Reports of Cases

OPINION OF ADVOCATE GENERAL
SHARPSTON
delivered on 12 September 2019 [1]

Cases C-542/18 RX-II and C-543/18 RX-II

Erik Simpson
v
Council of the European Union
and
HG
v

European Commission

(Review — European Union Civil Service Tribunal — Appointment of judges — Ground of appeal involving a matter of public policy — Incidental review — Article 47 of the Charter of Fundamental Rights of the European Union — Right to a fair trial — Tribunal established by law — Principle of legal certainty — Adverse effect on the unity or consistency of EU law)

1. What should happen if candidates duly qualified to perform the duties of judge at the European Union Civil Service Tribunal ('the CST') are appointed following a procedure that proves to be irregular? These unprecedented proceedings contain all the ingredients necessary to explore the correct answer to that question. They raise issues concerning the procedure for the Council to appoint judges to the CST, whether such appointments are amenable to review by the General Court, whether such a review can be an incidental review, how to reconcile the various principles applicable to a review and the effects which an irregularity in the appointment of a judge may have on judicial proceedings in which that judge has participated. First and foremost, however, the principal challenge in this Opinion is to formulate guidelines as to how to strike the balance between the right to a tribunal established by law, on the one hand, and the legal certainty needed to ensure the stability of the judicial system, on the other.

[1] Original language: French.

Legal framework

Convention for the Protection of Human Rights and Fundamental Freedoms

2. Article 6(1) of the Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950 ('the ECHR'), entitled 'right to a fair trial', states that 'everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law'. Article 13 thereof enshrines the right to an effective remedy.

TFEU

3. The first and fourth paragraphs of Article 257 TFEU provide that:

'The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may establish specialised courts attached to the General Court to hear and determine at first instance certain classes of action or proceeding brought in specific areas.

…

The members of the specialised courts shall be chosen from persons whose independence is beyond doubt and who possess the ability required for appointment to judicial office. They shall be appointed by the Council, acting unanimously.'

Annex I to the Statute of the Court of Justice of the European Union

4. Article 2 of Council Decision 2004/752/EC, Euratom of 2 November 2004 establishing the CST [2] attached Annex I (entitled 'The European Union Civil Service Tribunal') to Protocol No 3 on the Statute of the Court of Justice of the European Union ('the Statute of the Court of Justice'). [3] Article 2 of that annex, in the version applicable to the facts at issue, provided:

'The [CST] shall consist of seven judges. …

The judges shall be appointed for a period of six years. Retiring judges may be reappointed.

Any vacancy shall be filled by the appointment of a new judge for a period of six years.'

5. Article 3 of Annex I provided:

'1. The judges shall be appointed by the Council, acting in accordance with the fourth paragraph of Article 257 of the [TFEU], after consulting the committee provided for by this Article. [4] When appointing judges, the Council shall ensure a balanced composition of the [CST] on as broad a

2 OJ 2004 L 333, p. 7.

3 Annex I was deleted by Article 2 of Regulation (EU, Euratom) 2016/1192 of the European Parliament and of the Council of 6 July 2016 on the transfer to the General Court of jurisdiction at first instance in disputes between the European Union and its servants (OJ 2016 L 200, p. 137).

4 Later in this Opinion I shall refer to that committee, whose functions are described in Article 3(3) of Annex I, as the 'selection committee'.

geographical basis as possible from among nationals of the Member States and with respect to the national legal systems represented.

2. Any person who is a Union citizen and fulfils the conditions laid down in the fourth paragraph of Article 257 of the [TFEU] may submit an application. The Council, acting by a qualified majority on a recommendation from the Court of Justice, shall determine the conditions and the arrangements governing the submission and processing of such applications.

3. A [selection] committee shall be set up comprising seven persons chosen from among former members of the Court of Justice and the General Court and lawyers of recognised competence. The [selection] committee's membership and operating rules shall be determined by the Council, acting on a recommendation by the President of the Court of Justice.

4. The [selection] committee shall give an opinion on candidates' suitability to perform the duties of judge at the [CST]. The [selection] committee shall append to its opinion a list of candidates having the most suitable high-level experience. Such list shall contain the names of at least twice as many candidates as there are judges to be appointed by the Council.'

Charter of Fundamental Rights of the European Union

6. Article 47 of the Charter of Fundamental Rights of the European Union ('the Charter'),[5] entitled 'right to an effective remedy and to a fair trial', states, in the second paragraph thereof:

'Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented.'

7. Article 52(3) of the Charter provides that, 'in so far as this Charter contains rights which correspond to rights guaranteed by the [ECHR], the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection'.

The procedure for appointments to the CST

The 2013 call for applications

8. On 3 December 2013, a public call for applications was published in the *Official Journal of the European Union* ('the 2013 call for applications')[6] with a view to appointing two judges to the CST for a period of six years commencing on 1 October 2014 and ending on 30 September 2020. That call for applications was launched in anticipation of the expiry, on 30 September 2014, of the terms of office of two CST judges, namely Judges S. Van Raepenbusch and H. Kreppel.

5 OJ 2010 C 83, p. 389.

6 OJ 2013 C 353, p. 11.

9. Paragraph 2 of the 2013 call for applications described the procedure to be followed:

'… The judges are appointed by the Council acting unanimously, after consulting a [selection] committee of seven persons chosen from among former members of the Court of Justice and the General Court of the European Union and lawyers of recognised competence. The [selection] committee gives its opinion on candidates' suitability to perform the duties of judge at the [CST]. The [selection] committee appends to its opinion a list of the candidates having the most suitable high-level experience. The list contains the names of at least twice as many candidates as there are judges to be appointed.'

10. Paragraph 4 explained that, 'as there are two judges whose term of office is due to expire on 30 September 2014, a call is made for applications with a view to the appointment of two new judges for a period of six years from 1 October 2014 to 30 September 2020'.

11. The selection committee duly drew up a list containing the names of not four but six candidates having the required experience, ranked in order of merit ('the list of candidates at issue').[7] However, the Council did not fill those two posts at that stage. Judges Van Raepenbusch and Kreppel therefore continued to hold office beyond the end of their respective mandates, that is to say beyond 30 September 2014, in accordance with Article 5, third paragraph, of the Statute of the Court of Justice, which provides that a judge shall continue to hold office until his successor takes up his duties. The first paragraph of Article 5 of Annex I to the Statute of the Court of Justice rendered that provision applicable to judges serving in the CST.

12. On 31 August 2015, the term of office of a third judge at the CST, Judge I. Rofes i Pujol, expired.[8] No public call for applications had been published with a view to filling that post. Consequently, Judge Rofes i Pujol also continued to hold office beyond the end of her mandate, in accordance with Article 5, third paragraph, of the Statute of the Court of Justice.

Decision (EU, Euratom) 2016/454

13. Recitals 1 to 6 of Council Decision (EU, Euratom) 2016/454 of 22 March 2016 appointing three judges to the European Union Civil Service Tribunal ('the appointment decision')[9] state:

'(1) The mandate of two Judges of the [CST] … has ended with effect from 30 September 2014, and the mandate of a further Judge has ended with effect from 31 August 2015. It is therefore necessary under Article 2 and Article 3(1) of Annex I to … the Statute of the Court of Justice …, to appoint three judges to fill those vacancies.

(2) Following a public call for applications published in 2013 … with a view to the appointment of two Judges to the [CST], the [selection committee] delivered an opinion on the candidates' suitability to perform the duties of a Judge of the [CST]. The [selection committee] appended to its opinion a list of six candidates having the most suitable high-level experience.

7 The Council appears never to have accepted that the selection committee could list the candidates it put forward in order of merit. See Sevón, L., 'La procédure de sélection des membres du Tribunal de la fonction publique de l'Union européenne: une expérience pionnière', *Revue universelle des droits de l'homme*, vol. 20, Nos. 1-3, 30 June 2011, pp. 7 to 9.

8 Ms I. Rofes i Pujol was appointed to the CST for a period of six years, from 1 September 2009 to 31 August 2015, by Council Decision 2009/474/EU, Euratom of 9 June 2009 appointing a judge to the European Union Civil Service Tribunal (OJ 2009 L 156, p. 56).

9 OJ 2016 L 79, p. 30.

(3) Following the political agreement on the reform of the judicial architecture of the European Union that led to the adoption of Regulation (EU, Euratom) 2015/2422 of the European Parliament and of the Council … , the Court of Justice [of the European Union] presented on 17 November 2015 a proposal for a Regulation of the European Parliament and of the Council on the transfer to the General Court of the European Union of jurisdiction at first instance in disputes between the Union and its servants with effect from 1 September 2016.

(4) In these circumstances, for reasons of timing, it is appropriate not to publish a new public call for applications, but rather to draw on the list of the six candidates having the most suitable high-level experience established by the [selection committee] following the public call for applications published in 2013.

(5) It is therefore appropriate to appoint three of the persons included on that list as Judges of the [CST], ensuring a balanced composition of the [CST] on as broad a geographical basis as possible from among nationals of the Member States and with respect to the national legal systems represented. The three persons on that list having the most suitable high-level experience are Mr Sean VAN RAEPENBUSCH, Mr João SANT'ANNA and Mr Alexander KORNEZOV. Mr João SANT'ANNA and Mr Alexander KORNEZOV should be appointed with effect from the date of entry into force of this Decision. Given that Mr Sean VAN RAEPENBUSCH was already a Judge at the [CST] until 30 September 2014 and continued to hold office pending the Decision of the Council in accordance with Article 5 of [the Statute of the Court of Justice], it is appropriate to appoint him for a new mandate with effect from the day after the end of his previous mandate.

(6) It follows from Article 2 of Annex I to [the Statute of the Court of Justice] that any vacancy is to be filled by the appointment of a new Judge for a period of six years. However, upon the application of the proposed Regulation on the transfer to the General Court of the European Union of jurisdiction at first instance in disputes between the Union and its servants, the [CST] will no longer exist, and the mandate of the three Judges appointed by this Decision will thus end *ipso facto* on the date preceding that on which that Regulation applies.'

14. Article 1 of that decision provides:

'The following are hereby appointed Judges to [the CST]:

– Mr Sean VAN RAEPENBUSCH, with effect from 1 October 2014,

– Mr João SANT'ANNA, with effect from 1 April 2016,

– Mr Alexander KORNEZOV, with effect from 1 April 2016'.

15. Messrs Sant'Anna and Kornezov were sworn in on 13 April 2016.

16. By decision of 14 April 2016,[10] the CST attached Judges Bradley, Sant'Anna and Kornezov to its Second Chamber for the period from 14 April to 31 August 2016 ('the panel of judges at issue'). That chamber delivered, inter alia, judgments and orders in the cases of *FV*,[11] *Simpson*[12] and *HG*.[13]

10 OJ 2016 C 146, p. 11.

11 Judgment of 28 June 2016, *FV* v *Council*, F-40/15, EU:F:2016:137.

12 Order of 24 June 2016, *Simpson* v *Council*, F-142/11 RENV, EU:F:2016:136.

13 Judgment of 19 July 2016, *HG* v *Commission*, F-149/15, EU:F:2016:155.

The background to Simpson and HG

The judgment in FV

17. FV claimed in her appeal before the General Court that the CST's judgment dismissing her claim had been delivered by a panel of judges which had been irregularly constituted, inasmuch as the procedure for appointing the successor to the post previously occupied by Judge Rofes i Pujol was vitiated by an irregularity.

