**The appointment of judges and the right to a tribunal established by law: the ECJ tightens its grip on issues of domestic judicial organization.**

Joined Cases C-542/18 RX-II and C-543/18 RX-II, *Review Simpson* v. *Council and Review HG* v. *Commission*, Judgment of the Court (Grand Chamber) of 26 March 2020, EU:C:2020:232.

1. INTRODUCTION

The existence of a judicial dialogue on the European level between the European Court of Justice and the European Court of Human Rights has been well-established.[[1]](#footnote-1) Scholars have carefully documented instances where ‘Luxembourg’ and ‘Strasbourg’ engage with each other’s case law and influence each other on a variety of topics such as *non refoulement*,[[2]](#footnote-2) the principle of *ne bis in idem* for tax offences,[[3]](#footnote-3) or the general relationship between the two Courts.[[4]](#footnote-4) Much less common are the instances where the General Court is part of the conversation and the dialogue becomes a trialogue, as is the case in the judgment that is annotated here.[[5]](#footnote-5) In the last two years, the General Court, the European Court of Human Rights and the European Court of Justice have all expressed their opinion – while referring to each other’s case law – on the same fundamental question: is a tribunal still established by law when the appointment procedure of one of its judges has proven to be irregular?

In the joined cases of *Review Simpson* v. *Council* and *Review HG* v. *Commission* (hereafter: *Review Simpson*), the ECJ had to rule on review proceedings concerning two judgments of the General Court, in which it had set aside the decisions of the second chamber of the Civil Service Tribunal (hereafter: CST). The GC had done so, because it had decided that that chamber of the CST could not be seen as a tribunal established by law, since the appointment of two of its members had occurred in violation of the procedural rules. In its judgment, the ECJ ruled that, while the appointment procedure had indeed been tainted by procedural irregularities, the General Court had erred in law by setting aside the decision of the CST solely on the basis of the irregularities in question. It did not, however, disagree with the General Court’s basic premise that the regularity of judicial appointment proceedings falls within the scope of the right to a tribunal established by law.

While the judgment of the ECJ is situated at the level of the European Union and its institutions, this case note argues that it is of constitutional importance for the Members States as well. By confirming that the scope of the right to a tribunal established by law, as enshrined in Article 47(2) of the Charter, includes the judicial appointment proceedings, the Court has established a principle that can also be applied at the national level. In this sense, this judgment can be seen as another step by the Court in intensifying its supervision over the organization of the domestic judiciary. Moreover, this judgment might prove influential for the substantively similar case currently pending before the Grand Chamber of the ECtHR.[[6]](#footnote-6) In that way, this judgment might also have an additional effect on the domestic institutional order.

The case note proceeds as follows. The next three sections set forth the complex proceedings that have led up to this judgment, the opinion of Advocate General Sharpston and the judgment of the Court. Where necessary, it will address the proceedings in the case that is currently pending before the Grand Chamber of the ECtHR, thereby indicating how the various European Courts have reacted to each other’s case law. Section 5 comments on the significance of this judgment for the right to a tribunal established by law in European law and on its consequences for the EU Member States. Finally, the section briefly touches upon the questions that remain unanswered after this judgment. Section 6 concludes.

1. FACTUAL AND LEGAL BACKGROUND

On 3 December 2013, a public call for applications was published in the Official Journal of the Union,[[7]](#footnote-7) with a view to appointing two judges to the CST in anticipation of the expiry of the terms of office of two of the Tribunal’s judges on 30 December 2014. The call stated, among other things, that the list of suitable candidates drawn up by the selection committee would contain the names of at least twice as many candidates as there were judges to be appointed. The selection committee drew up a list containing the names of six, instead of the minimum required four, suitable candidates. The Council, however, decided not to fill the two posts at that time and the judges whose mandate had expired, continued to hold office.

After the term of office of a third judge of the CST had expired in August 2015, the Council issued a decision in March 2016,[[8]](#footnote-8) in which it appointed three judges to fill all three vacancies. Given that at that time, it had already been decided that the CST would seize to exist from 1 September 2016, the Council decided it was best, for reasons of timing, not to publish a new call for applications, but rather to appoint three members from the list of six candidates from the earlier call that was published in 2013. Two of the three newly appointed judges were attached to the second chamber of the CST.

It is this second chamber that dismissed the complaints from Simpson and HG in the original disputes. Both individuals subsequently appealed to the General Court. In the appeal proceedings, the General Court set aside both decisions by the CST.[[9]](#footnote-9) In both judgments, it relied heavily on an earlier judgment, *FV* v. *Council*, in which it had decided that the composition of the second chamber of the CST was irregular, due to the fact that the appointment of two of the judges that sat in the second chamber had disregarded the legal framework that was laid down in the public call for applications of 3 December 2013. In that judgment the GC had held that, having regard to the importance of compliance with the rules governing the appointment of a judge for the confidence of the public in the independence and impartiality of the courts, the judges at issue could not be regarded as lawful judges within the meaning of Article 47(2) of the Charter.[[10]](#footnote-10) Furthermore, relying on the ECJ’s judgment in *Chronpost*,[[11]](#footnote-11) the General Court held that a ground alleging the irregular composition of a tribunal is a ground involving a question of public policy, which must be examined of its own motion, even if this irregularity was not invoked at first instance.[[12]](#footnote-12)

In accordance with Article 62 of the Statute of the Court of Justice, the First Advocate General recommended that the General Court’s judgments in the appeal proceedings in *Simpson* v. *Council* and *HG* v. *Commission* be reviewed. In response, the Reviewing Chamber of the ECJ, by virtue of Article 193(4) of the Rules of Procedure of the Court of Justice, decided that the judgments in question should be reviewed.[[13]](#footnote-13) It limited the parameters of the review first to the question whether, having regard to the principle of legal certainty, the General Court, as appeal court, was correct in finding an infringement of the principle of the right to a tribunal established by law on the basis of an irregularity affecting the appointment procedure of one of the members of the CST who ruled on the case. Second, the review should assess whether the appointment of a judge may form the subject of a review of indirect legality or whether such a review for illegality is excluded or limited to certain types of irregularity in order to ensure legal certainty and the force of *res judicata*. These review proceedings have led to the judgment that is annotated here.

Several months after the judgments of the General Court, the European Court of Human Rights ruled on an application raising similar questions in the case of *Ástráðsson*.[[14]](#footnote-14) This case addressed the composition of a newly established Court of Appeal in Iceland. According to domestic legislation it would be composed of 15 judges. A committee of experts had been set up to evaluate the candidates and draw up a list of the 15 best-qualified. The Minister of Justice was in principle not allowed to appoint a candidate who had not been considered as most qualified by the committee. However, the legislation allowed, by way of exception, that Parliament accepted the Minister’s proposal for the appointment of another candidate on the condition that he or she fulfilled the minimum requirements to be appointed to a judicial post. Ultimately, the committee assessed 33 candidates and drew up a list of the 15 best-qualified. However, the Minister deviated from that list and presented to Parliament a list which contained only 11 of the candidates that were originally proposed by the committee and four who, although qualified, had not been selected. The Parliament appointed the members on the list as it had been proposed by the Minister as judges of the Court of Appeal. However, it approved this list in its entirety as opposed to each proposed candidate individually, as the legislation required.

The application itself concerned an individual who had been brought before the Icelandic Court of Appeal on charges of driving a vehicle without holding a valid driver’s licence and under the influence of narcotics. The panel of judges that heard his appeal included one of the judges who had not been mentioned in the original list of 15 members by the committee. The defence counsel contested the presence of this member on the panel, but this claim was rejected by the Court of Appeal itself and subsequently by the Supreme Court. He then made an application to the ECtHR.

