



## Reports of Cases

JUDGMENT OF THE COURT (Grand Chamber)

14 July 2022\*

(Action for annulment – Law governing the institutions – Bodies, offices and agencies of the European Union – European Labour Authority (ELA) – Competence to determine the location of the seat – Article 341 TFEU – Scope – Decision adopted by the Representatives of the Governments of the Member States in the margins of a Council meeting – Jurisdiction of the Court under Article 263 TFEU – Author and legal nature of the act – Absence of binding effects in the EU legal order)

In Case C-743/19,

ACTION for annulment under Article 263 TFEU, brought on 9 October 2019,

**European Parliament**, represented by I. Anagnostopoulou, C. Biz and L. Visaggio, acting as Agents,

applicant,

v

**Council of the European Union**, represented by M. Bauer, J. Bauerschmidt and E. Rebasti, acting as Agents,

defendant,

supported by:

**Kingdom of Belgium**, represented by J.-C. Halleux, M. Jacobs, C. Pochet and L. Van den Broeck, acting as Agents,

**Czech Republic**, represented by L. Březinová, D. Czechová, K. Najmanová, M. Smolek and J. Vlácil, acting as Agents,

**Kingdom of Denmark**, represented by M. Jespersen, V. Pasternak Jørgensen, J. Nymann-Lindegren and M. Søndahl Wolff, acting as Agents,

**Ireland**, represented by M. Browne, G. Hodge, A. Joyce and J. Quaney, acting as Agents, and by D. Fennelly, Barrister-at-Law,

**Hellenic Republic**, represented by K. Boskovits and E.-M. Mamouna, acting as Agents,

\* Language of the case: Italian.

**Kingdom of Spain**, represented by S. Centeno Huerta and A. Gavela Llopis, acting as Agents,

**French Republic**, represented by A. Daly, A.-L. Desjonquères, E. Leclerc and T. Stehelin, acting as Agents,

**Grand Duchy of Luxembourg**, represented by A. Germeaux, C. Schiltz and T. Uri, acting as Agents,

**Hungary**, represented by M.Z. Fehér and K. Szíjjártó, acting as Agents,

**Kingdom of the Netherlands**, represented by M.K. Bulterman, J.M. Hoogveld and J. Langer, acting as Agents,

**Republic of Poland**, represented by B. Majczyna, acting as Agent,

**Slovak Republic**, represented by E.V. Drugda and B. Ricziová, acting as Agents,

**Republic of Finland**, represented by M. Pere, acting as Agent,

interveners,

THE COURT (Grand Chamber),

composed of K. Lenaerts, President, A. Arabadjiev, K. Jürimäe, C. Lycourgos, E. Regan, S. Rodin, I. Jarukaitis, N. Jääskinen and J. Passer, Presidents of Chambers, J.-C. Bonichot, M. Safjan, F. Biltgen, P.G. Xuereb, A. Kumin and N. Wahl (Rapporteur), Judges,

Advocate General: M. Bobek,

Registrar: R. Şereş, Administrator,

having regard to the written procedure and further to the hearing on 8 June 2021,

after hearing the Opinion of the Advocate General at the sitting on 6 October 2021,

gives the following

### Judgment

- 1 By its application, the European Parliament seeks the annulment of Decision (EU) 2019/1199 taken by common accord between the Representatives of the Governments of the Member States of 13 June 2019 on the location of the seat of the European Labour Authority (OJ 2019 L 189, p. 68; ‘the contested decision’).

## Legal context

- 2 On 12 December 1992, the Representatives of the Governments of the Member States adopted by common agreement, on the basis of Article 216 of the EEC Treaty, Article 77 of the ECSC Treaty and Article 189 of the EAEC Treaty, the decision on the location of the seats of the institutions and of certain bodies and departments of the European Communities (OJ 1992 C 341, p. 1; ‘the Edinburgh Decision’).
- 3 Article 1 of the Edinburgh Decision fixed the respective seats of the European Parliament, the Council of the European Union, the European Commission, the Court of Justice of the European Union, the European Economic and Social Committee, the European Court of Auditors and the European Investment Bank.
- 4 Under Article 2 of that decision:  
‘The seat of other bodies and departments set up or to be set up will be decided by common agreement between the Representatives of the Governments of the Member States at a forthcoming European Council, taking account of the advantages of the above provisions to the Member States concerned, and giving appropriate priority to Member States who do not at present provide the sites for Community institutions.’
- 5 Article 341 TFEU provides that ‘the seat of the institutions of the Union shall be determined by common accord of the governments of the Member States’.
- 6 As provided in Protocol No 6 on the location of the seats of the institutions and of certain bodies, offices, agencies and departments of the European Union (‘Protocol No 6’), annexed to the EU, FEU and EAEC Treaties:

‘The Representatives of the Governments of the Member States,

Having regard to Article 341 of the Treaty on the Functioning of the European Union and Article 189 of the Treaty establishing the European Atomic Energy Community,

Recalling and confirming the Decision of 8 April 1965, and without prejudice to the decisions concerning the seat of future institutions, bodies, offices, agencies and departments,

Have agreed upon the following provisions ...:

### *Sole Article*

- (a) The European Parliament shall have its seat in Strasbourg ...
- (b) The Council shall have its seat in Brussels. ...
- (c) The Commission shall have its seat in Brussels. ...
- (d) The Court of Justice of the European Union shall have its seat in Luxembourg.
- (e) The Court of Auditors shall have its seat in Luxembourg.

