1) State of play de jure and in practice

Decision on Agency's Seat

Agencies' seat is determined by common agreement between the representatives of the Member States meeting at Head of state or government level\(^1\) or by the Council. In some cases the Decision states the city in which the agency will be located, whereas in others there is a mentioning of the country and the decision on the city is left to the national government\(^2\).

At the European Council of December 2003\(^3\), the Member States agreed to give priority to newly acceding states in the distribution of the seats of Community offices or agencies to be set up in the future. According to the conclusions of this European Council, seats of future offices or agencies should be primarily located in the Member States that acceded to the Union in or after 2004. The European Council of June 2008 recalled the 2003 conclusions agreeing further that appropriate priority should be given to the Member States that do not already host an EU office or agency.

In some Commission proposals establishing a new agency, e.g. the proposal on ACER\(^4\), the Commission proposed that the agency's seat, once decided upon, is introduced in the constituent act.

At present there are no fixed criteria according to which the choice of seat is made.

Seat Agreement

Eighteen agencies\(^5\) concluded seat agreements or similar agreements with host countries.

Most of these seat agreements include provisions on the inviolability of the agency's headquarters\(^6\), its assets and archives, as well as on the privileges and immunities of the officials and other servants of the agencies in compliance with the Protocol on the privileges and immunities of the European Communities\(^7\). In the case of CPVO, the host country (France) was of the opinion that the Protocol on Privileges and Immunities should be the sole basis for hosting the new agency.

OHIM does not have an official seat agreement but instead functions on the basis of an exchange of notes between the Commission and the Spanish government. This exchange of

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1 Analogy with Article 341 TFEU (ex. 289 of TEC) stipulating that the seat of the institutions of the Union shall be determined by common accord of the governments of the Member States.

2 E.g. OHIM, ECDC, ENISA

3 Presidency Conclusions, Conclusions of the Representatives of the Member States, meeting at Head of State and Government level in Brussels on 13 December 2003

4 COM(2007)530, Article 2: “The seat of the Agency shall be located in [place]. Until its premises are ready, it will be hosted on Commission premises.”

5 CEDEFOP, CEPOL, CFCA, EAR, EASA, ECHA, ECDC, EEA, EFSA, EMCDDA, EMA, EMSA, ENISA, ETF, EUROFOUND, FRA, EUROJUST, EUROPOL. A seat agreement for ACER is currently being negotiated.

6 Provisions on inviolability are not found in the seat agreements of EASA, EAR and EUROFOUND.

letters does not contain additional privileges that can be granted with a seat agreement. OHIM is the only agency among those hosted in Spain without a seat agreement.

All agencies, with or without a seat agreement, benefit from the provisions of the Protocol on Privileges and Immunities as it is applicable in all Member States. The seat agreements of ten agencies\(^8\) state explicitly that the agency is sole responsible for security and preservation of order within its buildings and premises. In nine of these cases\(^9\), agencies may designate security staff and bodyguards authorized to bear arms within agencies' buildings and premises in compliance with the national law of the host country.

Eleven agencies' seat agreements\(^10\) include a provision on the cooperation between the agency and the host country in security matters. In seven cases\(^11\) the host country is obliged to ensure the agencies' communication facilities or shall at least exercise its powers as far as it is within its competence in this respect. In the case of EFSA the seat agreement foresees the obligation for the host country - Italy - to assist the agency in installing and using telecommunication systems.

Eight agencies' seat agreements\(^12\) oblige the host country to ensure a general and/or logistic support to the agencies.

In six cases\(^13\) the host country issues the special identity card to the agency staff. CFCA, ECHA and EFSA seat agreements have provisions on access of staff's children to the national education system. In addition, ECHA's agreement grants access to the health day-care organized by municipalities.

In some cases, the seat agreements of agencies hosted by the same Member States differ significantly.

**Obligations for the host country arising from agencies' constituent acts**

No obligations for the host country occur from the existing agencies' constituent acts themselves. The two most recent proposals for agencies\(^14\) include some provisions concerning the host country.

The regulation establishing EASO requires the host state to ensure the proper functioning of the agency, including multilingual, European-oriented schooling and appropriate transport connections.

The Commission proposal for establishing the Agency for Operational Management of SIS II, VIS and EURODAC requires the host state to ensure the best possible conditions for the smooth operation of the Agency.

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\(^8\) CEDEFOP, CFCA, ECDC, ECHA, EEA, EMCDDA, EMA, EMSA, FRA, CEPOL  
\(^9\) CEDEFOP, CFCA, ECDC, ECHA, EEA, EMCDDA, EMA, EMSA, FRA  
\(^10\) CEDEFOP, CFCA, ECDC, EEA, EFSA, EMCDDA, EMA, EMSA, FRA, CEPOL, EUROJUST  
\(^11\) CEPOL, CFCA, ECHA, EMCDDA, ENISA, FRA, EUROJUST  
\(^12\) CEPOL, CFCA, EEA, EFSA, EMCDDA, EMSA, ENISA, FRA  
\(^13\) CEPOL, CFCA, EAR, ECHA, EFSA, EUROJUST  
\(^14\) EASO, Agency for the Operational Management of SIS II, VIS and EURODAC
Donations of the host state

In some cases host countries made donations towards agencies. Some host countries give concessions, e.g. EASA was reimbursed by Germany on actual leasing cost of its buildings until 31 December 2005 and EFSA was offered for free the property of the soil on which the seat is being built. In the case of ENISA the Greek Government provides the premises for the agency free of rent in order to offset the geographically remote location. In other cases, e.g. ETF, the host country has created a fund to finance certain activities from the agency's work programme.

