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Op-Ed

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On 6 October, Advocate General (AG) Bobek adopted two (1, 2) Opinions in five (1, 2, 3, 4, 5) cases that have been brought against the Council (and the Parliament) by the Parliament, Italy and the city of Milan. There is one very simple and straightforward question underlying all these cases: Who decides where an EU agency should be located? The different (political land legal) constellations in which this question is put to the Court result in unseen levels of sophism being reached in the observations submitted to the Court. As the AG notes in (para.125) of one of his Opinions:

Upon initial inspection, a number of the arguments raised by the parties in the present cases are simply baffling, amounting to nothing less than advanced legal acrobatics. A Member State and a local entity are seeking to protect the prerogatives of the European Parliament in a specific case, apparently against the will of that very Parliament, while in parallel proceedings that latter body insists on upholding those same prerogatives. A Member State is alleging that the Member States do not have the competence to take a decision on the seats of agencies, but was previously and apparently subsequently willing to participate in those exact selection procedures. As for the Council, it posits that the decision of the representatives of the Member States on the seat of an EU agency adopted pursuant to Article 341 TFEU is binding on everyone, without anybody actually being subsequently limited in their legislative powers, in particular, with regard to where exactly that issue ought to be settled.

To ensure this Op-Ed remains readable, it will not get drawn into the detailed submissions by the parties. This Op-Ed first makes a distinction between the cases (1, 2, 3) challenging the ‘intergovernmental seat decisions’ and the cases (4, 5) challenging the ‘EMA relocation regulation’. To be clear, in the first set of cases,

there is the Parliament, Italy and Milan asking for the annulment of decisions taken by the Member States on the seat of the European Medicines Agency (EMA) and of the European Labour Authority (ELA). In the 'EMA relocation regulation' cases, Italy and Milan ask for the annulment of the Regulation of the Parliament and Council amending the EMA regulation to the effect that EMA's seat is defined as being in Amsterdam, The Netherlands.

Some background

The EMA and ELA are EU decentralised agencies. While there is no official definition of these bodies, they can be qualified as permanent bodies under EU public law established by the EU institutions under secondary legislation and endowed with their own legal personality. EU agencies are typically established by the EU legislature, in the past by the Council alone and now generally by Council and Parliament through the ordinary legislative procedure. Politically, whenever a new agency is established, it is seen by the Member States as an appealing trophy to host on their territories. In the past this has resulted in protracted horse trading on who gets to host a newly established agency, not seldomly with suboptimal outcomes for the agency concerned. Indeed, the priority for the Member State that ultimately clinches the trophy was often not the proper functioning of the new EU agency but instead increasing the prestige or appeal of the city designated to host the agency. In this regard, the 2009 Ramboll report noted that six EU agencies had significant or major remoteness problems and the same critique has been a recurring feature in the European Parliament's yearly budgetary discharge resolutions since 2012.

The EU institutions also recognized this problem in their 2012 Common Approach on EU Decentralized Agencies since the Common Approach defines a set of non-binding criteria to be met by the city that hosts an agency. The Common Approach equally notes that it did not call into question that 'the political decision on an agency's seat [is] taken by common agreement between the representatives of the Member States meeting at Head of State or government level or by the Council'. Still, since 2012 a rationalization of the way in which the host city is selected may be seen: Member States are asked to submit bids which the Commission evaluates and upon which a collective decision is then made. In 2017 Tovo therefore found that this new rationalized process amounts to a partial 'communitarisation' of this decision-making. It should thus be possible to prevent any new agency from ending up in places like Valenciennes or Heraklion (on the evolving decision-making, see also here).

The issue remains however that the Member States seem to believe that the choice on the seat of an agency established by the EU legislature is to be made by the Member States, not by the EU legislature itself or any EU institution for that matter. Evidently, the European Parliament does not agree and criticizing the Common Approach on this point, believes that the Member States could not have decided on the seat of the ELA as they did. Italy and Milan for their part are unhappy that Milan lost against Amsterdam in its bid to host the EMA and therefore challenge both the Member States' decision on the relocation and

the subsequent legislative regulation that amended the EMA regulation. Before the AG could address the key issue of who gets to decide on an agency's seat he had to deal with the admissibility of the different cases.