- (f) The Economic and Social Committee shall have its seat in Brussels.
- (g) The Committee of the Regions shall have its seat in Brussels.
- (h) The European Investment Bank shall have its seat in Luxembourg.
- (i) The European Central Bank shall have its seat in Frankfurt.
- (j) The European Police Office (Europol) shall have its seat in The Hague.’

## **Background to the dispute**

### ***Regulation (EU) 2019/1149***

- 7 On 13 March 2018, the Commission adopted the Proposal for a Regulation of the European Parliament and of the Council establishing a European Labour Authority (COM(2018) 131 final). The sole wording of Article 4 of that proposal was as follows: ‘The seat of the Authority shall be [x].’
- 8 Following interinstitutional negotiations in January and February 2019, the representatives of the Parliament and the Council found that they did not have the elements necessary to decide on the seat of the European Labour Authority (ELA) and agreed to postpone that choice until a later date. It was thus decided, first, to delete Article 4 from the proposal for a regulation mentioned in the preceding paragraph and, secondly, to set out the reasons for that position in a joint statement, also to be made by the Commission, which would be annexed to the regulation once it had been adopted.
- 9 On 20 June 2019, Regulation (EU) 2019/1149 of the European Parliament and of the Council establishing a European Labour Authority, amending Regulations (EC) No 883/2004, (EU) No 492/2011, and (EU) 2016/589 and repealing Decision (EU) 2016/344 (OJ 2019 L 186, p. 21), was adopted. That regulation, published in the *Official Journal of the European Union* on 11 July 2019, did not contain any provision on the location of the ELA’s seat.
- 10 According to the Joint statement of the European Parliament, the Council and the Commission (OJ 2019 L 188, p. 131), adopted concomitantly with Regulation 2019/1149 and published in the *Official Journal of the European Union* on 12 July 2019:

‘The European Parliament, the Council and the Commission note that the process for selecting the location of the seat of the [ELA] was not concluded at the time of the adoption of its founding Regulation.

Recalling the commitment to sincere and transparent cooperation and recalling the Treaties, the three Institutions acknowledge the value of exchange of information from the initial stages of the process for the selection of the seat of the ELA.

Such early exchange of information would make it easier for the three Institutions to exercise their rights according to the Treaties through the related procedures.

The European Parliament and the Council take note of the Commission’s intention to take any appropriate steps in order for the founding Regulation to provide for a provision on the location of the seat of the ELA, and to ensure that the ELA operates autonomously in line with that Regulation.’

***The contested decision***

- 11 On 13 March 2019, in the margins of a meeting of the Committee of Permanent Representatives (Coreper), the Representatives of the Governments of the Member States approved by common accord the procedure and the criteria for determining the seat of the ELA.
- 12 The selection rules adopted made it clear that the decision determining the ELA’s seat would be based on criteria similar to those set out in the Common Approach annexed to the Joint Statement of the European Parliament, the Council and the European Commission of 19 July 2012 on decentralised agencies (‘the 2012 Joint Statement’). Those criteria related to (i) geographical balance, (ii) the date when the agency concerned can be set up on site after the entry into force of its founding act, (iii) accessibility of the location, (iv) existence of adequate education facilities for the children of agency staff, and (v) appropriate access to the labour market, social security and medical care for both children and spouses.
- 13 The rules of the selection procedure also provided that all offers to host the agency concerned should be made in writing to the Secretary-General of the Council and copied to the Secretary-General of the Commission, and that they would be published on the website of the Council; that the Commission would prepare a general assessment of all the offers and would describe how each offer meets the criteria; that the General Secretariat of the Council would then distribute that assessment to the Member States and make it publicly available; and that a political discussion among the Representatives of the Governments of the Member States would subsequently be held in the margins of a Coreper meeting. Those same rules stated that the voting process would later take place in the margins of a meeting of the ‘Employment, Social Policy, Health and Consumer Affairs’ (EPSCO) Council in Luxembourg; that the voting process should consist in successive voting rounds that should not involve the drawing of lots, until one offer received the majority of votes; and that the final decision, which would reflect the outcome of the voting process, would be adopted by common agreement of the Representatives of the Governments of the Member States at the same meeting.
- 14 On 5 June 2019, on the basis of the evaluation carried out by the Commission of the four offers that were made, namely Sofia (Bulgaria), Nicosia (Cyprus), Riga (Latvia) and Bratislava (Slovakia), the Representatives of the Governments of the Member States exchanged views on those offers in the margins of a Coreper meeting.
- 15 On 13 June 2019, in the margins of a Council meeting and following a vote to decide between the four Member States which proposed to host the ELA, the Representatives of the Governments of the Member States adopted the contested decision, which was published in the *Official Journal of the European Union* on 15 July 2019.
- 16 Article 1 of that decision is worded as follows:  
‘The [ELA] shall have its seat in Bratislava.’

### **Forms of order sought**

17 The Parliament claims that the Court should:

- annul the contested decision and
- order the Council to pay the costs.

18 The Council contends that the Court should:

- dismiss the action as inadmissible or unfounded;
- order the Parliament to pay the costs, and
- should the action be upheld, maintain the effects of the contested decision as long as it is necessary to determine a new seat for the ELA.

### **Procedure before the Court**

19 By decision of the President of the Court of 7 January 2020, the Slovak Republic was granted leave to intervene in support of the form of order sought by the Council.

20 By decision of the President of the Court of 3 February 2020, the Hellenic Republic, the Kingdom of Spain and the Kingdom of the Netherlands were granted leave to intervene in support of the form of order sought by the Council.

