRECHAL, S., DE LEEUW, M. E. Transparency: A General Principle of EU Law? In BERNITZ, U. (eds.). *General Principles of EC Law in a Process of Development*. London: Kluwer Law International, 2008, pp. 201–242.

⁴⁸ ALEMANN, A., STEFAN, O. Openness at the Court of Justice of the European Union: Toppling a Taboo. *Common Market Law Review*. 2014, Vol. 51, No. 1, pp. 97–139.

⁴⁹ It can be noted, that Art. 15 (1) of TFEU also played role in the case *Commission v. Breyer* mentioned in the beginning of this text. The case concerned the question of public access to written submissions filed in another case pending before the CJEU. In the end the Court ruled in favour of accessing such documents and used Art. 15 (1) as a core argument for its ruling.

⁵⁰ ALEMANN, A., STEFAN, O. Openness at the Court of Justice of the European Union: Toppling a Taboo. *Common Market Law Review*. 2014, Vol. 51, No. 1, pp. 97–139.

⁵¹ Compare the Multiannual European E-Justice Action Plan 2009-2013 (2009/C 75/01) or the recent Multiannual European E-Justice Action Plan 2014-2018 (2014/C 182/02). In: *EUR-Lex* [online]. 14. 6. 2014 [2018-02-19]. Available at: <[http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52014XG0614\(01\)&from=CS](http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52014XG0614(01)&from=CS)>.

⁵² Council conclusions of 29th April 2011, 2011/C 127/01.

persons involved, but an understanding of how the judicial system works is undoubtedly of educational value and should help to boost public confidence in the functioning of the courts.”⁵³

In a report issued in 2012 titled *Justice, Society and the Media*, the European Network of Councils for the Judiciary (hereinafter as “ENCJ”) made recommendations related to judicial communication with the public and media. The recommendations are divided into five categories: (i) judicial spokespersons, (ii) audio-visual recording of proceedings, (iii) online publication of judgment, (iv) press guidelines and (v) proactive approach to communication with the media. ENCJ adopted main recommendations in which it took a rather liberal approach to the various issues at hand. It recommended that courts appoint trained press judges and communication advisors; allow audio and video recordings, whole taking special measures to protect non-professionals from being filmed; and have a generally open relationship with the press. While ENCJ believes social media can be a useful tool for courts, it recommends courts develop a comprehensive strategy of using them.⁵⁴

There is a general trend towards more transparency among most of European countries. Although individual legal cultures differ in the level of judicial openness, it may be advisable to identify certain common standards of good practice. In future, the EU and the Council of Europe advisory bodies should continue to deal with the relationship between courts and media. Inspiration might be found for example in Latin America where detailed guidelines on judicial transparency have been developed.⁵⁵ One of the aims of our paper is to formulate recommendations for enhancing the principle of openness in the judiciary. For this, we have carried out an analysis of recent practice among selected European courts.

III. COMPARATIVE ANALYSIS

The comparative analysis is based mainly on our observations of the courts’ websites, search engines and other tools of communication with the public. We have included the two European courts: CJEU and ECHR, and the supreme court(s) of Germany, France, Ireland and Czech Republic as representatives of each of the major European legal traditions: German, French, Anglo-Saxon and Post-Communist. We consider these courts very useful to our analysis as both of them are in many respects advanced in the field of judicial openness.

While it is not our objective to supply the reader with a comprehensive analysis of the differences amongst those legal cultures, it is clear that their judicial styles differ in a num-

⁵³ Opinion No. 7 (2005) of the Consultative Council of European Judges (CCJE) to the attention of the Committee of Ministers on “justice and society”, para. 9.

⁵⁴ ENCJ. *Justice, Society and the Media*. Report 2011–2012. In: *European Network of Councils for the Judiciary* [online]. [2018-02-19]. Available at: <https://www.encj.eu/images/stories/pdf/GA/Dublin/encj_report_justice_society_media_def.pdf>. See p. 21.

⁵⁵ HERRERO, A., LOPEZ, G. Access to Information and Transparency in the Judiciary. In: *World Bank Institute* [online]. 2010 [2018-02-19]. Available at: <http://siteresources.worldbank.org/WBI/Resources/213798-1259011531325/6598384-1268250334206/Transparency_Judiciary.pdf>.

ber of aspects.⁵⁶ Some of those differences, which we believe to be potentially beneficial in supplying the necessary context to our findings, are briefly summarized in the respective parts of this chapter. We recognize there will always be variations in the manner, in which judges in different European countries communicate with the public and present their decisions, and we do not seek or propose to extinguish them. Nevertheless, we present findings, which in our opinion have the potential to help find a general common ground on the topic of judicial openness in Europe.

