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The administrative functions of the Court of Justice of the European Union

Nikos Vogiatzis[*]

This article focuses on aspects of the Court of Justice's work that have received, to date, very limited scholarly attention: its administrative functions. It demonstrates that understanding what constitutes the Court's administrative functions has implications pertaining to the access to document regime, as well as the scope of supervision by both the European Ombudsman and the European Data Protection Supervisor over the Court of Justice. Through a critical examination of the applicable legal framework concerning the CJEU's administrative functions, as well as an exploration of several 'missed opportunities' which could have been used by the Court to provide further clarity on this matter, it is argued that the Court has elected to proceed on a purely ad hoc *basis, with a view to strengthening its autonomy and expanding its discretion. This explains its reluctance to provide further clarity on the scope of its administrative functions. The time is now appropriate for the Court to improve its accountability and transparency vis-à-vis its non-judicial work. Thinking about the way forward, since the delineation of the Court's administrative functions should preserve the latter's* independence*, while simultaneously improving its* accountability and transparency*, the article argues (and explains how) the Court should apply a more principled (and publicly available) approach, with a view to deciding when the activity or document in question is 'administrative'.*

Introduction

The role of the Court of Justice of the European Union (CJEU, the Court) as a judicial institution has been the subject of extensive scholarly work. The present contribution is concerned, however, with a much more neglected aspect of the CJEU's work, namely its administrative functions. The implications of a CJEU activity being classified as 'administrative' should be spelled out at the outset: administrative functions are subject to scrutiny by the European Ombudsman and the European Data Protection Supervisor, while documents which are administrative in nature are subject to a request for access. That is not the case with the Court's judicial functions. In other words, the special, more restrictive regime (in terms of transparency and accountability) that applies to the Court's judicial work does not apply to its administrative work.

This article argues that, to date, the Court has refrained from delineating the boundaries of the judicial and the non-judicial as this preserves its autonomy; nevertheless, the existing *ad hoc*

[*] Senior Lecturer, School of Law, University of Essex. An earlier version of this paper was presented at a Public Law Cluster seminar at the University of Essex in 2019; I thank all participants for their comments and observations. For comments on a later version I am very grateful to Maurice Sunkin, Carlo Petrucci and the anonymous reviewer. The usual disclaimer applies. The article considers developments up to the end of July 2021.

approach is not optimal from the point of view of transparency and accountability. The Court's reluctance to provide further clarity and guidance on what its administrative functions entail (or engage in a debate about this matter) is brought to the fore in this article via a number of 'missed opportunities', which may not be viewed in isolation, but rather reveal a general tendency, on the part of the Court, to preserve its significant discretion to decide on a case-by-case basis. Such approach entails a risk that any activity could essentially be associated (either loosely or more closely) with the judicial functions of the CJEU.

Reflecting on the way to depart from the current unsatisfactory practice, this contribution approaches this question from a viewpoint whereby securing, on the one hand, judicial independence and, on the other, increasing the CJEU's openness, transparency and accountability are competing but not irreconcilable demands. It is argued that in order to find an appropriate balance, in this respect, it should be the CJEU itself, in the first instance, that should provide further clarity on the scope of its administrative functions. This could be achieved on the basis of developing a set of principles that would determine whether openness and accountability requirements would actually undermine the Court's independence. If the answer is in the negative, it should be possible to classify the activity in question as 'administrative'.

It is accepted that attempting to draw clearer boundaries between the 'judicial' and the 'non-judicial' is a considerably challenging task. Nevertheless, it is a task that cannot and should not wait any longer: sufficient time has elapsed since the Court was firstly presented with this dilemma, and the accumulated experience over these years will have provided the Court with the tools to depart from the *ad hoc* approach and develop a set of principles to that effect, as stated earlier.

In this context, the article sheds light on the CJEU's non-judicial work, an area which has received very limited scholarly attention. Moreover, it contributes to the ongoing and pressing debates on judicial independence and improving transparency and accountability of the judiciary. On the question of accountability more specifically, it expands the debate beyond the confines of the CJEU's judicial functions, and shows how further clarity on the CJEU's administrative functions has implications across various areas/ levels of control: the supervision by the European Ombudsman and the European Data Protection Supervisor over the Court's non-judicial functions, and of course the access to documents regime.

The article proceeds as follows. First, it provides a brief overview of the CJEU's administrative set-up, before elaborating on the legal framework surrounding the Court's administrative functions. Second, it addresses a number of missed opportunities to provide further clarity on the Court's administrative functions: these pertain to the legal framework (and revisions thereof) on access to documents and data protection; the Court's replies to the investigations and other queries by the European Ombudsman; and the case of *Dehousse* v *Court of Justice*.[1] Third, reflecting on the way forward, the penultimate section situates the discussion on the Court's administrative functions in the context of a dialectic relationship between judicial independence and increased accountability and openness. From there, it is explained how the Court can depart from the current purely *ad hoc* approach. It is argued that it should be left to the Court itself, in the first instance (and therefore not to institutions external to it), to provide further clarity on this matter, but also that its discretion should be confined via the development of a set of principles that would determine when its independence and impartiality would actually be undermined.

The legal framework surrounding the Court's administrative functions and why this discussion matters

Every institution (be it legislative, judicial or executive in nature) undertakes administrative tasks so as to operate. Yet, if we focus on courts, what precisely such administrative functions may entail is a contested topic.[2] For instance, many will view activities concerning the preparation and management of a tender as falling under the courts' administrative functions; but what about the translation of a published case into other languages, or even the appointment of staff (other than judges)? In addition, there can be activities which are not absolutely indispensable for the courts' operation, and yet cannot be deemed to fall within their judicial work: the organisation of visits to the premises of a court so that citizens familiarise themselves with its work can serve as a helpful example, in this respect.

In this context, devoting the required attention to the administrative tasks of courts is important for a number of reasons. To begin with, pragmatically, such tasks enable courts to carry out their judicial functions. A related, albeit partly distinct, reason is that properly organised

[1] Case T-433/17, *Franklin Dehousse* v *CJEU*, EU:T:2019:632.
[2] Murray Schwartz, 'The other things that courts do' (1981) 28 *UCLA Law Review* 438. For a discussion on the CJEU's administrative functions with respect to Article 15(3) TFEU see 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, at 113-116.

administrative functions have the potential to improve the quality of 'court management', including judicial efficiency and implementation of judgments.[3] In addition, as noted earlier, non-judicial work enables courts to reach out to external stakeholders beyond the courtroom: for example, by organising visits, exhibitions and other events (activities which are likely to be considered non-judicial, at least in the strict sense), such work contributes to improving courts' external image, and can bridge the gap with citizens who may not have a direct interest in the outcome of specific cases. Moreover, the administrative functions of courts, once dissociated from judicial functions, raise different questions and standards in terms of accountability and transparency: applying horizontal standards across both tasks would not be optimal, because judicial independence is not equally affected in both cases. In other words, effective scrutiny of administrative tasks that does not undermine judicial independence should, in principle, be acceptable.

To date, the discussion on the CJEU's transparency and accountability has focused on the latter's judicial functions. Earlier[4] and more recent[5] studies have underlined a number of important points about, among others, the limited possibilities of third parties to access court documents or the absence of live-streamed or recorded oral hearings.[6] It should be remembered that the right to a public and fair hearing is enshrined under Article 6 ECHR[7] and under Article 47 of the EU Charter of Fundamental Rights. As Dahlberg observed, publicity of court proceedings increases public confidence in the judiciary, promotes the fairness of the proceedings and reveals arguments and considerations that may not be included in the judgment.[8] In brief, it strengthens the legitimacy and accountability of the judiciary.[9]

The Court's jurisprudence on public access to judicial documents which are in the possession of other EU institutions has drawn a distinction between pending and closed cases. For pending

[3] See, among others, Judith Resnik, 'Managerial judges' (1982) 96 *Harvard Law Review* 474; Daniela Piana, 'Reforming the judiciary through standards: agency empowerment and centre (re)building in Italy, 2001–2015' (2017) 83 *International Review of Administrative Sciences* 757.
[4] Alemanno and Stefan (n 2).
[5] 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.
[6] The Court also retains significant discretion regarding whether a hearing is necessary in order to give a ruling; see Chapter 6 of the Consolidated version of the Rules of Procedure of the Court of Justice of 25 September 2012 (hereinafter the 'Rules of Procedure') and, in particular, Article 76 thereof.
[7] On how the term 'public hearing' under Article 6(1) ECHR has been interpreted by the European Court of Human Rights see, among others, European Court of Human Rights, 'Guide on Article 6 of the European Convention on Human Rights, Right to a fair trial (civil limb)' (2021), pp. 81-87, available at: https://www.echr.coe.int/documents/guide_art_6_eng.pdf.
[8] Dahlberg (n 5) 310-311.
[9] Ibid.

cases, in *API* the CJEU held that a 'general presumption' of non-disclosure applies.[10] In particular, the Court found that '[d]isclosure of the pleadings in question would have the effect of exposing judicial activities to external pressure, albeit only in the perception of the public, and would disturb the serenity of the proceedings'.[11] The 'general presumption' would not apply, however, in closed proceedings. This has been confirmed in *Breyer*, where the Court found that the Commission should grant access to pleadings submitted by a Member State (and which are in its possession) where the proceedings in question have been closed.[12] Importantly, the CJEU also clarified that the exemption under Article 15(3)(4) TFEU (discussed below in in this contribution) has no bearing on that finding.[13] The Court stressed, in this respect, that such broad interpretation of the principle of access to documents of the EU institutions is justified in light of Articles 1 TEU and 15(1) and 298 TFEU (the principle of openness) and Article 42 of the EU Charter (right of access to documents).[14] Although *Breyer* was a positive development in the Court's case law, allowing access to documents in the possession of other EU institutions when the case is closed[15] does not signify a significant shift in transparency terms: thus, the CJEU is likely to continue to face calls to become more proactive in facilitating access to documents and -more generally – openness in its activities.[16] The above brief analysis will facilitate understanding of the discussion on the Court's administrative functions, which is the focus of the present article.