In its judgment, the Strasbourg Court held that the concept of ‘establishment’ within the right to a tribunal established by law encompasses, by its very nature, the process of appointing judges within the domestic judicial system which must be conducted in compliance with the applicable rules of national law.[[15]](#footnote-15) It is important to stress here that this was a new principle in the case law of the ECtHR and that it only referred to jurisprudence of Union Courts at this point.[[16]](#footnote-16) In principle, a violation of the domestic legal provisions relating to the establishment and competence of judicial organs gives rise to a violation of Article 6(1) ECHR. However, given the Court’s subsidiary position, such a violation must be flagrant.[[17]](#footnote-17) In examining whether the establishment of a tribunal was based on such a flagrant violation of domestic law, the Court takes into account whether the breach of the domestic rules on the appointment of judges was deliberate or constituted a manifest disregard of the applicable national law. When applying these principles to the case at hand, the Court concluded that the procedural violations of the domestic legislation by the Icelandic Minister of Justice and Parliament during the appointment process amounted to a flagrant breach and therefore violated the right to a tribunal established by law.[[18]](#footnote-18)

The ECtHR’s judgment in *Ástráðsson* was not unanimous. Two judges strongly opposed the majority’s approach, stating that they opened a Pandora’s box.[[19]](#footnote-19) After the judgment, the Icelandic government submitted a request for referral of the case to the Grand Chamber. On 9 September 2019, six months after the judgment, this request was accepted by the Grand Chamber Panel.[[20]](#footnote-20) At the time of writing the case is pending before the Grand Chamber.

1. OPINION OF THE ADVOCATE GENERAL

Three days after the decision by the Grand Chamber Panel, Advocate General Sharpston delivered her opinion in the case of *Review Simpson*.[[21]](#footnote-21) Following the parameters set forth by the Reviewing Chamber, the Opinion addressed two questions: whether the General Court struck the right balance between the right to a tribunal established by law and the principle of legal certainty, and whether it was entitled to carry out an incidental review of the appointment decision.

As regards the first of these questions, the Advocate General agreed with the finding of the General Court that the appointment procedure for the judges at the CST had been vitiated by an irregularity. However, she did not agree with the consequences that the GC attached to this finding. By deciding that an irregularity during the appointment procedure inevitably led to the setting aside of the judgment by the CST, the GC neglected to strike a balance between two equally important principles: the right to a tribunal established by law and the requirement of legal certainty.[[22]](#footnote-22)

The Advocate General then continued by elaborating on both principles. Interestingly, the exposition on the right to a fair trial nowhere referred to case law of the ECJ, but rather solely relied on the principles set forth by the ECtHR, with special emphasis on the *Ástráðsson* judgment. Then, she applied the principles set out in that judgment to the appointment procedure of the judges of the CST. She concluded that the Council had deliberately departed from the procedure which it had itself set out in the 2013 call for applications by using the list of candidates to make three appointments instead of two. Nonetheless, this irregularity did not give rise to a flagrant violation of the right to a fair trial. In the absence of such a flagrant violation, the General Court should have examined whether the right to a fair trial had been observed in the cases in question, which it did not do. When examining the principle of legal certainty, the Advocate General found that there is a trend in Member States to try to strike a balance between this principle and the right to a tribunal established by law, when ruling on irregularities relating to the appointment of a judge. In light of these factors, the General Court committed a serious error in law when it found that the irregularity in the appointment procedure to the CST affected the right to a tribunal established by law and should therefore automatically lead to the setting aside of its judgments, without seeking to balance that principle against the principle of legal certainty.[[23]](#footnote-23)

As regards the second question, concerning the indirect review of legality of the appointment decision, the Advocate General came to the conclusion that Article 277 TFEU is not applicable to such a decision. Appointment decisions cannot be seen as a measure of general application and can therefore not form the subject of an incidental review. This, however, does not mean that the lawfulness of the appointment procedure cannot be assessed by relying on the right to a tribunal established by law, as the General Court did. In this regard, the Advocate General held that the GC could not rely as it did on the *Chronopost* judgment to examine the lawfulness of the appointment procedure of its own motion. She pointed out that that judgment concerned doubts about the independence and impartiality aspects of the right to a fair trial. By extending the scope of that judgment to questions pertaining to the appointment process of the judges and the right to a tribunal established by law, the General Court had exceeded the scope of this judgment and had moreover failed to take into account the presumption of legality which the appointment decisions enjoy. In so doing, it had failed to take into consideration the principle of legal certainty and the authority of *res judicata*.[[24]](#footnote-24)

1. JUDGMENT OF THE COURT

In its judgment, the Court held that, in the context of the review proceedings, it was necessary to determine, first, in what circumstances the appointment of a judge may form the subject matter of an incidental review of legality. Second, it had to be examined whether, in so far as the irregularity of the appointment procedure is established, that irregularity led to an infringement of the right to a tribunal established by law, justifying the setting aside of the decisions by the CST.[[25]](#footnote-25) The ECJ thus decided to tackle the two questions in the opposite order as prescribed by the Review Chamber.

The ECJ dealt with the question on the incidental review of the legality of the appointment procedure in six swift paragraphs. Like the Advocate General, it held that a decision by the Council to appoint a judge to the CST does not constitute a measure of general application and can thus not be the subject of an incidental review under Article 277 TFEU. However, the Courts of the European Union must be able to check whether an irregularity during the appointment procedure could lead to an infringement of the right to a tribunal established by law, as safeguarded in Article 47(2) of the Charter. For the ECJ, the right to an independent and impartial tribunal established by law represents the cornerstone of the right to a fair trial. Consequently, every court is obliged to check whether, in its composition, it constitutes such a tribunal, where a serious doubt arises on that point. Such a check is an essential procedural requirement and must therefore be verified of the court’s own motion. Thus, contrary to the Advocate General, the Court held that the General Court rightfully extended the scope of the *Chronopost* judgment to the right to a tribunal established by law.[[26]](#footnote-26)

As to the question on the effect of the irregularity in the appointment procedure on the right to a tribunal established by law, the ECJ concurred with the General Court that the Council had committed an irregularity by using the list drawn up in 2013 for the appointment of three instead of two judges. Nonetheless, it took pains to emphasize that this was the only irregularity and that all other procedural requirements had been met.[[27]](#footnote-27) The Court then examined the implications of this irregularity on the right to a tribunal established by law. It started off by referring to its earlier case law in which it stressed that the substantive conditions and procedural rules that govern the appointment decisions for judges should be such that they cannot give rise to reasonable doubts about the independence of these judges.[[28]](#footnote-28) Then, relying on Article 52(3) of the Charter it referred to the ECtHR’s case law on the right to a tribunal established by law, among which the *Ástráðsson* judgment. From this case law, it followed that an irregularity during the appointment procedure of a judge entails an interference with the right to a tribunal established by law. This is in particular the case when that irregularity is of such a kind that it could give rise to a reasonable doubt in the minds of individuals as to the independence and the impartiality of the judge or judges in question. When applying this principle to the case at hand, the Court found that the procedural irregularity committed by the Council was not sufficient to create such doubts. Therefore, this irregularity could not by itself justify the setting aside of the judicial decisions adopted by the CST. Consequently, the General Court had erred in law by doing so.[[29]](#footnote-29) According to the ECJ, this error of law was such as to affect the unity and consistency of EU law.[[30]](#footnote-30)

1. COMMENTARY

In *Review Simpson*, the ECJ set aside the judgment of the General Court because it found that that Court had erred in its understanding of the right to a tribunal established by law, enshrined in Article 47(2) of the Charter. However, it did not disagree with the General Court on the basic premise that an irregularity in the appointment procedure for a judge might lead to a violation of that right. On the contrary, the ECJ expressly accepted that an irregularity committed during the appointment of judges entails an infringement of the right to a tribunal established by law, particularly when that infringement is of such a kind and of such a gravity as to give rise to a reasonable doubt in the minds of individuals as to the independence and the impartiality of the judge or judges concerned.[[31]](#footnote-31) This is a principle that had not been mentioned in the ECJ’s case law before, but which could prove to be of fundamental importance.

This case note will comment on three aspects of this judgment. First, it examines in what way this judgment contributes to the material scope of the right to a tribunal established by law in European law, meaning within the case law of the CJEU as well as that of the ECtHR. Then, it addresses the fundamental effects of this judgment for the EU Member States. Finally, it briefly looks into the questions that remain unanswered after this judgment.

* 1. The right to a tribunal established by law in European law

The judgments in *FV*, *Ástráðsson* and now *Review Simpson* have each stressed that the appointment procedure of a judge is a relevant factor in assessing whether a tribunal is established by law, thereby adding a new dimension to this right. This section examines the place of the right to a tribunal established by law in European law, both in the case law of the CJEU and of the ECtHR. The section first examines the case law of the Courts before the *Review Simpson* and *Ástráðsson* judgments and then assesses what these judgments have added to this case law.