Admissibility

The five cases present two glaring admissibility issues: can a legal person like the city of Milan bring an admissible action against a legislative regulation? Can collective decisions of the Member States be challenged under Article 263 TFEU?

The AG proposes to find Milan's action in the 'EMA relocation regulation' case admissible, since Milan is directly and individually concerned by it. In a nutshell, the AG arrives at this conclusion by comparing Milan's situation as that of the unsuccessful competitor of a winning bid in a public procurement procedure: Milan is directly concerned because the decision to assign the EMA to Amsterdam meant it could not be assigned to Milan. Milan would also be individually concerned, i.e. because it was one of the candidate cities that made it to the final rounds of the selection process. For both direct and individual concern, the AG stresses that account should be taken of the *factual* circumstances (paras 94 & 110-111), but this simultaneously stresses the vulnerability of the AG's proposed solution. Under established case law (e.g. para. 27), being part of a closed group is not sufficient to show individual concern in relation to an act of general application like the regulation at issue. While a decision to award a contract to a competitor is of an individual nature for which it is sufficient to show one is member of a closed group, the decision of the EU legislature on the location of one of the bodies of the EU is arguably different, even if a competitive process not unlike a public procurement procedure has preceded that decision. Indeed, the restrictive effect of the *Plaumann* doctrine results precisely from the fact that it boils down to a non-factual assessment. Otherwise Jego-Quéré would still be happily fishing in ICES sub-area VII. The Court of Justice might therefore well rule that Milan's action against the regulation is inadmissible.

The second admissibility issue, in the 'intergovernmental seat decisions' cases gives even more food for thought. Can a collective decision of the Member States be challenged pursuant to an action for annulment? The obvious answer clearly is 'no', since only the acts of EU institutions, bodies, offices and agencies may be reviewed by the EU Courts. However, in the past the Courts exceptionally do 'requalify' the author of a contested act to bring it within or outside the scope of Article 263 TFEU. Should we requalify the author of the contested decisions on the seat of the EMA and ELA through inverse reasoning based on the question who should have adopted these decisions rather than who did adopt these decisions? The AG proposes not to embark on such a perilous journey and proposes to just take the decisions at face value: they were adopted by the Member States acting jointly and are therefore decisions of the Member States, not of the Council (paragraph 81). The possibility to requalify should be limited, according to the AG, to situations where a procedure under EU law has initially been followed which undoubtedly should have resulted in an EU decision but which for some reason resulted in an intergovernmental

decision adopted outside the Treaty framework (paragraph 80). Since that is not the case here, the AG finds the action inadmissible.

Sticking to the purpose of the action for annulment, this is where the analysis of the AG in the 'intergovernmental seat decisions' ought to have ended. However, this would not have allowed the key issue underlying the controversy to be settled and as the AG noted all the institutional parties concerned would like to see the Court settle this issue (fn. 104). The AG thus goes on to determine whether Article 341 TFEU, which states that 'The seat of the institutions of the Union shall be determined by common accord of the governments of the Member States', applies also to the seat of EU agencies as argued by the Council. While this is no critique on the elaborate analysis of the AG, it should be clear that the finding on this question cannot change the finding of inadmissibility anymore: regardless of whether Article 341 TFEU is applicable or not, the AG already found that the contested decision is one of the Member States and therefore not challengeable pursuant to Article 263 TFEU. For the remainder, the action for annulment thus *de facto* serves the purpose of an infringement action under Article 258 TFEU: if Article 341 TFEU does not apply to the choice on the seat of the agencies, the Member States have infringed the Treaties by arrogating this power to themselves.