18. The General Court concluded that, 'having regard to the importance of compliance with the rules governing the appointment of a judge for the confidence of litigants and the public in the independence and impartiality of the courts, the judge at issue cannot be regarded as a lawful judge within the meaning of the first sentence of the second paragraph of Article 47 of the Charter …' [14] and set aside the CST's judgment. I shall consider the General Court's reasoning in the judgment in *FV* later in this Opinion. [15]

19. The Court did not review the General Court's judgment in *FV*. The First Advocate General took the view that 'the judgment [in *FV*] does not … constitute a serious risk that the unity or consistency of EU law may be affected'. He nevertheless proposed (as I understand it, because of the judgment's constitutional importance) that the Court should conduct a review. Against that background, the Court decided that the formal conditions for review laid down in Article 62 of the Statute of the Court of Justice were not met. [16]

The judgments in Simpson *and* HG

20. The present review procedures concern two judgments of the General Court: the judgment of 19 July 2018, *Simpson* v *Council* [17] and the judgment of 19 July 2018, *HG* v *Commission* [18] (together, 'the judgments under review'). In so far as the review does *not* concern the substance of those cases, I shall merely summarise the essence of each here and refer the Court of Justice to the General Court's judgments for a more detailed account of each set of proceedings.

Case C-542/18 RX-II Simpson

21. Mr Erik Simpson was originally a member of the auxiliary staff in the Estonian translation unit at the Council. He was then successful in a competition for translators, became an official (initially graded AD 5, then re-graded AD 6) and passed a further competition. He requested promotion to grade AD 9 on the basis that he had passed a competition corresponding to the grade sought and that three officials from other translation units in a situation comparable to his own had been upgraded in that way.

22. The Council refused that request and rejected the ensuing complaint that Mr Simpson lodged under Article 90(2) of the Staff Regulations.

14 Judgment of 23 January 2018, *FV* v *Council*, T-639/16 P, EU:T:2018:22 ('the judgment in *FV*'), paragraph 78.

15 See points 41 et seq. and 126 et seq. of this Opinion.

16 Decision of the Court of Justice of 19 March 2018, *Review FV* v *Council*, C-141/18 RX, EU:C:2018:218, paragraphs 4 and 5.

17 T-646/16 P, not published, EU:T:2018:493.

18 T-693/16 P, not published, EU:T:2018:492.

23. Mr Simpson succeeded in his subsequent action before the CST (Case F-142/11), which annulled the Council's decision on the grounds that the Council had infringed the obligation to state reasons. The General Court upheld the Council's appeal against that judgment (Case T-130/14 P) and sent the case back to the CST (where it became Case F-142/11 RENV). By reasoned order of 24 June 2016, the Second Chamber of the CST (composed of Judges Bradley, Sant'Anna and Kornezov) then dismissed the action in its entirety.

24. Mr Simpson lodged an appeal before the General Court on 6 September 2016 against that order.

25. On 22 March 2018, the General Court invited the parties to submit observations as to the implications for the appeal of the judgment in *FV*. In response to that invitation, the parties both submitted, first, that a ground of appeal alleging an irregularity in the composition of the panel of judges (such as the General Court had found in the judgment in *FV*) involves a matter of public policy which must be examined by the court on appeal of its own motion and, secondly, that the CST's order had been signed by the same panel of judges as had decided *FV*. Thus, they concluded that that order must be set aside for the same reasons as those upheld by the General Court in the judgment in *FV*.

26. The General Court thereupon set aside the CST's order and referred the case to a different chamber of the General Court to rule at first instance on the action. That case is currently suspended.

Case C-543/18 RX-II HG

27. HG, a Commission official, was on detachment to work with the EU delegation at the United Nations in New York. Staff accommodation had been made available to him in connection with his posting there. He did not move fully into that accommodation - by his account, for family reasons - but made intermittent use of it and arranged for a third party (a friend) to stay there sometimes as 'a house-sitter'. HG was disciplined and ordered to compensate the Commission for the damage it had sustained. He lodged a complaint, which was rejected, against the disciplinary decision taken against him.

28. HG then brought an action before the CST (Case F-149/15) by which he sought, inter alia, the annulment of the disciplinary decision and compensation from the Commission for the damage he had allegedly sustained. That case (F-149/15) was assigned to the Second Chamber of the CST, initially composed of Judge Kreppel, Judge Rofes i Pujol and Judge Bradley. The CST later attached Judges Bradley, Sant'Anna and Kornezov to its Second Chamber,[19] which, in that composition, dismissed the action by judgment of 19 July 2016.

29. HG lodged an appeal before the General Court on 28 September 2016 against that judgment.

30. On 31 January 2018, HG enquired in writing whether the General Court intended to seek the parties' observations as to the implications for the appeal of the judgment in *FV*. On 26 March 2018, the General Court invited the parties to submit their observations on that issue. In response to that invitation, the parties both emphasised that the CST's judgment had been delivered by the same panel of judges whose composition had been considered to be irregular by the General Court in the judgment in *FV*. HG also argued that a ground of appeal alleging an

[19] See point 16 of this Opinion.

irregularity in the composition of the panel of judges (such as the General Court had found in that judgment) involved a matter of public policy. He therefore concluded that the CST's judgment must be set aside for the same reasons as the General Court had upheld in *FV*. The Commission recognised that the CST's judgment could be set aside on the basis of the conclusions reached by the General Court in *FV* and the appeal then be referred to a different chamber of the General Court (as HG had also proposed). The Commission suggested that that chamber would need to re-start the proceedings at the point when either the judge whose nomination was irregular or the chamber of the CST to which he had been attached had taken its first procedural step.

31. The General Court thereupon set aside the CST's judgment under appeal and referred the case to a different chamber of the General Court to rule at first instance on the action. That case is currently suspended.

The procedure before the Court of Justice

32. On 20 August 2018, the First Advocate General recommended that the General Court's judgments on appeal in Case T-646/16 P *Simpson* and Case T-693/16 P *HG* should be reviewed. Thereafter the Reviewing Chamber, acting under the second paragraph of Article 62 of the Statute of the Court of Justice and Article 193(4) of the Rules of Procedure, adopted the decisions of 17 September 2018 in *Review Simpson* v *Council*[20] and *Review HG* v *Commission*.[21] It held that there should be reviews of both those judgments in order to determine whether they affect the unity or consistency of EU law.

33. More specifically, the Reviewing Chamber defined the parameters of those two reviews as follows:

'The review shall concern the question whether, having regard, in particular, to the general principle of legal certainty, [the judgments under review affect] the unity or consistency of EU law in that the General Court, as the court hearing the appeal, held that the composition of the panel of judges … which had delivered [the judgments under review] had been irregular, on the basis of an irregularity affecting the procedure for the appointment of one of the members of that panel of judges, leading to infringement of the principle of the lawful judge, laid down in the first sentence of the second paragraph of Article 47 of the Charter ...

The review shall involve, in particular, the question whether, like the acts covered by Article 277 TFEU, the appointment of a judge may form the subject matter of a review of indirect legality or whether such a review of indirect legality is — by principle or after the passage of a certain period of time — excluded or limited to certain types of irregularity in order to ensure legal certainty and the force of *res judicata*.'

34. The interested parties referred to in Article 23 of the Statute of the Court of Justice were invited to lodge written observations on these questions. Written observations were thus lodged by the appellants in the two appeals before the General Court, the Council, the Commission and the Bulgarian Government. The cases were assigned to the Grand Chamber in accordance with Article 195(5) of the Rules of Procedure.

35. All those parties presented oral argument at the hearing on 21 May 2019.

[20] Decision of 17 September 2018, C-542/18 RX, EU:C:2018:763.

[21] Decision of 17 September 2018, C-543/18 RX, EU:C:2018:764.

Analysis

Preliminary observations

36. I begin by noting that the Court has never decided whether the General Court's reasoning in the judgment in *FV* poses a serious risk to the unity or consistency of EU law. The Court did not review that judgment for purely procedural reasons – it considered that the First Advocate General's proposal for a review of that judgment did not fulfil the requisite conditions. Where the Court of Justice decides *not* to review a judgment of the General Court because that judgment does *not* pose a serious risk to the unity or consistency of EU law, the form of words used is entirely different and merely states that 'it is not necessary to review the judgment'. [22]

37. The issue raised by the judgment in *FV* therefore remains unresolved and the judgments currently under review serve only to highlight its relevance. In these two judgments the General Court simply followed the approach it had taken previously in the judgment in *FV* and reproduced the reasoning formulated there. It is therefore impossible to undertake a review in the present cases without starting by analysing the judgment in *FV* in detail.

38. Inasmuch as in the judgments under review the General Court (i) held that, in the present factual scenario, the 'principle of the lawful judge' established in the first sentence of the second paragraph of Article 47 of the Charter had been infringed *without* taking the principle of legal certainty into consideration in its analysis, and (ii) undertook an incidental review of whether the appointment of a judge to the CST was lawful, do those judgments pose a threat to the unity or consistency of EU law?

39. In the analysis that follows, I shall use the expression 'right to a tribunal established by law' rather than 'principle of the lawful judge'. The former is the wording used not only in the first sentence of the second paragraph of Article 47 of the Charter and Article 6(1) ECHR but also in the relevant case-law of the European Court of Human Rights ('the Strasbourg Court'). I consider that it is to that aspect of the right to a fair trial that the General Court is referring in the judgment in *FV* and the judgments under review when it speaks of the 'principle of the lawful judge', a phrase adopted by the Court of Justice in its definition of the parameters of the present review.

40. I also emphasise here that the three appeals before the General Court (and the present review proceedings) *do not in any way call into question the fitness to serve* of the three persons appointed as judges at the CST whose appointment procedure was challenged. All three were on the list of candidates at issue. All three are therefore persons whom the selection committee recognised as 'possessing *the most suitable high-level experience*' (my emphasis) to perform the duties concerned. In other words, the three persons in question not only possess the qualities *necessary* to be appointed as judges to the CST but were also the best of all the candidates considered by the selection committee which, I recall, had drawn up its list in order of merit. I also place on record that at no point has the independence or impartiality of those judges or the panel of judges (the Second Chamber of the CST at the material time) been called into question.

[22] See, by way of example, decisions of the Court of Justice of 8 February 2011, *Review Commission* v *Petrilli*, C-17/11 RX, EU:C:2011:55, and of 29 June 2016, *Review Andres and Others* v *BCE*, C-312/16 RX, not published, EU:C:2016:520.

The first aspect of the issue identified by the Court: striking the balance between the right to a tribunal established by law and the principle of legal certainty

The General Court's reasoning in the judgment in FV

41. In the judgment in *FV*, the General Court examined the appointment procedure and formed the view that the legal framework laid down by the 2013 call for applications had been disregarded, because the Council later used the list of candidates at issue in order to fill not only the two posts covered by the 2013 call for applications but also the post occupied by Judge Rofes i Pujol, which was never so advertised. [23]

42. I say at the outset that in my view the General Court's reasoning concerning the appointment procedure was correct. That procedure was indeed vitiated by an irregularity.

43. By using the list of candidates at issue in order to make three appointments, including to fill the post previously occupied by Judge Rofes i Pujol, the Council did indeed deliberately depart from the procedure which it had itself set out in the 2013 call for applications as provided for in Article 3(2) of Annex I to the Statute of the Court of Justice. The brief reasons given by the Council in recitals 3 and 4 of the appointment decision, which relate to the timetable for reforming the judicial architecture of the European Union, do not to my mind justify the Council's failure to have regard to the legal framework laid down for the appointment of judges to the CST.

44. Thus, before Judge Rofes i Pujol's term of office came to an end, the Council should have launched a new procedure to replace her, given that, in paragraph 4 of the 2013 call for applications, it had explicitly confined that procedure to the replacement of the *two* judges whose terms of office were expiring on 30 September 2014. [24] By using the list of candidates at issue to appoint *three* judges, the Council failed to apply the legal rules which it had itself laid down to govern the procedure.

45. It is understandable that, when it adopted the appointment decision, the Council should have wished to fill all the vacancies at the CST as swiftly as possible. Articles 1 and 2 of Regulation (EU, Euratom) 2016/1192, [25] adopted in parallel with these appointments, abolished the CST and transferred its powers to the General Court on 1 September 2016. To my mind, however, that does not alter the Council's obligation to comply with the procedure which it had itself laid down. If the Council considered in March 2016 that there was no longer time to issue a public call for applications to fill Judge Rofes i Pujol's post, which had not yet been so advertised, a possible legal solution would have been for that judge simply to continue to serve in accordance with Article 5, third paragraph, of the Statute of the Court of Justice until the CST ceased to exist; and for the Council to fill the other two vacancies (which had duly been advertised).