The notion of a tribunal ‘established by law’ appears in two different provisions of EU law. First, it is an aspect of the right to a fair trial, safeguarded by Article 47(2) of the Charter. Second, according to long-standing case law, a domestic body must be established by law before it can take part in the preliminary rulings procedure, provided in Article 267 TFEU.[[32]](#footnote-32)

Despite the prevalence of these two provisions in the jurisprudence of the CJEU, there is very limited case law on how the notion of ‘established by law’ should exactly be understood.[[33]](#footnote-33) In this connection, in its judgments under Article 267 TFEU, the ECJ regularly refrains from referring to this criterion,[[34]](#footnote-34) or simply confirms that it clearly has been met.[[35]](#footnote-35)

Yet, when the case law is examined more in-depth, it becomes clear that the notion of ‘established by law’ in EU law encompasses two dimensions. The first dimension relates most closely to the definition of the term ‘established’, and encompasses that the very existence of the tribunal should have a basis in legal rules. In most judgments, it is this aspect of the right to a tribunal established by law that is addressed. The ECJ then simply refers to the domestic legal provision which provides the legal basis for the tribunal in question.[[36]](#footnote-36) It appears that the ECJ does not require this legal basis to be enshrined in primary legislation, but also accepts subordinate legislation.[[37]](#footnote-37) In other judgments, the CJEU addresses a second dimension of the notion ‘established by law’. In those cases, the question is not whether the tribunal has a basis in legislation, but whether it complies with the rules concerning its jurisdiction and composition.[[38]](#footnote-38) Here, the argument is that a tribunal can only be established by law, if it ruled in accordance with the jurisdictional rules and the provisions concerning the composition of the bench. In several judgments, the CJEU has shown its willingness to verify the compliance with this second dimension of the right to a tribunal established by law.[[39]](#footnote-39) The General Court, with reference to the case law of the ECtHR, appears to require these rules to be laid down in formal legislation.[[40]](#footnote-40)

These two dimensions of the right to a tribunal established by law can also be found in the jurisprudence of the ECtHR. According to long-standing case law, the phrase ‘established by law’, as guaranteed by Article 6(1) ECHR, covers the legal basis for the very existence of a tribunal.[[41]](#footnote-41) Moreover, it also encompasses the particular rules that govern it and the composition of the bench in each case.[[42]](#footnote-42) Therefore, for the Strasbourg Court, a tribunal is only established by law if it complies with all provisions of domestic law, of which any breach would cause the participation of one or more judges in the examination of the case to be unlawful.[[43]](#footnote-43) Importantly, the Strasbourg Court requires a law emanating from parliament,[[44]](#footnote-44) in order to ensure that the judicial organization does not depend on the discretion of the executive or the judicial authorities themselves.[[45]](#footnote-45) However, this does not mean that the legislature must regulate every detail in this area by a formal act of parliament, as long as it establishes at least the organizational framework for the judicial organization.[[46]](#footnote-46) What exactly constitutes this organizational framework is not particularly clear from the case law of the ECtHR. According to the former European Commission of Human Rights, at least the material and territorial jurisdiction should be laid down in formal legislation.[[47]](#footnote-47) However, it is unclear to which extent this principle is also accepted by the ECtHR itself. In a handful of cases, the Court has referred to this principle, but it has always expressly mentioned that this was the opinion of the former Commission.[[48]](#footnote-48)

Thus, both the ECJ and the ECtHR have discerned two dimensions in the right to a tribunal established by law. The judgments in *FV*, *Ástráðsson* and *Review Simpson* have added a third dimension. They have made clear that the term ‘established by law’ does not only require compliance with the domestic provisions that govern the function and composition of a tribunal, but also with the provisions that govern the appointment of judges. In doing so, these judgments have broadened the scope of the right to a tribunal established by law. Furthermore, the ECJ stressed the importance of this right, by clarifying that every court is obliged to check of its own motion whether it is itself established by law, wherever a serious doubt arises on that point.[[49]](#footnote-49)

Both the ECJ and the ECtHR rely on the principle of the separation of powers in their reasoning and do so in very similar fashion. The ECtHR reiterated the growing importance that the notions of separation of powers and judicial independence assume in its case law and stated that, in light of those principles, it should ascertain whether the breach of the applicable rules during the appointment proceedings created a real risk that the other organs of government, in particular the executive, exercised undue discretion undermining the integrity of the appointment process.[[50]](#footnote-50) The ECJ held that an irregularity during the appointment of judges entails an infringement of the right to a tribunal established by law, particularly when that irregularity is of such a kind and of such gravity as to create a real risk that other branches of the State, in particular the executive, could exercise undue discretion undermining the integrity of the outcome of the appointment process.[[51]](#footnote-51) In this sense, these judgments can be seen as further evidence of how both Courts are increasingly dealing with topics that affect the balance of power between the branches of government.[[52]](#footnote-52)

So what exactly is the level of protection which the right to a tribunal established by law affords to judicial appointment proceedings? As opposed to the approach taken by Advocate General Sharpston, the ECJ does not impose a duty to balance the right to a tribunal established by law and the principle of legal certainty.[[53]](#footnote-53) The principle of legal certainty is not even mentioned once by the ECJ. Rather, the Court follows an approach that is more closely linked to the one followed by the Strasbourg Court and imposes a threshold of minimum severity. Whereas the ECtHR requires the irregularity during the appointment proceedings to be flagrant, the ECJ holds that an irregularity during the appointment proceeding entails an infringement of the right to a tribunal established by law, particularly when that irregularity is of such a kind as to give rise to a reasonable doubt in the minds of individuals as to the independence and the impartiality of the judge or judges concerned.[[54]](#footnote-54) This threshold closely resembles the one which the Court recently imposed in the judgment of *A. K., CP and DO*. In that case, the Court required the referring national court to assess whether all factors taken together are capable of giving rise to legitimate doubts in the minds of subjects of the law, as to the imperviousness of the Polish Disciplinary Chamber to external factors and whether they may lead to that chamber not being seen to be independent and impartial.[[55]](#footnote-55)

All things considered, the outcome of the approach adopted by the ECJ might not differ all that much from the one taken by Advocate General Sharpston. By limiting an infringement of the right to a tribunal established by law to those irregularities that give rise to reasonable doubts about the independence and impartiality of the judge(s) concerned, the Court strikes a balance between the right to a tribunal established by law and the principle of legal certainty. Only, rather than requiring the courts to perform this balancing exercise between those two principles themselves, the ECJ has imposed a fixed threshold. The advantage of reasonable doubt as a threshold is that it is flexible and allows the court in question to take every relevant factor into consideration. The downside, however, is that it is a notion of unclear scope and therefore difficult to operationalize.[[56]](#footnote-56)

* 1. A judgment of constitutional importance for the Member States

The judgment in *Review Simpson* has significant consequences for the European Union. The ECJ made clear that Union Courts can verify the regularity of appointment proceedings to ensure that they constitute a tribunal established by law and must even do so of their own motion when a serious doubt arises on that point. In doing so it empowered the Union Courts vis-à-vis the Council, thereby altering the balance of power within the Union. Nonetheless, it would appear that the judgment is of even more significance for the Member States themselves, as the principles set out in it can apply just as well to domestic courts. This section will examine the constitutional importance of the judgment in *Review Simpson* for the EU Member States. It will do so in two steps. First, it will address the question to what extent the principles of the judgment can be applied to domestic judiciaries, and second, it assesses what consequences this would entail.

To reiterate, the *Review Simpson* judgment is grounded completely on Article 47 of the Charter. The two cases that eventually gave rise to the review proceedings before the ECJ concerned disputes between two individuals and the Commission and the Council respectively, that were submitted to the CST. In such circumstances, Article 47 of the Charter clearly applies.[[57]](#footnote-57) Yet, Article 47 of the Charter is also applicable to domestic courts and tribunals when they rule on the rights and freedoms guaranteed by EU law. As soon as there is a sufficient link with EU law for the Charter to apply, in accordance with the case law on Article 51(1) of the Charter,[[58]](#footnote-58) then the guarantees under Article 47 of the Charter also have to be ensured.[[59]](#footnote-59) In such cases, the right to a tribunal established by law, as interpreted by the ECJ, will apply and the domestic tribunal in question will have to verify the regularity of its composition, if need be of its own motion.