21 By decision of the President of the Court of 4 February 2020, the Kingdom of Belgium, the Czech Republic, the Kingdom of Denmark, Ireland, the French Republic, the Grand Duchy of Luxembourg, Hungary, the Republic of Poland and the Republic of Finland were granted leave to intervene in support of the form of order sought by the Council.

22 On 20 November 2020, the European Parliament, pursuant to the third paragraph of Article 16 of the Statute of the Court of Justice of the European Union, requested that the Court sit in a Grand Chamber in the present case.

### **The jurisdiction of the Court**

#### *Arguments of the parties*

23 The Council, supported by all the Governments of the intervening Member States, maintains that the Parliament's action is manifestly inadmissible.

24 First of all, the Council contends that the contested decision is attributable not to the Council but to the Member States. As confirmed in the case-law, the Member States do not have the capacity to be sued. Next, that decision was taken on the basis of Article 341 TFEU, which applies not only to the location of the seat of the institutions of the Union listed in Article 13 TEU, but also to that of the seat of the bodies, offices and agencies of the Union, with the result that the decision is not subject to review by the Court under Article 263 TFEU. Lastly, the Council states that the

adoption of that decision by the Member States in no way precludes effective judicial review. In any event, the need to ensure such review cannot, in the Council's view, give rise to the creation of legal remedies other than those provided for by the Treaties.

- 25 The Parliament submits that it is established that the contested decision is open to challenge for the purposes of Article 263 TFEU and, therefore, that the action is admissible.
- 26 According to the Parliament, that decision is clearly a legally binding act of the European Union. First of all, it is important to refer to the formal denomination of 'decision', which designates, under the fourth paragraph of Article 288 TFEU, an act which is to be binding in its entirety. Next, the contested decision is an act which was adopted under Article 341 TFEU, that is to say, a provision of the Treaties which provides for the adoption of binding acts, and which seeks to determine where the seat of the agencies of the Union is to be located. Lastly, that decision was published in the L series of the *Official Journal of the European Union*, which is reserved for legislative acts.
- 27 As regards the actual author of the contested decision, the Parliament submits that, notwithstanding the reference in the title of that decision to the 'common accord between the Representatives of the Governments of the Member States', the Council is the actual author.
- 28 In support of that position, the Parliament submits, first, that the documents relating to the selection procedure and the draft giving rise to the contested decision bear the header of the 'Council of the European Union', which suggests that the Council has assumed authorship. Secondly, the process preceding the adoption of that decision was based on the administrative structures as well as the preparatory bodies of the Council, in particular Coreper referred to in Article 240(1) TFEU. Thirdly, the involvement of a Romanian minister in that decision-making process shows that the Presidency of the Council referred to in Article 16(9) TEU acted in that capacity in the present case. Fourthly, since the first subparagraph of Article 297(2) TFEU provides that certain non-legislative acts must be signed by the President of the institution which adopted them, the fact that the Romanian minister signed the contested decision proves that he acted in the performance of his duties as serving President of the Council.
- 29 In that regard, the Parliament notes that, according to the case-law, it is not enough that an act should be described as a decision of the Member States for it to be excluded from the review of legality by the Court. In order for the act in question to be excluded from review, it must still be determined whether, having regard to its content and all the circumstances in which it was adopted, it is not in reality a decision of the Council (judgment of 30 June 1993, *Parliament v Council and Commission*, C-181/91 and C-248/91, EU:C:1993:271, paragraph 14). That finding cannot be made without examining the content of the act and its legal effects. That is all the more so since, in the present case, the contested decision encroaches upon the power conferred on the EU legislature by Articles 46 and 48 TFEU.
- 30 In the alternative, even if it were to be held that the contested decision emanates from the Member States and not from the Council, the present action would still be admissible. That decision would still be an act of the European Union intended to produce legal effects vis-à-vis third parties in two areas falling within the competence of the European Union, namely freedom of movement for workers and the coordination of the social security systems of the Member States. It is, therefore, clear that the determination of the location of the ELA's seat by the

contested decision directly affects a matter already regulated by the EU legislature with the creation of that authority and contributes to creating a legal situation which may be relied on as against third parties.

- 31 The Parliament states that to call into question the challengeable nature of the contested decision under Article 263 TFEU would amount to excluding from all judicial review a legally binding act of the European Union adopted under a provision of the Treaties. Indeed, there is no other remedy available for ascertaining whether the competence claimed by the Member States under Article 341 TFEU actually exists for determining the seat of bodies of the Union, such as the ELA, or whether, as the Parliament submits, the Member States have, through their recourse to Article 341 TFEU, encroached upon the power conferred on the EU legislature by Articles 46 and 48 TFEU.
- 32 The Parliament considers that, although acts of the Member States are not among those listed in the first paragraph of Article 263 TFEU, the Court must declare that it has jurisdiction to verify that the powers conferred by the Treaties on the institutions, within the meaning of Article 13(2) TEU, have been observed. To exclude the contested decision from review by the Court on the ground that it is an act of the Member States would amount to depriving the Court of the possibility of verifying whether the powers of the EU legislature have been observed and, if necessary, of putting an end to the contravention of those powers by annulling that decision.
- 33 Such an approach would, moreover, conflict with the principles of the rule of law, according to which neither the Member States nor the institutions of the Union can avoid a review of whether their acts are in conformity with the Treaties (judgment of 23 April 1986, *Les Verts v Parliament*, 294/83, EU:C:1986:166, paragraph 23). In that regard, the Parliament submits that those principles form the basis of the general jurisdiction which Article 19 TEU confers on the Court to ensure that in the interpretation and application of the Treaties the law is observed (judgment of 24 June 2014, *Parliament v Council*, C-658/11, EU:C:2014:2025, paragraph 70).
- 34 In its reply, the Parliament observes that the case-law relied on by the Council relates to acts adopted by the Member States outside the framework defined by the Treaties. However, according to the Parliament, the contested decision is a legal act of the European Union, adopted on the basis of a power conferred by the Treaties, namely that deriving from Article 341 TFEU. Indeed, the main legal question raised by the present action concerns precisely whether that power may be exercised to establish the seat of the ELA.