III.1. European Court of Human Rights

According to Articles 44 and 45 of the Convention, the final judgement is published with given reasons. If a judgement does not represent unanimous opinion of the judges, any judge is entitled to deliver a separate opinion. ECHR's decisions are thoroughly explained, having quite a comprehensible language. All judgements are published in the HUDOC database (Human Rights Document Online), where some cases are also provided with legal summaries – brief information about relevant facts and law. ECHR's practise is to publish large scale of documents on the HUDOC, i.e. decisions, consultative opinions, information on communicated cases, legal summaries etc. Consequently, ECHR is developing towards the broad publicity of its work.

Nevertheless, we can observe considerable shortcomings in the ECHR own decision-making practice regarding the publicity and reasoning of the inadmissibility decisions. The Convention does not require publication of decisions declaring an application admissible or inadmissible. After the entry of Protocol No. 14⁵⁷ into force in 2010, a single judge or a committee by a unanimous vote may declare inadmissible or strike out an application under Article 34, where the decision can be taken without further examination.⁵⁸ The vast majority of ECHR decisions are those on inadmissibility taken by a single judge.⁵⁹ Taking into account the amount of those decisions, with the notion that a decision on admissibility or inadmissibility is crucial for the applicants, the relevant procedural practice could be decisive for the transparency of the court itself.

Until 2016, only a minority of ECHR's inadmissibility decisions was reasoned, which had been widely criticized.⁶⁰ Applicants received only a decision letter informing about the rejection of their complaints. Although this procedure helps to treat repetitive or clearly inadmissible cases in a more efficient way, resignation from the publication of rea-

⁵⁶ TICHÝ, L., HOLLÄNDER, P., BRUNS, A. *Odůvodnění soudního rozhodnutí*. Praha: Univerzita Karlova v Praze, Právnická fakulta, 2011.

⁵⁷ Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, amending the control system of the Convention. In: *Council of Europe* [online]. 2004 [2018-02-19]. Available at: <<https://rm.coe.int/1680083711>>.

⁵⁸ Art. 27, Art. 28 of the Convention, according to the Protocol No. 14.

⁵⁹ In 2017, there were 63,350 new applications, and 49,400 of these were identified as a single judge cases likely to be declared inadmissible. Comparing to 2016, there had been an increase of 36%. See ECHR. Analysis of statistics 2017. In: *European Court of Human Rights* [online]. 2018 [2018-02-19]. Available at: <http://echr.coe.int/Documents/Stats_analysis_2017_ENG.pdf>.

⁶⁰ GERRARDS, J. Inadmissibility Decisions of the European Court of Human Rights: A Critique of the Lack of Reasoning. *Human Rights Review*. 2014, Vol. 14, No. 1, pp. 148–158.

soned decisions does not correspond with the ECHR call for transparent decision-making practice. Given the serious deficit regarding the individualised reasoning of the cases, ECHR has adopted a new practise beginning on 1 July 2017. Currently, the Court issues inadmissibility decisions which contain references to specific grounds of inadmissibility.⁶¹ Nevertheless, the shortcomings in publicity still prevail.

ECHR has a collection of all the press releases issued by the Registry since 1999. Press releases inform simply and shortly about the most relevant judgements and decisions rendered by ECHR, both before and after the decision is rendered. Press releases generally contribute to the publicity and transparency of decision-making processes. Due to their comprehensible language, readers do not have to possess expert legal knowledge to follow the information. As the ECHR press releases contain references about cases and publication of full-version judgements and decisions, anyone may inspect the original version and deepen their own knowledge about relevant case law. The press releases provide recipients with brief but needed information about the case. The ECHR's press releases may be followed on Twitter, through a mailing list or by RSS feeds.⁶² The RSS feeds are quite user friendly, as subscribers can choose country-specific feeds relating to their countries of origin or other parties to the Convention they desire to follow.

ECHR tends to be quite transparent about the proceedings and other activity. According to Article 40 of the Convention, all deposited documents are publicly accessible, unless the president of ECHR states otherwise. The Convention and ECHR's practice contribute to the transparency of the decision-making process. On the other hand, ECHR publishes official version of decisions only in English or French, therefore insufficient knowledge of those languages may discourage both judges and other professional as well as lay public from any further study of ECHR's decisions.

ECHR mainly communicates with the public through a website, which is available in English or French. The website provides links to the press releases, statistical data, advices for applicants and detailed information about the Court or its proceedings. The Registry of the ECHR publishes materials and guides in case law to enhance the comprehension of ECHR's practise of law. Furthermore, ECHR informs about its study materials on Twitter, where the latest publications, information about a new case law or other documents are published also in different languages.

ECHR particularly honours the obligation of public hearings, having them streamed on the Internet via webcasts. When a person cannot travel to Strasbourg to be personally present in a specific hearing, there is a possibility to watch its video recording. The ECHR's practice of broadcasting a video from public hearing on the Internet is a good example of how courts may use specific tool of information and communication technology to promote publicity of court's hearing and its decision to the public. While watching webcasts in cyberspace, no boundaries apply for recipients, possibly except their insufficient knowledge of English or French.

⁶¹ ECHR Press Release 180(2017).