To provide a clearer picture on the possible scope of the CJEU's administrative activities, it is useful to consider the administrative set-up of the Court, on the basis of information provided on the Court's website[17] and its Rules of Procedure. The set-up of the institution has the primary aim of enabling the Court to perform its judicial functions. A key role in the administration of the Court is undertaken by the Registrar, who is also the Secretary-General. Thus, she 'shall

[10] Joined Cases C-514/07 P, C-528/07 P and C-532/07 P, *Sweden and Others* v *API and Commission*, EU:C:2010:541.
[11] Ibid, para 93. For further discussion see, among others, Paivi Leino, 'Just a little sunshine in the rain: The 2010 case law of the European Court of Justice on access to documents' (2011) 48 *Common Market Law Review* 1215, at 1228-1234.
[12] Case C-213/15 P, *Commission* v *Breyer*, EU:C:2017:563.
[13] Ibid, paras 47-52.
[14] Ibid, para 52.
[15] According to Advocate General Bobek, in *API* 'the Court did not rule out, as a matter of principle, access to the Commission's pleadings in pending cases (and certainly not in closed ones). It only established a general presumption of a risk to the protection of court proceedings in pending cases'; see Opinion of Advocate General Bobek in Case C-213/15 P, *Commission* v *Breyer*, EU:C:2016:994, para 36. A fuller consideration of this question falls outside the scope of the present article.
[16] See, for example, Deirdre Curtin and Päivi Leino-Sandberg, 'Openness, Transparency and the Right of Access to Documents in the EU. In-Depth Analysis', Working Paper, EUI RSCAS, 2016/63, pp. 24, 26.
[17] See the Court's organisational chart at: https://curia.europa.eu/jcms/upload/docs/application/pdf/2018-01/en.pdf.

direct the services of the Court under the authority of the President of the Court' and 'be responsible for the management of the staff and the administration, and for the preparation and implementation of the budget'.[18] The Registrar is appointed by the Court,[19] and is normally present at the 'general meetings' of the latter, where 'administrative issues' are also discussed.[20] The above demonstrates that the Court is essentially managed by judges and staff members attached to the Registry. This is desirable and facilitates the preservation of the Court's independence, as will be shown in subsequent sections.[21] Simultaneously, such autonomy underlines that the distinction between judicial and non-judicial matters cannot be made on the basis of the person or the office, within the Court, who/ which makes the decision.

The Registrar coordinates three main Directorates-General, namely the DG for Administration,[22] the DG for Multilingualism[23] and the DG for Information.[24] Additional offices that fall under the coordinating role of the Registrar include the Legal Adviser for 'administrative cases', the Data Protection Officer, and the Research and Documentation Directorate – among others. The Court also publishes an Annual Activity Report for each financial year, in accordance with Article 74(9) of the Financial Regulation.[25]

Before analysing the legal framework on administrative matters, a note on terminology is appropriate. The article uses primarily the term administrative 'functions', but also - and interchangeably - the terms administrative 'tasks' or administrative 'matters'. Is there something particular to the term 'functions' that should discourage the use of the word when referring to the Court's non-judicial work? The answer is in the negative: consideration of the

[18] Article 20(4) of the Consolidated version of the Rules of Procedure of the Court of Justice of 25 September 2012 (hereinafter the 'Rules of Procedure').
[19] Article 18(1) of the Rules of Procedure.
[20] Article 25 of the Rules of Procedure – unless the Court decides that they will not be present.
[21] According to the Court's website, '[l]ike the other European Union institutions, the Court of Justice enjoys administrative and budgetary autonomy'; see https://curia.europa.eu/jcms/jcms/Jo2_13977/.
[22] The following Directorates fall under this DG: Directorate for Human Resources and Personnel Administration; Directorate for the Budget and Financial Affairs; and Directorate for Buildings and Security. The Court's website contains further details about the sub-units.
[23] The following Directorates fall under this DG: Interpretation Directorate; Legal Translation Directorates A and B.
[24] The following Directorates fall under this DG: Directorate for Information Technology; Library Directorate; and Directorate for Communication.
[25] Regulation (EU, Euratom) 2018/1046 of the European Parliament and of the Council of 18 July 2018 on the financial rules applicable to the general budget of the Union, OJ L 193/1.

legal framework,[26] the Court's case-law[27] and legal scholarship[28] indicates that, at least insofar as the CJEU is concerned, this is not a particularly controversial choice.[29]

Access to documents

The right of EU citizens and residents to access documents is enshrined in the Treaties (Article 15(3) TFEU[30]) and under Article 42 of the Charter of Fundamental Rights.[31] The well-known piece of legislation on access to documents is Regulation 1049/2001,[32] which covers European Parliament, Commission and Council documents but has also served as the basis for the regulation of access to documents of other EU institutions and bodies. Nevertheless, Article 15(3) does not fully apply to the Court of Justice. Indeed, its fourth subparagraph states that the 'Court of Justice of the European Union, the European Central Bank and the European Investment Bank shall be subject to this paragraph only when exercising their administrative tasks'.

In this context, the Court adopted its first Decision on access to 'administrative documents'[33] in 2012;[34] this Decision has been amended twice and the latest version is that of November

[26] See 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*, OJ C 45/2 (and Article 1(1) of the said Decision on its scope of application) (emphasis added).
[27] See, in particular, *Dehousse* v *CJEU* (n 1).
[28] As Sunkin explains, with reference to Section 6(3) of the UK Human Rights Act, judicial review adopted two approaches to the term 'functions of a public nature': an institutional and functional approach. The institutional approach is informed by the nature of the body's legal authority or the 'institutional proximity' to the state, while the functional approach directs to the functions themselves, thereby enabling judicial review of private or hybrid authorities which exercise significant public functions. See Maurice Sunkin, 'Pushing forward the frontiers of human rights protection: The meaning of public authority under the Human Rights Act' [2004] Public Law 643. The functional approach suggests (or rather confirms) the viewpoint advanced here that judicial functions cannot be merely determined with reference to the institutional nature of the decision-maker: courts adopt also other decisions which do not pertain to their judicial functions.
[29] In fact, the French version of Article 15(3)(4) TFEU refers to *fonctions administratives*.
[30] This provision is worded as follows: 'Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, shall have a right of access to documents of the Union's institutions, bodies, offices and agencies, whatever their medium, subject to the principles and the conditions to be defined in accordance with this paragraph.'
[31] See further Joana Mendes and Deirdre Curtin, 'Article 42' in Steve Peers et al (eds) *The EU Charter of Fundamental Rights: A commentary* (Hart Publishing 2014) 1100.
[32] Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, OJ L 145.
[33] This is the term used on the CJEU's website; see https://curia.europa.eu/jcms/jcms/P_184871/en/.
[34] This step was described shortly afterwards as an 'important', 'commendabl[e]' development, but it was also argued that, 'in the interest of openness and legal certainty, further legislative action [was] needed to distinguish between the Courts' judicial and administrative tasks, in order to ensure the exact limits of the Article 15(3) exception'; failing that, the case-law could determine the matter. See Alemanno and Stefan (n 2) 99, 138.

2019.[35] Importantly, none of these Decisions (including the latest version currently in force) attempted to delineate, or at least provide some clarity, about the 'administrative' and the 'judicial'. In particular, on its scope of application, the Decision states that it applies 'to all documents held by the Court of Justice of the European Union, that is to say, documents drawn up or received by it and in its possession, as part of the exercise of its administrative functions'.[36] No definition is provided either as to the term 'document'.[37] At most places, the 2019 Decision reflects the provisions of Regulation 1049/2001, with some notable exceptions.[38]

The European Ombudsman's supervision over the Court of Justice

Under Article 228 TFEU, the European Ombudsman examines complaints on maladministration in the activities of the EU institutions, bodies, offices and agencies, 'with the exception of the Court of Justice of the European Union acting in its judicial role'. The Ombudsman's Statute[39] contains further guarantees: the Ombudsman 'may not question the soundness of a court's ruling or a court's competence to issue a ruling';[40] in addition, complaints submitted to the Ombudsman 'shall not affect time limits for appeals in administrative or judicial proceedings';[41] and the Ombudsman has to declare inadmissible (or terminate the consideration of) complaints pertaining to 'legal proceedings in progress or concluded concerning the facts which have been put forward'.[42] Beyond ensuring judicial

[35] Decision of the Court of Justice (n 26). Access requests are now dealt with, in the first instance, by the Director of the Library (in the past there was an 'access to documents' department within the Communications Directorate), except if they are held by one of the CJEU's registries. See further Article 8 of the Decision.
[36] See Article 1(1) of the Decision of the Court of Justice (n 26).
[37] Contrast this to Article 3(a) of Regulation 1049/2001: '"document" shall mean any content whatever its medium (written on paper or stored in electronic form or as a sound, visual or audiovisual recording) concerning a matter relating to the policies, activities and decisions falling within the institution's sphere of responsibility'. It might be argued, however, that the broad understanding of the term 'document' enshrined in Regulation 1049/2001 and in the Court's case law (see, for example, Joined cases C-39/05 P and C-52/05 P, *Turco* EU:C:2008:374, paras 33-34) should also apply to the Court of Justice, once it has been established that the document in question is 'administrative'.
[38] Exceptions include the following: the EU institutions in question under Article 11 of Regulation 1049/2001 should maintain a publicly accessible register of documents; there is no such obligation for the Court of Justice. In addition, the Court of Justice benefits from a period of one month to initially decide if it will grant access (Article 5(2) of the Decision), whereas the EU institutions should normally reply within 15 working days (Article 7(1) of Regulation 1049/2001).
[39] Regulation (EU, Euratom) 2021/1163 of the European Parliament of 24 June 2021 laying down the regulations and general conditions governing the performance of the Ombudsman's duties (Statute of the European Ombudsman) and repealing Decision 94/262/ECSC, EC, Euratom [2021] OJ L 253 (hereinafter the 'Statute').
[40] Article 1(5) of the Statute.
[41] Article 2(8) of the Statute.
[42] Article 2(9) of the Statute.

independence, the purpose of these provisions is also to safeguard the coherence and uniformity of EU law, a matter entrusted to the Court of Justice.[43]

The aforementioned arrangements establish an imbalance of power between the judicial and the extra-judicial institution. This is not submitted as a critical remark, but rather as an observation of the institutional reality. In addition, while Article 15(3) TFEU is confined to administrative tasks, Article 228 TFEU merely excludes the CJEU's judicial functions. This – intentional or unintentional - difference in treatment raises the question whether there could be functions undertaken by the CJEU which would be neither judicial nor administrative that could be subject to a complaint to the European Ombudsman. This matter is addressed below.