That is of course only the case in disputes that concern the rights and freedoms guaranteed by EU law and trigger the application of the Charter. One could, however, ask the question whether the requirement of a tribunal established by law can also apply outside of such circumstances. The answer to this question, I argue, is positive. The crucial provision in this regard is the second subparagraph of Article 19(1) TEU, according to which Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law. Since the ECJ’s judgment in *Associação Sindical dos Juízes Portugueses* (hereafter: ASJP),[[60]](#footnote-60) this provision has received an enormous amount of scholarly attention.[[61]](#footnote-61) In this judgment, the Court pointed out that the observance of Union law is entrusted to both the CJEU and the national courts and tribunals.[[62]](#footnote-62) Therefore, the Member States are obliged to ensure the application of and respect for EU law. In that regard, they are required to provide remedies that are sufficient to ensure effective judicial protection for individual parties in those fields covered by EU law. In light of these principles, all Member States must ensure that the bodies which as courts or tribunals within the meaning of EU law come within its judicial system in the fields covered by that law, meet the requirements of effective judicial protection.[[63]](#footnote-63)

In *ASJP*, the Court essentially interpreted the second subparagraph of Article 19(1) TEU in such a way that it provides an autonomous ground to verify the right to an effective judicial remedy. Autonomous because, unlike Article 47 of the Charter, this provision applies irrespective of whether the Member States are implementing Union law within the meaning of Article 51(1) of the Charter.[[64]](#footnote-64) Rather, the relevant criterion is whether the domestic court in question may be required to rule on questions which concern the application or interpretation of EU law and thus fall within he fields covered by EU law. As has been noted,[[65]](#footnote-65) there do not appear to be many, if any, courts that do not fit that description. Consequently, virtually all domestic courts fall within the scope of Article 19(1)(2) TEU.[[66]](#footnote-66)

In its case law, the ECJ has read Article 19(1)(2) TEU in light of fundamental rights enshrined in Article 47 of the Charter.[[67]](#footnote-67) As of yet, the second subparagraph of Article 19(1) TEU has only been read in conjunction with the right to an independent and impartial court.[[68]](#footnote-68) There is, however, little that prevents the Court to interpret this provision in the light of other substantive aspects of Article 47 of the Charter,[[69]](#footnote-69) such as the right to a tribunal established by law.

Understood in this sense, Article 19(1)(2) TEU would provide an autonomous ground to verify the right to a tribunal established by law on the domestic level. In general, such an understanding seems to be in accordance with the existing case law of the Court. In *ASJP* the Court held that Member States must ensure that the bodies which, as ‘courts or tribunals’ within the meaning of EU law, come within its judicial system in the fields covered by that law, meet the requirements of effective judicial protection.[[70]](#footnote-70) It then recalled that the factors to be taken into account in assessing whether a body is a ‘court or tribunal’ include, among others, whether the body is established by law, whether its jurisdiction is compulsory, whether its procedure is *inter partes*, whether it applies rules of law and whether it is independent.[[71]](#footnote-71) Just like judicial independence, the ‘establishment by law’ is thus a prerequisite for any domestic body to be seen as a ‘court or tribunal’. Furthermore, the ECJ held that the guarantees of access to an ‘independent and impartial tribunal previously established by law’ represent the cornerstone of the right to a fair trial.[[72]](#footnote-72) The ECJ appears to indicate that a court’s establishment by law and its independence and impartiality concern the very essence of the right to a fair trial and seems to hold the view that the two aspects are linked.[[73]](#footnote-73) These two aspects indeed seem to be the two most fundamental aspects of the right to a fair trial enshrined in Article 47(2) of the Charter. As opposed to, for example, the right to be tried within a reasonable time, these two aspects have a structural nature, in the sense that, if they have not been met, one could question every judgment issued by that court.[[74]](#footnote-74)

On these grounds, I argue that the right to effective judicial protection, enshrined in the second subparagraph of Article 19(1) TEU, can be read in conjunction with the right to a tribunal established by law.[[75]](#footnote-75) This provision would then provide an autonomous ground for this right. Based on this provision, establishment by law and the compliance with procedural requirements during the judicial appointment proceedings, would then become a duty of EU law for the domestic courts, subject to supervision by the ECJ. It should be noted here, that the Court will have to rule on this interpretation of Article 19(1)(2) TEU in the near future. At the time of writing, there are several preliminary references pending before the Court which ask whether Article 19(1) TEU, read in conjunction with Article 47 of the Charter and Article 267 TFEU, must be interpreted as meaning that a person who has been appointed to the position of judge in flagrant breach of the laws of a Member State applicable to judicial appointments is not an independent judge within the meaning of EU law, and whether a court whose composition includes such a person is not an independent and impartial tribunal established by law within the meaning of EU law.[[76]](#footnote-76)

The above made clear that the principles that were set out in the judgment of *Review Simpson* can be applied to the domestic judiciary.[[77]](#footnote-77) If the ECJ does not interpret Article 19(1)(2) TEU as to encompass the establishment by law, then domestic judges will still have to comply with these principles when they rule on rights and freedoms within the sense of Article 47 of the Charter. This conclusion has significant repercussions for the domestic judicial order. From now on, every domestic court is obliged under EU law to verify of its own motion whether, as composed, it constitutes a tribunal established by law.[[78]](#footnote-78) As such, they are competent to assess whether the appointment proceedings occurred in conformity with the procedural requirements. In this sense, the ECJ has empowered the domestic courts vis-à-vis the executive and legislature. Just as with judicial independence, the ECJ is competent to verify whether the domestic courts comply with this obligation. Moreover, when the national courts are in doubt about the exact meaning of ‘established by law’, they will be able to ask the ECJ via the preliminary reference procedure.

This brings me to a related point. As was noted above, the notion of ‘establishment by law’ appears both in the right to a fair trial, enshrined in Article 47(2) of the Charter, and in Article 267 TFEU. The question then arises whether a domestic tribunal that is not seen as established by law in the sense of Article 47(2) of the Charter, is still allowed to reach the Court via the preliminary ruling mechanism of Article 267 TFEU. The exact same question was raised after the *ASJP* judgment with regard to the aspect of judicial independence.[[79]](#footnote-79) Since the recent judgment in *Banco de Santander*,[[80]](#footnote-80) the answer to this question would appear to be negative. In this case, the Court declared a request for a preliminary ruling inadmissible because it concluded that the referring body was not independent. In doing so, the Court relied on its case law concerning Article 19(1)(2) TEU and Article 47 of the Charter when assessing the notion of independence under Article 267 TFEU.[[81]](#footnote-81) With this judgment the Court indicated that the notion of independence in Article 19(1)(2) TEU and Article 267 TFEU should be interpreted in the same way.[[82]](#footnote-82) It can be expected that the Court will align the interpretation of the notion of ‘establishment by law’ in Article 47(2) of the Charter and Article 267 TFEU in this way as well.

Importantly, the principles set out in *Review Simpson* also allow the Commission to act when Member States violate the right to a tribunal established by law. The Commission can now initiate infringement proceedings on the ground of Article 47 of the Charter – and possibly Article 19(1)(2) TEU –, when domestic tribunals are composed of one or more judges who have been appointed in violation of the principles that the Court has set out. Granted, the Commission may not initiate infringement proceedings based on the alleged unlawful composition of just any domestic court. Nonetheless, this judgment might empower the Commission to initiate such proceedings in some important or high-profile cases. In this regard, one could think of the Polish Constitutional Court, which for several years now has partly been composed of judges whose appointment was questionable to say the least.[[83]](#footnote-83)

This brings me to one final point: the enforcement of the principles set forth in this judgment. The Court held in *Review Simpson* that the check whether a tribunal is established by law is a matter of public policy and must be verified by the domestic court of its own motion.[[84]](#footnote-84) The main responsibility for the compliance with this principle thus rests on the domestic court in question, if need be with the guidance of the ECJ via a preliminary reference. Alternatively, an appeal court can rely on the principles of *Review Simpson* in order to verify whether a lower court was established by law. As such, the ECJ relies primarily on the self-regulation by the domestic judiciary. However, one can wonder whether these principles can effectively be enforced for, for instance, supreme courts or courts that are completely biased in their composition, for example in an illiberal regime. A system that relies on self-regulation would appear to be of limited avail in such circumstances. In general, the effective enforcement of the principles set forth in *Review Simpson* may prove most difficult for those courts that require it most. In such circumstances, the question arises as to the enforcement by external actors. I see two possibilities here. First, as was noted above, the Commission may initiate infringement proceedings for an allegedly unlawfully established tribunal. However, it was mentioned as well that it is not likely that the Commission will initiate such proceedings in all possible cases. A second, complementary avenue may be found in the earlier judgment of *A. K., CP and DO*. In this judgment, the Court held that a domestic court may be required to disapply national competence legislation and to assume jurisdiction itself if it concludes that the court which would ordinarily have jurisdiction cannot be seen as independent.[[85]](#footnote-85) One could ask if the same mechanism might apply with the right to a tribunal established by law. Can an individual bring a case before a court and ask it to verify whether the court that would ordinarily have jurisdiction over that case is duly established by law, and to assume jurisdiction itself when that verification turns out negative? The Court’s interpretation of Article 47 of the Charter in *Review Simpson*, combined with the general wording of the *A. K., CP and DO* judgment would support such an interpretation.[[86]](#footnote-86) Such an incidental review of a court’s lawful establishment would offer an alternative avenue to safeguard an individual’s right to a tribunal established by law. It can be expected that the Court will be asked in the near future on this interpretation of Article 47 of the Charter and the right to a tribunal established by law.