⁶² ECHR. General information. Press Releases. In: *European Court of Human Rights* [online]. [2017-05-21]. Available at: <<http://www.echr.coe.int/Pages/home.aspx?p=press&c=#n1347882722901>>.

III. 2. Court of Justice of the European Union

CJEU guarantees a uniform interpretation of Union law “as it must be or ought to have been understood and applied from time of its coming into force”.⁶³ The manner of communicating decisions of CJEU and a favourable level of openness including transparency is thus crucial for good interpretation, application and effective enforcement of the EU law.

The demand for openness and publicity applies for judges and advocates-general assisting the Court of Justice. Pursuant to Article 252 TFEU the advocate-general, acting with complete impartiality and independence, makes reasoned submissions on cases which require his involvement in *open court*. Such provision strengthens the overall openness of judicial process before the Court.

CJEU informs thoroughly about all its decisions through a link on its website. Additionally, the website provides links to press releases, schedule, advices on the method of citing its case law or national and international case law. Search form for CJEU case law is available in all EU official languages. The possibility to use one own’s language when typing down selected note of criteria, i.e. the referential text to look up the required case law, is very useful. The website provides for another important source of the EU law - the Digest of the case law (*Répertoire de jurisprudence*), a systematic collection of relevant judgements and orders of the Court of Justice, the General Court and the Civil Service Tribunal, from the very beginning of their ruling activities in the EU. The Digest brings summary of relevant decisions relating to specific areas of the EU law and therefore is quite important in the recognition and application of the EU law. However, the impact could be more significant, if the Digest was accessible in more languages than in French only. The same applies to the Annotation of judgements (*Notes de doctrines*), i.e. the opinions by legal commentators relating to the judgements delivered by the CJEU. Although both the Digest and the Annotation are mainly used by legal professionals focused on the EU law who are expected to be fluent in French, translation to more official languages would contribute to better insight in the EU law, at least within the wider public.

According to the Rules of Procedure of the Court of Justice and the General Court, reports of cases are published in all official languages of the EU. They inform about the original language of the proceedings and language spoken by the advocate-general which enables comparison of the original language version with the other official language versions. Reports contain CJEU’s decisions accompanied by respective opinions of the advocate-general where those are given. Some decisions⁶⁴ are not published in the reports, unless it is decided otherwise, and, exceptionally, the Chambers of three or five judges may decide not to publish their preliminary ruling in the reports.

CJEU has a press service with an account on Twitter in English and French. Tweets inform about the latest activity of the Grand Chamber, about current opinions of advocates-general or schedule of hearings. The Court of Justice also regularly publishes educative videos about its activities. Each tweet provides a link to the relevant press release or deci-

⁶³ 27 March 1980, Case 61/79, Amministrazione delle finanze dello Stato v. Denkavit italiana Srl [1980] ECR 1205, para. 16; 13 February 1996, Joined Cases C-197/94 and C-252/94, Société Bautiaa v. Directeur des Services Fiscaux des Landes and Société Maritime v. Directeur des Services Fiscaux du Finistère [1996] ECR I-505, para. 47.

⁶⁴ Judgements of the General Court ruled by a single judge and orders with a judicial determination.

sion. Tweets facilitate circulation of quick and apt information about ongoing activities; however, their considerable part is available only in French. Another disadvantage is that CJEU does not inform about all its decisions. Furthermore, a tweet may be sometimes misleading because of its limited format, if part of relevant information is omitted. This particular shortcoming is typical for all forms of brief information on social media.

In conclusion, the publicity of judgements and advocates-general opinions in all official languages of the EU contributes to better level of transparency of the decision-making process. Press releases and use of RSS feeds and Twitter enhance the level of openness, but in comparison to ECHR, the use of modern media by CJEU is rather limited, providing no webcasts. On the other hand, CJEU seems open towards media professionals, allowing them to contact its Press and Information Unit for explanation on legal theory and questions of law addressed in the decisions. Besides, the Press and Information Unit organises meetings with judges and advocates-general; each CJEU's language section has staff from the Unit responsible for organisation of the meetings and the questions from media towards CJEU's judges.

III.3. Germany⁶⁵

In Germany, it is generally accepted that all courts have a duty to publish their significant decisions.⁶⁶ These decisions are made available to the public, although in an anonymized form – excluding personal data of the persons involved. That allows for broad case law databases, some of which are accessible free of charge (e. g. *dejure.org*). Since German courts follow the Central European tradition of written judgments which contain thorough reasoning, the informative value of publishing the judgment itself is great. However, for a non-lawyer, whether it be a journalist or a member of the public, an extensive and thorough legal argument may pose a hindrance in understanding how the court in fact decided and why.