46. In other respects, the procedure by which the appointment decision was adopted complied punctiliously with the legislative framework. The selection committee, duly composed, had drawn up a list of candidates having the most suitable high-level experience. That list formed a legitimate basis to appoint two judges. In accordance with Article 3(2) of Annex I to the Statute

23 Paragraphs 49 to 51 of the judgment in *FV*. As to the facts, see also points 17 to 19 above.

24 Namely Judges Van Raepenbusch and Kreppel. The procedure to replace those two judges was launched on December 2013, almost nine months before the date on which their mandates expired (see point 8 above).

25 The Commission's proposal for that regulation is referred to in recital 3 of the appointment decision (see point 13 above).

of the Court of Justice, it included at least twice as many candidates as there were judges to be appointed by the Council (namely, six candidates for three judges ultimately appointed). The Council confined itself to the list of candidates at issue and drew from it in order to appoint the three judges in question. A reading of recital 5 of the appointment decision shows, as the Council confirmed at the hearing, that the Council appointed the three candidates having the most suitable high-level experience on the list of candidates at issue and the appointment was carried out in such a way as to ensure a balanced composition of the CST on as broad a geographical basis as possible from among nationals of the Member States and with respect to the national legal systems represented.

47. Whilst in the judgment in *FV* the General Court correctly identified the irregularity in the appointment procedure, it did not evaluate correctly its legal *consequences*. In my view, the irregularity identified was liable to affect the appointment decision as a whole. Still less did the General Court address the complex question of how to reconcile the right to a tribunal established by law, on the one hand, and the principle of legal certainty, on the other hand.

48. Rather, the General Court set about identifying the 'judge at issue', that is to say, the judge appointed to fill the 'third vacant post'.[26] It is apparent from reading the judgment in *FV*[27] that, in so doing, the General Court endorsed the first ground of appeal put forward by the appellant in that case.

49. In my view, the General Court was wrong to take that approach. If the Council's 2016 appointment was irregular, it follows that *the three appointments to the CST made by that decision cannot be separated out* in order to identify the 'third judge' who (according to the General Court) was the only one to be affected by that irregularity.

50. Even if one were to take the view — *quod non* — that only one of the three appointments was irregular, recital 5 of the appointment decision mentions the three candidates in the order in which they were proposed by the selection committee, without specifying which judge was appointed to the 'third post'.

51. It might at most be *possible*, in attempting to follow the General Court's line of reasoning, to assume that Mr Van Raepenbusch, the former President of the CST (appointed with effect from 1 October 2014, the date of expiry of his previous term of office) was perhaps the first to be selected by the Council for appointment. But it is impossible to identify, on the basis of the material that the judgment in *FV* records as being before the General Court, which of the other two candidates appointed with effect from 1 April 2016 was the successor to Judge Rofes i Pujol in the famous 'third post'. Neither recital 5 nor Article 1 of the appointment decision expressly identify which appointee was to fill which vacant post. The Council had never accepted that it was bound in any way by the order of listing employed by the selection committee.[28] Furthermore, the Council necessarily enjoyed some discretion in its choice amongst the candidates named in the list of candidates at issue. Article 3(1) of Annex I to the Statute of the Court of Justice required the Council to 'ensure a balanced composition of the Civil Service Tribunal on as broad a geographical basis as possible from among nationals of the Member States and with respect to the national legal systems represented'.[29] It follows that the Council could (for example) lawfully have chosen the first, fourth and fifth persons named on that list.

26 See paragraphs 34 to 38 and 51 of the judgment in *FV*.

27 Paragraph 29 of the judgment in *FV*.

28 See point 11 and footnote 7 above.

29 See also, to that effect, recital 5 of the appointment decision.

52. I note here in passing that the judge identified as 'the judge at issue' has had no opportunity whatsoever to present any observations he might have on the regularity of his appointment. To my mind, that raises questions as to whether his rights were respected.

53. The General Court also made reference to the situation of other potential candidates for the post occupied by Judge Rofes i Pujol, who could have applied if there had been a call for applications. [30] Here again, the General Court's considerations seem to me to be irrelevant to FV's appeal. The existence of other potential candidates and consideration of their rights would of course have taken centre stage in the context of a direct action brought by such a potential candidate disappointed with the appointment decision. However, the General Court was not seised of such an action when it delivered the judgment in *FV*.

54. I pause to emphasise that, whilst I do not endorse the General Court's reasoning in its entirety, I do think that the General Court was right to reject the arguments put forward by the Council to justify the irregularity of the appointment procedure. [31] In my opinion, this part of the judgment in *FV* does not raise issues that are relevant to the present review proceedings.

55. The General Court went on to examine the irregularity of the appointment procedure in the light of the right to a tribunal established by law as provided for in the first sentence of the second paragraph of Article 47 of the Charter, interpreted in the light of the first sentence of Article 6(1) ECHR and the case-law of the Strasbourg Court, which requires compliance with provisions governing the procedure for the appointment of judges. [32]

56. The General Court arrived at the following conclusion:

'78. Accordingly, having regard to the importance of compliance with the rules governing the appointment of a judge for the confidence of litigants and the public in the independence and impartiality of the courts, the judge at issue cannot be regarded as a lawful judge within the meaning of the first sentence of the second paragraph of Article 47 of the Charter of Fundamental Rights.

79. Consequently, the first ground of appeal, alleging that the constitution of the Second Chamber of the Civil Service Tribunal, which delivered the judgment under appeal, was improper must be upheld.

80. In the light of those considerations, the judgment under appeal must be set aside in its entirety, without there being any need to examine the second and third grounds of appeal.'

57. The simple fact is that the matters analysed at length in the judgment in *FV do not include the central question that arises* once the irregularity of the procedure has been established, namely whether (and, if so, why) that irregularity was such as to lead directly and automatically to the judgment of the CST under appeal being set aside. In the presence of an irregularity in the appointment procedure for a judge, how is the balance to be struck between two equally important fundamental principles: the right to a (fair and impartial) tribunal established by law and the requirements of legal certainty? Those issues are nowhere addressed, however, in the judgment in *FV*.

30 See paragraphs 54 to 57 of the judgment in *FV*.

31 Judgment in *FV*, paragraphs 59 to 63.

32 ECtHR, 9 July 2009, *Ilatovskiy v. Russia*, Application No. 6945/04, CE:ECHR:2009:0709JUD000694504, § 40 and 41. See judgment in *FV*, paragraphs 67 to 76.

58. In my opinion, that fundamental shortcoming in the judgment in *FV* creates a serious risk that the unity and consistency of EU law will be adversely affected. The reasoning in that judgment was subsequently reproduced in the judgments under review. Consequently, the analysis that follows concerns the entirety of that case-law.

The General Court's errors with respect to the implications of the irregularity in the appointment procedure

59. Having established the *presence* of *the irregularity* in question, did the General Court have any discretion or was it obliged to set aside the CST's judgment, adopted by the panel of judges at issue, as violating the right to a tribunal established by law? If annulment was not the automatic consequence of the finding that an irregularity had occurred in the appointment procedure, what were the parameters of the discretion available to the General Court?

60. In order to examine those questions, it is necessary to analyse the irregularity of the appointment procedure from the perspective both of the right to a tribunal established by law and of the principle of legal certainty.

– *The right to a tribunal established by law*

61. Article 47 of the Charter encompasses, in a single provision, the right to a fair trial recognised in Article 6(1) ECHR and the right to an effective remedy enshrined in Article 13 ECHR. The relationship between Article 47 of the Charter and those articles of the ECHR is expressly mentioned in the Explanations relating to the Charter of Fundamental Rights.[33] Thus, the first paragraph of Article 47 of the Charter 'is based on Article 13 ECHR' and the second paragraph of that article 'corresponds to Article 6(1) ECHR'. The right to a 'tribunal previously established by law', provided for in the first sentence of the second paragraph of Article 47 of the Charter, is an aspect of the right to a fair trial. The tribunal so identified is the outcome of a process. Only if the procedure for establishing the tribunal (i) existed in law and (ii) was followed in a particular case is the resulting judicial body a 'tribunal previously established by law'.

62. Article 52(3) of the Charter requires that, since the content of Article 47 thereof corresponds to rights guaranteed by the ECHR, the meaning and scope of the right to an effective remedy and to a fair trial under Article 47 must be the same as the matching rights under the ECHR. Article 47 of the Charter must thus be interpreted having due regard both for the Explanations relating to the Charter and for the case-law of the Strasbourg Court.[34] As Article 52(3) of the Charter makes clear, EU law is moreover free to afford more extensive protection.

63. According to the case-law of the Strasbourg Court, 'in principle, a violation by a tribunal of domestic legal provisions relating to the establishment and competence of judicial organs gives rise to a violation of Article 6 § 1. The Court may therefore examine whether the domestic law has been complied with in this regard. However, having regard to the general principle that it is,

33 OJ 2007 C 303, p. 17, see in particular pp. 29 and 30.

34 As my colleague Advocate General Saugmandsgaard Øe noted in his Opinion in *Associação Sindical dos Juízes Portugueses*, C-64/16, EU:C:2017:395, point 71 and the footnote on page 77, 'the fact that it is necessary to refer solely to Article 47 of the Charter where the situation in question falls within the scope of EU law (see judgment of 16 May 2017, *Berlioz Investment Fund*, C-682/15, EU:C:2017:373, paragraph 54 and the case-law cited) [I would say, clearly] does not exclude the possibility of interpreting that article in the light of the case-law of the ECtHR'.

in the first place, for the national courts themselves to interpret the provisions of domestic law, the Court finds that it may not question their interpretation unless there has been a flagrant violation of domestic law'. [35]

64. Thus, in order to find that the right to a tribunal established by law has been breached – and through that breach (taken in isolation) *also* the right to a fair trial guaranteed by Article 6(1) ECHR – the case-law of the Strasbourg Court requires that there should be a 'flagrant' [36] or 'substantive' [37] violation of the applicable national law. It is only where there has been a 'flagrant violation' of domestic law that it becomes unnecessary to go on to consider whether the resulting judicial assessment (the 'trial') was 'unfair'. [38]

65. It follows that not every irregularity in a judicial appointment process is liable to affect that aspect of the right to a fair trial that pertains to the right to a 'tribunal established by law' to a sufficient extent to breach the right to a fair trial. [39] It is therefore appropriate to examine the meaning of the expression 'tribunal established by law' in the light of its objective.

66. That expression covers not only the legal basis for the existence of a 'tribunal' but also the composition of the bench in each case, which includes the rules relating to the appointment of judges. [40] The term 'by law' includes the legislation providing for the establishment and competence of judicial organs and any other provision of domestic law which, if breached, would render the participation of one or more judges in the examination of a case irregular. [41]

67. The rationale behind that aspect of the right to a fair trial is to prevent the executive from exercising an unfettered discretion over the establishment of, or appointments to, a court and to ensure that such matters are governed by statutory rules. [42] The separation of powers between the executive and the judiciary has assumed growing importance in the case-law of the Strasbourg Court. [43] That concept reflects the principle of the rule of law, inherent in the entire ECHR system, inasmuch as any organ which has not been established in accordance with the wishes of the legislature would necessarily be divested of the legitimacy required in a democratic society to hear the cases of individuals. [44]

68. The question is therefore, when does an infringement of the rules governing the appointment of judges give rise in itself to an infringement of the right to a fair trial?

69. The recent case-law of the Strasbourg Court, in particular the judgment in *Ástráðsson*, provides some important clarifications in this regard.

35 ECtHR, 2 May 2019, *Pasquini v. San Marino*, Application No. 50956/16, CE:ECHR:2019:0502JUD005095616, § 102. See earlier ECtHR, 13 April 2006, *Fedotova v. Russia*, Application No. 73225/01, CE:ECHR:2006:0413JUD007322501, § 42.