* 1. Remaining questions

The previous section made clear that the judgment of *Review Simpson* will have significant repercussions for the EU Member States. Exactly how significant is hard to say at this point, since the judgment leaves one important question unanswered.

Something that has not been addressed by the Court in the *Review Simpson* judgment is what should happen with judgments that have been issued by courts that are later found not to be established by law. This issue was also brought up by the dissenting judges in the ECtHR’s *Ástráðsson* judgment.[[87]](#footnote-87) Despite its silence on the matter in *Review Simpson*, the ECJ will have to rule on this issue in the near future. The abovementioned pending cases also ask whether Article 19 TEU, read together with Article 47 of the Charter and Article 267 TFEU, should be interpreted as meaning that a judgment issued by a tribunal that is not established by law is not a judgment in the legal sense, meaning that another court may still rule on the case in question.[[88]](#footnote-88) In this regard we must wait to see what balance the Court will strike. Will it attach decisive weight to the importance of the right to a tribunal established by law, by deciding that all judgments issued by a court that does not fulfil this requirement, should be regarded as non-existent? Or will it, by contrast, argue that, given the relatively high threshold it has imposed in this judgment, the principle of legal certainty should prevail.[[89]](#footnote-89)

Besides this point, the judgment also raises an entirely new question. As was mentioned above, the judgments in *Review Simpson* and *Ástráðsson* add a new dimension to the right to a tribunal established by law. As such, they broaden the scope of this fundamental right and increase the level of human rights protection in Europe. Yet, one could question if the principles that were set out in this judgment can be taken one step further still. The question arises whether the irregular removal of a judge from a tribunal can also lead to the conclusion that this tribunal is no longer established by law, even when the new judge who replaces him or her has been appointed in conformity with all procedural requirements. In such an understanding, the violation of the right to a tribunal established by law would not follow from any irregularities leading up to the way a judge is appointed, but rather during the procedure on his or her removal.

Such an understanding of the right to a tribunal established by law would seem to be a rather logical extension of the principles that have been set out by the ECJ and the ECtHR. The considerations by both Courts concerning the undue interference by the executive and the legislature can just as well be applied to the removal of a judge. It seems likely that either or both Courts will be confronted with this question sooner or later.

1. CONCLUSION

Over the course of the last two years, the General Court, the European Court of Human Rights and the European Court of Justice have each, in turn, replied to the same fundamental question: is a tribunal still established by law when one of its members has been appointed in an irregular manner? Even though the three Courts afford different levels of protection to the right to a tribunal established by law, they do all agree on the basic premise that an irregular appointment procedure can lead to a violation of this fundamental right. The judgment by the General Court in *FV* has thus given rise to a judicial trialogue on the right to a tribunal established by law, which broadened the material scope of this fundamental right, by adding a new dimension to it. The notion of ‘established by law’ now not only encompasses the legal basis for the tribunal and compliance with the rules governing its jurisdiction and composition, but also compliance with the procedural rules during the appointment proceedings.

This case note addressed three aspects of the ECJ’s judgment in *Review Simpson*. First, it analysed the scope of the right to a tribunal established by law in the case law of the ECJ and the ECtHR and what the *Review Simpson* and *Ástráðsson* judgments have added in this regard. Second, it examined the consequences of the *Review Simpson* judgment for the EU Member States. In order to do so it asked to what extent the principles of the judgment, which concerned a dispute on the level of the EU institutions, could be applied to the domestic level as well. In this regard, it was noted that the principles will necessarily apply when domestic courts are ruling on the rights and freedoms guaranteed by EU law, in accordance with Article 47 of the Charter. More importantly, this case note argued that the right to a tribunal established by law can also be read in the second subparagraph of Article 19(1) TEU. This provision would then constitute an autonomous ground for the domestic application of the right to a tribunal established by law. The repercussions of this application for the domestic judicial order should not be underestimated, as it requires every court to verify of its own motion whether it constitutes a tribunal established by law and whether the appointment proceedings of its judges complied with all requirements. Furthermore, it may interfere with the possibility of domestic courts to ask for preliminary rulings and may even provide the grounds for future infringement proceedings. In a third and final part of the commentary, the case note briefly touched upon the questions that remained unanswered after this judgment. It questioned what would be the fate of judgments that were issued by tribunals that were subsequently found not to be established by law. Furthermore, it asked whether the principles set forth in *Review Simpson* could be taken one step further, by including the irregular removal of judges into the scope of the right to a tribunal established by law as well.

In general, this judgment can be seen as another step by the ECJ in strengthening its supervision over issues concerning the domestic judicial organization. The Court made clear that it is not only committed to addressing issues of judicial independence, but also of other fundamental aspects of the right to a fair trial. In doing so, the Court is increasingly dealing with topics that imply the domestic balance of powers and the organization of governmental structures within the European Member States.