Data protection and the role of the European Data Protection Supervisor

The European Data Protection Supervisor (EDPS) is the EU body responsible for the monitoring of the processing of personal data carried out by the EU institutions and bodies. The EDPS 'performs vis-à-vis the Union institutions and bodies the role of the independent supervisory authority within the meaning of article 8(3) of the Charter and article 16(2) TFEU'.[44] Her tasks are mainly defined in Chapter VI of Regulation 2018/1725.[45] The EDPS is granted a number of significant powers and responsibilities,[46] which cannot be analysed here in detail.[47] They have summarily been classified into four main categories: supervision of the processing of personal data by the EU institutions with a view to ensuring compliance with data protection rules, consultation (on legislation or other initiatives in the field of data protection), monitoring and assessment of technological developments and co-operation with national data protection authorities.[48] A key aspect of the EDPS's supervisory role is the examination of complaints by 'data subjects' – a right enshrined under Article 63 of Regulation

[43] See, in particular, Article 19 TEU. For further discussion see Nikos Vogiatzis, *The European Ombudsman and Good Administration in the European Union* (Palgrave Macmillan 2018) ch 2.
[44] Anna Buchta and Herke Kranenborg, 'Institutional Report Topic 2: The New EU Data Protection Regime' in Jorrit Rijpma (ed) *The New EU Data Protection Regime: Setting Global Standards for the Right to Personal Data Protection: The XXIX FIDE Congress in the Hague* (Eleven Publishing 2020) 79, at 92.
[45] Regulation (EU) 2018/1725 of the European Parliament and of the Council of 23 October 2018 on the protection of natural persons with regard to the processing of personal data by the Union institutions, bodies, offices and agencies and on the free movement of such data, OJ L 295.
[46] See, in particular, Articles 57 and 58 of Regulation 2018/1725.
[47] See, generally, Hielke Hijmans, 'The European Data Protection Supervisor: The institutions of the EC controlled by an independent authority' (2006) 43 *Common Market Law Review* 1313; Paola Chirulli and Luca De Lucia, *Non-Judicial Remedies and EU Administration: Protection of Rights versus Preservation of Autonomy* (Routledge 2021) 193-202. See also the paper by the EDPS, 'Monitoring and enforcing compliance with Regulation (EU) 2018/1725' (2020) available at: edps.europa.eu/sites/edp/files/publication/20-05-08_monitoring_and_ensuring_compliance_en.pdf.
[48] See EDPS, Annual Report 2020, at 18-21.

2018/1725. The EDPS can be involved in cases before the Court in a number of ways: she can refer a matter to the CJEU;[49] they can intervene in cases relevant to their work;[50] and the EDPS's decisions can be challenged before the Court of Justice.[51]

For present purposes, the question to be asked is as follows: can the EDPS, as an accountability mechanism in the field of data protection, supervise the processing of personal data by the CJEU? Again, a crucial distinction has to be drawn between judicial and non-judicial tasks. Indeed, Article 57(1)(a) of Regulation 2018/1725 provides that the EDPS cannot monitor and enforce the application of this Regulation when the Court of Justice is acting in its judicial capacity.[52] There is no further guidance in that measure as to when the Court is performing judicial or administrative functions. Nonetheless, recital 74 of the same Regulation states: '[f]or such processing operations [i.e. the Court acting in its judicial capacity], the Court should establish independent supervision, in accordance with Article 8(3) of the Charter, for example through an internal mechanism.'

In response to what the EU legislature had 'suggested' in recital 74 of Regulation 2018/1725, the Court of Justice and the General Court adopted in October 2019 their respective Decisions on an internal mechanism for the processing of personal data when acting in their judicial capacity.[53] Both Decisions establish a two-tier system in which applications can be submitted to the Registrar, in the first instance, but can then be examined by committees consisting of judges or Advocates General from the Court of Justice and judges from the General Court, respectively. The adoption of these Decisions is certainly a positive step which contributes to the protection of personal data by the Court of Justice. Nevertheless, nowhere in the Decisions can be found any guidance on what judicial and non-judicial tasks entail, even though the term 'when acting in its judicial capacity' is mentioned several times. In addition, in October 2019 the CJEU adopted a further Decision concerning its non-judicial tasks: this Decision covers the rules concerning the restrictions of the rights of data subjects, in accordance with Article 25 of

[49] Article 58(4) of Regulation 2018/1725 and Article 23 of the EDPS's Rules of Procedure (Decision of the European Data Protection Supervisor of 15 May 2020 adopting the Rules of Procedure of the EDPS, OJ L204/49).
[50] Article 58(4) of Regulation 2018/1725 and Article 24 of the EDPS's Rules of Procedure. Indeed, the EDPS has intervened in several landmark judgments on data protection delivered by the CJEU.
[51] Article 64(2) of Regulation 2018/1725.
[52] Similarly, Article 55(3) of the GDPR excludes the judicial activity of courts from the supervision of national data protection authorities; see further Research Note of the Court of Justice of the European Union, 'Supervision of courts' compliance with personal data protection rules when acting in their judicial capacity' (2018).
[53] Decision of the Court of Justice of 1 October 2019 establishing an internal supervision mechanism regarding the processing of personal data by the Court of Justice when acting in its judicial capacity, OJ C 383/2; Decision of the General Court of 16 October 2019 establishing an internal supervision mechanism regarding the processing of personal data by the General Court when acting in its judicial capacity, OJ C 383/4.

Regulation 2018/1725.[54] The precise scope of application of that Decision is not specified either.[55]

The aforementioned legal framework is insufficient from the point of view of the EDPS's mandate to hold the CJEU to account. Although the mandates of the EDPS and the Ombudsman present similarities but also notable differences,[56] an imbalance of power (in favour of the Court) may be observed here as well: among others, a decision of the EDPS is subject to review by the Court of Justice, while the EDPS 'shall suspend the investigation of a complaint pending a ruling by a court or a decision of another judicial or administrative body on the same matter'.[57]

In this context, a combined reading of the mandates of the European Ombudsman and the EDPS vis-à-vis the Court reveals that, leaving judicial matters aside, both offices are perfectly entitled to supervise the Court's administrative activities. Thus, the Court of Justice is not entirely beyond the control of these two authorities.

The CJEU's reluctance to provide further guidance on its administrative functions: Missed opportunities

Having explained why the administrative functions of courts matter, and outlined the legal framework surrounding the CJEU's non-judicial work, it is now appropriate to explore a number of missed opportunities, namely instances where the CJEU as an institution refrained from developing clearer guidance on the 'judicial' and the 'administrative'. It is argued that these instances should not be viewed in isolation, but rather demonstrate a broader reluctance to engage in a debate about the Court's non-judicial work.

Adopting (or amending) the legal framework on administrative functions

As the earlier section highlighted, multiple opportunities were offered to the Court to provide further clarity on its administrative functions via the adoption (or amendment) of Decisions on access to documents and data protection. This is not to suggest that the precise scope of application of these Decisions had necessarily to be identical; instead, what is argued is that

[54] Decision of the Court of Justice of the European Union of 1 October 2019 on internal rules concerning restrictions of certain rights of data subjects in relation to the processing of personal data in the exercise of non-judicial functions of the Court of Justice of the European Union, OJ L 261/97.
[55] See Article 1 of the Decision of the Court of Justice (n 54).
[56] See further Hijmans (n 47) 1323-1332.
[57] Article 16(6) of the EDPS's Rules of Procedure. Similarly, it is specified on the EDPS's website that the latter 'does not deal with matters that are currently before a court or that have already been settled by a court'; see: edps.europa.eu/data-protection/our-role-supervisor/complaints_en.

the absence of further clarity in both instances (seen also in light of the additional 'missed opportunities' that are discussed below) cannot be coincidental.

On a more positive note, the Court did take the commendable step to deposit its historical archives at the European University Institute.[58] This is noteworthy because the (amended) Council Regulation on the historical archives of the EU institutions specified that the CJEU and the ECB[59] may deposit their archives on a 'voluntary basis'.[60] There is no distinction between judicial and non-judicial documents in the archives – but these documents were, of course, produced more than 30 years ago.[61]

Complaints and inquiries by the European Ombudsman against the Court of Justice

The Court has had additional opportunities to provide further guidance on its administrative functions via the inquiries undertaken by the European Ombudsman. As already mentioned, the judicial work of the Court is excluded from the European Ombudsman's remit. Its non-judicial work is, however, included. Thus, a number of European Ombudsman cases provide further evidence of the Court's reluctance to engage in a debate about its administrative functions; elsewhere, the Court probably opted for a narrow understanding of such term. This section will also address toward the end the contribution of the EDPS – albeit only briefly, as the latter does not appear to have engaged (directly, at least) with the scope of the CJEU's exemption from supervision.

The first European Ombudsman case reveals that the Court was reminded of the need to undertake this task as early as in 1997. The Ombudsman opened an own-initiative inquiry concerning public access to documents held by EU institutions and bodies; this inquiry (undertaken before the entry into force of Regulation 1049/2001) resulted in a special report (in December 1997) to the European Parliament.[62] What is less-known, however, is the

[58] Decision of the Court of Justice of the European Union of 10 June 2014 concerning the deposit of the historical archives of the Court of Justice of the European Union at the Historical Archives of the European Union (European University Institute), OJ C 406/2.
[59] As regards the EIB, recital 5 of the 2015/496 Council Regulation specifies that it 'deposits its historical archives at the EUI under a separate Convention with the EUI … and under the Rules on historical archives which were adopted by the Bank's Management Committee on 7 October 2005'.
[60] Article 8(3) of the consolidated version of Council Regulation (EEC, EURATOM) No 354/83 of 1 February 1983 concerning the opening to the public of the historical archives of the European Economic Community and the European Atomic Energy Community, available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:01983R0354-20150326.
[61] Article 2(2) of the 2014 Decision (n 58). Regarding judicial proceedings, the 30 year period is calculated from the date on which the proceedings were closed.
[62] European Ombudsman Case 616/96/(PD)IJH.

exchanges with the Court at that time. The Court informed the Ombudsman in April 1997 that it was preparing a draft regulation on access to administrative documents, and that it needed more time. In October 1997 and via further correspondence the Court informed the Ombudsman that 'it had *extreme difficulty* in establishing a clear separation between documents which relate to its *judicial role and those which do not*'.[63] No concrete date could be provided as to when this task would be completed. This was found 'regrettable' by the Ombudsman, but no further steps could be taken as the Court had indicated that it would include judicial documents in its study: this provided a suitable avenue for the Ombudsman to opine that, since the Court's judicial functions are outside the mandate, no further action against the Court could be taken.[64]