36 ECtHR, 31 May 2011, *Kontalexis v. Greece*, Application No. 59000/08, CE:ECHR:2011:0531JUD005900008, § 41 and 44, and ECtHR, 4 March 2003, *Posokhov v. Russia*, Application No. 63486/00, CE:ECHR:2003:0304JUD006348600, § 39 and 43.

37 ECtHR, 9 July 2009, *Ilatovskiy v. Russia*, Application No. 6945/04, CE:ECHR:2009:0709JUD000694504, § 40.

38 See further points 68 to 87 below.

39 See again points 68 to 87 below.

40 ECtHR, 9 July 2009, *Ilatovskiy v. Russia*, Application No. 6945/04, CE:ECHR:2009:0709JUD000694504, § 36.

41 ECtHR, 12 March 2019, *Guðmundur Andri Ástráðsson v. Iceland*, Application No. 26374/18, CE:ECHR:2019:0312JUD002637418 ('the judgment in *Ástráðsson*'), § 98 and the case-law cited.

42 ECtHR, 20 October 2009, *Gorguiladzé v. Georgia*, Application No. 4313/04, ECLI:CE:ECHR:2009:1020JUD000431304, § 69.

43 ECtHR, 8 November 2018, *Ramos Nunes de Carvalho e Sá v. Portugal*, Applications Nos. 55391/13, 57728/13 and 74041/13, CE:ECHR:2018:1106JUD005539113, § 144 and the case-law cited.

44 ECtHR, 28 November 2002, *Lavents v. Latvia*, Application No. 58442/00, CE:ECHR:2002:1128JUD005844200, § 114.

70. The Strasbourg Court there held that where a judge had been nominated to a court in breach of the national rules governing the judicial appointment procedure, the participation of that judge in a panel which had found the applicant guilty of criminal offences constituted in itself a violation of Article 6(1) ECHR. [45]

71. Before turning to the reasoning applied by the Strasbourg Court, it is important to note its facts. That case concerned a procedure to appoint 15 judges to a newly established Court of Appeal in Iceland. According to the relevant domestic legislation, it was in principle for an independent evaluation committee composed of five experts ('the Evaluation Committee') to select the 15 best-qualified candidates, the Minister of Justice ('the Minister') not being entitled to appoint different candidates from the 15 so proposed. By way of derogation from that rule, however, Parliament could accept a proposal from the Minister to appoint a specific candidate who, although not among the 15 best candidates, nonetheless satisfied the minimum criteria for appointment. [46]

72. Applications were submitted by 37 candidates, 33 of whom were assessed by the Evaluation Committee. Although the Minister asked to be given a list of, for example, 20 persons for her to choose from, the Evaluation Committee remained faithful to the text of the legislation and presented her with a list of the 15 best candidates, ranked in order of merit, together with a detailed analysis of the evaluation procedure. The Minister wished to appoint a number of other candidates to the posts concerned. Taking the view that greater weight should be given to judicial experience and invoking the equal opportunities legislation (the 'Equality Act No 10/2008'), she presented to the Parliament's Constitutional and Supervisory Committee (the 'CSC'), a list comprising only 11 of the candidates selected by the Evaluation Committee, [47] the remaining four being candidates who, although qualified, had not made it through the selection procedure. [48] She refrained from asking the Evaluation Committee to carry out a fresh evaluation based on the amended criteria. [49]

73. The members of Parliament ('MPs') composing the CSC voted along party-political lines on the Minister's proposal. A majority supported it, while the minority expressed serious doubts about the compatibility of the Minister's conduct with the rules of administrative law. The proposal as approved by the majority of the CSC was then referred to Parliament. The MPs, voting strictly along party-political lines, rejected the CSC minority's view that the Minister's proposal should be dismissed. Subsequently, the majority of MPs, again voting along party-political lines, approved the list of candidates proposed by the Minister (the vote having been on the list as a whole rather than on candidates considered individually, as required by law). Even though the President of the Republic of Iceland raised last-minute doubts about the procedure followed in Parliament, he ultimately signed the appointments to the Court of Appeal of the 15 candidates proposed by the Minister. [50]

45 Judgment in *Ástráðsson*, see in particular § 107, 108 and 123.

46 Judgment in *Ástráðsson*, § 6.

47 The four candidates thus removed from the list were those who had been ranked seventh, eleventh, twelfth and fourteenth respectively in the Committee's evaluation table.

48 The four candidates whose names were added to the list by the Minister had been ranked seventeenth, eighteenth, twenty-third and thirtieth by the Committee. Since there were 15 posts to be filled, and the Committee had expressly drawn up the list in order of merit, it followed that none of those candidates should ordinarily have been appointed to the Court of Appeal.

49 For further details, see the judgment in *Ástráðsson*, § 7 to 18. I note that a legal adviser had even alerted the Prime Minister's Office to the potential shortcomings in the procedure that the Minister was proposing to follow: see paragraph 13 of the judgment.

50 See judgment in *Ástráðsson*, § 19 to 26.

74. As regards the facts of the case, the applicant, M. Ástráðsson, had been found guilty by a criminal court of driving a vehicle without a driving licence and under the influence of narcotics. He was sentenced to 17 months' imprisonment and had his driving licence revoked for life. He applied to the Court of Appeal for a reduction of his sentence. His counsel subsequently contested the presence, on the panel of four judges, of one judge whose name had not been on the list of selected candidates presented by the Evaluation Committee, citing, inter alia, the judgment in *FV*. M. Ástráðsson's arguments were rejected, however, both by the Court of Appeal and by the Supreme Court. He therefore made an application to the Strasbourg Court. [51]

75. It should be noted here that, before commencing its analysis, the Strasbourg court mentions both the judgment in *FV* and the EFTA Court judgment in *Pascale Nobile*. [52]

76. In concluding that there had been a violation of Article 6(1) ECHR, the Strasbourg Court considered a number of factors. First, it gave considerable weight to two rulings of the Supreme Court of Iceland concerning the judicial appointment process. That court had already held, in the context of actions brought by candidates put forward by the Evaluation Committee but not appointed, [53] that the Minister had infringed the appointment procedure in removing four candidates from the list of the 15 best qualified candidates proposed by the Evaluation Committee and in adding four other candidates (included in the Evaluation Committee's report and considered to be adequately qualified but ranked in a position that excluded their appointment) without relying on new documents or carrying out an independent evaluation of the facts. For that reason, the Supreme Court of Iceland awarded compensation for the non-pecuniary damage suffered by the other candidates (the claim for compensation for pecuniary damage was dismissed by that court, as was the application to annul the Minister's decision not to include those candidates in the list of persons to be appointed). [54]

77. Secondly, the infringement of the applicable national legislation was fundamental, because it concerned an essential part of the appointment procedure and lay at the core of the process for selecting candidates. Furthermore, the Minister was aware of the situation and thus had shown a manifest disregard for the applicable rules. [55]

78. Thirdly, the judgment in *Ástráðsson* stresses that the Icelandic Parliament also failed to follow the prescribed procedure for the appointment of judges by not voting separately on the appointment of each candidate. The purpose of that step in the procedure was to ensure the judiciary's independence from the executive. The Parliament's failure to discharge its functions according to the applicable statutory rules constituted a further serious defect in the selection procedure. [56] I observe here that, whilst the Strasbourg Court does not expressly say as much in its reasoning concerning the breach of the right to a tribunal established by law (it does specifically record the point when setting out the national factual framework), the successive votes in both the CSC and the Parliament approving the Minister's proposal faithfully reflected the party-political affiliations of the parliamentarians called upon to participate in them. [57]

51 See judgment in *Ástráðsson*, § 36 to 50.

52 Decision of the EFTA Court of 14 February 2017, *Pascal Nobile* v *DAS Rechtsschutz-Versicherungs*, E-21/16. See judgment in *Ástráðsson*, § 64 to 69. The General Court also referred to that judgment in paragraph 75 of the judgment in *FV*.

53 First by J.R.J. and Á.H. and then by E.J. and J.H.: see judgment in *Ástráðsson*, § 27 to 35 and 52 to 54 respectively.

54 Judgment in *Ástráðsson*, § 11, 16, 27 to 35 and 105 to 109.

55 Judgment in *Ástráðsson*, § 115 to 118.

56 Judgment in *Ástráðsson*, § 119 to 122.

57 Judgment in *Ástráðsson*, § 18 to 22.

79. The Strasbourg Court thus concluded that, by their very nature, the procedural infringements at issue constituted a flagrant violation of the applicable rules both by the executive, which exceeded the limits of its discretion and manifestly disregarded those rules, and by the Parliament, which failed in its duty to ensure that the appointment procedure respected the balance between the legislature and the executive. The Strasbourg Court therefore held that that procedure was liable to operate to the detriment of the confidence which the judiciary must inspire in the public in a democratic society and that there had been a violation of Article 6(1) ECHR. [58]

80. There is obviously some common ground between the judgment in *Ástráðsson* and the situation that gave rise to the judgments under review. In both instances, the appointments procedure for judges included the opinion of an independent committee. That committee presented a list of the best-qualified candidates to the executive. The appointment procedure was vitiated by an irregularity committed by the executive, which was aware that it was departing from the prescribed procedure. [59]

81. However, the parallels end there.

82. The procedure for the appointment of judges to the CST is vitiated by a *single procedural irregularity*: without issuing a new call for applications for the third post at the CST that had by then become vacant, the Council appointed three candidates instead of two from an existing list compiled to fill two posts. That said, however, in so doing the Council chose candidates whose names were on the list proposed by the selection committee, which comprised twice as many candidates as the number of judges ultimately appointed by the Council (six candidates for three posts ultimately filled). Even though it was not required to do so, the Council in fact also appointed the first three persons on the list, whom the selection committee had ranked in order of merit. It did not tamper with the list or include persons whose names were not on the list. The Council departed from the prescribed procedure for reasons relating exclusively to timing (which is conceivably here another word for administrative convenience) [60] as the CST was due to close its doors less than five months after the newly appointed judges took office. [61]

83. By contrast, in the procedure for the appointment of judges recorded in the judgment in *Ástráðsson*, the Evaluation Committee had proposed a list of the 15 best-qualified candidates for the same number of posts. The Minister withdrew four names from that list and added to it other candidates who had participated in the procedure and had been judged to be adequately qualified, but less qualified than the 15 candidates proposed. In so doing, the Minister

58 Judgment in *Ástráðsson*, § 123.

59 In *Ástráðsson* the Minister was fully aware that she had no margin of manoeuvre, but was meant to accept the list of 15 best-qualified candidates presented to her by the Evaluation Committee (she had, indeed, asked that committee to give her a longer list from which she could choose but had been rebuffed). In the judgments under review, the Council was perfectly aware that the list of candidates at issue compiled by the selection committee had been drawn up on the basis of the 2013 call for applications, which was intended to fill two – *not three* – posts at the CST that would shortly become vacant.

60 The fact that Judge Rofes i Pujol's mandate ended on 31 August 2015 was obvious from the terms of her appointment. Nothing in the material that I have reviewed in preparing this Opinion sheds useful light on why, either in advance of that date or during the nearly seven months between that date and the date of the decision appointing three judges to the CST (22 March 2016), a separate call for candidates to replace her was not issued. Viewed from the standpoint of taking a decision on 22 March 2016, however, it may well have been thought difficult to complete the process of a further call for candidates followed by assessment by the Selection Committee in time for the newly appointed judge usefully to take office at the CST before it closed for business. I have suggested earlier (at point 45 above) an alternative, legal way of dealing with that problem.

61 See recital 4 of the appointment decision and point 13 above. The appointment of Mr Van Raepenbusch was retrospective, while Messrs Sant'Anna and Kornezov did not take office until after being sworn in on 13 April 2016. The CST ceased to exist on 1 September 2016.

deliberately eliminated four of the selected candidates (that is to say, four of the candidates judged to be the best qualified by the Evaluation Committee) and replaced them with other candidates of her choice.