German Courts tend to be generally conservative in their approach to direct communication with the media and the public. They normally do not have a professional press secretary. Each court appoints a judge who serves as a spokesperson; they are responsible for issuing press announcements and communicating with the media. It is established practice that upon issuing a significant judgment, the court will make a press announcement available, briefly explaining the main concepts of the judgment. These announcements are usually published on the court's website. They regularly include a brief summation of the facts of the case, the legal reasoning of the court and information about recourses which may be taken by the parties. The press releases usually use rather factual as well as concise language; occasionally, one may encounter a “catchy” headline, such as: *“Does a psychologist need to have studied psychology?”*⁶⁷

⁶⁵ This paper takes into account highest federal courts of general justice as well as a representative number of lower courts across the federation; the Federal Constitutional Court, on the other hand, was not considered due to the specific nature of its agenda.

⁶⁶ Judgment of the Supreme Administrative Court of Germany, BVerwG 6 C.96.

⁶⁷ Schleswig-Holsteinisches Oberlandesgericht: “Muss ein Psychologe Psychologie studiert haben?” In: *Schleswig-Holstein* [online]. 27. 7. 2016 [2018-02-19]. Available at: <<http://www.schleswig-holstein.de/DE/Justiz/OLG/Presse/PI/201611Psychologe.html>>.

High courts in Germany also have an established practice of including normative sentences (*Leitsätze*) in their judgments, which summarize the decision's core conclusion. These sentences are created by judges who ruled in the respective case. The federal courts usually point out the decisions with normative sentences (*Leitsatzentscheidungen*) on their website's main page. While the Federal Administrative Court often does not add further commentary, the Federal Social Court almost always publishes a press release as well. The Federal Court of Justice, on the other hand, does not usually actively draw the public's attention to its significant judgments and publishes them amongst others in its database of decisions.

Courts in Germany usually do not communicate with the public beyond the means described above. Judges in Germany do not generally give interviews related to specific cases. As for social media presence, the only German court which has a Twitter account is the Federal Court of Justice. The account used to be very active and between March 2009 and October 2016 it shared around 10.900 tweets, usually announcing a significant judgment. However, since November 2016 the account has ceased to tweet in an apparent, yet officially unannounced change of policy. Thus, there is no active social media account of a German court at this time.

III. 4. France⁶⁸

Judgments of both the *Cour de Cassation* and the *Conseil d'État* are relatively short and always begin with the same introductory phrase. The decisions refer very briefly to the facts of the case, with no reference to previous decisions in the matter. In plenary cases, names of the judges in panel are stated, while in chamber judgments only the president of the chamber is named. The judge rapporteur is not stated but dissenting opinions are published. The *Cour de Cassation's* mode of application of law is syllogistic, mechanical and deductive.⁶⁹ One of the most striking things is that the reasoning refers only to the legislation, other reasons for justification are not given.

The *Cour de Cassation's* website is user-friendly and informative. It contains materials about structure and activity of the court, names of the judges and photos of the president of the court and its chambers, it does not, however, contain any biographical information. A great benefit of the website is a possibility to use an individual password to follow the progress of a case by its parties.

The *Cour de Cassation* communicates its judgements and other important events through press releases, an RSS feed and Twitter. It has a press service and translates the most important judgements into English, Spanish, Arabic, Chinese, Japanese and Russian.

⁶⁸ This section deals with France's two supreme courts: the *Cour de Cassation* and the *Conseil d'État*. The *Cour de Cassation* is the supreme court in civil and criminal law matters. It is a rather big jurisdiction, containing six chambers, 120 judges and 33 advocates general. It has no possibility to choose its cases. The *Coseil d'Etat* is the French Supreme Administrative Court. The court consists of the vice-president and around three hundred judges divided into six sections. The paper does not deal with the *Conseil Constitutionnel* due to its specific non-judicial nature.

⁶⁹ LASSER, M. *Judicial Deliberations. A Comparative Analysis of Judicial Transparency and Legitimacy*. Oxford: Oxford University Press, 2009.

It also issues case reports, the so-called “*notes explicatives*”. Its case law may be searched through the website legifrance.gouv.fr.⁷⁰ The *Cour de Cassation* also publishes a compilation of civil, labour and criminal law judgements. The decisions of lower French courts are accessible through the website legifrance.gouv.fr as well, however in a relatively small number.⁷¹

The *Cour de Cassation* is currently undergoing a reform. It has been proposed that the court should enrich justification of its decisions, cite previous case law and the case law of CJEU and ECHR. Furthermore, opinions of advocates general should be published to enhance the transparency of the judicial process.⁷²

While it is also possible to find its judgments through the general website, the *Conseil d'État* has its own web database called ArianeWeb, which contains over 230.000 decisions, the most important judgments since 1873 and the majority of all decisions since 1999. Its collection of the most important judgments is called “*Recueil Lebon*”. On ArianeWeb, the *Conseil d'État* publishes an analysis of the public rapporteurs.⁷³ The *Conseil d'État* communicates its judgments through press-releases and press-service. It does not use Twitter or Facebook account, just an RSS feed.

