

ORDER OF THE COURT OF FIRST INSTANCE (First Chamber)

7 July 2006 *

In Case T-319/05,

Swiss Confederation, represented by S. Hirsbrunner and U. Soltész, lawyers,

applicant,

v

Commission of the European Communities, represented by F. Benyon,
M. Huttunen and M. Niejahr, acting as Agents,

defendant,

supported by

Federal Republic of Germany, represented by C.-D. Quassowski and A. Tiemann,
acting as Agents, and T. Masing, lawyer,

intervener,

* Language of the case: German.

ACTION under Article 230 EC, read in conjunction with Article 20 of the Agreement between the European Community and the Swiss Confederation on air transport, for annulment of Commission Decision 2004/12/EC of 5 December 2003 on a procedure relating to the application of Article 18(2), first sentence, of the Agreement between the European Community and the Swiss Confederation on air transport and Council Regulation (EEC) No 2408/92 (Case TREN/AMA/11/03 — German measures relating to the approaches to Zurich airport) (OJ 2004 L 4, p. 13),

THE COURT OF FIRST INSTANCE
OF THE EUROPEAN COMMUNITIES (First Chamber),

composed of R. García-Valdecasas, President, J.D. Cooke and V. Trstenjak, Judges,

Registrar: E. Coulon,

makes the following

Order

Legal context

- ¹ The first and second paragraphs of Article 40 of the Statute of the Court of Justice, which also governs procedure before the Court of First Instance pursuant to the first paragraph of Article 53 of that statute, provides that:

‘Member States and institutions of the Communities may intervene in cases before the Court.

The same right shall be open to any other person establishing an interest in the result of any case submitted to the Court, save in cases between Member States, between institutions of the Communities or between Member States and institutions of the Communities.’

Procedure before the Court of Justice and the Court of First Instance (Case C-70/04, now, after referral from the Court of Justice to the Court of First Instance, Case T-319/05)

- 2 By application received at the Registry of the Court of Justice on 13 February 2004 and registered under the number C-70/04, the Swiss Confederation sought the annulment of Commission Decision 2004/12/EC of 5 December 2003 on a procedure relating to the application of Article 18(2), first sentence, of the Agreement between the European Community and the Swiss Confederation on air transport and Council Regulation (EEC) No 2408/92 (Case TREN/AMA/11/03 — German measures relating to the approaches to Zurich airport) (OJ 2004 L 4, p. 13) (‘the contested decision’).
- 3 The contested decision arose from a complaint by the Swiss Confederation of 10 June 2003 directed against the 213th Regulation for the implementation of German air traffic regulations, adopted by the German Federal Aviation Authority on 15 January 2003. That regulation sets out new procedures for the approach to Zurich Airport for aircraft flying over German territory. Those measures are deemed to reduce the noise pollution which the communes affected, situated north of the border between Germany and Switzerland, are exposed to by the passing of aircraft.
- 4 The action by the Swiss Confederation has been brought on the basis of Article 230 EC, read in conjunction with Article 20 of the Agreement between the European

Community and the Swiss Confederation on air transport (OJ 2002 L 114, p. 73) ('the Agreement on air transport'), which provides that:

'All questions concerning the validity of decisions of the institutions of the Community taken on the basis of their competences under this Agreement, shall be of the exclusive competence of the Court of Justice of the European Communities.'

- 5 By fax received at the Registry of the Court of Justice on 27 May 2004, the Landkreis Waldshut sought leave to intervene in support of the form of order sought by the defendant in Case 70/04, now Case T-319/05 following the referral of that case to the Court of First Instance by the Court of Justice. The Landkreis Waldshut is the area of Germany situated near the Swiss border over which aircraft approaching Zurich Airport fly and which the German measures forming the subject-matter of the contested decision seek to protect against noise pollution.
- 6 That application for leave to intervene was served on the parties in accordance with Article 93(2) of the Rules of Procedure of the Court of Justice. By letters of 18 and 23 June 2004, the Commission and the Swiss Confederation submitted their respective observations on the application for leave to intervene.
- 7 By order of the President of the Court of Justice of 21 July 2004, the Federal Republic of Germany was granted leave to intervene in support of the form of order sought by the Commission.
- 8 By order of 14 July 2005 in Case C-70/04 *Swiss Confederation v Commission*, not published in the ECR, the Court of Justice referred that case to the Court of First Instance. In that order, the Court states, first, in paragraph 21, that, even if the Swiss Confederation were to be treated in the same way as the Member States, the fact remains that actions brought by Member States against a Commission decision now fall at first instance within the jurisdiction of the Court of First Instance in the case

of actions referred to in Article 230 EC which, in accordance with Article 225 EC, are not assigned to a judicial panel and are no longer reserved to the Court of Justice pursuant to Article 51 of its Statute, as amended by Council Decision 2004/407/EC, Euratom of 26 April 2004 amending Articles 51 and 54 of the Protocol on the Statute of the Court of Justice (OJ 2004 L 132, p. 5, and corrigendum, OJ 2004 L 194, p. 3).