84. It is important at this stage to examine carefully the precise reasoning applied by the Strasbourg Court in paragraphs 102, 103 and 123 of its judgment (the true core, in my opinion, of that Court's analysis), which I cite here *in extenso*:

'102. The Court notes in this connection that it flows from the criteria in the Court's case-law that a violation of national law be "flagrant" that only those breaches of applicable national rules in the establishment of a tribunal that are of a fundamental nature, and form an integral part of the establishment and functioning of the judicial system, can be considered to fulfil this criterion. In this context, the concept of a "flagrant" breach of domestic law therefore relates to the nature and gravity of the alleged breach. Furthermore, in the Court's examination of whether the establishment of a tribunal was based on a "flagrant" violation of domestic law, the Court will take into account whether the facts before it demonstrate that a breach of the domestic rules on the appointment of judges was deliberate or, at a minimum constituted a manifest disregard of the applicable national law [see also in this context the judgment in *FV*, paragraph 77].

103. Finally, the Court recalls that "the notion of the separation of powers between the executive and the judiciary has assumed growing importance in its case-law" … The same applies to the "importance of safeguarding the independence of the judiciary" ... Therefore, on the basis of the above-mentioned principles, and taking account of the object and purpose of the requirement that a tribunal be always established by law, and its close connection to the fundamental principle of the rule of law, the Court must look behind appearances and ascertain whether a breach of the applicable national rules on the appointment of judges created a real risk that the other organs of Government, in particular the executive, exercised undue discretion undermining the integrity of the appointment process to an extent not envisaged by the national rules in force at the material time.

…

123. In the light of all of these elements, the Court cannot but conclude that the process by which A.E. was appointed a judge of the Court of Appeal, taking account of the nature of the procedural violations of domestic law as confirmed by the Supreme Court of Iceland, amounted to a flagrant breach of the applicable rules at the material time. Indeed, the Court finds that the process was one in which the executive branch exerted undue discretion, not envisaged by the legislation in force, on the choice of four judges to the new Court of Appeal, including A.E., coupled with Parliament failing to adhere to the legislative scheme previously enacted to secure an adequate balance between the executive and legislative branches in the appointment process. Furthermore, the Minister of Justice acted, as found by the Supreme Court, in manifest disregard of the applicable rules in deciding to replace four of the 15 candidates, considered among the most qualified by the Committee, by other four applicants, assessed less qualified, including A.E. The process was therefore to the detriment of the confidence that the judiciary in a democratic society must inspire in the public and contravened the very essence of the principle that a tribunal must be established by law, one of the fundamental principles of the rule of law. The Court emphasises that a contrary finding on the facts of the present case would be tantamount to holding that this

> fundamental guarantee provided for by Article 6 § 1 of the [ECHR] would be devoid of meaningful protection. Therefore, the Court concludes that there has been a violation of Article 6 § 1 of the [ECHR] in the present case.'

85. In my opinion, it follows from the paragraphs of the judgment in *Ástráðsson* which I have just cited that, even though it is important to 'take into account whether the facts demonstrate that a breach of the domestic rules on the appointment of judges was deliberate', *this in itself is not enough* for an irregularity in the procedure for appointing a judge to constitute a *flagrant violation* of Article 6(1) ECHR. It is necessary to look beyond that criterion considered in isolation and ascertain whether the infringement of the rules applicable to the appointment of judges created a real risk that the other organs of government, in particular the executive, have used their powers in such a way as to jeopardise the integrity of the appointment procedure.[62] If so – if 'the executive exercised undue discretion' (so that the resulting process 'was to the detriment of the confidence that the judiciary in a democratic society must inspire in the public and contravened the very essence of the principle that a tribunal must be established by law') – then there is a 'flagrant' breach of the right to a tribunal established by law which gives rise in itself to an infringement of the right to a fair trial.

86. If that analysis is applied to the irregularity by which the appointment decision in the present case is vitiated, it cannot reasonably be concluded that *that irregularity* operated to the detriment of 'the confidence that the judiciary in a democratic society must inspire in the public'. Unlike the facts underlying the judgment in *Ástráðsson*, there was no manipulation of a list by the executive in order to exclude certain successful candidates and replace them with other candidates. The executive did not, through the irregularity identified, exercise its power so as to undermine the entire appointment process.

87. Applying the criteria established by the Strasbourg court in the judgment in *Ástráðsson*, I conclude that the specific irregularity which vitiated the appointment of the three judges to the CST, as recorded in the judgment in *FV* and the judgments under review, was not in itself such as to give rise to a 'flagrant violation' of the right to a fair trial provided for in the first sentence of the second paragraph of Article 47 of the Charter. It is therefore necessary to examine whether, in the light of all the relevant factors, the right to a fair trial was observed in the present case, an examination which the General Court did not carry out. It is clear that both the appellants in the judgments under review and the appellant FV had their actions processed by a chamber of the CST composed of persons fully and duly qualified to hold office in that jurisdiction and selected from the selection committee's list; and no error such as to invalidate the *processing* of those cases by that panel of judges has been identified.

– *The principle of legal certainty*

88. In the light of the foregoing, I shall now – taking due account of the principle of legal certainty – examine the consequence which the General Court derived from the irregularity in the appointment procedure, namely that the judgments of the CST in *FV*, *HG* and *Simpson* should be set aside.

62 Judgment in *Ástráðsson*, § 103.

89. To my knowledge, the principle of legal certainty, which is classified by the Court as a general principle of law,[63] first appeared in our case-law in the early 1960s. In that very first judgment, the Court struck a balance between that principle and the principle of legality, and stated that the question as to which of those principles should prevail in each particular case depends upon a comparison of the public interest with the private interests in question.[64]

90. The principle of legal certainty requires that legal rules be clear and precise and aims to ensure that situations and legal relationships governed by EU law remain foreseeable.[65] It appears in various guises in the case-law of the Court in order to preserve the certainty, stability, unity and consistency of the EU legal order.[66] It is the root and foundation of two other principles of EU law which are its corollaries: the principle of legitimate expectations[67] and the principle of the authority of *res judicata*.[68]

91. As regards the point where the principle of legal certainty and the principle of the authority of *res judicata* meet, I subscribe to Dean Carbonnier's view that 'what gives the judgment its full value, its superiority over the accommodation that a well-intentioned passer-by might attempt to strike between two quarrellers, is not that it represents the absolute truth (where is the truth?); it is that it is endowed by the State with a particular force that prohibits it from being called into question, because litigation must have an end point … and this guarantees stability, certainty and peace among men'.[69]

92. Thus, the Court has not hesitated to limit the temporal effects of its judgments in order to preserve legal certainty. In the case of actions for annulment, that possibility is explicitly provided for in Article 264(2) TFEU. The Court has also applied such a limitation in references for a preliminary ruling concerning both interpretation and validity. In *Defrenne*, for example, the Court held that 'important considerations of legal certainty affecting all the interests involved, both public and private, make it impossible in principle to reopen the question [of pay] as regards … periods prior to the date of this judgment, except as regards those workers who have already brought proceedings or made an equivalent claim'.[70] However, it is 'only exceptionally that the Court may, in application of the general principle of legal certainty inherent in the [EU] legal order, be moved to restrict for any person concerned the opportunity of relying on a provision which it has interpreted with a view to calling into question legal relationships established in good faith. Two essential criteria must be fulfilled before such a limitation can be imposed, namely that those concerned should have acted in good faith and that there should be a risk of serious difficulties'.[71]

93. The Court has also relied on the principle of legal certainty when ruling on questions relating to the withdrawal of EU measures. Thus, the withdrawal of an unlawful measure is permissible provided that it occurs within a reasonable time and that the institution from which the act

63 Judgment of 15 February 1996, *Duff and Others*, C-63/93, EU:C:1996:51, paragraph 31.

64 Judgment of 22 March 1961, *S.N.U.P.A.T.* v *High Authority*, 42/59 and 49/59, EU:C:1961:5, p. 159.

65 Judgment of 15 February 1996, *Duff and Others*, C-63/93, EU:C:1996:51, paragraph 20.

66 For an analysis of the Court's case-law on this point, see Puissochet, J.-P., and Legal, H., 'Le principe de sécurité juridique dans la jurisprudence de la Cour de justice des Communautés européennes', *Cahiers du Conseil Constitutionnel* No. 11, December 2001.

67 Judgment of 4 July 1973, *Westzucker*, 1/73, EU:C:1973:78, paragraph 6.

68 Judgment of 1 June 1999, *Eco Swiss*, C-126/97, EU:C:1999:269, paragraph 46.

69 Carbonnier, Droit civil, Introduction, No. 46, cited in the report of rapporteur Mr Charruault concerning the judgment of the French Cour de Cassation (assemblée plénière) (Court of Cassation (plenary assembly)) No. 540 of 7 July 2006.

70 Judgment of 8 April 1976, *Defrenne*, 43/75, EU:C:1976:56, paragraphs 74 and 75.

71 Judgment of 18 January 2007, *Brzeziński*, C-313/05, EU:C:2007:33, paragraph 56.

emanates has had sufficient regard to how far the applicant might have been led to rely on the lawfulness of the measure; if those conditions are not fulfilled, the withdrawal is contrary to the principles of legal certainty and protection of legitimate expectations and must be annulled.[72]

94. The Strasbourg Court has also recognised the principle of legal certainty, even though this does not explicitly appear in the ECHR.

95. Thus, in the context of Article 6(1) ECHR, it held that the 'right to a court' is not absolute and is subject to limitations permitted by implication, notably where this serves to ensure the proper administration of justice and compliance with, in particular, the principle of legal certainty. However, those limitations must be proportionate and must not restrict the open access available to a litigant in such a way or to such an extent as to impair the very essence of his right to a court.[73]

96. The Strasbourg Court has also given itself the option of limiting the temporal effects of its decisions on the ground that 'the principle of legal certainty, which is necessarily inherent in the law of the [ECHR] as in [EU] law, dispenses [the State in question] from re-opening legal acts or situations that antedate the delivery of the present judgment'.[74] That principle, as implemented by the Strasbourg Court, encompasses the concepts of stability and foreseeability, which it inherently implies.[75]

97. I shall now look at whether, where an irregularity is found to have occurred in the appointment procedure for a judge, the principle of legal certainty precludes judgments which have been delivered by or involving that judge from being set aside automatically as a consequence.

98. From a brief and necessarily incomplete survey of relevant case-law, it would appear that such an automatic consequence does *not* flow from the legal traditions common to the Member States. On the contrary: mechanisms for striking a balance between the right to a tribunal established by law, on the one hand, and the principle of legal certainty, on the other hand, can readily be found in the legal orders of a number of States. Below are some examples of the approaches taken that may serve as inspiration, although I am conscious that this list is not exhaustive and that approaches vary from one Member State to another, and from one area of law to another, in particular where criminal law is concerned.

99. In France, for example, in the context of reviewing the legality of decrees appointing three judges, the Conseil d'État (Council of State) held in two landmark judgments that immediate retroactive annulment of the appointment of those judges would have a 'manifestly excessive' impact on the functioning of the public justice service. It therefore held that the decision annulling their appointment would only take effect several weeks later. The Conseil d'État's ruling was based on its view that, while 'the annulment of an administrative measure implies in principle that that measure is deemed never to have existed', where 'it is apparent that the retroactive effect of annulment would have manifestly excessive consequences not only on account of the effects which that measure has produced and the situations which may have come into being while it was in force but also on account of the general interest that might lie in

72 Judgment of 26 February 1987, *Consorzio Cooperative d'Abruzzo* v *Commission*, 15/85, EU:C:1987:111, paragraphs 12 and 17.

73 ECtHR, 28 October 1998, *Pérez de Rada Cavanilles v. Spain*, Application No. 28090/95, CE:ECHR:1998:1028JUD002809095, § 44 and 45. See also in this regard the View of Advocate General Mengozzi in *Review Arango Jaramillo and Others* v *EIB*, C-334/12 RX-II, EU:C:2012:733, points 59 and 60 and the case-law cited.