Further questions were raised in the context of an inquiry concerning requests for information, among others, on the composition of the Court Chambers and the available remedies in suspicion of bias.[65] On the basis of a friendly solution, the Court agreed to provide further information on the applicable legal framework. The Ombudsman framed the inquiry in the context of the rights of EU citizens and residents to contact the EU institutions in one of the official languages and receive a response in the same language[66] - thereby separating the matter from the substantive issue of the composition of the Court's Chambers, a matter that falls within the judicial functions of the Court. A fine line can be identified here: while a complaint on the composition of the Chambers as such cannot be subject to the Ombudsman's review, it is probably a different matter if the complaint concerns failure, on the part of the Court, to engage with requests to provide further information on this matter. However, while agreeing to the friendly solution, the Court underlined that Article 228 TFEU 'should not be interpreted as extending only to the Court's activities in handling cases pending before it but instead to the exercise of the Court's judicial role in its entirety'.[67] Yet, the Court did not take the opportunity, in the context of its response, to further clarify what 'acting in its judicial role in its entirety' entails. The Court added, however, that 'the Ombudsman's inquiry concerns a request for information regarding the exercise of its judicial role. According to the Court, its replies to

[63] Ibid, Part B: 'Responses to the Ombudsman's draft recommendations' (emphasis added).
[64] Ibid, Part C: 'Analysis of responses to the draft recommendations'.
[65] European Ombudsman Case 2252/2011/BEH.
[66] Article 24 TFEU and Article 41(4) of the Charter. See also Articles 13 and 22 of the European Code of Good Administrative Behaviour.
[67] European Ombudsman Case 2252/2011/BEH, point 61.

such requests concern its judicial role and not administrative matters'.[68] The Ombudsman opined differently:

> 'The Ombudsman …[is] not convinced that an interpretation of his Statute should lead to the conclusion that he would not be entitled to assess, in the present case, whether the Court's replies to the complainant contained answers to the questions he raised. … [T]he Ombudsman recalls that Article 43 of the Charter … confers … the right to refer to the Ombudsman cases of maladministration … with the exception of the Court acting in its judicial role. As an exception to the fundamental right to complain to the Ombudsman, the reference to the Court's judicial role must not be construed in a manner which would go beyond the purpose pursued by it.'[69]

Another issue is whether translators or interpreters, once assuming office, always (i.e. including when the proceedings have been concluded) perform judicial functions.[70] More generally, the approach of both the Court and the Ombudsman in the field of multilingualism[71] deserves attention. In 2002, the Ombudsman examined a complaint on the language versions of judgments and opinions available on the Court's website.[72] The Ombudsman encouraged the Court to continue going beyond its legal obligations, as required by the principles of good administration, with a view to ensuring that the judgments are available in as many languages as possible.[73] Yet, in 2012, the Ombudsman was called upon to assess whether the Court should provide the 'digest of case-law' and the 'alphabetical table of subject-matter' in additional languages (they are available only in French).[74] The Court initially expressed doubts about the Ombudsman's competence, advancing the view that the aforementioned publications 'were developed to meet internal needs with a view to facilitating the Court's judicial activities' and 'not to communicate with the public'.[75] The Ombudsman found this claim 'unfounded' – relying again on Article 43 of the Charter and the need to interpret any exemptions from the

[68] Ibid, point 62.
[69] Ibid, point 63.
[70] This is a matter that may not be pursued in further detail here; however, a number of European Ombudsman inquiries yield interesting results. See, among others, European Ombudsman Cases 777/2013/CK; 826/2013/EIS; 878/2013/EIS; 3018/2009/(TN)(TS)TN; 842/2013/JF; 1948/2018/NH.
[71] On linguistic rights and political participation more generally see Nikos Vogiatzis, The linguistic policy of the EU institutions and political participation post-Lisbon' (2016) 41 *European Law Review* 176.
[72] European Ombudsman Case 624/2002/ME.
[73] Ibid, 'Decision'.
[74] European Ombudsman Case 635/2012/BEH. It is noted that since 2021, and on a monthly basis, the Court publishes in English and in French a 'monthly case-law digest', namely a 'compilation of the summaries of the decisions of the Court of Justice and the General Court which, having regard to the issues of law involved, merit particular attention'. See: https://curia.europa.eu/jcms/jcms/p1_3471594/en/.
[75] Ibid.

Ombudsman's mandate in a narrow way. Despite the fact that it is possible to identify maladministration even when the EU institutions stick to their legal obligations, the Ombudsman concluded that no maladministration had occurred. The Court's argument that these publications are internal and concern its judicial functions is certainly questionable. It may also be added (from this and earlier cases) that it is perhaps slightly unusual for the Court to express 'doubts' about provisions that the Court itself is not, of course, prevented from interpreting (even if an exchange with the Ombudsman is very different from judicial proceedings).

Although it may certainly be deduced from the above discussion that, when it responded to European Ombudsman inquiries, the Court refrained from defining the boundaries between the 'judicial' and the 'administrative', it is equally fair to suggest that the office of the Ombudsman was not particularly keen to hold the Court to account either. The imbalance of power that was explained in earlier paragraphs is of relevance here. There is an additional dimension to be considered. The Court has granted the Ombudsman considerable discretion in the handling of complaints,[76] but not immunity from judicial review, especially via the possibility of an action for damages.[77] To be sure, such imbalance of power does not concern solely the Ombudsman (see also the earlier remarks on the European Data Protection Supervisor). Simultaneously, the Ombudsman is confined by the nature of the institution that should be supervised, given that the Court is the EU institution that provides the authoritative interpretation of EU law. Such interpretation cannot de disputed by the Ombudsman and extends to the interpretation of the terms 'administrative' and 'judicial', as well as the parameters of the Ombudsman's mandate, more generally.

That being said, the scope of the European Ombudsman's control over the Court of Justice is an evolving issue. For example, in July 2021 the Ombudsman opened an inquiry against the Court on how the latter 'handled concerns about public comments made by an advocate general of the Court concerning the draft EU Digital Markets Act'.[78] In the letter addressed to the Court, the Ombudsman specified that, after 'a careful analysis of the facts' she took the view that 'the matter is an administrative one and merits an inquiry'.[79] Given that this inquiry has just been

[76] See the landmark Case C‑234/02 P, *European Ombudsman* v *Lamberts*, EU:C:2004:174.
[77] Case C-337/15 P, *European Ombudsman* v *Staelen*, EU:C:2017:256; annotated by Nikos Vogiatzis, 'The EU's liability owing to the conduct of the European Ombudsman revisited: *European Ombudsman* v *Staelen*' (2018) 55 *Common Market Law Review* 1251.
[78] European Ombudsman Case 1072/2021/NH.
[79] Ibid.

opened, very limited information on the factual and legal background is naturally provided (which would enable a commentator to make a preliminary assessment). It will be interesting to await the Court's reply to that letter and any future developments concerning this case (or further cases concerning the Court).

Since the Treaty excludes judicial activities, thereby not confining the Ombudsman's control to administrative activities, one is entitled to ask whether the Ombudsman can supervise activities other than judicial and administrative.[80] The reform of the EU judiciary has created controversy:[81] in the context of the amendment of the Court's Statute (Protocol 3 annexed to the Treaties) the Court can, exceptionally, exercise quite particular and unique[82] legislative functions,[83] in the sense that it can request the European Parliament and the Council to adopt regulations with a view to amending the Court's Statute. It is not the purpose of this contribution to assess the merits of this reform. Nonetheless, a question might be posed as to whether the Ombudsman could examine a complaint concerning the (particular) functions of the Court under Articles 281 and 257 TFEU. The Ombudsman has long held the view that matters pertaining to the merits of legislation should not be examined by the office.[84] But what about the process leading to the adoption of legislation? The Ombudsman has produced decisions which indicate that this possibility is always open.[85] Although in principle the Ombudsman does not appear to be prevented from exercising such supervision (namely to review the process leading to the adoption of such Regulations), the dynamics between the two institutions suggest that the European Ombudsman might elect to accept a possible (and not necessarily unmeritorious - but again, the lack of clearer boundaries does not help) objection,

[80] It is noted that the Ombudsman can receive complaints on the work of the panel established under Article 255 TFEU (for the appointment of judges and Advocates-General), but these complaints are directed against the Council and not the Court. See European Ombudsman Case 1955/2017/THH.

[81] For a critical account see Alberto Alemanno and Laurent Pech, 'Thinking justice outside the docket: A critical assessment of the reform of the EU's Court system' (2017) 54 *Common Market Law Review* 129; see also on the possible effects of the reform Daniel Sarmiento, 'The Reform of the General Court: An Exercise in Minimalist (but Radical) Institutional Reform' (2017) 19 *Cambridge Yearbook of European Legal Studies* 236.

[82] Alemanno and Pech (n 81, at 146) call these powers 'unorthodox' and 'unconventional'.

[83] See Articles 257 and 281 TFEU.

[84] See, for example, European Ombudsman, Annual Report 1995.

[85] See, for example, European Ombudsman Cases OI/8/2015/JAS (on the transparency of trilogues); 2395/2003/GG (on the Council's openness when acting in its legislative capacity before Lisbon – see now Articles 15(2) TFEU and 16(8) TEU). It is noted that in both cases the Council raised objections regarding the competence of the Ombudsman to investigate such areas, but these arguments were dismissed by the Ombudsman. See further Vogiatzis (n 43) 243 *et seq*.

on the part of the Court, that the aforementioned process is closer to or even part of its judicial,[86] rather than its non-judicial, functions.