- 9 Secondly, the Court also states, in paragraph 22, that if the Swiss Confederation were to be treated, in particular in the light of the specific context of the Agreement on air transport, not as a Member State so that the second paragraph of Article 230 EC applies, but as a legal person as provided for in the fourth paragraph of that article, the action also falls at first instance within the jurisdiction of the Court of First Instance under the conditions laid down by that provision of the Treaty and, therefore, should be referred to the Court of First Instance pursuant to the second paragraph of Article 54 of the Statute of the Court of Justice.
- 10 In those circumstances, the Court decided that, in any event, the action was to be brought at first instance before the Court of First Instance pursuant to either Decision 2004/407 or the second paragraph of Article 54 of the Statute of the Court of Justice.
- 11 On 30 March 2006, the President of the First Chamber referred the Landkreis Waldshut's application for leave to intervene to the Court of First Instance pursuant to the third paragraph of Article 116(1) of the Rules of Procedure of the Court of First Instance.

The application for leave to intervene by the Landkreis Waldshut and the observations of the parties

- 12 In support of its application for leave to intervene, the Landkreis Waldshut submits that its intervention cannot be precluded by the second paragraph of Article 40 of

the Statute of the Court of Justice, given that the Swiss Confederation is not a Member State for the purposes of that provision. In that regard, Article 20 of the Agreement on air transport, which confers jurisdiction on the Court of Justice alone for certain disputes, does not have the effect of making the Swiss Confederation a Member State for the purpose of the second paragraph of Article 40 of the Statute of the Court of Justice. The same applies where a State has concluded an international agreement with the Community (Order in Joined Cases 91/82 R and 200/82 R *Chris International Foods v Commission* [1983] ECR 417, and order in Case T-44/98 R *Emesa Sugar v Commission* [1998] ECR II-3079, paragraph 26 et seq.).

- ¹³ Moreover, the Landkreis Waldshut's interest in the result of the action stems from the fact that, as a public law local authority, it must promote the well-being of its inhabitants and administer its territory. The Landkreis Waldshut is thus affected from a spatial and material point of view, given that the noise pollution to which the contested decision puts an end occurs in its territory and affects its population. Furthermore, the Landkreis Waldshut was instrumental in the adoption of the disputed flight limitations (by the 213th Regulation for the implementation of German air traffic regulations) and it also informed the Commission during the administrative procedure.
- ¹⁴ The Commission acknowledges that the Landkreis Waldshut has established an interest in the result of the action, whilst at the same time entertaining doubts as to whether its intervention is not precluded by the second paragraph of Article 40 of the Statute of the Court of Justice. In that regard, the Commission submits that, whilst it is true that the Swiss Confederation is not a Member State for the purpose of that provision, it must, none the less, be taken into consideration that that State is to be treated in the same way as the Member States of the Community for the purpose of the application of the regulations and directives listed in the annex to the Agreement on air transport.
- ¹⁵ After pointing out, first, that the Statute of the Court of Justice is not referred to in the annex to that agreement, so that treatment of the Swiss Confederation in the same way as a Member State does not extend to the application of that statute and,

secondly, that the exclusion provided for in the second paragraph of Article 40 of the Statute of the Court of Justice is an exception to the right to intervene which is also laid down by that provision and must, as a rule, be interpreted restrictively, the Commission submits, however, that that exclusion must be applied *mutatis mutandis* to this case. That is justified by the fact that disputes between Member States or the Community institutions are distinguished from other disputes in that the parties do not generally pursue specific interests but the general interest of the population which is subject to their sovereign powers, that is to say their 'institutional interests'. It would thus be contradictory for it to be possible for specific interests to be brought into such disputes by means of the intervention of other parties. The exclusion provided for in the second paragraph of Article 40 of the Statute of the Court of Justice is specifically intended to avoid such a contradiction. The Landkreis Waldshut cannot be treated differently from a private undertaking, for example, the intervention of which is precluded in this type of case, since Article 40 of the Statute of the Court of Justice distinguishes only between, on the one hand, the Member States and the Community institutions, and, on the other hand, 'any other person'.

16 However, in so far as the Court of Justice has not yet ruled on that question and it is a question which must be examined by the Court of its own motion, the Commission refrains from making submissions for that purpose and defers to the decision of the Court of First Instance.

17 The Swiss Confederation contends that the Court of First Instance should reject the intervention of the Landkreis Waldshut, submitting that such an intervention is precluded pursuant to the second paragraph of Article 40 of the Statute of the Court of Justice and the principle of equal treatment. That intervention could not take place if this case had been brought by a Member State, given that the second paragraph of Article 40 of the Statute of the Court of Justice provides that in cases between Member States and Community institutions, only Member States and Community institutions may intervene, whereas other persons do not have that possibility. Therefore, in a case concerning the Agreement on air transport, the Swiss Confederation should also be able to benefit from that rule of procedure in accordance with the principle of equal treatment.