### ***Findings of the Court***

- 35 The European Union is a union based on the rule of law which has been provided by the FEU Treaty with a complete system of legal remedies and procedures designed to enable the Court to review the legality of acts of the institutions (see, to that effect, judgments of 23 April 1986, *Les Verts v Parliament*, 294/83, EU:C:1986:166, paragraph 23; of 3 September 2008, *Kadi and Al Barakaat International Foundation v Council and Commission*, C-402/05 P and C-415/05 P, EU:C:2008:461, paragraph 281; and of 3 June 2021, *Hungary v Parliament*, C-650/18, EU:C:2021:426, paragraph 34 and the case-law cited).

- 36 As regards the action for annulment provided for in Article 263 TFEU, it is available in the case of all measures adopted by the institutions, bodies, offices and agencies of the Union, whatever their nature or form, which are intended to have binding legal effects (see, to that effect, judgments of 31 March 1971, *Commission v Council*, 22/70, EU:C:1971:32, paragraph 42, and of 3 June 2021, *Hungary v Parliament*, C-650/18, EU:C:2021:426, paragraph 37 and the case-law cited).
- 37 That said, in the context of an action for annulment under Article 263 TFEU, the EU Courts have jurisdiction only to review the legality of acts attributable to the institutions, bodies, offices and agencies of the Union. It follows therefrom, in particular, that acts adopted by Representatives of the Governments of the Member States acting, not in their capacity as members of the Council or of the European Council, but as representatives of their governments, and thus collectively exercising the powers of the Member States, are not subject to judicial review by the EU Courts (see, to that effect, judgment of 30 June 1993, *Parliament v Council and Commission*, C-181/91 and C-248/91, EU:C:1993:271, paragraph 12, and order of 16 June 2021, *Sharpston v Council and Representatives of the Governments of the Member States*, C-685/20 P, EU:C:2021:485, paragraph 46).
- 38 However, it is not enough that the decision which is the subject of an action should be formally presented as being a decision of the Member States for that act to be excluded from the review of legality established by Article 263 TFEU. In order for such an act to be excluded from review, it must still, having regard to its content and all the circumstances in which it was adopted, not in reality be a decision of the Council (see, to that effect, judgment of 30 June 1993, *Parliament v Council and Commission*, C-181/91 and C-248/91, EU:C:1993:271, paragraph 14).
- 39 In the present case, the contested decision must be assessed in the light of the legal framework applicable to the location of the seat of the bodies, offices and agencies of the Union. In that regard, the parties disagree as to whether Article 341 TFEU, under which the seat of the ‘institutions’ is to be determined ‘by common accord of the governments of the Member States’, may properly be relied on as the basis for decisions determining the seat of the bodies, offices and agencies of the Union.
- 40 On the one hand, the Council and the Member States intervening in support of the form of order sought by it contend that Article 341 TFEU must be interpreted broadly, as referring by extension to the bodies, offices and agencies of the Union, with the result that the competence to determine the seat of such a body, office or agency lies solely with the Representatives of the Governments of the Member States acting by common accord. It would follow that the contested decision, as an act emanating from the Member States and not from the Council, is not subject to the review of legality by the Court under Article 263 TFEU.
- 41 On the other hand, the Parliament submits that the decision determining the seat of an agency of the Union does not fall within the scope of Article 341 TFEU, but comes within the powers of the EU legislature. It infers from this that the contested decision is necessarily imputable to the Council and cannot, therefore, avoid the review of legality carried out by the Court. In any event, even if it were to be held that that decision is attributable to the Member States, the present action should be declared admissible in that it is directed against the ‘actual author’ of that decision.

42 It is, therefore, necessary, in the first instance, to determine whether the decision on the designation of the seat of a body, office or agency of the Union must be taken by the Member States, in accordance with the rule set out in Article 341 TFEU, or whether it must be taken by the EU legislature, pursuant to the substantive legal basis applicable to the area in which the body, office or agency in question is called upon to intervene.

*Competence to determine the location of the seat of the bodies, offices and agencies of the Union*

43 According to settled case-law of the Court, the interpretation of a provision of EU law requires that account be taken not only of its wording and the objectives it pursues, but also of its context. The origins of a provision of EU law may also provide information relevant to its interpretation (see, to that effect, judgment of 10 December 2018, *Wightman and Others*, C-621/18, EU:C:2018:999, paragraph 47 and the case-law cited).

44 It is, therefore, necessary to examine, on the basis of those methods of interpretation, whether Article 341 TFEU applies to decisions determining the seat of the bodies, offices and agencies of the Union.

45 In the first place, as regards the wording of Article 341 TFEU, it refers only to the ‘institutions of the Union’. In accordance with Article 13(1) TEU, the concept of ‘institutions’ refers to a precise list of entities which does not include the bodies, offices and, in particular, the agencies of the Union.