74 ECtHR, 13 June 1979, *Marckx v. Belgium*, Application No. 6833/74, CE:ECHR:1979:0613JUD000683374, § 58.

75 Soulas de Russel, D., and Raimbault, Ph., 'Nature et racines du principe de sécurité juridique: une mise au point', *Revue internationale de droit comparé*, vol. 55, No. 1, January-March 2003, pp. 85-103, in particular pp. 90-91.

temporarily maintaining its effects, it falls to the administrative court … to take into consideration, first, the consequences of retroactive annulment for the various public or private interests involved and, secondly, the disadvantages, from the point of view of the principle of legality and the right of litigants to an effective remedy, that would flow from limiting the temporal effects of annulment'. [76]

100. The approach taken in England and Wales (I do not feel competent to speak for the other parts of the United Kingdom) also strikes me as interesting, for its pragmatism if nothing else. The legal system there recognises the 'de facto judge' principle, whereby the acts of a judge may remain valid in law even if the appointment of that judge is invalid and without legal effect. Thus, in a case initially heard in the High Court of Justice, Queen's Bench Division, by a judge who lacked authority to sit there, the appellant had queried (at first instance) the judge's qualification to sit and (on appeal) whether what had happened raised the question as to whether this was consistent with the right of any person to be heard by a tribunal 'established by law'. According to the lengthy judgment of the Court of Appeal, the 'de facto judge' principle may render both the acts of the judge concerned and the establishment of the court itself valid in such a way as to satisfy the requirements of Article 6(1) ECHR. It follows from the Court of Appeal's reasoning that that principle is meant to protect anyone who brings an action before a court believing that court to be duly constituted. The rationale behind the principle is to preserve the expeditiousness, legal certainty and stability of the legal system and the public's confidence in it, as well as to avert the occurrence of disputes over appointment formalities. The 'de facto judge' principle does not apply, however, to persons (known as 'usurpers') who have sat on a panel of judges in full knowledge that they lacked authority to do so. Decisions given by such persons are invalidated. [77]

101. In Germany, the Bundesverfassungsgericht (Federal Administrative Court, Germany) has had occasion to make the point that, notwithstanding its fundamental importance to litigants, the right to a 'lawful judge' as provided for in the German Constitution aims in principle only to prevent the risk of manipulation of judicial institutions. In advocating that approach, the Bundesverfassungsgericht expressly stated that such a limitation of the 'absolute' right to a 'lawful judge' is justified on the ground of legal certainty. [78]

102. In the Czech Republic, in the context of reviewing the attachment of a judge to the Nejvyšší soud (Supreme Court, Czech Republic) which led to that attachment being annulled on the grounds that it was procedurally defective, the Ústavní soud (Constitutional Court, Czech Republic) decided to maintain the rulings given by the chamber in which the judge in question had sat, thus giving precedence to the principles of protection of citizens' legitimate expectations of the law and protection of good faith. [79]

103. In Spain, the Tribunal Constitucional (Constitutional Court, Spain) has held that irregularities relating to the appointment or designation of a judge do not result either in the nullity of the procedure as a whole or in the nullity of the judgment given by that judge. [80] That interpretation is justified by the need to ensure legal certainty. [81] The same case-law, however,

[76] CE, 6e/1e SSR, decision of 12 December 2007, No. 296072, ECLI:FR:CESSR:2007:296072.20071212; CE, sect., decision of 30 December 2010, No. 329513, ECLI:FR:CESEC:2010:329513.20101230.

[77] Fawdry & Co (A Firm) v Murfitt (Lord Chancellor's Department intervening) [2002] EWCA Civ 643.

[78] Bundesverfassungsgericht (Federal Constitutional Court, Germany), order of 27 October 1996, 2 BvR 1375/96; see also Bundesgerichtshof (Federal Court of Justice, Germany), order of 26 April 2005, X ZB 17/04.

[79] Ústavní soud (Constitutional Court, Czech Republic), judgment of 12 December 2006, No. Pl. ÚS 17/06-2.

[80] Judgment of the Tribunal Constitucional (Constitutional Court, Spain) 164/2008, 15 December 2008 (ECLI:ES:TC:2008:164).

[81] Judgment of the Tribunal Constitucional (Constitutional Court, Spain) 101/1984, of 28 November 1984 (ECLI:ES:TC:1984:101).

draws a clear distinction in cases where there is doubt as to the impartiality or independence of the judge concerned.[82] If those features are lacking, there may indeed be grounds for setting the judgment aside.

104. It follows that in a number of Member States the right to a tribunal established by law is not considered absolute; and an interference with that right does not therefore automatically result in the setting aside of any judgment in which the judge concerned has participated. The emerging trend is, rather, to attempt to strike an appropriate balance between that right, on the one hand, and legal certainty, on the other.

105. In the light of those considerations, it is important to look at how that balancing exercise is to be carried out if an irregularity is found to have occurred in the procedure for appointing a judge who sat on a given case.

106. In my opinion, everything depends on the nature of the irregularity at issue.

107. I shall not attempt here to draw up an exhaustive list of possible irregularities. As I see it, there is a wide spectrum, ranging from a procedural irregularity that is truly '*de minimis*' to a flagrant breach of the essential criteria governing the appointment of judges. The first category of irregularities would include, for example, a situation where a stamp in green ink should have been placed underneath the responsible minister's signature on the judge's letter of appointment but an assistant in a hurry picked up the wrong cartridge and the ink used was not green but blue. An example of the second category of irregularities would be where the procedure is manipulated by political leaders in order to secure the appointment as judge of a supporter of theirs who does not have the legal qualification required by the call for applications but who would unquestionably sentence anyone opposed to the government to life imprisonment.

108. It seems to me that the criterion established by the case-law of the Strasbourg Court analysed above is of very particular importance here.

109. Where there is a 'flagrant' breach of the right to a tribunal established by law that operates to the detriment of the confidence which justice in a democratic society should inspire in litigants, the judgments affected by that irregularity should evidently be set aside without more ado. Where, however, the irregularity in question is of a lesser nature and does not constitute such a breach, the principle of legal certainty does not allow those judgments to be set aside automatically. Rather, one should go on to examine the situation in greater detail, taking into account that important principle. In a particular case under scrutiny, it may be that that principle outweighs the right to a tribunal established by law.[83] However, if it transpires that the *substance* of the right to a fair trial was adversely affected, it will become imperative to give that right precedence over the principle of legal certainty and set aside the judgment at issue.

110. In my view, the irregularity with which these review procedures are concerned, whilst unquestionably more serious than a mere formal error in the colour of ink used, is *still not* an irregularity that can properly be described as a 'flagrant breach of the right to a tribunal established by law'.

82 Judgment of the Tribunal Constitucional (Constitutional Court, Spain) 164/2008, of 15 December 2008 (ECLI:ES:TC:2008:164).

83 Irregularities that are merely formal in nature obviously come into this category.

111. It follows that in finding that the irregularity in the appointment procedure to the CST was liable to affect the right to a tribunal established by law and that therefore the judgments in question should automatically be set aside, *without* seeking to balance that first principle against the principle of legal certainty, the General Court committed a serious error of law in the judgments under review (as it did in the judgment in *FV*).

The second aspect of the issue identified by the Court: the incidental review of the legality of a judicial appointment

112. I note at the outset that in *Simpson*, the General Court acting of its own motion asked the parties what the implications were of the judgment in *FV*;[84] whereas in *HG* the appellant himself raised the question of the possible presence of an irregularity in the composition of the panel of judges.[85]

113. Before addressing the question as to whether the General Court committed an error of law in undertaking, in its appellate jurisdiction, an *ex officio* review of the judicial appointments of the judges who sat at first instance, I shall look at whether it was entitled in that context to carry out an incidental review on the basis of Article 277 TFEU, since this was the subject of lively debate at the hearing in the present proceedings.

Whether Article 277 TFEU is applicable

114. Article 277 TFEU provides the possibility of seeking an incidental review of measures of EU law. That is done not through an independent action, but by way of an incidental procedure before the EU judicature in the course of a main action.[86] It is an expression of the general principle which ensures that every person has, or will have had, the opportunity to challenge an EU measure which forms the basis of a decision adversely affecting him.[87]

115. I shall not dwell on all the conditions which Article 277 TFEU attaches to the raising of a 'plea of illegality', such as (for example) that the person raising the plea must be a 'party'[88] to 'proceedings' constituting the main action. I shall move straight on to the condition most relevant to the present cases. A plea of illegality may be raised only in order to contest a measure 'of general application' adopted by an institution, body, office or agency of the Union.[89]

84 Judgment of 19 July 2018, *Simpson* v *Council*, T-646/16 P, not published, EU:T:2018:493, paragraph 31, see further point 25 above.

85 Judgment of 19 July 2018, *HG* v *Commission*, T-693/16 P, not published, EU:T:2018:492, paragraph 32.

86 Judgment of 16 July 1981, *Albini* v *Council and Commission*, 33/80, EU:C:1981:186, paragraph 17.

87 Judgment of 16 April 2015, *TMK Europe*, C-143/14, EU:C:2015:236, paragraph 18 and the case-law cited.

88 In addition to the individuals, case-law recognises so-called 'privileged' applicants as being able to raise a plea of illegality. See judgment of 10 July 2003, *Commission* v *ECB*, C-11/00, EU:C:2003:395. The Advocates General had long since expressed the view that 'privileged applicants' should be given this option. See, inter alia, the Opinion of Advocate General Slynn in *France* v *Commission*, 181/85, not published, EU:C:1986:491, pp. 702 and 703. However, the Court refuses Member States the right to plead the illegality of a decision or a directive addressed to them as a defence to an action for failure to fulfil obligations based on their failure to comply with that decision or that directive (judgment of 18 October 2012, *Commission* v *Czech Republic*, C-37/11, EU:C:2012:640, paragraph 46). The same reasoning applies to a decision that was not formally addressed to the Member State: as a member of the Council, which was the author of that decision, the Member State necessarily had knowledge of it and was therefore fully in a position to bring an action for annulment (judgment of 27 March 2019, *Commission* v *Germany*, C-620/16, EU:C:2019:256, paragraph 90).

89 I note here that before the entry into force of the Treaty of Lisbon, the plea of illegality was limited by the Treaties to regulations (see Article 184 EEC which became Article 244 EC and is now Article 277 TFEU). The case-law, however, quickly opened up that remedy to other acts of the institutions which, although they are not in the form of a regulation, 'nevertheless produce similar effects', even though they 'are not in the strict sense measures laid down by a regulation' (judgment of 6 March 1979, *Simmenthal* v *Commission*, 92/78, EU:C:1979:53, paragraph 35 et seq.).

116. Defining the legal nature of the appointment decision thus becomes a necessary step in establishing the means available for its review. Its legal nature is defined in the first place by the author of the measure: the Council. It is therefore a measure adopted by an EU institution, unlike the appointment of judges and Advocates General to the Court and the General Court, which is effected by common accord of the governments of the Member States, in accordance with the first paragraph of Article 253 TFEU.

117. Its legal nature is defined next by the classification given to it by EU primary law: a 'decision'. It is therefore a measure of secondary law adopted not in accordance with the 'ordinary' legislative procedure, set out in Article 289(1) TFEU, but in accordance with the special procedure provided for in the fourth paragraph of Article 257 TFEU in conjunction with Article 3(1) of Annex I to the Statute of the Court of Justice.