The scope of Article 341 TFEU

Following a textual (paras 91-92) and systemic (paras 93-108) (but not teleological, see below) reading of Article 341 TFEU the AG rejects the Council's reading of that Article to the effect that it would also apply to the seat of EU agencies. The AG does not make short shrift of the Council's argument that past practice indicates that the seat of EU agencies should indeed be decided by the Member States (paras 109-127). Rather than simply noting that in any event (past) practice cannot override the Treaties (para. 127), the AG notes that past practice has not been consistent (para. 121) and that Protocol No 6 which refers to Article 341 TFEU and which was annexed to the TEU and TFEU by the Treaty of Amsterdam only incorporates a part of the Edinburg Decision and only refers to one EU agency, namely Europol (para. 112). The AG could also have noted here that at the time (Treaty of Amsterdam), Europol was still a fully fledged international organisation and not an EU agency. Countering the argument that Article 341 TFEU would have exhausted its useful purpose if it would only relate to the institutions in the strict sense, the AG makes a remarkable case against the purposeful reading of the EU Treaties (para. 137) and rightly notes that even a strict reading of Article 341 TFEU would still be of use, since the Member States might still want to change the seat of an institution in the future (para. 138).

As noted above, the AG's finding on the applicability of Article 341 TFEU only served to confirm that the Member States acted in contravention of the Treaties. While their decision may have legal effect between themselves, this is only so outside the EU legal order (paras 144-164). Within the EU legal order, their decision has no legal effects and does not bind the Council or Parliament. The seat of an EU agency should thus be determined by the EU legislature that establishes the agency (paras. 164-176).

Paradoxically, if the Court follows the AG's lead the Parliament will win its case although its action is found inadmissible. This follows from the peculiar constellation resulting from the Parliament's prerogatives being threatened by intergovernmental decision-making between the Member States. It is the same reason why an argument has been made (in vain) for the Parliament to challenge the European Council conclusions of December 2020 in which the heads of state and government *de facto* amended the draft legislative act of the Parliament and Council on the Rule of Law mechanism. AG Bobek's reasoning in the present cases shows that the Parliament could also have bolstered its prerogatives vis-à-vis the European Council even if the Court had found such an action inadmissible. A clear judicial confirmation that the European Council's amendments to a draft legislative act are legally non-existent would indeed strengthen the position of the Parliament for the future, just like AG Bobek's Opinion will do next time the seat of a new EU agency needs to be decided upon.

The EU legislature's prerogative to decide on an EU agency's seat

Finally, this brings us back to the 'EMA relocation regulation' cases. Even if the case brought by the city of Milan would be inadmissible, the case brought by Italy will (also) allow the Court to deal (at least implicitly) with the key issue underlying all five cases.

A first argument raised by Italy and Milan is that the prerogatives of the Parliament were not respected in the adoption of the new EMA regulation since the Parliament was relegated to rubberstamping the intergovernmental decision of the Member States. Without stating so explicitly, the reasoning of the AG assumes that it is ultimately for the EU legislature to decide on the seats of the EU agencies which it establishes. Even if the Member States come to a political agreement between themselves outside the framework of the Treaties, it is still for the legislature (which typically includes the Parliament) to take the formal decision on the seat. The AG thus soundly refutes the argument by Italy and Milan, noting that since the intergovernmental decision had no legal effect whatsoever in the EU legal order (see above), the Parliament could fully play its role in the ordinary legislative procedure (paras 128-152). As to the argument that the regulation is invalid because it followed from an invalid decision of the Member States, the AG reiterates again that such an intergovernmental decision could not be based on Article 341 TFEU and 'has no binding legal effects within the EU legal order' (para. 156).

Looking to the future

If the Court follows the AG's lead, it will put an end to the misconception that the decision on the seat of an EU agency is one for the Member States to make (regardless whether pursuant to Article 341 TFEU or not). EU agencies are established by the EU legislature, and it is for the EU legislature to determine their seat. Building on the improvements in the selection process for the seats of EU agencies since 2012 (see above), such judgments should result in a further rationalization of the selection process. As the AG hinted at in his closing lines in his Opinion

on the ‘EMA relocation regulation’: when the Court confirms that the decision on the seat of an EU agency comes under EU competence, and more specifically that of the EU legislature, it would be appropriate to redesign the selection procedure. Such a redesigned procedure would fully involve the European Parliament and put it on par with the Council. Following an assessment of bids submitted by interested Member States it would be up to the Member States *in Council* to decide together with the Parliament on the location for the seat. The ‘communitarisation’ in the selection process would then be finally fully achieved.

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