46 In the second place, as regards the context of Article 341 TFEU, it must be pointed out, first of all, as observed by the Advocate General in point 94 of his Opinion, that a number of provisions of the Treaties have been amended by the Treaty of Lisbon in order to include an express reference to the ‘bodies, offices and agencies of the Union’, which has had the effect of expressly distinguishing between, on the one hand, the institutions of the Union expressly referred to in Article 13(1) TEU and, on the other, the bodies, offices and agencies of the Union. Thus, while some provisions of the FEU Treaty refer only to the institutions of the Union, other provisions of the FEU Treaty, such as Articles 15, 16, 123, 124, 127, 130, 228, 263, 265, 267, 282, 298 and 325, refer more broadly to the institutions, bodies, offices and agencies of the Union. That is the case in particular, as regards the Court’s jurisdiction, with Articles 263, 265 and 267 TFEU.

47 It is clear that the wording of Article 341 TFEU, which refers only to the ‘institutions’, corresponds to that of the provisions which preceded that article, namely Article 216 of the EEC Treaty (subsequently Article 216 of the EC Treaty, which in turn became Article 289 EC).

48 The fact, put forward by the Council, that the provisions of Part Seven of the FEU Treaty, of which Article 341 TFEU forms part, entitled ‘General and Final Provisions’, refer to the ‘institutions’ cannot therefore be interpreted – even though, as is clear from paragraph 46 above, the EU Treaty draws a clear distinction between the institutions of the Union, on the one hand, and the bodies, offices and agencies of the Union, on the other – as an expression of the intention of the framers of the Treaties to confer a broad understanding on the concept of ‘institutions’, in that that concept would encompass not only the entities listed in Article 13(1) TEU, but also the bodies, offices and agencies of the Union established by or under the Treaties and intended to contribute to the achievement of the European Union’s objectives. This is all the more so since the EU Treaty and the TFEU constitute a unitary constitutional basis for the European Union by reason of the third paragraph of Article 1 TEU and Article 1(2) TFEU, with the result that the

definition of the concept of ‘institutions’ in Article 13(1) TEU and the distinction between those institutions, on the one hand, and the bodies, offices and agencies of the Union, on the other, must apply transversely and uniformly in both treaties.

- 49 Nor can the broad interpretation given by the Court to the concept of ‘institutions’, within the meaning of the second paragraph of Article 340 TFEU, be determinative, that provision stating that ‘in the case of non-contractual liability, the Union shall, in accordance with the general principles common to the laws of the Member States, make good any damage caused by its institutions or by its servants in the performance of their duties’.
- 50 Although the Court has held that the term ‘institutions’ within the meaning of that provision encompasses not only the institutions of the Union listed in Article 13(1) TEU but also all the bodies, offices and agencies of the Union that have been established by or under the Treaties and are intended to contribute to the achievement of the European Union’s objectives (judgment of 16 December 2020, *Council and Others v K. Chrysostomides & Co. and Others*, C-597/18 P, C-598/18 P, C-603/18 P and C-604/18 P, EU:C:2020:1028, paragraph 80 and the case-law cited), it expressly relied, in order to establish that case-law, on the fact, first, that the bodies, offices and agencies of the Union established by or under the Treaties are intended to contribute to the achievement of the European Union’s objectives and, secondly, that it would be contrary to the intention of the framers of the Treaties if, when it acts through a body, office or agency, the European Union could escape the consequences of the provisions of the Treaties governing the European Union’s non-contractual liability (see, to that effect, judgment of 2 December 1992, *SGEEM and Etroy v EIB*, C-370/89, EU:C:1992:482, paragraphs 13 to 16).
- 51 Thus, the broad interpretation given by the Court to the concept of ‘institutions’, for the purposes of applying the second paragraph of Article 340 TFEU, meets the need, justified by the general principles common to the laws of the Member States expressly referred to in that provision, to prevent the European Union from being able to avoid the application of the system of non-contractual liability under Article 268 TFEU, read in conjunction with the second paragraph of Article 340 TFEU, and the resulting judicial review by the Court, where the European Union acts through a body, office or agency of the Union other than the institutions listed in Article 13(1) TEU (see, by analogy, judgment of 2 December 1992, *SGEEM and Etroy v EIB*, C-370/89, EU:C:1992:482, paragraphs 14 and 16). This must all the more be so since, as the Advocate General stated in point 100 of his Opinion, the concept of ‘servants’ in the second paragraph of Article 340 TFEU encompasses from a functional point of view all the staff working for the European Union, whether in the institutions or in the bodies, offices and agencies of the Union.
- 52 Consequently, the interpretation given to the concept of ‘institutions’ within the meaning of the second paragraph of Article 340 TFEU, which governs the extent of the non-contractual liability of the European Union, cannot be properly relied upon for the purposes of defining by analogy the scope of Article 341 TFEU, relating to the extent of the powers reserved to the Member States under the Treaties.
- 53 Nor can the Council properly rely on the concept of ‘institutions’ in Article 342 TFEU, according to which ‘the rules governing the languages of the institutions of the Union shall, without prejudice to the provisions contained in the Statute of the Court of Justice of the European Union, be determined by the Council, acting unanimously by means of regulations’. As the Advocate General stated in point 98 of his Opinion, the term ‘institutions’, within the meaning of

Article 342 TFEU, need not necessarily be interpreted as including the bodies, offices and agencies of the Union, since the language regime of a body, office or agency of the Union can be different from that in force in the institutions of the Union.