118. The case-law has elaborated on the concept of a measure of general application. A measure's status can be inferred from the fact that it applies to objectively determined situations and produces legal effects for categories of persons regarded generally and in the abstract. [90] In contrast, measures lacking general application, that is to say decisions addressed to an individual, are excluded by the text of Article 277 TFEU itself. [91] It is true that, in cases challenging elections or the appointment of elected members to the Luxembourg local staff committee [92] or the rejection of a candidature by the Council, [93] the General Court has carried out an incidental review. Both those reviews concerned measures of general application which had formed the basis for the adoption of the measures actually challenged (the Luxembourg local staff committee regulations [94] and a vacancy notice calling for applications). [95]

119. Thus, according to the case-law of the General Court, a plea of illegality raised incidentally under Article 277 TFEU, in the context of a challenge in the main proceedings to the legality of another measure, is admissible only if there is a link between the measure whose incidental review is sought and the provision forming the subject matter of the plea. The general measure claimed to be illegal must be applicable, directly or indirectly, to the issue with which the action is concerned and there must be a direct legal connection between the contested individual decision and the general measure in question. [96]

120. May the appointment decision be regarded as having a dual nature, as an individual measure (in relation to the persons appointed) and as a measure of general application (on account of the effects it produces for EU litigants), as the Commission and HG submitted at the hearing?

121. It is true that the Court has already recognised that a Council measure may have a dual nature and constitute simultaneously a measure of general application, in that it is directed at a category of addressees determined in a general and abstract manner (for example, a measure imposing a prohibition on making available funds and economic resources to persons and

90 Judgment of 31 May 2001, *Sadam Zuccherifici and Others* v *Council*, C-41/99 P, EU:C:2001:302, paragraph 24.

91 Judgment of 24 September 1987, *Acciaierie e Ferriere di Porto Nogaro* v *Commission*, 340/85, EU:C:1987:384, paragraph 5. The Court recalled that it had 'consistently held that an applicant may not, in proceedings for annulment directed against an individual decision, raise an objection of illegality against other individual decisions which were addressed to it and which have become conclusive'.

92 Judgment of 22 April 2004, *Schintgen* v *Commission*, T-343/02, EU:T:2004:111.

93 Judgment of 23 March 2004, *Theodorakis* v *Council*, T-310/02, EU:T:2004:90.

94 Judgment of 22 April 2004, *Schintgen* v *Commission*, T-343/02, EU:T:2004:111, paragraph 25.

95 Judgment of 23 March 2004, *Theodorakis* v *Council*, T-310/02, EU:T:2004:90, paragraphs 48 and 49.

96 Judgment of 30 April 2019, *Wattiau* v *Parliament*, T-737/17, EU:T:2019:273, paragraph 56 and the case-law cited. That case-law applies the principles established by the Court in the judgment of 13 July 1966, *Italy* v *Council and Commission*, 32/65, EU:C:1966:42, p. 594.

entities named in the lists contained in the annexes to the measures in question), and a bundle of individual decisions (in relation to those persons and entities).[97] That type of measure is indeed consistent with the definition of a measure of general application, in so far as (i) it produces legal effects on categories of persons regarded generally and in the abstract, (ii) it is directly or indirectly applicable to the issue with which the action is concerned and (iii) there is a direct legal connection between it and the contested individual decision.

122. I do not consider that to be the case with the appointment decision, however.

123. First, the decision appointing a judge cannot generically be characterised as a measure applicable to the issue with which any particular action is concerned. Secondly, there is no direct (or indirect) legal connection between the appointment decision and the individual decisions contested by the appellants before the CST (in *Simpson*, the Council decision refusing Mr Simpson promotion to grade AD 9; in *HG*, the decision of the tripartite appointing authority imposing a disciplinary penalty on HG and ordering him to pay compensation for the damage sustained by the Commission). Thirdly, the individual measures contested here before the General Court are not individual decisions forming the subject of an action but judgments of the CST forming the subject of appeals. Fourthly, the appointment decision is not aimed at 'categories of persons regarded generally and in the abstract'; and all EU litigants who are subject to the jurisdiction of the CST likewise cannot be 'regarded' as such a category of persons by the appointment decision. The fact that that decision was published in the Official Journal does not alter its legal nature. Thus, for example, Commission state aid decisions are also published in the Official Journal but that does not mean that they are measures of general application.

124. I therefore take the view that the appointment decision cannot be regarded as a measure of general application capable of forming the subject of an incidental review as to legality on the basis of Article 277 TFEU.

125. That does not mean, however, that an appellant will be unable to request a review of an alleged irregularity in the appointment of a member of the judicial panel to which his case is assigned. Provided that his action falls within the scope of EU law, he will be entitled to rely on the rights guaranteed by the Charter, in particular Article 47 thereof. A remedy pursued on that basis does not constitute an 'incidental review' *stricto sensu*. It is not a matter of reviewing the appointment decision, but rather of examining whether there has been a breach of the right to a tribunal established by law because a judge whose appointment procedure is vitiated by an irregularity sat on the adjudicating panel.

The General Court's reasoning on this issue in the judgment in FV

126. The General Court relied on the judgment of 1 July 2008, *Chronopost and La Poste* v *UFEX and Others* as its basis for examining the lawfulness of the judicial appointments in its judgment in *FV* and also in the judgments under review.[98]

127. It thus held that, 'when the proper constitution of the court which delivered the judgment at first instance is contested and the challenge is not manifestly devoid of merit, the appeal court is required to verify that the court was properly constituted. A ground alleging the irregular

97 Judgment of 23 April 2013, *Gbagbo and Others* v *Council*, C-478/11 P to C-482/11 P, EU:C:2013:258, paragraph 56.

98 C-341/06 P and C-342/06 P, EU:C:2008:375 (the 'judgment in *Chronopost*').

constitution of the panel of judges is a ground involving a question of public policy, which must be examined by the appeal court of its own motion, even if this irregularity was not invoked at first instance (see, to that effect, [judgment in *Chronopost*], paragraphs 44 to 50)'. [99]

128. In my opinion, applying that case-law in the judgments under appeal is erroneous, because it both misconstrues the scope of the judgment in *Chronopost* and disregards the presumption of legality that attaches to acts of the EU institutions.

129. In that case, an initial judgment of the General Court had been set aside by the Court, which referred the case back to the General Court. The latter assigned it *to a chamber in which the Judge-Rapporteur was the same judge as had drafted the original judgment under appeal*. The parties had thereupon expressed doubts as to the proper conduct of the proceedings before the General Court. In the subsequent (further) appeal the Court dismissed those arguments on the merits. [100]

130. Before conducting that examination, however, the Court held, that '… every court is obliged to check whether, in its composition, it constitutes such an independent and impartial tribunal, where this is disputed on a ground that does not immediately appear to be manifestly devoid of merit. That check is necessary for the confidence which the courts must inspire in those subject to their jurisdiction … . It follows from this that, if, in an appeal, a challenge is made in that respect on a ground that is, as in the present case, not manifestly devoid of merit, the Court of Justice is obliged to check the correctness of the composition of the formation of the Court of First Instance which delivered the judgment under appeal'. [101]

131. The approach taken in the judgment in *Chronopost* is based indeed on the right to a fair trial. The content of that right as there defined by *Chronopost* corresponds to the wording of Article 6(1) ECHR and Article 47(2) of the Charter: 'everyone must be entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law'. [102]

132. In the context of the judgments under review, and in the judgment in *FV*, the General Court examined the lawfulness of the CST chamber which had delivered the judgments in question from the perspective of whether there had been any irregularity in the procedure for the appointment of its members, which is an element of the condition relating to its *establishment by law*. [103]

133. A reading of the judgment in *Chronopost*, however, shows that the obligation incumbent on every court to examine the lawfulness of its composition as a matter of public policy 'where this is disputed on a ground that does not immediately appear to be manifestly devoid of merit' relates to the *independence* and *impartiality* aspects of the right to a fair trial. [104] Thus, where an EU court

[99] Judgment in *FV*, paragraph 66. See also judgments of 19 July 2018, *Simpson* v *Council*, T-646/16 P, not published, EU:T:2018:493, paragraph 38, and of 19 July 2018, *HG* v *Commission*, T-693/16 P, not published, EU:T:2018:492, paragraph 39.

[100] Judgment in *Chronopost*, paragraph 60.

[101] Judgment in *Chronopost*, paragraphs 46 and 47.

[102] Judgment in *Chronopost*, paragraph 45.

[103] Judgment in *FV*, paragraphs 72 to 76. In that judgment, the General Court concludes by linking its findings to the confidence of litigants and the public in the independence and impartiality of the courts in the abstract sense of that term (paragraph 78). Nobody had suggested that there was any reason to believe that the independence or impartiality of the panel of judges in question in that case was in the slightest doubt. The same is true of the cases currently under review (see point 44 above).

[104] Judgment in *Chronopost*, paragraphs 46 to 48.

refers a case to a particular chamber including a particular Judge-Rapporteur,[105] it falls to that court to verify that, taking account of the composition of that panel, on the one hand, and the particular characteristics of the case at issue, on the other, there can be no reasonable doubt as to the independence and impartiality of those called upon to give judgment in that case.

134. The aspect of the right to a fair trial that pertains to the right to be heard by a tribunal *established by law*, invoked by the Court in paragraph 45 of the judgment in *Chronopost*, is not mentioned in paragraphs 46 and following of that judgment. I do not think that the way in which the Grand Chamber formulated its reasoning was inadvertent or unintentional.

135. Paragraph 45 does no more than echo the full wording of the right guaranteed by Article 6(1) ECHR and Article 47 of the Charter. Paragraphs 46, 47 and 48 then move on to discuss the important question of *ex officio* verification of the *independence and impartiality* of the panel of judges called upon to dispose of any particular dispute. There is no further examination of the question of whether a court has indeed been 'established by law'. That question, if pertinent, can obviously be raised — as it was in *FV* — by *any party* which has doubts in that regard.

136. Consequently, I take the view that, in using the judgment in *Chronopost* as the basis for review of the judicial appointment process for the judges forming the panel that adjudicated at first instance from the perspective of the guarantee to a *tribunal established by law*, the judgment in *FV* and consequently the judgments under review exceeded the scope of the *Chronopost* case-law.

Whether the lawfulness of a judicial appointment is open to review

137. The Council measure appointing judges to the CST is a measure taken by an EU institution on the basis of Article 257, fourth paragraph, TFEU. According to settled case-law, such measures are in principle presumed to be lawful and produce legal effects until such time as they are withdrawn, annulled in an action for annulment or declared invalid following a reference for a preliminary ruling or a plea of illegality.[106]

138. The General Court therefore committed an error in transposing the criterion for *ex officio* review of the independence and impartiality of courts ('where this is disputed on a ground that does not immediately appear to be manifestly devoid of merit'[107]) to the context of whether there was or was not an irregularity in a judicial appointment made by a Council measure benefiting from a presumption of legality. As I see it, that presumption of legality also reflects the principle of legal certainty, which aims to ensure that situations and legal relationships governed by EU law remain foreseeable.[108]

139. Consequently, in the absence of evidence that appears prima facie to undermine the validity of the appointment decision, a court itself is under no obligation to investigate such a question of its own initiative.[109] To put it even more clearly, in the context of the EU judicature, after the

[105] Or, where applicable, a particular Advocate General. Thus, for example, this Court refrains from assigning a case relating to the conditions governing a European arrest warrant either to the Advocate General proposed for nomination by the issuing Member State or to the Advocate General proposed for nomination by the executing Member State.

[106] Judgment of 6 October 2015, *Schrems*, C-362/14, EU:C:2015:650, paragraph 52 and the case-law cited.

[107] Judgment in *Chronopost*, paragraph 46.

[108] Judgment of 15 February 1996, *Duff and Others*, C-63/93, EU:C:1996:51, paragraph 20.

[109] Conversely, if a court has evidence that casts doubt on the validity of such a decision, it *should* investigate of its own initiative, without waiting for the issue to be raised by a party to a case before it.

formal hearing before this Court at which each new member is sworn in, the court in which that member will sit is *not* required, of its own motion, to go through the procedure that led to his appointment with a fine tooth comb, including a point-by-point examination of the reasoning supporting the decision appointing him, in order to be sure of its validity.