French judges in general do not tend to give interviews related to specific cases. Interviews given by judges usually concern judicial activity in general and the role of a judge.⁷⁴ The *Cour de Cassation* publishes on its website speeches and interviews given by the president of the court and its chamber presidents.

In conclusion, the French judiciary is, on the one hand, rather non-transparent, as neither the names of the judges sitting in a panel nor that of the judge rapporteur are disclosed; no dissenting opinion is published and the reasoning is short and syllogistic. On the other hand, publicity of its decisions is quite significant as supreme courts, the *Cour de Cassation* and the *Conseil d'État* respectively, make their decisions available on the Internet. Furthermore, both institutions communicate with the public through press releases, spokespersons and, in the case of the *Cour de cassation*, also via Twitter.

⁷⁰ See the Regulation No. 2002-1064 of 7 August 2002 concerning the diffusion of law on the Internet.

⁷¹ There are only two decisions for the year 2016 and none from the years 2015 and 2017.

⁷² Recommendations of the Commission on the reflection of the reform. In: *Cour de Cassation* [online]. 2017 [2018-02-19]. Available at: https://www.courdecassation.fr/cour_cassation_1/reforme_cour_7109/reflexion_reforme_8182/liste_propositions_36786.html.

⁷³ The public rapporteur at the Conseil d'Etat is a similar function to the advocate general at the Cour de Cassation. They give their opinion publicly on the issues of the case before it is decided by the judicial panel. For more information, see CONSEIL D'ETAT. Comment se déroule l'audience? In: *Le Conseil d'État et la Juridiction Administrative* [online]. 2017 [2018-02-19]. Available at: <http://www.conseil-etat.fr/Conseil-d-Etat/Demarches-Procédures/L-examen-des-requetes-et-l-audience/Comment-se-deroule-l-audience>.

⁷⁴ See for example Entretien avec M. le juge fédéral Giuseppe Nay, Président du Tribunal fédéral suisse. In: *Conseil Constitutionnel* [online]. 2005 [2018-02-19]. Available at: <http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/nouveaux-cahiers-du-conseil/cahier-n-18/entretien-avec-m-le-juge-federal-giusepe-nay-president-du-tribunal-federal-suisse.51919.html>.

III. 5. Ireland⁷⁵

Opinions of the Supreme Court of Ireland are written by one judge of the majority; however, any judge in any case may deliver a separate dissenting opinion, which is then published together with the ruling one. The only exception is when judicial review of legislation is being carried out – in that case, no dissenting opinion shall be pronounced.

Website of the Supreme Court of Ireland has a simple form to search for the court's judgements. Each judgement includes information on concurring and dissenting opinions. The majority of judgements are written in a very intelligible language. Each judge is speaking for themselves, presenting their personal point of view. Most of the judgements contain introduction to the facts of the case, history of the proceedings and the conclusion. However, a short and distinctive clause of the issue of law is normally missing, which is a disadvantage - since such approach does not contribute to clear outcome of judgements for future disputes and leaves the decisions open for future interpretation.

The Supreme Court's website provides a list of its important judgements. This inventory consists of judgements from different legal branches since 1934. However, a present disclaimer warns that the list of selected case law is arbitrary and not intended to be comprehensive. The question then arises, what criteria there have been for selection of relevant Irish case law. The process of selection is significantly influenced by the Law Reporting Council of Ireland, which is a joint venture of judiciary and other legal professionals.

Compared to other courts, the Supreme Court of Ireland's website has poor content. A digest of the case law is missing as well as any link to a press service. The Supreme Court of Ireland does not communicate with public through any social platforms such as Twitter or Facebook. Its judges usually do not individually communicate with the public. Information about the court system in general is provided by The Court Service of Ireland, which has its own website where judgements of all Irish courts are published.

To conclude, the means of communicating judicial decisions by the Supreme Court of Ireland are quite limited. Notwithstanding intelligible language of its judgements, the Supreme Court of Ireland does not communicate its decision via social media platforms.

III. 6. The Czech Republic⁷⁶

The approach of Czech judiciary to communication with the public significantly differs amongst different courts. When the decision is pronounced by Czech courts during a hearing, brief reasoning is given by presiding judge to the parties and the public present in the courtroom. However, in some cases no hearing is held and the parties (and the public), in

⁷⁵ This section focuses on the Supreme Court of Ireland which is the court of final appeal in both civil and criminal law cases. It also has jurisdiction as interpreter of the Irish Constitution, thus also functioning as a constitutional court.

⁷⁶ This section is based on our knowledge of the Czech judicial system in general, with special focus on the supreme courts, i.e. the Constitutional Court, the Supreme Court and the Supreme Administrative Court. Similarly to Germany, the Czech Constitutional Court has jurisdiction over individual constitutional complaints and thus functions not only as interpreter of the Constitution *in abstracto* but reviews constitutionality of concrete judicial decisions. The Supreme Court has jurisdiction in civil and criminal law cases, the Supreme Administrative court is the court of final appeal in administrative law cases.

the form of formal announcement, only learn the result and not its reasons. In cases where the ruling is widely expected by the public, this often creates an atmosphere of nervousness and speculations which can quite damage reputation of the judiciary.