- 54 As regards Protocol No 6, although, as the Council contends, that protocol determines not only the seat of the institutions of the Union but also that of certain bodies, offices and agencies of the Union, including Europol, and refers to Article 341 TFEU, it does not, however, provide that the seats of bodies, offices and agencies of the Union must be determined collectively by the Member States in accordance with the principle laid down in that article. In that regard, it is important to note that the common feature of those bodies, offices and agencies of the Union in question is that they were established by the Member States, whereas that is not the case with an agency of the Union such as the ELA, which was established, on the basis of the founding Treaties, by the EU legislature. Thus, it cannot be inferred from that protocol that the Member States intended to apply, directly or by analogy, the principle laid down in Article 341 TFEU to the determination of the seat of all the bodies, offices and agencies of the Union.
- 55 As the Advocate General observed in point 112 of his Opinion, the adoption of a specific protocol shows, on the contrary, that the Member States considered that their collective decision as to the determination of the seat of certain bodies, offices and agencies of the Union exhaustively listed had to be specifically enshrined in primary law in order to produce legal effects in EU law.
- 56 As regards the express reference in Protocol No 6 to Article 341 TFEU, this can be explained by the fact that that protocol refers primarily to the institutions mentioned in Article 13(1) TEU.
- 57 On the other hand, it is true, as is apparent from Article 2 of the Edinburgh Decision, that the Representatives of the Governments of the Member States expressed the wish to reserve to themselves decisions concerning the seats of bodies, offices and agencies of the Union in the same way that they are expressly and clearly authorised by Article 341 TFEU to establish the seats of the institutions of the Union. Furthermore, at the intergovernmental conference which led to the adoption of the Treaty of Amsterdam, the text of the Edinburgh Decision was reproduced as a protocol annexed to the EU, EC, ECSC and EAEC Treaties, now Protocol No 6, annexed to the EU, FEU and EAEC Treaties.
- 58 Nevertheless, first, the sole article of that protocol fixes, in terms comparable to those of Article 1 of the Edinburgh Decision, the seat only of institutions, bodies, offices or agencies of the Union set up by the Member States. Secondly, although the Court recognised that that decision had binding legal force, in the judgment of 1 October 1997, *France v Parliament* (C-345/95, EU:C:1997:450), to which judgment it referred in other subsequent judgments (see, to that effect, judgments of 13 December 2012, *France v Parliament*, C-237/11 and C-238/11, EU:C:2012:796, paragraphs 36 to 42, and of 2 October 2018, *France v Parliament (Exercise of budgetary powers)*, C-73/17, EU:C:2018:787, paragraph 33), Article 2 of that decision cannot lead to an interpretation of Article 341 TFEU that would run counter to its clear wording.
- 59 The Council also relies, as a contextual element, on previous institutional practice relating to the determination of the seat of bodies, offices and agencies of the Union and maintains that that practice enjoys ‘institutional recognition’ by means of the 2012 Joint Statement and the common approach annexed thereto.

- 60 However, it is clear from the information brought to the Court's attention in the context of the present case that the alleged practice is far from being generalised. The procedures followed with a view to designating the seat of the bodies, offices and agencies of the Union have either been carried out by the Member States alone or have, to varying degrees and on varying grounds, involved the institutions of the Union in their capacity as participants in the legislative procedure or not.
- 61 Assuming, however, that it were possible, as the Council maintains, to identify an established and consistent previous practice whereby the seats of the bodies, offices and agencies of the Union were systematically determined on the basis of a political choice made by the Representatives of the Governments of the Member States alone, the interpretation of Article 341 TFEU that the Council advocates on the basis of that practice could not enjoy any 'institutional recognition' by means of the 2012 Joint Statement and the common approach annexed thereto. That statement, as made clear in the fifth paragraph thereof, is not legally binding and does not, moreover, contain any recognition of any reservation of competence on the part of the Member States as regards determining the seat of the bodies, offices and agencies of the Union.
- 62 In any event, such a practice, which would run counter to the rules of the FEU Treaty and, in particular, Article 341 TFEU, by extending, notwithstanding its clear wording, the scope of that article to the location of the seat of the bodies, offices and agencies of the Union, could not create a precedent binding on the institutions (see, to that effect, judgment of 6 May 2008, *Parliament v Council*, C-133/06, EU:C:2008:257, paragraph 60 and the case-law cited).
- 63 In the third and last place, as regards the objective of Article 341 TFEU, this consists in preserving the decision-making powers of the Member States in determining the seat of the institutions of the Union only. Contrary to the position defended by the Council at the hearing, an interpretation of that article to the effect that it does not apply to bodies, offices and agencies of the Union cannot have the effect of completely negating its effectiveness, as the Advocate General observed in point 138 of his Opinion. While it is true that the seat of the institutions of the Union is already determined by primary law, in this case by Protocol No 6, Article 341 TFEU nevertheless remains relevant to any possible future decision modifying the seat of an existing institution or determining the seat of a new institution.
- 64 In that context, it must be borne in mind that, unlike the institutions of the Union, the establishment and functions of which are, because of their constitutional importance, provided for by the Treaties themselves, the bodies, offices and agencies of the Union, such as the ELA, the object of which is the achievement of the aims of a given EU policy, are not as a general rule established by the Treaties. In those circumstances, their establishment, since it does not derive from primary law, must result from an act of secondary legislation adopted on the basis of the substantive provisions implementing the EU policy in which the body, office or agency concerned is involved and in accordance with the procedures laid down by those provisions.
- 65 In the absence of further details in that regard in the Treaties, it is likewise for the EU legislature, in accordance with the procedures laid down by the substantively relevant provisions of the Treaties, to determine the seat of a body, office or agency of the Union which it has itself established by an act of secondary legislation adopted on the basis of those provisions, in the same way as it has competence under those provisions to define the powers, organisation and mode of operation of that body, office or agency.