Mathieu Leloup[[90]](#footnote-90)\*

1. By way of example: Frese and Palmer Olsen, “Spelling it out – Convergence and Divergence in the Judicial Dialogue between CJEU and ECtHR”, 88 Nordic JIL (2019), pp. 429-458; Souvignet, “Cour de justice de l’Union européenne et Cour européenne des droits de l’homme: dialogue des juges ou objectivité des droits fondamentaux?” in Menétrey and Hess (eds.), *Les dialogues des juges en Europe* (Larcier, 2014), pp. 141-154; Harpaz, “The European Court of Justice and its relations with the European Court of Human Rights: The quest for enhanced reliance, coherence and legitimacy” 46 CML Rev. (2009), pp. 105–141. [↑](#footnote-ref-1)
2. Ciliberto, “*Non-refoulement* in the Eyes of the Strasbourg and Luxembourg Courts: What Room for Its Absoluteness?” in Natoli and Riccardi (eds.), *Borders, Legal Spaces and Territories in Contemporary International Law. Within and Beyond* (Springer, 2019), pp.59-92. [↑](#footnote-ref-2)
3. Vetzo, “The Past, Present and Future of the Ne Bis In Idem Dialogue between the Court of Justice of the European Union and the European Court of Human Rights: The Cases of *Menci*, *Garlsson* and *Di Puma*”, 11 REALaw (2018), pp. 55-84. [↑](#footnote-ref-3)
4. Glas and Krommendijk, “From *Opinion 2/13* to *Avotiņš*: Recent Developments in the Relationship between the Luxembourg and Strasbourg Courts”, 17 H.R.L. Rev. (2017), pp. 567-587. [↑](#footnote-ref-4)
5. In this case note, European Court of Justice (or ECJ) and General Court (or GC) will be used to refer specifically to those institutions. Court of Justice of the European Union (or CJEU) will be used when referring to both institutions at the same time. [↑](#footnote-ref-5)
6. ECtHR, *Guðmundur Andri Ástráðsson* v. *Iceland*, Appl. No. 26374/18, judgment of 12 March 2019. [↑](#footnote-ref-6)
7. Council, Public call for applications for the appointment of judges to the European Civil Service Tribunal, *OJ* 2013 C 353, p. 11. [↑](#footnote-ref-7)
8. Council Decision (EU, Euratom) 2016/454 of 22 March 2016 appointing three Judges to the European Union Civil Service Tribunal, *OJ* 2016 L 79, p. 30. [↑](#footnote-ref-8)
9. Case T-646/16 P, *Simpson* v. *Council*, EU:T:2018:493; Case T-693/16 P, *HG* v. *Commission*, EU:T:2018:492. [↑](#footnote-ref-9)
10. Case T-639/16 P, *FV* v. *Council*, EU:T:2018:22, paras 67-78. Seeing as the First Advocate General took the view that this judgment did not constitute a serious risk that the unity or consistency of EU law may be affected, the Review Chamber of the Court of Justice decided not to review this case. See: Case C-141/18 RX, *Review FV* v. *Council*, EU:C:2018:218. Given that the reasoning of the General Court in the cases of *Simpson* and *HG* completely rely on its ruling in *FV*, it can only be concluded from the ECJ’s judgment that the General Court’s ruling in *FV* also erred in law. [↑](#footnote-ref-10)
11. Joined Cases C-341/06 P and 342/06 P, *Chronopost and La Poste* v. *UFEX a.o.*, EU:C:2008:375. [↑](#footnote-ref-11)
12. Case T-646/16 P, *Simpson* v. *Council*, EU:T:2018:493, paras 38 and 45; Case T-693/16 P, *HG* v. *Commission*, EU:T:2018:492, para 39; Case T-639/16 P, *FV* v. *Council*, EU:T:2018:22, para 66. [↑](#footnote-ref-12)
13. Case C-542/18 RX, *Review Simpson* v. *Council*, EU:C:2018:763; Case C-543/18 RX, *Review HG* v. *Commission*, EU:C:2018:764. In accordance with Article 195(5) of the Rules of Procedure, it requested the Court to assign the cases under review to the Grand Chamber. [↑](#footnote-ref-13)
14. ECtHR, *Guðmundur Andri Ástráðsson* v. *Iceland*, Appl. No. 26374/18, judgment of 12 March 2019. [↑](#footnote-ref-14)
15. ECtHR, *Guðmundur Andri Ástráðsson*, para 98. [↑](#footnote-ref-15)
16. See: ECtHR, *Guðmundur Andri Ástráðsson*, para 98. It only referenced the General Court’s judgment in *FV* and a judgment by the EFTA Court: Case E-21/16, *Pascal Nobile* v. *DAS Rechtsschutz-Versicherungs*, Decision of the Court of 14 February 2017, para 16. [↑](#footnote-ref-16)
17. ECtHR, *Guðmundur Andri Ástráðsson*, paras 100-101. [↑](#footnote-ref-17)
18. ECtHR, *Guðmundur Andri Ástráðsson*, paras 104-123. [↑](#footnote-ref-18)
19. Dissenting opinion by judges Lemmens and Griţco in ECtHR, *Guðmundur Andri Ástráðsson*, para 1. [↑](#footnote-ref-19)
20. See press release of 10 September 2019, ECHR 308 (2019). The proceedings for referral to the Grand Chamber are a little more opaque than those for a review in the ECJ. It is in principle unknown on what grounds cases are either accepted or declined by the Grand Chamber Panel. However, the Court has published a note in which it sets forth the general practice of the Panel. See: https://www.echr.coe.int/Documents/Note\_GC\_ENG.pdf (last accessed: 27 March 2020). See further: Baglayan and Fahner, “‘One Can Always Do Better’ The Referral Procedure before the Grand Chamber of the European Court of Human Rights”, 17 H.R.L. Rev. (2017), pp. 339-363, at p. 347. [↑](#footnote-ref-20)
21. Opinion by AG Sharpston in joined Cases C-542/18 RX-II and C-543/18 RX-II, *Review Simpson* v. *Council and Review HG* v. *Commission*, EU:C:2019:977. [↑](#footnote-ref-21)
22. Opinion by AG Sharpston in joined Cases C-542/18 RX-II and C-543/18 RX-II, *Review Simpson* v. *Council and Review HG* v. *Commission*, paras 41-58. [↑](#footnote-ref-22)
23. Opinion by AG Sharpston in Joined Cases C-542/18 RX-II and C-543/18 RX-II, *Review Simpson* v. *Council and Review HG* v. *Commission*, paras 59-111. [↑](#footnote-ref-23)
24. Opinion by AG Sharpston in joined Cases C-542/18 RX-II and C-543/18 RX-II, *Review Simpson* v. *Council and Review HG* v. *Commission*, paras 112-142. [↑](#footnote-ref-24)
25. Joined Cases C-542/18 RX-II and C-543/18 RX-II, *Review Simpson* v. *Council and Review HG* v. *Commission*, EU:C:2020:232, para 51. [↑](#footnote-ref-25)
26. Joined Cases C-542/18 RX-II and C-543/18 RX-II, *Review Simpson* v. *Council and Review HG* v. *Commission*, paras 53-58. [↑](#footnote-ref-26)
27. Joined Cases C-542/18 RX-II and C-543/18 RX-II, *Review Simpson* v. *Council and Review HG* v. *Commission*, paras 59-68. [↑](#footnote-ref-27)
28. Joined Cases C-542/18 RX-II and C-543/18 RX-II, *Review Simpson* v. *Council and Review HG* v. *Commission*, para 71. With reference to Joined Cases C-585/18, C-524/18 and C-525/18, *A. K., CP and DO*, EU:C:2019:982, para 153. [↑](#footnote-ref-28)
29. Joined Cases C-542/18 RX-II and C-543/18 RX-II, *Review Simpson* v. *Council and Review HG* v. *Commission*, paras 73-83. [↑](#footnote-ref-29)
30. Joined Cases C-542/18 RX-II and C-543/18 RX-II, *Review Simpson* v. *Council and Review HG* v. *Commission*, paras 84-87. [↑](#footnote-ref-30)
31. Joined Cases C-542/18 RX-II and C-543/18 RX-II, *Review Simpson* v. *Council and Review HG* v. *Commission*, para 75. [↑](#footnote-ref-31)
32. These criteria are whether the body is established by law, whether it is permanent, whether its jurisdiction is compulsory, whether its procedure is *inter partes*, whether it applies rules of law and whether it is independent. See among many others: Case C-503/15, *Margarit Panicello*, EU:C:2017:126, para 27; Case C-53/03, *Syfait*, EU:C:2005:333, para 29; Case C-54/96, *Dorsch Consult*, EU:C:1997:413, para 23; Case 61/65, *Vaassen-Göbbels*, EU:C:1966:39, p. 273. [↑](#footnote-ref-32)
33. In the same sense: Kuijer, *The blindfold of Lady Justice. Judicial Independence and Impartiality in Light of the Requirements of Article 6 ECHR*, (Wolf Legal Publishers, 2004), p. 194. This is also evidenced by the lack of attention to this aspect in literature on this topic. See for example: Wahl and Prete, “The Gatekeepers of Article 267 TFEU: on Jurisdiction and Admissibility of References for Preliminary Rulings”, 55 CML Rev. (2018), pp. 511-548; Broberg and Fenger, *Preliminary References to the European Court of Justice* , 2nd ed. (OUP, 2014), pp. 61-62. The same holds true for the right to a tribunal established by law in the framework of the ECHR. See for example: Barkhuysen, van Emmerik, Jansen and Fedorova, “Right to a Fair Trial” in van Dijk, van Hoof, van Rijn and Zwaak (eds.), *Theory and Practice of the European Convention on Human Rights*, 5th ed. (Intersentia, 2018), pp. 611-612; Shabas, *The European Convention on Human Rights: A Commentary* (OUP, 2015), pp. 294-296. [↑](#footnote-ref-33)