Recently, the Supreme Court ordered an appellate court to take a new decision in a case in which an advisor to a former prime minister had been convicted of corruption charges. This decision became immediately known to the press as the accused person was released from prison. However, the Supreme Court's spokesperson refused to indicate in any way what the judgment's reasoning might be, announcing that the written judgment would be published within thirty days. Wild speculations among journalists as well as the public followed as to the possible, even illicit reasons for which the judges might rule in favour of the accused. After being subjected to enormous public pressure, the court issued a press release explaining the main reasoning of its decision (based on which the accused would very likely be convicted again in the continuing proceedings). However, the Supreme Court insisted that it would not bow to public pressure and would continue the practice of first writing the full judgment and delivering it to the parties and only subsequently informing the public.⁷⁷

Some of the other courts, especially the Supreme Administrative Court, choose a different approach. Firstly, the Court usually does not issue a ruling until it can immediately release the full written judgment. Secondly, a press release is issued right after the decision, explaining the main points of the judgment. While it is understandable that the written judgment must at times be subject to some finishing touches, the court must obviously always be aware of the basic reasons of the decision and can share those with the public in a brief press statement. Nevertheless, this sensible approach is rarely taken by any other Czech court. According to our opinion, in cases dealing with sensitive political and social issues, even the courts in criminal proceedings, which have to take a decision without any undue delay, especially when dealing with unlawful restraint, should prepare a brief statement for the press about decision just rendered.

All courts in the Czech Republic appoint a spokesperson. At lower courts which communicate with the media only occasionally, it is usually one of the judges. Higher courts and courts dealing regularly with cases which are of interest to the public often hire a professional press secretary who is not a judge and often not even a lawyer. Judges rarely give interviews to the press regarding recently decided cases; at times, however, involuntary interviews are recorded when a judge is “ambushed” by a journalist. Czech courts lack social media presence with the sole exception of the Constitutional Court, which has a Facebook account. The account draws followers' attention to the latest press releases regarding significant decisions, sometimes with a witty commentary. The Judiciary Union of Czech Republic, a professional association of Czech judges, supports the general idea of providing media with information about Czech judiciary and justice system, but it neglects the topic of spokespersons.⁷⁸ The Judiciary Union has currently been considering the issue of

⁷⁷ SUPREME COURT OF THE CZECH REPUBLIC. Press Release. In: *Nejvyšší soud* [online]. 2017 [2017-04-20]. Available at: <www.nsoud.cz>.

⁷⁸ Statutes of the Judiciary Union of Czech Republic and its Ethical Principles of Judicial Conduct are available at <http://sucr.cz/>.

judges' activity on social media and on the Internet in general;⁷⁹ the guidelines about the expression of judges' personal opinions on the Internet have been issued as well.⁸⁰

Interestingly, when a higher court decides in criminal cases outside of public hearing, the decision does not include names of all judges on the deciding panel. The presiding judge is signed and sometimes the judge rapporteur's name is also included; however, names of the full panel are known to the parties only. Therefore, the public and media often interpret the decision as having been primarily authored by the presiding judge even though such judge may well have been outvoted by other judges on the panel (dissenting opinions are not issued at Czech criminal courts). It follows that the presiding judge is usually targeted by the media as being responsible for explaining the decision and even advocating for it.

Only the supreme courts, such as the Constitutional Court, the Supreme Court and the Supreme Administrative Court, publish their decisions (anonymized) on their respective websites,⁸¹ once they have been delivered to the parties; judgments of lower courts are not regularly published (with exception of the majority of decisions in administrative matters). However, any court is obliged to publish any judgment upon a request under the freedom-of-information act. As the Constitutional Court ruled in 2010, the constitutional guarantee of freedom of information requires courts to make any decision which the public might require, available, even if it is still subject to overturning by a higher court.⁸²

There is a significant difference between approaches of the Supreme Administrative Court and the Supreme Court to writing judgments. With a certain degree of generalization, one might conclude that while the Supreme Administrative Court usually gives quite thorough reasoning, citing domestic as well as international case law, the Supreme Court often limits its decisions to more simplistic statements of what the law is. However, it has been apparent in recent years that many of the Supreme Court's chambers slowly move towards more thorough argumentation, which might be more persuading to the professional public.

Each of the supreme courts mention above publishes its selected decisions and occasionally even important decisions of lower courts in case reports. These always include normative sentences which should summarize the decision's *ratio decidendi*. However, unlike in Germany, these summations are formulated only after the decision had been written. These decisions are generally, although informally, respected as binding case law. There are also numerous private databases of case law aimed at the professional public; these databases work with the decisions which are published on the supreme courts' websites even when they have not been officially published in case reports.