- 66 The decision on the location of the seat of a body, office or agency of the Union, such as an EU agency, is therefore, contrary to the Council's arguments, consubstantial with the decision on its establishment.
- 67 Admittedly, the determination of the location of the seat of a body, office or agency of the Union may take account of political considerations, such as the need, in locating bodies, offices or agencies of the Union, to ensure a certain geographical balance or to favour Member States which do not yet host the seat of a body, office or agency of the Union.
- 68 However, the political nature of the decision determining the location of the seat of such a body, office or agency of the Union is not in itself such as to justify that decision falling outside the competence of the EU legislature, which is indeed regularly called upon to make political choices in the exercise of the European Union's competences (see, to that effect, judgment of 7 September 2016, *Germany v Parliament and Council*, C-113/14, EU:C:2016:635, paragraph 55).
- 69 Moreover, such a decision must primarily ensure that the tasks entrusted to the body, office or agency of the Union concerned are carried out with a view to achieving the objectives of a given policy.
- 70 Nor can the Court accept the argument that linking the determination of the seat of a body, office or agency of the Union to the material basis on which that body, office or agency is established is likely, depending on the relevant legal basis, to result in that determination being subject to a qualified majority vote in the Council, and not to a decision taken by common accord of the Representatives of the Governments of the Member States, while making the determination an element of compromise in the context of the legislative debate.
- 71 As has been pointed out in paragraph 68 above, the fact that the decision determining the location of the seat of a body, office or agency of the Union may have an important political dimension, inasmuch as it must reflect, inter alia, considerations relating to geographical balance, does not preclude that decision from being taken by the EU legislature in accordance with the procedures laid down by the substantively relevant provisions of the Treaties, since that political dimension may in that respect constitute a factor which the EU legislature can take into account in exercising its discretion. It should also be noted that since the EU legislative process is guided, under the second paragraph of Article 1 TEU in conjunction with Article 10(3) TEU, by the principle of transparency with regard to the citizen, recourse to that process is liable to strengthen the democratic foundation of a decision designating the location of the seat of a body, office or agency of the Union, such as the ELA.
- 72 In addition, and more fundamentally, the fact that a decision, such as that determining the location of the seat of a body, office or agency of the Union, is politically sensitive cannot lead to the powers conferred by the Treaties on the institutions of the Union being modified, nor can it remove the exercise of those powers from the legislative procedures laid down by the Treaties. The determination of the scope of a provision of the Treaties governing a substantive competence of the European Union cannot, therefore, depend on considerations relating to the politically sensitive nature of the matter concerned or to the concern to ensure the effectiveness of an action.
- 73 It follows from all those considerations, and in particular from the wording of Article 341 TFEU, that that provision cannot be interpreted as governing the designation of the location of the seat of a body, office or agency of the Union, such as the ELA.

- 74 In those circumstances, the competence to determine the location of the seat of that agency lies not with the Member States but with the EU legislature, which must act to that end in accordance with the procedures laid down by the substantively relevant provisions of the Treaties, in this case Articles 46 and 48 TFEU, which provide for recourse to the ordinary legislative procedure.
- 75 It is in the light of that conclusion that it is necessary to adjudicate, in the second instance, on the Court's jurisdiction to rule on the present action.

*The author of the contested decision and the jurisdiction of the Court under Article 263 TFEU*

*– The author of the contested decision*

- 76 It is necessary, in the first place, to ascertain whether the contested decision, which was taken in the margins of a meeting of the Council by the Conference of the Representatives of the Governments of the Member States, is attributable to those representatives.
- 77 As regards the content of the contested decision, it is apparent from the wording thereof that that decision is an act of the Heads of State or Government of 27 Member States adopted in the margins of a Council meeting following an intergovernmental procedure. This is evidenced by the express reference, in the title and at the beginning of the preamble to that decision, to the 'Representatives of the Governments of the Member States'.
- 78 In that regard, it should be noted that the contested decision was adopted on the express basis of Article 341 TFEU, the authors of that decision having considered that the reference to the 'institutions', in that article, had to be interpreted broadly, that is to say, as referring not only to the institutions specifically listed in Article 13(1) TEU, but also to the bodies, offices and agencies of the Union.
- 79 Furthermore, the *travaux préparatoires* for the contested decision were carried out on the occasion of meetings of the Representatives of the Governments of the Member States that were held in the margins of the Coreper meetings of 13 March 2019 and 5 June 2019.
- 80 As regards the circumstances in which the contested decision was adopted, neither the fact that the selection procedure conducted at intergovernmental level with a view to designating the location of the ELA's seat took place on the Council's premises with the assistance of the services of the Council's General Secretariat, nor the fact that the offers submitted in the context of that selection procedure were evaluated by the Commission, nor the fact that the contested decision was signed by the representative of the Member State holding the Presidency of the Council pursuant to Article 16(9) TEU at the time the decision was adopted, in this case the Romanian Minister for Justice, is such as to invalidate the conclusion that the contested decision is attributable to the Member States, and not to the Council.
- 81 First, the adoption of an act on the premises or with the assistance of an institution of the Union does not in itself confer jurisdiction on the Court to assess the legality of that act (see, by analogy, judgment of 22 March 1990, *Le Pen*, C-201/89, EU:C:1990:133, paragraphs 11 and 16). Secondly, the participation of institutions of the Union in drawing up a decision of the Representatives of the Governments of the Member States taken in the margins of a meeting of the Council cannot determine the legal nature and the author of the resulting act.

82 The contested decision cannot therefore, either by its content or by the circumstances in which it was adopted, be classified as an act of the Council. On the contrary, that decision constitutes an act taken collectively and by common accord by the Representatives of the Governments of the Member States.