18 Furthermore, the Swiss Confederation observes that intervention by the Landkreis Waldshut should be excluded on account of the intervention by the Federal Republic of Germany. The principle laid down by the Court of Justice in Case 282/85 *DEFI v Commission* [1986] ECR 2469 must be applied here, according to which a body is not entitled to have recourse to a legal remedy where a higher body is already utilising that remedy and the interests represented by the body in question are covered by the interests of the higher body or coincide with them.

Findings of the Court

19 First, it must be pointed out that the application for leave to intervene has been brought in accordance with the formal requirements and within the period laid down by Article 93(1) of the Rules of Procedure of the Court of Justice.

20 Secondly, the Landkreis Waldshut has established its interest in the result of the dispute in the present case. That interest derives from the fact that it arises out of the German measures which are the subject of the contested decision and that its territory and its population are flown over by aircraft approaching or departing from Zurich Airport. Furthermore, contrary to the contentions of the Swiss Confederation, the Landkreis Waldshut's interest in intervening cannot be confused with the Federal Republic of Germany's interest in intervening. The Federal Republic of Germany is intervening in this case pursuant to the first paragraph of Article 40 of the Statute of the Court of Justice, which provides that '[m]ember states and institutions of the Communities may intervene in cases before the Court', and it does not have to establish an interest in the result of the case. Thus, the Federal Republic of Germany's intervention pursuant to the first paragraph of Article 40 of the Statute of the Court of Justice does not in any way make it possible to exclude intervention by the Landkreis Waldshut or by 'any other person establishing an interest in the result of any case' pursuant to the second paragraph of that provision.

21 Thirdly, the fact that the Swiss Confederation may be treated in the same way as a 'Member State' of the Community for the purposes of the application of the regulations and directives listed in the annex to the Agreement on air transport cannot have the effect of removing the procedural rights which individuals derive from the Statute of the Court of Justice. The second paragraph of Article 40 of the Statute of the Court of Justice enshrines the right of persons establishing an interest in the result to intervene in cases before the Court. The exceptions to that procedural right of intervention, which is an embodiment of the right to a fair hearing, must necessarily be interpreted restrictively. Thus, since the Swiss Confederation is not a Member State of the Community, it cannot properly rely on the second paragraph of Article 40 of Statute of the Court of Justice, which precludes intervention by any person other than Member States and Community institutions in cases between Member States, between Community institutions or between Member States and Community institutions. That exclusion, which is set out in the second paragraph of Article 40 of the Statute of the Court of Justice and is applicable to the procedure before the Court of First Instance pursuant to the first paragraph of Article 53 of that statute, applies only to cases between Member States or Community institutions.

22 On the same basis, the Swiss Confederation cannot claim that that exclusion applies on the ground that it represents the general interest of the population which is subject to its sovereign authority, that is to say, its institutional interests, and that, on that basis, the dispute between it and the Commission in this case should be treated in the same way as a dispute between a Member State and a Community institution in which entities pursuing a similar interest, namely the other Member States and Community institutions, may intervene. That similarity of interest cannot suffice, in view of the principle of restrictive interpretation set out above, to remove the procedural right which the Landkreis Waldshut derives from the second paragraph of Article 40 of the Statute of the Court of Justice where it establishes an interest in the result of the case. A State which is not a Member of the Community cannot claim to be entitled to the rights and powers granted to the Member States and Community institutions by the Statute of the Court of Justice in order to undermine a procedural right expressly conferred by that statute on 'any other person establishing an interest in the result of any case'.

23 Consequently, it is apparent from the above that the Landkreis Waldshut has established its interest in the result of the case and that it must therefore be granted

leave to intervene in accordance with the second paragraph of Article 40 of the Statute of the Court of Justice, which is applicable to the procedure before the Court of First Instance pursuant to the first paragraph of Article 53 thereof. The rights of the Landkreis Waldshut are those set out in Article 116(2) and (4) of the Rules of Procedure.

On those grounds,

THE COURT OF FIRST INSTANCE (First Chamber)

hereby orders:

- 1. The Landkreis Waldshut is granted leave to intervene in Case T-319/05 in support of the form of order sought by the defendant.**
- 2. A copy of all procedural documents shall be served by the Registrar on the Landkreis Waldshut.**
- 3. A period shall be prescribed for the Landkreis Waldshut to set out in writing the pleas in law and arguments in support of the form of order which it seeks.**
- 4. The costs are reserved.**

Luxembourg, 7 July 2006.

E. Coulon

Registrar

R. García-Valdecasas

President