⁷⁹ Interview with the President of the Judiciary Union, Daniela Zemanová. *Soudce*. 2017, No. 1, p.7.

⁸⁰ CZECH JUDGES UNION. Ethical Limits of Judges' Activity on Social Media. In: *Soudcovská unie České republiky* [online]. 24. 5. 2017 [2018-02-19]. Available at: <<http://www.soudci.cz/zpravy-a-stanoviska/pohledy-a-nazory/843-eticke-meze-pusobeni-soudce-na-socialnich-sitich.html>>.

⁸¹ See webpages nalus.usoud.cz, www.nssoud.cz and www.nsoud.cz.

⁸² The Constitutional Court of Czech Republic. Judgement of 30 March 2010, No. Pl. US 2/10, ECLI:CZ:US:2010:Pl.US.2.10.1.

III. 7. Synthesis

For most of the European courts it is natural to comply with the ECHR case law regarding the proper justification of courts' decisions. However, there are still judges who argue that giving reasons for judicial decisions is mostly unnecessary, as courts are primarily expected to hand down a ruling, not to provide the public with elaborate explanations. For illustration, the vice-president of Czech Supreme Court noted in a recent interview that “[i]f European courts stopped giving reasons for their decisions with only a few exceptions, the problem of speedy process in Europe would be solved.”⁸³ In our view, such opinion is untenable.⁸⁴ Proper reasoning of the decision should serve not only to the parties of the proceedings. It shall create a better future judiciary and contribute to a just society itself.

According to the survey conducted by the European Network for Councils for the Judiciary among European judges in 2011, it was very unusual for courts to have an official Facebook or Twitter account or even to have an experience with social media at all.⁸⁵ However, in our comparative analysis a number of courts turned out to use Twitter to inform about public hearings or recently published judgements. Nowadays, most supreme European courts such as ECHR, CJEU, the German Federal Court of Justice and the French *Cour de Cassation*, have their own account on Twitter. The Czech Constitutional Court, on the other hand, prefers Facebook. Only the Supreme Court of Ireland, the French *Conseil d'Etat* and the Czech supreme courts do not use either Facebook or Twitter.

All mentioned judicial institutions have their own website with general information about the respective institution and its proceedings. The website of ECHR has the richest content. ECHR is also the only court which has adopted the practise of live broadcasting of public hearings through webcasts.⁸⁶ Webcasts enable the public to follow public hearing before the court online, without the need to sit in the court room, and are therefore a very good example of effective use of cyberspace with the aim of promoting publicity and transparency of proceedings, especially when deposited documents are publicly accessible as well. On the other hand, live broadcasting of court sessions is not allowed in most Council of Europe Member states' courts, but there are notable exceptions: it is possible at the UK Supreme Court or in Italy, if the judge and the parties of the case agree, or in civil proceedings in Norway.⁸⁷ In Turkey, on the other hand, there is currently a push by human rights activists for live broadcasts of criminal trials related to the failed coup attempt of 2016.⁸⁸

⁸³ Interview with Roman Fiala. In: *Rozhlas* [online]. 1. 11. 2016 [2017-04-20]. Available at: <www.rozhlas.cz>.

⁸⁴ See the above mentioned ECHR decision in *Ryakib Biryukov v. Russia*, Judgement of 17 January 2008, ECLI:CE:ECHR:2008:0117JUD001481002.

⁸⁵ ENCJ. Justice, Society and the Media. Report 2011–2012. In: *European Network of Councils for the Judiciary* [online]. [2018-02-19]. Available at: <https://www.encj.eu/images/stories/pdf/GA/Dublin/encj_report_justice_society_media_def.pdf>.

⁸⁶ Webcasts available at <http://www.echr.coe.int>.

⁸⁷ ENCJ. Justice, Society and the Media. Report 2011–2012. In: *European Network of Councils for the Judiciary* [online]. [2018-02-19]. Available at: <https://www.encj.eu/images/stories/pdf/GA/Dublin/encj_report_justice_society_media_def.pdf>.

⁸⁸ See the text of a petition at SEZGIN, I. We call for transparency in Turkish courts! In: *Change.org* [online]. [2018-02-19]. Available at: <https://www.change.org/p/we-call-erdogan-to-enable-transparency-in-the-court-proceedings?source_location=petitions_share_skip>.

In most EU Member states, it is deemed inappropriate for a judge to give interviews to the media regarding a specific case, even after delivering the final ruling. The court's spokesperson is often the only person entitled to inform the public about cases through the media.⁸⁹ Having a press service or at least a spokesperson is not a rarity but a necessity for all the courts. Nevertheless, some press services are more active than others. CJEU's press service expressly offers organised meetings with judges where media may ask a legal question addressed in the court's decision. On the other hand, spokespersons of Czech lower courts are usually judges who suffer considerable lack of time and therefore avoid any unnecessary communication with the media or the public.