140. A party to a dispute can obviously contest the validity of the appointment of a member of the panel of judges hearing his case, as happened in *FV*. That challenge should be raised as soon as the litigant becomes aware of the elements that would together be needed to bring the challenge, namely (i) the (alleged) irregularity in the appointment procedure and (ii) the fact that the judge (or judges) to whom that alleged irregularity in appointment relates will be part of the panel hearing his case. Normally, it will be appropriate to raise that challenge before the court in question. That is because such a challenge should be raised at the earliest opportunity, not held in reserve to be used if the decision at first instance is adverse. In a particular case, however, there may be a good reason why (subject to the time limits laid down by law for lodging an appeal) the point is only raised before the appellate jurisdiction (for example, when it only came to light after the judgment at first instance had already been delivered). However, the more remote that step becomes from the date on which the judge was appointed, the more probable it is that the principle of legal certainty will override the principle of a tribunal established by law in the balancing exercise that must be carried out by the court in question. *Unless* the irregularity in question is serious enough to be classified as a 'flagrant breach' or to jeopardise the very essence of the right to a fair trial, the need to ensure legal certainty and the authority of *res judicata* are likely to prevail.

141. In the judgment in *FV*, and therefore in the judgments under review, the General Court failed to take into consideration in its analysis the impact of the presumption as to the legality of EU measures, the principle of legal certainty and the authority of *res judicata*.

142. Against that background, I consider that the General Court committed a serious error in reviewing the lawfulness of the CST chamber from the perspective of the proper conduct of the procedure for appointing its members and then automatically setting aside the judgments below, without having first taken those important elements into account.

The existence of an adverse effect on the unity or consistency of EU law

143. The provisions governing review proceedings, and in particular the second paragraph of Article 256(2) TFEU, do not contain any definition of the concepts of 'unity' and 'consistency' of EU law. In my opinion, an *adverse effect on the unity of EU law* must be regarded as being present, in particular, where the General Court has disregarded rules or principles of EU law which are of particular importance, whereas an *adverse effect on the consistency of EU law* is more likely to arise where the General Court has disregarded existing case-law of the EU courts. [110]

144. From the review judgments given to date by the Court it is possible to identify four assessment criteria that are useful in determining whether the unity or consistency of EU law is affected. First, the judgment of the General Court must be capable of constituting a precedent for future cases; secondly, the General Court must have departed from the settled case-law of the Court; thirdly, the General Court's errors must concern a concept which does not pertain solely to the law relating to the employment of EU officials but is applicable regardless of the subject

[110] Here I agree with the analysis of my colleague Advocate General Kokott in her View in *Review Commission* v *Strack*, C-579/12 RX-II, EU:C:2013:573, point 75.

matter of the case; and fourthly, the rules or principles which the General Court has failed to comply with must occupy an important position in the EU legal order.[111] Those criteria, which may be considered 'as a whole',[112] are not cumulative and do not necessarily all have to be met in order for it to be found that the unity or consistency of EU law is affected.[113]

First criterion

145. The first criterion for establishing an adverse effect on the unity or consistency of EU law is that the judgment of the General Court should be capable of constituting a precedent for future cases.

146. Even though the CST no longer exists and the appointment decision was the last one of its kind, the way in which the *FV*, *Simpson* and *HG* cases have evolved clearly shows how that case-law may constitute a precedent for future cases. Thus, the approach taken in *FV* was also adopted in the judgments under review. Although the other judgments delivered by the panel of judges at issue in *FV* have, as far as I know, now become final or have been the subject of an appeal in which no ground alleging the irregularity of the appointment decision has been raised, the precedent set by those cases extends beyond the ambit of this particular line of litigation. The extensive interpretation given to in the judgment in *Chronopost*, to the effect that the lawfulness of a panel of judges is open to incidental review, and the complete disregard for the principle of legal certainty, in the context of the consequences that follow from any irregularity in the procedure for appointing a judge, seem to me to be intrinsically capable of distorting the proper analysis, in future cases, of the concept of a 'tribunal established by law', whether approached from the common law perspective of precedent or from the civilian tradition's use of previously decided cases as a tool for interpretation.

147. What is more, the consequences for such cases of the judgments under review and the judgment in *FV* are liable to proliferate almost indefinitely. I recall that the Court already has pending before it an appeal which calls into question the correctness of the composition of a General Court chamber comprising one of the judges appointed to the CST by the appointment decision.[114] It is also worth noting that those consequences transcend the geographical limits of the European Union. It would appear, for example, that Mr Ástráðsson relied on the judgment in *FV* before the Icelandic courts in support of his argument that judgments delivered by a judge appointed by a procedure that fails to comply with the legislative framework must be set aside.[115]

The second, third and fourth criteria

148. In the judgments under review, the General Court failed to take into account, (i) the impact of the irregularity in the appointment procedure on that aspect of the right to a fair trial that pertains to the right to a 'tribunal established by law' and on the consequences that should follow, particularly in the light of the principle of legal certainty, and (ii) the scope of the

111 Judgments of 17 December 2009, Review *M* v EMEA, C-197/09 RX-II, EU:C:2009:804, paragraphs 62 to 65, and of 28 February 2013, Review of *Arango Jaramillo and Others* v *EIB*, C-334/12 RX-II, EU:C:2013:134, paragraphs 50 to 53.

112 Judgment of 17 December 2009, Review *M* v *EMEA*, C-197/09 RX-II, EU:C:2009:804, paragraph 66.

113 View of Advocate General Mengozzi in *Review of Arango Jaramillo and Others* v *EIB*, C-334/12 RX-II, EU:C:2012:733, paragraph 70.

114 *Crocs* v *EUIPO and Gifi Diffusion*, C-320/18 P.

115 Judgment in *Ástráðsson*, § 42.

presumption as to the legality of acts of the EU institutions and of the principle of legal certainty and the effect these have on the reviewability of a judicial appointment in the course of proceedings not relating to the validity of the appointment decision.

149. The importance of those rules in the EU legal order is clear and has been extensively analysed above. Although the nature of the cases the General Court was dealing with here and the questions raised were unprecedented, and although there was no established case-law of the Court on reviewing the correctness of judicial appointments to the CST, the fact remains that the General Court had a duty to comply with the settled case-law of the Court, as set out earlier in this Opinion, with respect to those rights and principles. It is clear moreover that those rules, rights and principles do not pertain only to the law relating to the employment of EU officials but are applicable, regardless of the subject matter of the case, to any legal relationship governed by EU law, since they are fundamental and cut across all subject areas.

150. It follows from the foregoing that, by virtue of the errors it committed in the appeals brought before it and the consequences it drew from those errors with respect to the outcome of those appeals, the General Court failed to have regard to the settled case-law of the Court and infringed provisions which are of fundamental importance in the EU legal order and are applicable regardless of the subject matter of the case.

151. For the reasons I have stated, I thus consider that all of the criteria established by the Court's case-law are fulfilled and I propose that the Court declare that the judgments under review adversely affect the unity and consistency of EU law.

The effects of the review

152. The first paragraph of Article 62b of the Statute of the Court of Justice provides that, if the Court finds that the decision of the General Court affects the unity or consistency of Union law, it must refer the case back to the General Court, which is to be bound by the points of law decided by the Court of Justice. In referring the case back, the Court of Justice may, moreover, state which of the effects of the decision of the General Court are to be considered as definitive in respect of the parties to the litigation. Exceptionally, the Court may give final judgment itself if, having regard to the result of the review, the outcome of the proceedings flows from the findings of fact on which the decision of the General Court is based.

153. It follows that the Court cannot confine itself to finding that the unity or consistency of EU law is affected without stating the implications of that finding as regards the two disputes here in question. [116]

[116] Judgment of 10 September 2015, *Review Missir Mamachi di Lusignano* v *Commission*, C-417/14 RX-II, EU:C:2015:588, paragraph 60 and the case-law cited.

The effects of the review on Simpson

154. By its judgment in *Simpson*, the General Court set aside the CST's order in its entirety for breach of the 'principle of the right to a judge assigned by law' without examining further the grounds of appeal raised by the appellant and referred the case to a chamber of the General Court other than that which had ruled on the appeal so that the former could rule at first instance on the action. [117]

155. The direct consequence of the errors committed by the General Court is that the judgment in *Simpson* should be set aside in its entirety and the case referred back to the General Court so that it can rule in its *appellate* jurisdiction on the two grounds of appeal raised by the appellant.

The effects of the review on HG

156. By its judgment in *HG*, the General Court set aside the judgment under appeal in its entirety for breach of the 'principle of the lawful judge' without further examining the grounds of appeal raised by the appellant and referred the case to a chamber of the General Court other than that which had ruled on the appeal so that the former could rule at first instance on the action. [118]

157. That judgment must also be set aside in its entirety and the case referred back to the General Court so that it can rule in its *appellate* jurisdiction on the four grounds of appeal raised by the appellant.

The effects of the review on FV

158. The judgment in *FV*, which was not reviewed for the procedural reasons set out above in point 36, gave rise to the judgments under review and was therefore the starting point for my analysis. Because it was not reviewed, that General Court judgment has become definitive.

159. It follows from my analysis that the judgment in *FV* is vitiated by several errors liable to affect the unity and consistency of EU law. That risk is no longer theoretical. The adverse effect materialised when the General Court delivered the judgments under review in accordance with its *FV* case-law. In my opinion, it is impossible at this stage for the present review proceedings to have consequences for how the action proceeds in *FV*: there, the General Court is preparing to rule on the applicant's claim at first instance (Case T-27/18 RENV, pending). If the Court agrees with the analysis that I have set out in this Opinion, however, it will in my view be essential to emphasise that *FV* was wrongly decided and no longer constitutes a precedent or an interpretative tool for future cases.

Costs

160. In accordance with Article 195(6) of the Rules of Procedure, where the decision of the General Court which is subject to review was given under Article 256(2) TFEU, the Court of Justice is to make a decision as to costs.

[117] That case is currently pending before the General Court. See *Simpson* v *Commission*, T-441/18 RENV (suspended).

[118] That case is currently pending before the General Court. See *HG* v *Commission*, T-440/18 RENV (suspended).

161. There are no specific rules governing the allocation of costs in review proceedings. [119] Given the nature of such proceedings, which are opened on the initiative of the First Advocate General, the Court's practice is that the parties and the interested persons referred to in Article 23 of the Statute of the Court of Justice who have participated in the proceedings before the Court should bear their own costs in connection with those proceedings. [120] However, the Court can always decide otherwise, depending on the nature of the case and the conclusion it reaches. [121]

162. Given that the present cases originated in an irregularity in the appointment procedure that is solely attributable to the Council, it seems sensible to me that the Council, even though it is a party only to the proceedings in *Simpson*, should bear not only its own costs but also those of Mr Simpson and HG. The Commission and the Bulgarian Government should bear their own costs.

Conclusion

163. In the light of the foregoing considerations, I propose that the Court should rule:

– The judgments of the General Court of the European Union of 19 July 2018, *Simpson* v *Council* (T-646/16 P) and *HG* v *Commission* (T-693/16 P) adversely affect the unity and consistency of EU law.

– The aforementioned judgments are set aside.

– The cases are referred back to the General Court of the European Union.

– The Council of the European Union is ordered to bear the costs incurred by Mr Simpson and HG in connection with the review proceedings as well as its own costs.

– The European Commission and the Bulgarian Government shall bear their own costs in connection with the review proceedings.

[119] See in this regard the View of Advocate General Wathelet in *Review Missir Mamachi di Lusignano* v *Commission*, C-417/14 RX-II, EU:C:2015:593, point 99.

[120] This was the approach taken in the first two reviews (judgment of 17 December 2009, *Review M* v *EMEA*, C-197/09 RX-II, EU:C:2009:804, paragraph 73, and of 28 February 2013, *Review of Arango Jaramillo and Others* v *EIB*, C-334/12 RX-II, EU:C:2013:134, paragraph 61) and in the most recent review case (judgment of 10 September 2015, *Review Missir Mamachi di Lusignano* v *Commission*, C-417/14 RX-II, EU:C:2015:588, paragraph 67).

[121] So it was that, in the third review (judgment of 19 September 2013, *Review Commission* v *Strack*, C-579/12 RX-II, EU:C:2013:570, paragraph 71), the Commission was ordered to bear the costs of Mr Guido Strack.