It should also be noted that, to this author's knowledge at least, the EDPS has not yet 'tested' the limits of her mandate vis-à-vis the Court. The most significant contribution of the EDPS, in this respect, appears to be a plethora of 'prior checking opinions' (now prior consultations) that were requested from the Court's Data Protection Officer.[87] Therein, the EDPS addressed recommendations to the CJEU. Unlike complaints, however, this form of supervision works on *the initiative of the institution concerned*.[88] In these opinions, therefore, the EDPS has not considered the boundaries of the judicial and the non-judicial.[89] In one further opinion (which was, however, addressed to the General Secretariat of the Council) on the appointment of Judges at the Court of Justice and the General Court, as well as the members of the panel under Article 255 TFEU, the EDPS did observe that the processing of personal data regarding the final choice of candidates was a 'phase' in the procedure which fell outside his competence.[90] In addition, more recently a complaint against the Court of Justice has become publicly available, concerning the use of cookies and similar technologies on the curia website.[91] Possibly because the matter manifestly falls within the Court's administrative functions, there is no discussion in the 'admissibility' part of the decision about the competence of the EDPS to examine this case. The EDPS identified a number of breaches of Regulation 2018/1725, which were, however remedied by the CJEU soon after the submission of the complaint. Further recommendations were addressed to the CJEU with a view to ensuring better compliance with the Regulation. In addition, in speeches and opinions (which did not, however,

[86] It should be noted, in this respect, that in *Dehousse* (discussed further in the next section) the General Court took the view that matters concerning the Court's Statute and its Rules of Procedure pertain to its judicial functions.
[87] These can be accessed at: edps.europa.eu/data-protection/our-work/our-work-by-type/opinions-prior-check-and-prior-consultations_en.
[88] Hijmans (n 47) 1318.
[89] The subject matters of more recent opinions have concerned, among others, whistleblowing; management of incident reports; the 'Asbestosis screening programme'; special allowances; adjustment of working time for breastfeeding; the ability to work in a third language; leave management. All of these opinions can be accessed at: edps.europa.eu/data-protection/our-work/our-work-by-type/opinions-prior-check-and-prior-consultations_en.
[90] See EDPS Case 2014-0017 concerning the processing of personal data when appointing members of the Court of Justice, the General Court and the Civil Service Tribunal. The reasons for this were as follows: 'The members of the Court of Justice and the General Court are appointed by mutual agreement of the Member States by way of an intergovernmental conference. This aspect therefore falls outside the competence of the EDPS.'
[91] Decision of the European Data Protection Supervisor in complaint case 2019-0878 submitted by Mr Michael Veale against the Court of Justice of the European Union, available at: GDPRhub.eu.

concern the CJEU or Regulation 2018/1725) the EDPS has argued that further clarity is needed on the term 'judicial capacity', which should generally be interpreted restrictively.[92]

Dehousse v Court of Justice

The judgment of the General Court in *Dehousse* of 2019[93] concerns the regime of access to documents applicable to the Court of Justice as an institution. It is discussed as a separate missed opportunity because it raises distinct issues. First, it demonstrates that there can be situations where the actor and the forum[94] essentially stem from the same institution.[95] Second, it shows that there may be different views between the General Court and the Court of Justice on the scope of the access regime. This is more remarkable than in other cases (in which the General Court, the Advocate General and the Court of Justice have disagreed on matters of interpretation and application of EU law) because, of course, the disagreement here concerned the nature of the Court's own powers. Third, the European Ombudsman's inquiry before the involvement of the General Court, and especially the interesting arguments that were submitted by the CJEU in the context of the Ombudsman's inquiry, is an additional reason why the case has to be discussed separately. One may start from the Ombudsman's inquiry as it preceded the judgment of the General Court.

The complainant, a former judge at the General Court, submitted a number of requests for access to documents held at the Court of Justice. He also alleged before the Ombudsman that the scope of application of Article 7(2) of the CJEU's Code of Conduct of 2016,[96] repealing and replacing the earlier version of 2007, is unduly broad given that, in addition to judicial, it also extends to administrative matters. The Ombudsman did not examine this aspect of the complaint because the question whether 'the adoption of the Code of Conduct constitutes a

[92] See, for example, EDPS Opinion 6/2015, 'A further step towards comprehensive EU data protection: EDPS recommendations on the Directive for data protection in the police and justice sectors', in particular p. 8; Giovanni Buttarelli, 'Data Protection in the Judiciary: The Challenges for Modern Management', Speech delivered in Budapest (2013) available at: edps.europa.eu/data-protection/our-work/publications/speeches-articles/data-protection-judiciary-challenges-modern_en.
[93] *Dehousse* v *CJEU* (n 1).
[94] See Mark Bovens, 'Analysing and Assessing Accountability: A Conceptual Framework' (2007) 13 *European Law Journal* 447.
[95] That being said, in some cases this is unavoidable (it is always possible that future cases on access against the Court may reach the latter for resolution) and is definitely not unique (one can consider staff cases against the Court of Justice, as an example).
[96] Code of Conduct for Members and former Members of the Court of Justice of the European Union [2016] OJ C 483/01.

"judicial activity" … [was] the subject of legal proceedings'.[97] This decision by the Ombudsman might have been informed by discussions during an inspection visit undertaken at the premises of the Court of Justice in Luxembourg, in which the Ombudsman's team met with CJEU representatives and inspected a number of documents relevant to the inquiry and in the latter's possession.[98] Therein, the Ombudsman's competence to inquire into the Code of Conduct was discussed. The CJEU also explained to the Ombudsman the volume of documents that were released to the applicant.[99]

The Court's submissions to the Ombudsman in the context of the inquiry merit particular attention.[100] Two points can be underlined here. First, and with reference to the Code's preamble, the Court of Justice took the view that the elaboration of the Code of Conduct forms part of the latter's judicial activities.[101] In any case, the Ombudsman's competence under Article 228 TFEU would not enable the Ombudsman to examine this claim any further. Second, the Court observed that the complainant argued that the CJEU 'tends to consider many administrative documents 'judicial'", before adding: 'This argument, regardless of its substantive merits or otherwise, is, in any event, intrinsically linked to the question of the scope of application of the Decision of 11 October 2016 and the inherent question of the distinction between the CJEU's judicial and administrative tasks'.[102]

Overall, the Ombudsman did not find maladministration on the aspects of the complaint that were not covered by the case before the General Court and, in accordance with the provisions of her Statute, she refrained from examining the aspects of the complaint that were subject to litigation. In particular, regarding matters that were raised by the complainant which *were not* covered by the case before the General Court, the Ombudsman found that the 2016 access rules were not more restrictive than the earlier 2012 rules.[103] In addition, the Ombudsman did not

[97] European Ombudsman Case 2006/2017/LP, point 23. The complainant also alleged that the 'CJEU considers administrative documents as being judicial in nature'; similarly, the Ombudsman did not address this part of the complaint as it was subject to litigation before the General Court. Ibid, points 67-71.
[98] Report on the European Ombudsman's inspection of documents and meeting (2018) available at: www.ombudsman.europa.eu/en/report/en/107584.
[99] According to the CJEU, the applicant was granted access 'to 190 documents (1686 pages in total) following requests 0007/2017D and 0007/2017C as well as 557 documents (2960 pages in total) following requests 0011/2017D and 0011/2017C' (ibid, p. 3). However, in accordance with data protection rules, text was redacted from many of these documents.
[100] 'Reply from the Court of Justice of the European Union (CJEU) to the European Ombudsman concerning the CJEU's alleged failure to address the concerns of a former judge about various possible instances of maladministration' (2018) available at: www.ombudsman.europa.eu/en/correspondence/en/106452.
[101] Ibid, point 4.
[102] Ibid, points 63-64. The 2016 Decision was the earlier version of the 2019 Decision on access to documents.
[103] European Ombudsman Case 2006/2017/LP, point 31.

find evidence supporting the complainant's claim that the CJEU does not provide sufficient reasoning in its initial decisions on access (but only at the 'confirmatory decision' stage) – but did recommend to the CJEU, as a matter of good administrative practice, to 'seek to provide, in its initial replies, a list of all the relevant documents that fall under the scope of a request for access to documents'.[104] Furthermore, she observed that one of the complainant's requests should have been dealt with by the Court according to the rules for access to documents, and not as a request for information – but even in that case the documents could not be disclosed on the basis of data protection requirements, while other documents were already available in the public domain.[105] On the same issue, while not finding maladministration the Ombudsman did '[encourage] the CJEU, in the future, to take a more citizen-friendly approach when assessing a request for access to documents that refers to information contained in documents'.[106] Lastly, the Ombudsman considered the Court's approach to data protection (as a ground for refusal to grant access) to be 'in line with EU case law'.[107]

Admittedly, in this case it would have been difficult for the European Ombudsman to scrutinise issues pertaining to the adoption of a new Code of Conduct for the Court as this matter was subject to litigation before the General Court. That does not mean, however, that the Ombudsman will not need to face the judicial/ administrative distinction in future work: as already noted, the inquiry concerning the EU Digital Markets Act[108] could prove a suitable opportunity for further input from the Ombudsman, in this respect.

The case was then examined by the General Court. Before returning to the Code, it should be noted that the Court of Justice was unable to find documents related to correspondence between the former President of the Court and the German authorities between 2011 – 2015 (this being one of the applicant's requests on access). This led the General Court to find that the CJEU had an obligation to maintain these documents, taking also into account the effective exercise of the right of access to documents, and the principles of transparency and good administration (the latter enshrined under Article 41 of the Charter).[109]

[104] Ibid, point 49.
[105] Ibid, point 54.
[106] Ibid, point 55.
[107] Ibid, point 62.
[108] European Ombudsman Case 1072/2021/NH.
[109] *Dehousse* v *CJEU* (n 1), in particular paras 47 and 51. See also the follow-up judgment of 2020 on this matter in Case T-857/19, *Dehousse* v *Court of Justice of the European Union*, EU:T:2020:513.

Regarding the Code of Conduct, in its submissions the CJEU as an institution repeated, among others, an argument that was also submitted before the European Ombudsman: given that the Code applies to current and former members precisely because of their exercise of judicial functions, this entails that the Code is fundamentally linked to the Court's judicial functions.[110] Interestingly, the CJEU also argued that even if it was assumed that the requested preparatory documents concerning the adoption of the new Code did fall under the scope of the Decision (thereby being 'administrative documents'), they would still be protected by the exemption on the protection of the decision-making process – which is Article 3(3) of the Court's Decision on access.[111] It was this line of argument that was accepted by the General Court.

Nevertheless, before accepting this argument, the General Court provided a more nuanced answer as to whether documents concerning the Code are 'administrative' documents. The General Court opined that no clear answer can be provided in principle; it is therefore necessary to focus on the substantive content of the documents in question for a clearer picture. The Code, according the General Court, is a document addressed to judges as forming part of an institution, containing ethical norms and values that safeguard their independence and impartiality within and beyond the courtroom. That the Code is addressed to both current and former members is evidence of the fact that it cannot be exclusively judicial in character.[112] Ultimately, the Code serves the CJEU's institutional autonomy, the latter not necessarily being confined to judicial functions exercised by its members.[113] Thus, preparatory documents concerning the adoption of the Code are neither automatically excluded from the scope of the CJEU's access regime, nor automatically included therein.[114]

It is submitted that, by focusing on the content of the documents in question, the General Court elected to avoid the broader issue of providing clearer guidelines on the scope of the CJEU's administrative functions. Simultaneously, the Court of Justice, too, could have provided further clarity both in its submissions to the European Ombudsman, as well as in *Dehousse*.

[110] *Dehousse* v *CJEU* (n 1) para 75.
[111] Ibid, para 77.
[112] Ibid, paras 83-86.
[113] Ibid, para 87.
[114] Ibid, paras 90-92.