All the above mentioned supreme courts have online databases of their decisions. They generally publish various types of decisions, including dissenting opinions. CJEU is a leader in online publication of decisions. It puts emphasis on greater publicity of its decisions through a well-organized internet database, press-releases and social media. However, CJEU still falls behind in transparency, as it does not publish dissenting opinions, its judgments are quite short and syllogistic. Moreover, as the case *Breyer vs. Commission* has recently shown, the issue of access to documents before CJEU may be problematic. Similar observation applies to French judiciary, where both supreme courts do not publish dissenting opinions and only briefly explain their decisions.

Our comparative analysis has shown that most, if not all European courts are moving towards greater transparency. Even the French *Cour de Cassation*, which is according to Lasser a non-transparent institution, has been considering a revision of its approach to the public, including the style of reasoning of its decisions. Surprisingly, in the field of openness, all the courts mentioned above go beyond the requirements of the case law of ECHR or CJEU. As judges and courts are playing more significant role in society today, their will to enhance communication with the public through publication of judgments, press-releases and social media posts is understandable. The public consequently wants to have greater control over judiciary through the ability to see what is going on in the judicial process. The increase of judicial powers might lead to deeper curiosity related to the judges' identity and background. In this aspect, the courts mentioned above differ. For example, the Czech Supreme Administrative Court publishes both photos and biographies of its judges, some courts publish only the names of judges and others do not present their judges to the public at all.

IV. NORMATIVE ANALYSIS

After analysing specific issues of openness, publicity and transparency regarding particular European courts mentioned above, we decided to come up with a proposal of guidelines of judicial good-practice in the field of openness. The proceedings must be open to the public and judgements shall be given in written form and subsequently pub-

⁸⁹ ENCJ. Justice, Society and the Media. Report 2011-2012. In: *European Network of Councils for the Judiciary* [online]. [2018-02-19]. Available at: <https://www.encj.eu/images/stories/pdf/GA/Dublin/encj_report_justice_society_media_def.pdf>.

lished as soon as possible after being issued. Case law should be published to the greatest possible extent via public and user-friendly web databases. Decisions of lower courts should be accessible as well. Social media are useful for brisk information about newly rendered judgments but they should be used conservatively, as there is a great risk that inappropriate social media coverage would undermine the public picture of the court. On the other hand, it is advisable to choose only one type of alternative channel of disseminating information about judicial decisions, i. e. either through Facebook or Twitter, not both, as otherwise the public might get confused, overwhelmed or disinterested.

To enhance transparency of the court, high courts should allow dissenting opinions to allow the addressees of the judicial decisions to see the different arguments and perspectives in difficult cases. They should also identify the judge rapporteur.⁹⁰ It is useful for high courts to provide short information about judges' professional background and expertise.

As for communication with the media, we believe that courts, particularly high courts developing case law, should have a professional spokesperson who would be the point of contact between the public and the judges. It is also very useful to communicate important judgments to the public through press releases. Although, for the reasons stated above, press releases should only be published in cases which have wider societal consequences and are thus bound to start a public debate. Courts are then able to ensure a certain degree of control of the way in which their decision is presented to the public in the media. In contrast to outcomes of our empirical findings, we believe that a judge should have a right (not an obligation) to communicate with media and the public. Interviews given by judges are in our opinion beneficial as an explanation of the decision to the public, enhance legal awareness and public trust in the judiciary and also improve the quality of judicial decisions. Judges and spokespersons shall only explain the decisions, not attempt to defend them, as there is no place for further justification of the result but the decision itself. What is not in the decision should not be communicated to the public. The judge must keep a professional distance. Still, judges must be aware of the potential risks of media communication. Media presentation and media communication should thus be part of the judicial education.

V. CONCLUSION

To conclude, we may observe a general trend amongst the European judiciary towards more openness, i.e. both towards more transparency and more publicity. Publicity and transparency do not necessarily correlate. Publicity without transparency contributes to a deity-like perception of judiciary where judges decide cases from an inaccessible divine position. A strong example of this approach is the Czech Supreme Court or the *Cour de Cassation* which significantly lag in the field of transparency.

While publicity of judicial decisions issued in processes lacking transparency at least raises public awareness of case law, transparency without publicity defeats its own purpose. Even when court documents are broadly accessible, the public has a difficult time

⁹⁰ We may also add that the manner of case allocation should be stated clearly.

perceiving what information is significant and how to interpret it. That may result in misconceptions capable of damaging the relationship between courts and the public. Therefore, judicial transparency should always come in hand with an adequate strategy for active communication with the public. Nonetheless, different states have different dispositions towards judges speaking to the media, using social media, as well other means of communication with the public.

Some still believe that courts can decide promptly and effectively only when they do not have to provide extensive reasoning to support their conclusions. In a world where authority is derived from persuasiveness, this approach deteriorates public trust in the judiciary and the rule of law. In its extreme form, it is also incompatible with the right to a fair trial, as interpreted by ECHR's case law.