34. Case C-296/15, *Medisanus*, EU:C:2017:431, paras 33-35; Case C-503/15, *Margarit Panicello*, EU:C:2017:126, paras 27-30; Case C-443/09, *Grillo Star Fallimento*, EU:C:2012:213, paras 20-26. [↑](#footnote-ref-34)
35. Case C-274/14, *Banco de Santander*, EU:C:2020:17, para 52; Case C-546/16, *Montte*, EU:C:2018:752, para 22; Case C-203/14, *Consorci Sanitari del Maresme*, EU:C:2015:664, para 18; Joined Cases C-58/13 & 59/13, *Torresi*, EU:C:2014:2088, para 20. [↑](#footnote-ref-35)
36. For example: Case C-136/11, *Westbahn Management*, EU:C:2012:740, para 28; Case C-54/96, *Dorsch Consult*, EU:C:1997:413, para 25. See also: Opinion 1/17, *Accord ECG UE-Canada*, EU:C:2019:341, para 197. [↑](#footnote-ref-36)
37. Seeing as most Member States virtually always enshrine the legal basis for judicial bodies in primary legislation, it is not easy to say this with absolute certainty. The ECJ has, to the best of my knowledge, never explicitly addressed the question whether the establishment of a tribunal should be done in primary legislation or can also be in subordinate legislation. In *Vaassen-Göbbels*, the Court accepted that the Arbitration Tribunal of the Fund for non-manual workers employed in the mining industry, a tribunal established by a regulation that was promulgated by an institution established under private law, was properly established by law. This would indicate that the Court also allows subordinate legislation. See for the same conclusion: Broberg, “Preliminary References by Public Administrative Bodies: When are public administrative bodies competent to make preliminary references to the European Court of Justice?”, 15 EPL (2009), pp. 207-221, at pp. 208-209. [↑](#footnote-ref-37)
38. See in this sense also the Opinion of AG Jääskinen in Case C-203/14, *Consorci Sanitari del Maresme*, EU:C:2015:445, para 22. He held that since the provision in question contained provisions concerning, in particular, the establishment, jurisdiction and composition of the tribunal, the criterion of the body’s establishment by law was clearly satisfied. [↑](#footnote-ref-38)
39. See: Case C-413/18 P, *H* v. *Council*, EU:C:2019:1044, para 61; Case T-729/15, *MSD Animal Health Innovation and Intervet international* v. *EMA*, EU:T:2016:435, paras 119-120; Case T-718/15 R, *PTC Therapeutics International* v. *EMA*, EU:T:2016:425, paras 127-129; Case C-127/13 P, *Strack*, EU:C:2014:2250, paras 48-55; Case T-199/11 P, *Strack* v. *Commission*, EU:T:2012:691, paras 19-29; Case C-528/08 P, *Marcuccio*, EU:C:2009:761, para 58; Case C-182/99 P, *Salzgitter AG* v. *Commission*, EU:C:2003:526, paras 28-37; Case C-103/97, *Köllensperger and Atzwanger*, EU:C:1999:52, para 18. See also Opinion of AG Kokott in Case C-127/13 P, *Strack*, EU:C:2014:455, paras 79-93. [↑](#footnote-ref-39)
40. Case T-639/16 P, *FV* v. *Council*, EU:T:2018:22, para 68; Case T-199/11 P, *Strack* v. *Commission*, EU:T:2012:691, para 22. [↑](#footnote-ref-40)
41. By way of some recent examples: ECtHR, *Ali Riza a.o.* v. *Turkey*, Appl. Nos. 30226/10 and 5506/16, judgment of 28 January 2020, para 194; ECtHR, *Pasquini* v. *San Marino*, Appl. No. 50956/16, judgment of 2 May 2019, para 101; ECtHR, *Mutu and Pechstein* v. *Switzerland*, Appl. Nos. 40575/10 and 67474/10, judgment of 2 October 2018, para 138. [↑](#footnote-ref-41)
42. ECtHR, *DMD Group, A.S.* v. *Slovakia*, Appl. No. 19334/03, judgment of 5 October 2010, para 59; ECtHR, *Buscarini* v. *San Marino*, Appl. No. 31657/96, decision of 4 May 2000. [↑](#footnote-ref-42)
43. ECtHR, *Mutu and Pechstein*, para 138; ECtHR, *Gorguiladze* v. *Georgia*, Appl. No. 4313/04, judgment of 20 October 2009, para 68. [↑](#footnote-ref-43)
44. This is one of relatively few areas in which the ECtHR requires parliamentary legislation. In other areas it applies a more flexible understanding of the notion of law, covering, for instance, judge-made law. See on this: Van Drooghenbroeck and Van Drooghenbroeck, “Le Principe de Légalité en Matière Judiciaire” in Detroux, El Berhoumi and Lombaert (eds.), *La Légalité: Un principe de la démocratie belge en péril?* (Larcier, 2019), pp.80-81. [↑](#footnote-ref-44)
45. ECtHR, *Chim and Przywieczersky* v. *Poland*, Appl. Nos. 36661/07 and 38433/07, judgment of 12 April 2018, para 137; ECtHR, *Miracle Europe KFT* v. *Hungary*, Appl. No. 57774/13, judgment of 12 January 2016, para 51. [↑](#footnote-ref-45)
46. ECtHR, *El Mottassadeq* v. *Germany*, Appl. No. 28599/07, decision of 4 May 2010. [↑](#footnote-ref-46)
47. EComHR, *Zand* v. *Austria*, Appl. No. 7360/76, report of 12 October 1978, para 68. [↑](#footnote-ref-47)
48. For example: ECtHR, *Trepashkin* v. *Russia (No. 2)*, Appl. No 14248/05, decision of 22 January 2009. Van Dijk argues that the national legislation should indicate the competence *ratione personae*, *ratione materiae* and *ratione loci* in any concrete case. See: Van Dijk, *The Right of the Accused to a Fair Trial under International Law* (SIM, 1983), p. 40. [↑](#footnote-ref-48)
49. Joined Cases C-542/18 RX-II and C-543/18 RX-II, *Review Simpson* v. *Council and Review HG* v. *Commission*, para 57. [↑](#footnote-ref-49)
50. ECtHR, *Guðmundur Andri Ástráðsson*, para 103. [↑](#footnote-ref-50)
51. Joined Cases C-542/18 RX-II and C-543/18 RX-II, *Review Simpson* v. *Council and Review HG* v. *Commission*, para 75. [↑](#footnote-ref-51)
52. For other examples by the ECJ concerning the balance of power on the level of the Union: Case C-72/15, *Rosneft*, EU:C:2017:236; Case C-409/13, *Council* v. *Commission*, EU:C:2015:217. On the level of the EU Member States: Joined Cases C-585/18, C-524/18 and C-525/18, *A. K., CP and DO*; Case C-619/18, *Commission* v. *Poland (Indépendance de la Cour suprême)*, EU:C:2019:531. [↑](#footnote-ref-52)
53. Opinion of AG Sharpston in Joined Cases C-542/18 RX-II and C-543/18 RX-II, *Review Simpson* v. *Council and Review HG* v. *Commission*, paras 57, 111 and 141. [↑](#footnote-ref-53)
54. Joined Cases C-542/18 RX-II and C-543/18 RX-II, *Review Simpson* v. *Council and Review HG* v. *Commission*, paras 75 and 79. [↑](#footnote-ref-54)
55. Joined Cases C-585/18, C-524/18 and C-525/18, *A. K., CP and DO*, para 153. [↑](#footnote-ref-55)
56. See for a similar point of concern regarding the judgment in *A. K., CP and DO*: Leloup, “An Uncertain First Step in the Field of Judicial Self-government: ECJ 19 November 2019, Joined Cases C-585/18, C-624/18 and C-625/18, *A. K., CP and DO*”, 16 EuConst 2020, pp. 1-25, at pp. 13-14. [↑](#footnote-ref-56)
57. See for example: Case C-385/07 P, *Der Grüne Punkt – Duales System Deutschland GmbH* v. *Commission*, EU:C:2009:456, para 178. [↑](#footnote-ref-57)
58. In such sense: Case C-457/09, *Chartry*, EU:C:2011:101, para 25. [↑](#footnote-ref-58)
59. Krenc, “Article 47 – Droit à un recours effectif et à accéder à un tribunal impartial” in Picod, Rizcallah and Van Drooghenbroeck (eds.), *Charte des droits fondamentaux de l’Union européenne* (Larcier, 2020), pp. 1133-1161,at 1137; Ward, “Art 47 – Right to an Effective Remedy” in Peers, Hervey, Kenner and Ward (eds.), *The EU Charter of Fundamental Rights. A Commentary* (Hart, 2014) p. 1199. [↑](#footnote-ref-59)
60. Case C-64/16, *Associação Sindical dos Juízes Portugueses*, EU:C:2018:117. [↑](#footnote-ref-60)