The way forward: Departing from dealing with administrative functions on a purely *ad hoc* basis

Reasons for departing from the existing approach

A combined reading of the aforementioned missed opportunities reveals multiple reasons why the Court should now depart from dealing with its administrative functions on a purely *ad hoc* basis. It is recalled that this is a matter presented before the Court at least since 1997 (in the context of the European Ombudsman's inquiry). These remarks should not be viewed as implying that this is a straightforward task.[115] Yet, despite these challenges, the time is now appropriate the Court to consider a different approach.

To begin with, further clarity on the CJEU's administrative functions will impact a number of areas: access to documents, supervision by the European Ombudsman and the European Data Protection Supervisor. Thus, there is a connection between Articles 15(3) TFEU, 228 TFEU and 57(1)(a) of Regulation 2018/1725, in the sense that they exclude the judicial functions of the Court from accountability and transparency, with a view to safeguarding its independence. By doing so, they impose a task, upon the Court, to provide further clarity on what is considered 'non-judicial'. In addition, the *ad hoc* approach that the CJEU appears to favour means that it is granted too broad a discretion in all three of the aforementioned areas (this matter is returned to in subsequent paragraphs). Moreover, the Ombudsman has raised a number of important points about the Charter which have not been fully addressed, to date, by the Court. In particular, since the right to complain to the Ombudsman and to contact the EU institutions in an official language feature in the Charter,[116] does this not entail that the Court's judicial role might need to be interpreted narrowly, particularly in cases where the Court's independence does not appear to be undermined?[117] Elsewhere, the Court has opted for a rather narrow understanding of administrative functions and/ or the Ombudsman's mandate: this author is not fully convinced, for example, that the publication of the digest of case-law in languages other than French serves the internal workings of the Court, while observing that additional

[115] See the Court's response in European Ombudsman Case 616/96/(PD)IJH (discussed above) and, more recently, Opinion of Advocate General Bobek in Case C-470/19, *Friends of the Irish Environment*, EU:C:2020:986, paras 79 *et seq* (on the notion of 'judicial capacity' under Article 2(2) of Directive 2003/4/EC).
[116] See Articles 43 and 41(4) of the Charter, respectively.
[117] Similar considerations could perhaps also be applied to the EDPS, since the right to data protection is enshrined under Article 8 of the Charter and Article 16 TFEU. On the significant contribution of the Court in the development of the right to data protection see, for example, in this journal, Serena Crespi, 'The applicability of *Schrems* principles to the Member States: National security and data protection within the EU context' (2018) 43 *European Law Review* 669.

linguistic versions of the digest would substantially improve citizens' access to its work. In addition, the complaints to the European Ombudsman and the discussion on the EDPS illustrate the imbalance of power between these extra-judicial accountability bodies and the Court. Both offices effectively have to rely on the Court's interpretation of the boundaries of its (and their) mandate. That the Court provides the authoritative interpretation of EU law does not solely concern, of course, the European Ombudsman and the EDPS. Nevertheless, one wonders whether the Court should not *facilitate* the work of both offices, by delineating in a clearer way the boundaries of its non-judicial work. Another reason is that *Dehousse* signified that the EU judiciary as a whole might not necessarily hold unanimous views on what qualifies as 'administrative'. This should serve as further evidence of the need for the Court to undertake this task.

Related to earlier remarks: proceeding on a purely *ad hoc* basis runs the risk of classifying much, and possibly everything, as 'judicial'. One could indeed ask: is not everything connected with the Court's judicial functions - even loosely so? Beyond 'borderline' cases, such as the translation of certain judgments into the official languages at some point after the completion of the proceedings, one may ask: is the purchase of a security system not indispensable in order for the Court to undertake its judicial functions? In other words: every administrative function enables the Court to perform its judicial role, broadly construed. This does not mean, however, that such function should be excluded from transparency and accountability, in accordance with the Treaty provisions and the EU Data Protection Regulation. Thus, a clearer delineation of the Court's non-judicial tasks would provide clarity to citizens and other stakeholders about what can be requested from the Court via an access request, and would clarify the precise ambit of the European Ombudsman and EDPS's supervision over the Court of Justice.[118] Setting these lines in a clearer way would then mean that the Court would undertake a commitment to respect them.

[118] It should be noted that there are areas in which the terms of supervision over the Court are defined in a clearer way (yet this does not mean that such terms should be duplicated in the areas mentioned in this article). One example is OLAF: in accordance with the Decision of the Court of Justice of 2011 (Decision of the Court of Justice of 12 July 2011 on the terms and conditions for internal investigations in the fight against the fraud, corruption and any illegal activity detrimental to the interests of the European Union (in French, on file with the author)) OLAF *cannot investigate* corruption or fraud within the Court regarding 'proceedings in legal cases, whether pending or closed' (Article 4, which effectively mirrors Article 22a(4) of the EU Staff Regulations). The author obtained a copy further to an access request; the document was provided within one day. Such prompt response is welcome and should be acknowledged. For an excellent study on OLAF see Jan Inghelram, *Legal and Institutional Aspects of the European Anti-Fraud Office (OLAF): An Analysis with a Look Forward to a European Public Prosecutor's Office* (Europa Law Publishing 2011).

Insights from the ECB and EIB access regimes

The point that the Court is granted too broad a discretion will be further illustrated via a comparative examination of the access regimes that have been adopted by the European Central Bank (ECB) and the European Investment Bank (EIB), the two other institutions/ bodies[119] mentioned in the exemption under Article 15(3)(4) TFEU. It is not, of course, claimed that the functions of the banks are comparable to the CJEU (if anything, they do not perform judicial functions). Yet, beyond the choice of the authors of the treaty to include all three institutions/ bodies in Article 15(3)(4) TFEU, one could also argue that there might be some connection as to the nature of the work involved in these cases, namely to provide expertise in a number of areas (law, monetary policy, investments that advance the EU's objectives).[120] Increased confidentiality requirements might be a further consideration, in this respect. In addition, strong guarantees of independence are provided for in the treaties and elsewhere concerning both the ECB and the EIB.[121]

Let us consider the ECB. To begin with, several contributions have raised concerns about the transparency of the ECB[122] – yet such path of enquiry exceeds the purposes of the present article. Instead, these paragraphs will focus on how the ECB designed its access regime in the first place. The key piece of legislation is the ECB's (amended) Decision 2004/258 on access to documents.[123] The Decision may not define its administrative tasks, yet it adopts a broad definition of document, encompassing 'any content whatever its medium … drawn up or held

[119] The ECB is an EU institution under Article 13(1) TEU, while the EIB is an EU body (see further Nicolas Hachez and Jan Wouters, 'A responsible lender? The European Investment Bank's environmental, social and human rights accountability' (2012) 49 *Common Market Law Review* 47, at 49-50; Case T-9/19, *ClientEarth* v *European Investment Bank*, EU:T:2021:42, para 20).

[120] It is noted that it goes beyond the purposes of this paper to ascertain which EU institutions/ bodies *should or should not* be included in the exemption provided under Article 15(3)(4) TFEU.

[121] See, among other provisions, Article 130 TFEU (on the ECB); Article 9(2) of the EIB's Statute (Protocol No5 of the Lisbon Treaty) on the Board of Directors and Article 11(8) of the EIB's Statute on the Management Committee.

[122] See, among others, Deirdre Curtin, '"Accountable independence" of the European Central Bank: Seeing the logics of transparency' (2017) 23 *European Law Journal* 28; Pieter Van Cleynenbreugel, 'Confidentiality behind transparent doors: The European Central Bank and the EU law principle of openness' (2018) 25 *Maastricht Journal of European and Comparative Law* 52; Päivi Leino-Sandberg, 'Public access to ECB documents: Are accountability, independence and effectiveness an impossible trinity?' in *Building bridges: Central banking law in an interconnected world: ECB Legal Conference 2019* (European Central Bank 2019) 195. See also European Ombudsman case 1703/2012/CK – among other cases.

[123] Consolidated text: Decision of the European Central Bank of 4 March 2004 on public access to European Central Bank documents (ECB/2004/3) (2004/258/EC), available at: eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A02004D0003%2801%29-20150329. This Decision repealed the earlier Decision of the European Central Bank of 3 November 1998 concerning public access to documentation and the archives of the European Central Bank (ECB/1998/12). See also Article 23 of the ECB's Rules of Procedure, titled 'Confidentiality of and access to ECB documents' (Decision of the European Central Bank of 19 February 2004 adopting the Rules of Procedure of the European Central Bank (ECB/2004/2) (2004/257/EC), OJ L 80/33.

by the ECB and relating to *its policies, activities or decisions*'.[124] The ECB itself has also confirmed before the EU judiciary the broad scope of application of the right to access, which therefore entails the purposefully 'general wording' of this provision.[125] This accords with the earlier *Thesing* judgment.[126] Nonetheless, the list of exceptions to disclosure is significantly lengthier than Regulation 1049/2001.[127] Thus, the ECB has opted for an overall different approach (which has, nonetheless, challenges of its own[128]): to adopt, even before the Lisbon treaty, a very broad understanding of document, while simultaneously increasing the exceptions and derogations from access. As such, an overall evaluation of the ECB's transparency levels boils down to how narrowly or broadly the exemptions from access will be interpreted, not least by the CJEU itself.[129]

The EIB has adopted a 'policy',[130] on the basis of which the requests for access are dealt with. Like the ECB, the EIB does not limit its access regime to 'administrative tasks'.[131] Nonetheless, the reasons for non-disclosure are – again – lengthier than those under Regulation 1049/2001.[132] The philosophy of the EIB is that it will rely on a range of exceptions so as to implement the letter of Article 15(3)(4) TFEU.[133] This is not without challenges: the EIB, too, has been criticised on transparency grounds.[134]

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[124] See Article 3(a) of the ECB Decision (n 123). See also, in this respect, Case T-436/09, *Dufour* v *ECB*, EU:T:2011:634, paras 82 *et seq.* (confirming that ECB databases also constitute 'documents').
[125] Opinion of Advocate General Pikamäe in Case C-342/19 P, *Fabio De Masi and Yanis Varoufakis* v *ECB*, EU:C:2020:549, para 30: 'The right of access granted by that decision does not concern documents relating to administrative tasks only, but extends, in general, to all "ECB documents"'. The case concerned the scope of two exemptions featuring in the Decision: legal advice and internal decision-making process.
[126] Case T-590/10, *Gabi Thesing and Others* v *ECB*, EU:T:2012:635, para 79.
[127] See Article 4 of the ECB Decision (n 123).
[128] See, for example, Case C-442/18 P, *ECB* v *Espírito Santo Financial*, EU:C:2019:1117, regarding the scope of the permissible exceptions under the ECB's Decision on access to documents, read in the light of Article 10(4) of the Statute of the European System of Central Banks and of the European Central Bank.
[129] For further discussion see Leino-Sandberg (n 122); Daniel Sarmiento, 'Confidentiality and access to documents in the Banking Union' in Chiara Zilioli, and Karl-Philipp Wojcik (eds) *Judicial Review in the European Banking Union* (Edward Elgar 2021) 165.
[130] EIB Group Transparency Policy, available at: www.eib.org/en/publications/eib-group-transparency-policy.htm.
[131] See Article 5(1) of the EIB Policy (n 130).
[132] Ibid, Exceptions (Articles 5.3-5.15).
[133] Ibid, Article 3.8. See also Hachez and Wouters (n 119) 73-78; the authors explain, among others, that this EU body may be a bank (which usually implies confidentiality) but it is also a public institution (which implies transparency and accountability). This is also recognised in Article 2(2) of the EIB's Transparency Policy (n 130) as follows: 'The member institutions of the EIB Group consider that due to their dual character as financial and public institutions, to be transparent about how they make decisions, work and implement EU policies strengthens their credibility and accountability to citizens'.
[134] See, for example, Transparency International EU, 'Investing in integrity? Transparency and Accountability of the European Investment Bank' (2016) available at: transparency.eu/wp-content/uploads/2016/11/EIB_report_digital-version.pdf.