– *The jurisdiction of the Court under Article 263 TFEU*

83 In the second place, it should be borne in mind that the relevant criterion used by the Court to exclude the jurisdiction of the EU Courts to hear and determine an action brought against acts adopted by the Representatives of the Governments of the Member States is solely that relating to their author, irrespective of their binding legal effects (order of 16 June 2021, *Sharpston v Council and Representatives of the Governments of the Member States*, C-685/20 P, EU:C:2021:485, paragraph 47).

84 The Parliament’s argument that in the present case the authors of the acts to which Article 263 TFEU refers, namely the institutions, bodies, offices and agencies of the Union, should be interpreted broadly in order to consider that the contested decision was adopted by an institution, body, office or agency of the Union within the meaning of that article, or, at the very least, to treat the present action like an action brought against a Council decision, cannot therefore be upheld without contravening the clear wording of that article (see, to that effect, order of 16 June 2021, *Sharpston v Council and Representatives of the Governments of the Member States*, C-685/20 P, EU:C:2021:485, paragraph 48).

85 Such an interpretation would also conflict with the intention of the framers of the Treaties, reflected in Article 263 TFEU – whose scope is limited solely to acts of EU law adopted by the institutions, bodies, offices and agencies of the Union – to remove acts of Member States from review by the EU Courts.

86 To extend the concept of challengeable acts under Article 263 TFEU to acts adopted, even by common accord, by the Member States would ultimately amount to allowing direct review by the EU Courts of acts of the Member States and, therefore, to circumventing the legal remedies specifically provided for in the event of failure of Member States to fulfil their obligations under the Treaties.

87 Those legal remedies are based on a consideration of the respective roles of the institutions, bodies, offices and agencies of the Union, on the one hand, and of the Member States, on the other, in the EU legal order. In that regard, it must be borne in mind that, in accordance with the principle laid down in Article 13(2) TEU, each institution, like the Court, is to act within the limits of the powers conferred on it in the Treaties, and in conformity with the procedures, conditions and objectives set out in them.

88 In the present case, although the contested decision must be analysed as an act adopted by the Member States alone, thereby falling outside the review of legality provided for in Article 263 TFEU, it cannot, however, be treated like a decision taken under Article 341 TFEU, since, as is apparent from the considerations set out in paragraphs 43 to 73 above, that article must be interpreted as referring exclusively to the determination of the seat of the institutions mentioned in Article 13(1) TEU, and not to the determination of the seat of the bodies, offices and agencies of the Union.

- 89 As the Advocate General observed in point 166 of his Opinion, a decision, like the contested decision, which has been taken by the Member States in an area in which the Treaties do not provide for their action is deprived of any binding legal effects under EU law. The fact that one or more institutions of the Union have played a certain role in the procedure leading to the adoption of that decision does not alter the nature of the decision, which falls outside the EU legal order (see, by analogy, judgment of 20 September 2016, *Ledra Advertising and Others v Commission and ECB*, C-8/15 P to C-10/15 P, EU:C:2016:701, paragraph 54).
- 90 In that context, it is for the EU legislature, for reasons of both legal certainty and effective judicial protection, to adopt, in accordance with the procedures laid down in the substantively relevant provisions of the Treaties, an act of the European Union ratifying or, on the contrary, departing from the political decision adopted by the Member States; only that act of the EU legislature is capable of producing binding legal effects under EU law and, in a context such as that of the present case, that act must necessarily precede any measure for the actual implementation of the location of the seat of the agency concerned.
- 91 It follows from all the foregoing considerations that the contested decision is not an act of the Council but an act of a political nature without any binding legal effects, taken by the Member States collectively, with the result that it cannot be the subject of an action for annulment under Article 263 TFEU.
- 92 Accordingly, the present action must be dismissed as being directed against an act the legality of which the Court does not have jurisdiction to review on the basis of Article 263 TFEU.

### **Costs**

- 93 Under Article 138(1) of the Rules of Procedure of the Court, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings.
- 94 According to Article 138(3) of the Rules of Procedure, where each party succeeds on some and fails on other heads, the parties must bear their own costs. However, if it appears justified in the circumstances of the case, the Court may order that one party, in addition to bearing its own costs, pay a proportion of the costs of the other party.
- 95 In the present case, characterised by the fact that the circumstances surrounding the adoption of the contested decision are distinguished by divergent practice and interpretations as to the question of decision-making competence in relation to the location of the seats of the bodies, offices and agencies of the Union, it appears justified to order that each of the main parties, namely the Parliament and the Council, bear its own costs.
- 96 In accordance with Article 140(1) of the Rules of Procedure, the Kingdom of Belgium, the Czech Republic, the Kingdom of Denmark, Ireland, the Hellenic Republic, the Kingdom of Spain, the French Republic, the Grand Duchy of Luxembourg, Hungary, the Kingdom of the Netherlands, the Republic of Poland, the Slovak Republic and the Republic of Finland must bear their own costs.

On those grounds, the Court (Grand Chamber) hereby:

### **1. Dismisses the action;**

- 2. Orders the European Parliament and the Council of the European Union to bear their own costs;**
- 3. Orders the Kingdom of Belgium, the Czech Republic, the Kingdom of Denmark, Ireland, the Hellenic Republic, the Kingdom of Spain, the French Republic, the Grand Duchy of Luxembourg, Hungary, the Kingdom of the Netherlands, the Republic of Poland, the Slovak Republic and the Republic of Finland to bear their own costs.**

[Signatures]