61. See for some notable examples: Platon and Pech, “Judicial independence under threat: The Court of Justice to the rescue in the ASJP case”, 55 CML Rev. (2018), pp. 1827-1854; Bonelli and Claes, “Judicial serendipity: how Portuguese judges came to the rescue of the Polish judiciary. ECJ 27 February 2018, Case C-64/16, *Associação Sindical dos Juízes Portugueses*”, 14 EuConst(2018), pp. 622-643; Mickonytė, “Effects of the Rule-of-Law Crisis in the EU: Towards Centralization of the EU System of Judicial Protection”, 79 *Heidelberg Journal of International Law* (2019), pp. 815-840. [↑](#footnote-ref-61)
62. With reference to: Case C-583/11 P, *Inuit Tapiriit Kanatami and Others* v. *Parliament and Council*, EU:C:2013:625, para 99. [↑](#footnote-ref-62)
63. Case C-64/16, *Associação Sindical dos Juízes Portugueses*, paras 33, 34 and 37. [↑](#footnote-ref-63)
64. Joined Cases C-558/18 and C-563/18, *Miasto Łowicz*, EU:C:2020:234, para 33; Joined Cases C-585/18, C-524/18 and C-525/18, *A. K., CP and DO*, para 82; Case C-619/18, *Commission* v. *Poland (Indépendance de la Cour suprême)*, para 50. [↑](#footnote-ref-64)
65. Platon and Pech, op. cit. *supra* note 61, at p. 1840. [↑](#footnote-ref-65)
66. In a recent decision, the Court has made clear that domestic courts cannot rely on Article 19(1)(2) TEU in all circumstances and clarified that there is a procedural limit to preliminary references concerning this provision. In this decision, the Court held that there should still be a connecting factor between the dispute in question and the provisions of EU law. If there is no such connection in the case at hand and there are no other reasons to provide the domestic court with an interpretation of Article 19(1)(2) TEU, then the request for a preliminary ruling will be found inadmissible. See: Joined Cases C-558/18 and C-563/18, *Miasto Łowicz*, paras 41-53. [↑](#footnote-ref-66)
67. Bonelli and Claes, op. cit. *supra* note 61, at p. 633. [↑](#footnote-ref-67)
68. The most notable examples are: Case C-64/16, *Associação Sindical dos Juízes Portugueses*, EU:C:2018:117; Case C-49/18, *Escribano Vindel*, EU:C:2019:106; Case C-619/18, *Commission* v. *Poland (Indépendance de la Cour suprême)*; Case C-192/18, *Commission* v. *Poland (Indépendance des juridictions de droit commun)*, EU:C:2019:924. [↑](#footnote-ref-68)
69. See for an author making a similar argument: Torres Pérez, “From Portugal to Poland: The Court of Justice of the European Union as watchdog of judicial independence”, 27 MJ (2020), pp. 105-119, at p. 111. See also: Rizcallah and Davio, “L’article 19 du Traité sur l’Union européenne: sésame de l’Union de droit”, 31 *Revue Trimestrielle des Droits de l’Homme* (2020), pp. 156-187, at pp. 178-181. [↑](#footnote-ref-69)
70. Case C-64/16, *Associação Sindical dos Juízes Portugueses*, EU:C:2018:117, para 37. [↑](#footnote-ref-70)
71. With reference to: Case C-503/15, *Margarit Panicello*, EU:C:2017:126, para 27. [↑](#footnote-ref-71)
72. Joined Cases C-542/18 RX-II and C-543/18 RX-II, *Review Simpson* v. *Council and Review HG* v. *Commission*, para 57. [↑](#footnote-ref-72)
73. The EJC has already held that the right to an independent and impartial tribunal forms part of the essence of the right to effective judicial protection: Case C-216/18 PPU, *Minister for Justice and Equality (Défaillances du système judiciaire)*, EU:C:2018:586, para 63. See for this link between the two aspects also the Opinion of AG Tanchev in Case C-192/18, *Commission* v. *Poland (Indépendance des juridictions de droit commun)*, EU:C:2019:529, para 97. He argues that there is a constitutional passerelle between Article 47 of the Charter and Article 19(1) TEU, given that these same sources are relevant to determining the content of the right to ‘an independent and impartial tribunal previously established by Law’ under Article 47 of the Charter. [↑](#footnote-ref-73)
74. In this sense I do not believe that every aspect of the right to effective judicial protection enshrined in Article 47 of the Charter is protected by Article 19(1)(2) TEU and that the latter might provide an avenue to claim, for example, the violation of the right to a trial within reasonable time outside the scope of Article 51(1) of the Charter, let alone open the door for the application of all Charter rights. See in such sense: Torres Pérez, op. cit. *supra* note 69, at pp. 115-119. [↑](#footnote-ref-74)
75. See also: Rizcallah and Davio, op. cit. *supra* note 69, at 178-181 and 185. They hold that Article 19(1)(2) TEU enshrines, from an institutional point of view, the essence of the right to effective judicial protection. It would offer a safeguard against measures that structurally affect this right. However, they do not explain what this essence might entail besides judicial independence. Nonetheless, it would appear that this view corresponds to what I argue here. [↑](#footnote-ref-75)
76. See pending cases C-763/19, C-764/19, C-765/19 and C-487/19 [↑](#footnote-ref-76)
77. It should be noted here that the judgment may also affect the Member States in a more indirect way, by influencing the ECtHR’s Grand Chamber judgment in the case of *Ástráðsson.* Especially after the Grand Chamber of the ECJ accepted the basic premise that the appointment proceedings for judges is a factor for a court’s establishment by law, it seem unlikely that the ECtHR will overrule the ordinary chamber on this point. [↑](#footnote-ref-77)
78. Joined Cases C-542/18 RX-II and C-543/18 RX-II, *Review Simpson* v. *Council and Review HG* v. *Commission*, para 57. [↑](#footnote-ref-78)
79. See more elaborately on this issue and with further references: Leloup, op. cit. *supra* note 56, at pp. 19-24. [↑](#footnote-ref-79)
80. Case C-274/14, *Banco de Santander*, EU:C:2020:17. [↑](#footnote-ref-80)
81. Case C-274/14, *Banco de Santander*, paras 56-77. See for more on this judgment: Leloup, “Het arrest Banco de Santander: naar een verstrenging van het onafhankelijkheidsbegrip onder Artikel 267 VWEU?”, (2020) SEW, forthcoming. [↑](#footnote-ref-81)
82. See also: Lenaerts, “On Judicial Independence and the Quest for National, Supranational and Transnational Justice” in Selvik, Clifton, Haas, Lourenço and Schwiesow (eds.), *The Art of Judicial Reasoning.* *Festschrift in Honour of Carl Baudenbacher* (Springer, 2019), pp. 155-174, at p. 169. [↑](#footnote-ref-82)
83. On this: Sadurski, *Poland’s Constitutional Breakdown* (OUP, 2019) pp. 58–95. There is also a case pending before the ECtHR which questions whether the Polish Constitutional Court is still a tribunal established by law: ECtHR, *Xero Flor W Polsce SP. Z O.O* v. *Poland*, Appl. No. 4907/18, communicated on 2 September 2019. [↑](#footnote-ref-83)
84. Joined Cases C-542/18 RX-II and C-543/18 RX-II, *Review Simpson* v. *Council and Review HG* v. *Commission*, para 57. [↑](#footnote-ref-84)
85. Joined Cases C-585/18, C-524/18 and C-525/18, *A. K., CP and DO*, paras 161-166. On this: Leloup, op. cit. *supra* note 56, at pp. 15-16. [↑](#footnote-ref-85)
86. Joined Cases C-585/18, C-524/18 and C-525/18, *A. K., CP and DO*, paras 162-165. [↑](#footnote-ref-86)
87. See dissenting opinion by judges Lemmens and Griţco in ECtHR, *Guðmundur Andri Ástráðsson*, para 10. Several question on this topic were asked during the hearing for the Grand Chamber judgment, held on 5 Feb. 2020. The hearing can be accessed via: <https://www.echr.coe.int/Pages/home.aspx?p=hearings&w=2637418\_05022020&language=lang&c=&py=2020>, (last visited 2 Apr. 2020). [↑](#footnote-ref-87)
88. See pending cases C-763/19, C-764/19, C-765/19. [↑](#footnote-ref-88)
89. Even though the Court attaches significant importance to the principle of *res judicata*, it is not absolute. See for the principle of *res judicata* in the case law of the ECJ: Korzenov, “*Res Judicata* of National Judgments Incompatible with EU law: Time for a Major Rethink?” 51 CML Rev. (2014), pp. 809-842; Groussot and Minssen, “Res Judicata in the Court of Justice Case-Law: Balancing Legal Certainty with Legality?”, 3 EuConst (2007), pp. 385-417. [↑](#footnote-ref-89)
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