The background behind the adoption of the present EIB transparency policy is crucial to understanding why the legal framework concerning access to CJEU 'administrative' documents is insufficient. In 2014, the EIB published a draft transparency policy that was seeking to update its 2010 policy; this draft was widely criticised by civil society.[135] Some of the key changes included the confinement of the access regime to the administrative tasks of the EIB, with the latter retaining the option to grant access to documents related to non-administrative tasks. Thus, Transparency International argued that 'the revised policy [did] not include a definition nor distinction of what tasks are to be considered administrative and which non-administrative. In the absence of legislative or judicial powers, it is unclear what EIB activities would indeed fall under the category of non-administrative.'[136] As such, the revised draft policy 'effectively provide[d] the Bank will *full discretion* over what can be considered *administrative* and *non-administrative tasks*, *on a case-by-case basis*, and therefore full discretion on whether to handle a request for access to information under the disclosure obligations laid down'.[137] This was an 'excessive' measure, creating uncertainty, whereas the scope of discretion granted on the EIB 'remove[d] predictability, transparency and clarity from the Bank's procedures'.[138] The EIB was encouraged to either drop the distinction (which it did) or to clearly and narrowly define each category.

The discussion above has shown that dilemmas of this sort were not particular to the Court of Justice. The criticism against the EIB by civil society was effectively that it endorsed an excessive, non-transparent policy that undermined certainty. Useful lessons can therefore be learnt particularly from the EIB experience and the criticism that absent clearer definitions, the scope of discretion is unduly wide, and therefore the case-by-case approach that is followed by the CJEU cannot easily be reconciled with the requirements of transparency and accountability. One might argue that, at least insofar as the banks are concerned, Article 15(3)(4) TFEU is poorly worded – because it is even more difficult for the banks (which do not exercise judicial and legislative functions) to separate the 'administrative' from the 'non-administrative', and such difficulty may ultimately explain the aforementioned starting point to include, in principle, all documents in their consideration for disclosure. That may indeed be the case, but

[135] In particular, Article 5(1) of the draft policy, available at: www.eib.org/attachments/consultations/eib_group_tp_draft_revised_version_en.pdf.
[136] See: www.eib.org/attachments/consultations/eib_group_tp_comments_transparency_international_20150109_en.pdf, p. 2.
[137] Ibid (emphasis added).
[138] Ibid.

the result is that the banks arguably find themselves in a better position of principle than the Court (without assessing here how the banks have implemented their transparency obligations in practice). One might also point to the public register of documents[139] maintained by them, as well as the EIB's annual report[140] on access requests. Nothing prevents the Court from taking similar steps.

The way forward for the Court

In this context, this contribution will advance a (balanced) proposal as the way forward that would enable Court to provide further guidance on its administrative functions. It is also argued that this discussion on (and any proposals for) the delineation of the Court's administrative functions should be informed by the need to achieve a balance between (on the one hand) ensuring judicial independence and impartiality and (on the other) improving the transparency and accountability of the judiciary.

Let us begin with judicial independence. Clearly, decisions to exclude judicial functions of courts from scrutiny mechanisms have the purpose of protecting judicial independence. With regard to the EDPS, this is specified in Regulation 2018/1725.[141] Relatedly, the access to documents exemption serves the purpose of protecting the serenity of judicial proceedings and ensuring that judges are not 'expos[ed] … to external pressure'.[142] But beyond this: the administrative functions of the judiciary should be entrusted to the judiciary itself because this serves, again, judicial independence. As US Justice Breyer observed (writing extra-judicially), 'the question of who controls the context in which judges decide cases matters a great deal to the question of the independence of the judiciary'.[143] Further instruments published by international organisations and their bodies confirm as much. For example, the Consultative Council of European Judges (CCEJ), an advisory body of the Council of Europe, has underlined in several Opinions the importance of administrative independence.[144]

[139] See Article 11 of Regulation 1049/2001 (n 32).
[140] See Article 17 of Regulation 1049/2001.
[141] See Recital 74 of Regulation (EU) 2018/1725 (n 45), stating that: 'The supervisory competence of the European Data Protection Supervisor should not cover the processing of personal data by the Court of Justice when acting in its judicial capacity, in order to safeguard the independence of the Court in the performance of its judicial tasks, including decision-making.'
[142] *Sweden and Others* v *API and Commission* (n 10) para 93.
[143] Stephen Breyer, 'Judicial Independence in the United States' (1996) 40 *St. Louis University Law Journal* 989, at 990.
[144] CCJE, Opinion No 2 (2001) on the funding and management of courts with reference to the efficiency of the judiciary and to Article 6 of the European Convention on Human Rights, available at:

More generally, readers should certainly be familiar with developments concerning judicial independence in the context of the EU rule of law crisis.[145] The CJEU has made landmark contributions, in this respect; yet, this is not the place to cover extensively the input of the Luxembourg Court.[146] The Strasbourg Court has also produced extensive jurisprudence on judicial independence as an essential requirement of Article 6 ECHR (the right to a fair trial).[147] The independence of the CJEU itself is strongly affirmed in the Treaty,[148] the CJEU's Statute (Protocol 3 annexed to the Treaties),[149] and it also permeates the Rules of Procedure of the Court and the Code of Conduct for its Members. Moreover, it has been the subject of scholarly analysis.[150]

Independence is, however, one side of the coin. It is now widely accepted that courts should also be open and transparent – to the extent that such openness does not, of course, undermine the judicial function.[151] It has already been observed that public court proceedings increase transparency, accountability and trust in the judiciary.[152] As AG Bobek noted in *Breyer*, openness 'strengthens the overall legitimacy of courts'.[153] He added that:

> 'it is notably through openness that courts become more accountable to the citizens. The openness of courts fosters their democratic nature by enabling the citizens to monitor the exercise of judicial power, by guaranteeing their participation through public debate and, finally, by furthering understanding of the judicial pronouncements. In this way, judicial openness ultimately fuels input legitimacy.'[154]

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www.coe.int/en/web/ccje/ccje-opinions-and-magna-carta, in particular point 13: 'it is important that judges are responsible for all administrative decisions which directly affect performance of the courts' functions'.

[145] See, among others, Dimitry Kochenov and Laurent Pech, 'Monitoring and Enforcement of the Rule of Law in the EU: Rhetoric and Reality' (2015) 11 *European Constitutional Law Review* 512; Matthias Schmidt and Piotr Bogdanowicz, 'The infringement procedure in the rule of law crisis: How to make effective use of Article 258 TFEU' (2018) 55 *Common Market Law Review* 1061; Alicia Hinarejos, '"Polexit" from the EU legal system? The Court of Justice and the Polish Constitutional Court' (2021) 46 *European Law Review* 413.

[146] See, among others, Case C-64/16, *Associação Sindical dos Juízes Portugueses*, EU:C:2018:117; Case C-216/18 PPU, *LM*, EU:C:2018:586; Case C-619/18, *Commission* v *Poland*, EU:C:2019:531; Joined Cases C-585/18, C-624/18 and C-625/18, *A.K. and Others*, EU:C:2019:982.

[147] Among many notable cases see, for example, *Baka* v *Hungary*, Application 20261/12, 23 June 2016; and more recently *Xero Flor w Polsce sp. z o.o.* v *Poland*, Application 4907/18, 7 May 2021; *Reczkowicz* v *Poland*, Application 43447/19, 22 July 2021.

[148] See Article 19(2) TEU and Articles 253-254 TFEU.

[149] See, in particular, Articles 2-6 of Protocol 3.

[150] See, for example, Daniel Kelemen, 'The political foundations of judicial independence in the European Union' (2012) 19 *Journal of European Public Policy* 43.

[151] See further on the judicial functions of international courts, Jeffrey Dunoff and Mark Pollack, 'The judicial trilemma' (2017) 111 *American Journal of International Law* 225.

[152] Dahlberg (n 5).

[153] Opinion of AG Bobek in *Breyer* (n 15) para 96.

[154] Ibid, para 98.

Accountability presents different challenges for the judiciary. For example, 'the very essence of the judicial function' would be 'obstruct[ed]' if 'a court or individual judges [would] face immediate consequences for decisions rendered in compliance with the law'.[155] Simultaneously, accountability should in principle apply to courts as they exercise significant public power.[156] Of course, the 'challenge is to develop mechanisms of accountability that do not undermine judicial independence' – but in any event, calling for (appropriate) judicial accountability 'carries no necessary implication of hostility or scepticism about the exercise of judicial power'.[157] In this context, this article takes into account the debate on accountability and transparency concerning courts' (and the CJEU's) judicial functions but wishes to focus on the accountability and transparency of the Court's administrative functions.