Some host countries provide support during a few years only, while others provide no support at all.

Role of the host state during the agency's set-up phase

The involvement of the host country during the set-up phase of an agency differs greatly from case to case. In some cases the host country agrees to run public procurement for various services (IT equipment; electricity, and other facilities).

2) Critical analysis of the issue at hand

There is no single framework for the decision on the location of an agency.

The decision of the 2003 European Council to give priority to newly acceding Member States and to those who do not yet host an agency seems a fair way to reduce the disproportion between host countries: one Member State\textsuperscript{15} hosts three agencies, six\textsuperscript{16} have two agencies, twelve\textsuperscript{17} have one agency and seven new Member States\textsuperscript{18} host no agency. Yet, what actually affects most the efficiency of agency's operation is not the host Member State per se, although there is an obvious cost to remoteness, but the conditions, which it offers to the agency (in particular concerning premises and buildings\textsuperscript{19}) and its staff (rights and social benefits\textsuperscript{20}). Considering the accessibility, attractiveness, cost of premises and VAT conditions, the so called "location package" is inefficient for several agencies\textsuperscript{21}.

Lack of pre-established criteria for choosing the agency's seat

A major disadvantage in the choice of the agency's seat is the lack of standard requirements according to which to measure the suitability of one proposed location or another.\textsuperscript{22} The decision on the seat of an agency is currently a political one for which no detailed justification is provided. In one case this led to a situation where due to accessibility problems and a need

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\textsuperscript{15} Spain
\textsuperscript{16} France, Greece, Italy, the Netherlands, Portugal and United Kingdom
\textsuperscript{17} Austria, Denmark, Finland, Germany, Ireland, Latvia, Lithuania, Luxembourg, Malta, Poland, Slovenia and Sweden
\textsuperscript{18} Bulgaria, Cyprus, Czech Republic, Estonia, Hungary, Romania and Slovakia
\textsuperscript{19} Some host countries offer buildings (nearly) free of charge, whereas many agencies on the other hand do not benefit from any host country support at all, and have to pay market prices for rent. Accommodation conditions also differ greatly since there are no common minimal standards.
\textsuperscript{20} Some agencies (for example ERA) experience certain difficulties with regard to VAT exemption.
\textsuperscript{21} Evaluation 2009
\textsuperscript{22} In addition, the European Parliament also questions why article 341 of the TFUE ("The seat of the institutions of the Union shall be determined by common accord of the governments of the Member States.") should apply "by analogy" to the seat of the agencies, bearing in mind that there are cases where the Commission, in its formal proposal to establish a new agency, proposed that the agency's seat, once decided upon, is introduced in the constituent act.
to organise a lot of meetings the legal seat of the agency became de facto its secondary seat because another, better connected (travelling) seat had to be established – the case of ERA. The overall accessibility of the agency is also of importance. Experience shows that agencies located in very remote places face severe difficulties to attract and retain staff from the rest of Europe. This leads not only to difficulties to fill the establishment plans with appropriate staff, but also to significant geographical imbalances (local staff being predominant).

Timing of the decision on the agency's seat

Another aspect with a strong impact is the timing of the decision on an agency's seat. The decision on the seat normally comes some months after the adoption of the agency's constituent act, leading to the necessity to provide a temporary seat (usually in Brussels) during the set up phase. This entails additional relocation costs and carries the risk of operational disruptions, as not all staff relocates to the new location.

Non-homogeneous practice regarding seat agreements

Another weak aspect concerning hosting an agency is the lack of seat agreements in case of some agencies. As mentioned in part 1, there are eleven existing agencies which did not conclude any seat agreement or similar agreements with their host country. This situation is disadvantageous for the agency. A timely concluded seat agreement, would contribute to the transparency of relations between the agency and the hosting country. The agency would know better the working and living conditions that it could offer to its staff and this factor could increase its capacity to attract highly qualified staff. Furthermore, the seat agreement could also serve as an instrument to compensate the disadvantages suffered by staff working in an agency located in remote places (see above). The EU institutions play a very limited role in fostering the host country to conclude a seat agreement.

Agencies are also in a rather weak negotiating position when it comes to seat agreements, since the decision on the seat is already taken. In this context, the issue of setting criteria for the choice of seat becomes even more pertinent.

In addition, the conditions in which agencies operate differ greatly not only from one Member State to another, but sometimes within the same host State. As long as the seat agreements are negotiated on a case by case basis in bilateral discussions, it is difficult to ensure that agencies benefit from a common and most favourable set of conditions. In addition to that, further problems may arise concerning inequality of treatment of the staff of an agency and the staff of the institutions, when both are submitted to the Staff Regulation. It is necessary to agree on a set of standardised framework and norms that should form the basis of any seat agreement.

A parallel with the Commission Representations

As is the case for agencies, the rights and privileges of Commission Representations and any special conditions for their staff are also covered by Seat Agreements based on the Protocol on the Privileges and Immunities of the European Communities. In this context, there is no reason why the seat agreements concluded by agencies and those concluded by the Commission Representations would differ, at least as far as staff matters are concerned.