Having rejected the purely *ad hoc* approach to administrative functions, the article will now propose how such clearer delineation or guidance from the CJEU could be provided. It is argued that, in order for the competing demands of independence and accountability to be met, it should be left to the Court itself, in the first instance, to provide further guidance on its administrative functions; yet, a more principled approach, on the part of the Court, is required, one that would be based on whether the Court's independence and impartiality would actually be undermined. The article, therefore, relies on independence in a dual way: first, to underline that judicial independence presupposes administrative autonomy or administrative autonomy reinforces independence (which, for present purposes, means that the 'administrative' field of the Court's work should not be externally imposed – for example, by other EU institutions or member states via a hypothetical revision of Article 15(3)(4) TFEU); and second, and conversely, to claim that the 'protection' from transparency and accountability that the CJEU enjoys serves precisely the aim of ensuring its independence and impartiality: if so, surely such criterion should be crucial in the classification of the activity in question.

With regard to the first dimension of independence, judicial independence does not only mean that the judicial aspects of the Court's role are excluded from these supervisory mechanisms, but also that the Court should have control over its administrative functions. The CJEU's set-up appears to confirm that the Court is essentially managed by the EU judiciary itself. If the CJEU controls its administrative functions, it is then appropriate to be left to the latter to

[155] Christoph Krenn, 'The European Court of Justice's Financial Accountability: How the European Parliament Incites and Monitors Judicial Reform through the Budgetary Process' (2017) 13 *European Constitutional Law Review* 453, at 454.
[156] Andrew Le Sueur, 'Developing mechanisms for judicial accountability in the UK' (2004) 24 *Legal Studies* 73.
[157] Ibid, 74.

attempt to provide clearer guidelines on the 'non-judicial', as opposed to, for example, a legislative intervention in one of the aforementioned areas (European Ombudsman, EDPS, access to documents[158]) that would attempt to delineate the Court's administrative tasks. This solution would increase the Court's accountability and openness and contribute to improving legal certainty; but it would also safeguard its independence, given that it would be a solution that would not be externally imposed. In addition, the solution employed by the banks cannot be duplicated by the Court, despite the earlier remark that useful lessons can be drawn from their access regime: the bulk of the Court's work is still judicial in nature, and therefore the Court cannot start from the premise that everything, in principle, is subject to accountability and access. This would, in fact, contravene Article 15(3)(4) TFEU.

That being said, this article does not advance a strict, absolute delineation (for example, a pre-determined list of administrative functions). Beyond the challenges that such task would entail, it is also argued that in some cases it might even be desirable to leave some discretion with the Court. It is therefore preferable for the Court to operate on the basis of broader principles (while retaining some discretion), as opposed to a strict, and often impractical, separation. This article does argue, however, that the Court's broader principles upon which its decisions should be based should be publicly available. Such principles should be built around independence and impartiality. One may say that ultimately, this article calls for a principled *ad hoc* approach, which will enable external stakeholders (and most importantly citizens) to identify the framework and rationale underpinning the Court's classification. This would then enable external observers and accountability mechanisms (such as the European Ombudsman and the EDPS) to hold the Court to its own standards.

Obviously, the proposal advanced in the present contribution is based on a delicate balance of different interests. It seeks to narrow the Court's full discretion (the purely *ad hoc* approach) – but not to eliminate it. It seeks to rely on independence in a dialectic way (as already explained). It argues that the crucial consideration in the publicly available guidance should be whether increased accountability and openness of the activity in question would actually undermine the

[158] On access to documents it should be noted, though, that the third sub-paragraph of Article 15(3) TFEU states that '[e]ach institution, body, office or agency shall ensure that its proceedings are transparent and shall elaborate in its own Rules of Procedure specific provisions regarding access to its documents', while the European Parliament, the Council and the Commission invited other EU institutions and bodies to adopt *their own rules* (Joint Declaration relating to Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, OJ L 145).

Court's independence – but does not prescribe the precise principles that should be drafted by the Court.

In this respect, an objection could be raised that what is proposed here might not decisively increase the Court's transparency and accountability, particularly because the Court is still left with discretion to determine these principles. These are valid concerns. In this respect, a number of observations may be submitted: the proposal is presented here as a first step, in the sense that, were the Court to follow this approach, its outcome would have to be assessed and evaluated in due course (and clearer guidance by the Court would still leave the door open for more rigorous scrutiny in the future); it is a considerable improvement from the current *ad hoc* approach which, as was explained above, strengthens the Court's own autonomy, and explains its reluctance to engage more thoroughly with accountability frameworks; lastly, much would depend on how the Court would make use of this opportunity to draft (and publicise) these principles. Further approaches might be possible. On the scope of Article 15(3)(4) TFEU, Alemanno and Stefan have argued, for example, that the following criterion should be applied: 'only those activities and documents that belong to the process, being a direct expression of a court's judicial activity, should escape the principle of access to documents'; if so, a press release, for instance, cannot be covered by the exemption.[159]

In any case, should the CJEU decide to proceed with drafting clearer guidelines on the scope of its administrative functions, a consideration that would certainly appear less convincing than independence would pertain to resources. Resources are often advanced by EU institutions and bodies when questions of accountability and good administration are addressed to them.[160] To be sure, the EU institutions, including the judiciary, do not benefit from limitless resources. It remains to be seen whether the CJEU will clarify the scope of non-judicial activities and, if so, which considerations will matter most in such exercise.

Concluding remarks

The administrative functions of courts (and the CJEU, more specifically) should not escape scholarly attention: among other reasons, administrative independence informs judicial independence; administrative functions can contribute to the quality and management of decision-making within courts; and can be used so that courts engage with external stakeholders and citizens. The present article shed light on the CJEU's administrative

[159] Alemanno and Stefan (n 2) 115.
[160] Vogiatzis (n 43), in particular chapters 4 and 5.

functions, through a critical examination of the legal framework and a number of 'missed' opportunities for the Court to provide clearer guidance on its non-judicial work. It was argued that these instances reveal a broader reluctance, on the part of the Court, to engage in a debate about its non-judicial work.

There is no need to repeat here the 'missed opportunities' that were identified above; or the reasons pointing to the desirability of departing from the present purely *ad hoc* approach. Crucially, and concerning the way forward for the Court, the discussion was framed in the context of the competing demands of increasing the Court's accountability with regard to its administrative functions, while simultaneously safeguarding its independence. Thus, it was claimed that the task of drafting the principles, upon which the decision on the 'administrative' nature of the activity or document will be based, should be left to the Court itself, in the first instance; in such exercise, independence and impartiality should be crucial considerations.

It is quite fair to acknowledge that the legitimacy of supranational courts is increasingly being challenged, on various grounds.[161] The present account does not wish to question the Court's authority, nor does it challenge the Court's contribution to the process of European integration. Of course, as is the case with any court, authors (or even CJEU judges themselves) will differ on whether this or that judgment achieved the right balance of competing interests or adopted a plausible interpretation of EU law. Closer to the themes developed in this piece, the CJEU has taken the step to release historical documents at the Historical Archives in Florence,[162] and it has now established a very useful platform, titled 'Judicial network of the EU'.[163] The President of the CJEU has underlined the need for the Court to engage with all stakeholders via 'high-quality, effective and transparent justice' with a view to restoring their confidence in European integration.[164] These are all important initiatives and statements.

Nevertheless, the CJEU needs also to take further steps with a view to becoming more transparent and accountable. It has rightly been observed that there is 'a duty on the part of international courts and tribunals to keep the public informed, especially given that they are further removed from the public than national courts'.[165] In the context of its project on

[161] Among the vast literature see, for example, Nienke Grossman et al (eds) *Legitimacy and International Courts* (Cambridge University Press 2018).
[162] See also Editorial Comments, 'The Court of Justice in the Archives' (2019) 56 *Common Market Law Review* 899.
[163] See further: https://curia.europa.eu/jcms/jcms/p1_2170125/en/.
[164] CJEU Annual Report 2018, p. 8.
[165] Paul Mahoney, 'The International Judiciary – Independence and Accountability' (2008) 7 *The Law and Practice of International Courts and Tribunals* 313, at 345.

independence and accountability, the European Network of Councils for the Judiciary (ENCJ) has developed a number of principles that could inform the approach of the Court of Justice[166] (although, as already noted, the CJEU's legitimacy is more difficult to be established than that of national courts, which are the focus of the ENCJ's report). Therein, it is specified, among others, that to 'be accountable, not only the formal requirements about accountability must be met, but also the population must perceive the judiciary to be accountable. Even if there are formal procedures objectively in place to ensure judicial accountability, the subjective perception of citizens as to judicial accountability is of equal importance'.[167] And of course, accountability pertains to the court as a whole (which includes 'transparency about performance'), as well as to individual judges.[168] To whom should the CJEU be more open, transparent and accountable? Thinking about the Court's administrative functions, which is the focus of the present contribution, the answer is: to citizens, but also to EU bodies responsible for supervising its work, such as the European Ombudsman and the EDPS.

The Court enters a new period in which it will have to work with judges from 27 member states, in the context of the 'social and economic effects' of the Covid-19 pandemic.[169] The Court will, of course, carry on with its mission to safeguard the EU rule of law in the European Union. And it is no secret that the EU is also entering a period of reflection, including on how it will improve its legitimacy, become less bureaucratic and more transparent and accessible to citizens.[170] Also because it is as a particularly influential institution within the EU's constitutional system, the legitimacy and accountability of the CJEU matter for the EU's legitimacy and accountability as a whole. Thus, the CJEU should take further steps that will enable closer scrutiny, improve its visibility, accountability and transparency, without compromising its independence. As AG Bobek put it, referring to judicial documents, 'somewhat paradoxically in an age of universal internet information overload, the interested outside world is in fact receiving less and less information about the decision-making of the Court. The time is ripe to turn the tide'.[171] Taking this further, the time is appropriate for the Court to improve its accountability regarding its non-judicial work as well. Access requests,

[166] ENCJ, 'Independence, Accountability and Quality of the Judiciary: Measuring for improvement. ENCJ Report 2019-2020' (2020) available at: www.encj.eu/articles/71.
[167] Ibid, p. 12.
[168] Ibid.
[169] Alicia Hinarejos, 'A Brexit special issue and a pandemic' (2020) 45 *European Law Review* 161, at 162.
[170] See, more recently, European Commission, 'White Paper on the Future of Europe' (2017) available at: ec.europa.eu/commission/future-europe/white-paper-future-europe_en; and the website on the Conference on the Future of Europe at: https://futureu.europa.eu/.
[171] Opinion of AG Bobek in *Breyer* (n 15) para 120.

complaints to the Ombudsman and, perhaps, the EDPS as well (within the remit of their respective mandates) are not necessarily interferences with the CJEU's autonomy. Depending on what is requested or complained against, they may well be opportunities for the Court to engage with citizens and improve its administrative standards, services, and practices.