ORDER OF THE COURT OF FIRST INSTANCE (Second Chamber)

3 April 2008 *

In Case T-236/06,

Landtag Schleswig-Holstein (Germany), represented by S. Laskowski and J. Caspar,

applicant,

v

Commission of the European Communities, represented by P. Costa de Oliveira and C. Ladenburger,

defendant,

* Language of the case: German.

ACTION for annulment of the Commission's decisions of 10 March and 23 June 2006 refusing to grant the applicant access to document SEC(2005) 420 of 22 March 2005 containing a legal analysis of a draft framework decision, under discussion in the Council, on the retention of data processed and stored in connection with the provision of publicly available electronic communications services or of data on public communications networks for the purpose of prevention, investigation, detection and prosecution of criminal offences including terrorism,

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

composed of I. Pelikánová (Rapporteur), President, K. Jürimäe and S. Soldevila Fragoso, Judges,

Registrar: E. Coulon,

makes the following

Order

Facts and procedure

1 By email of 9 February 2006, the applicant, Landtag Schleswig-Holstein (the Parliament of the *Land* of Schleswig-Holstein), requested the Commission to grant it

unlimited access to internal document SEC(2005) 420 of 22 March 2005, containing a legal analysis of a draft framework decision, under discussion in the Council, on the retention of data processed and stored in connection with the provision of publicly available electronic communications services or of data on public communications networks for the purpose of prevention, investigation, detection and prosecution of criminal offences including terrorism.

2 By decision of 10 March 2006, the Director-General of the Commission's Legal Service refused the request for unlimited access pursuant to Article 4(2) of Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents (OJ 2001 L 145, p. 43), by transmitting the document at issue to the applicant with certain parts blacked out.

3 By letter of 29 March 2006, the applicant made a confirmatory application pursuant to Article 7(2) of Regulation No 1049/2001, asking the Commission to reconsider its decision of 10 March 2006, and made a fresh request for unlimited access to document SEC(2005) 420 on the basis of the obligation of cooperation in good faith laid down in Article 10 EC.

4 By letter of 23 June 2006, transmitted to the applicant by email on 26 June 2006, the Secretary-General of the Commission confirmed the decision of 10 March 2006 and rejected the fresh request of 29 March 2006.

5 By application lodged at the Registry of the Court of First Instance on 1 September 2006, the applicant brought the present action. On the same day, the applicant brought an action before the Court of Justice, registered as Case C-406/06, putting forward the same subject-matter and the same pleas in law.

6 The Republic of Finland and the United Kingdom of Great Britain and Northern Ireland applied to intervene on 28 November and 14 December 2006 respectively. The applicant submitted its observations on the applications to intervene on 10 January 2007.

7 By order of 8 February 2007 in Case C-406/06 *Landtag Schleswig-Holstein* v *Commission* (not published in the ECR), the Court of Justice remitted that case to the Court of First Instance, where it was registered as Case T-68/07. By order of 14 June 2007 in Case T-68/07 *Landtag Schleswig-Holstein* v *Commission* (not published in the ECR), the Court, before which the present case was already pending, dismissed the application in Case T-68/07 as manifestly inadmissible on the ground of *lis alibi pendens*, stating that the other questions of admissibility which it raised had not been considered (Case T-68/07 *Landtag Schleswig-Holstein* v *Commission*, paragraph 17).

8 By a separate document lodged at the Registry of the Court of First Instance on 5 February 2007, the Commission raised an objection of inadmissibility in regard to the present case under Article 114(1) of the Rules of Procedure of the Court of First Instance. The applicant filed its observations on that objection of inadmissibility on 20 March 2007.

Forms of order sought

9 The Commission claims that the Court should:

— dismiss the action as inadmissible;

— order the applicant to pay the costs.

10 The applicant contends that the Court should:

— declare the action admissible;

— annul the Commission's decisions of 10 March and 23 June 2006;

— order the Commission to pay the costs.

Law

11 Under Article 114(1) of the Rules of Procedure, the Court may, on the application of a party, rule on admissibility without considering the substance of the case. Under Article 114(3), unless the Court otherwise decides, the remainder of the proceedings is to be oral. In the present case, the Court considers that it has sufficient information from the documents in the case and that it is not necessary to hear oral argument from the parties.

12 The Commission raises two pleas of inadmissibility alleging, first, the applicant's lack of capacity to be a party to legal proceedings and, second, that the applicant is not validly represented by the two agents who signed the application. It must first be considered whether the applicant has capacity to be a party to legal proceedings.

Arguments of the parties

13 The Commission contends that, in German public law, which is the only law relevant, Landtag Schleswig-Holstein indisputably does not have a legal personality of its own. Only the region, the *Land* of Schleswig-Holstein, as a regional authority, has legal personality under German public law, whereas the applicant is merely one of its institutions.

14 In the Commission's view, the position of regional parliaments in regard to Article 230 EC cannot be more favourable that that of the national parliaments of the Member States. It is generally accepted that national parliaments do not have a right to be parties to legal proceedings independent of that of the Member States, since as institutions of the Member States they are part of the legal person which each State constitutes.

15 The 'partial legal capacity' claimed by the applicant cannot, in the Commission's view, give it the status of a legal person. The provisions of national law cited by the applicant certainly give it the capacity to be a party to legal proceedings and to bring actions in internal constitutional disputes in the *Land* of Schleswig-Holstein. However, such disputes are merely internal disputes between the institutions of a regional authority and not the defence in legal proceedings of that authority in regard to third parties. In the latter case, German law permits only the *Land* itself, and not one of its institutions, to bring legal proceedings. Similarly, the organisational autonomy granted to the regional parliament under the constitution of the *Land* is valid only within the *Land* and in regard to its other institutions, but not outside it.

16 The Commission concludes that the applicant does not have the capacity to be a party to legal proceedings and that the action should be dismissed as manifestly inadmissible. Moreover, the action cannot be reinterpreted as having been brought by the *Land* itself, represented by Landtag Schleswig-Holstein, because the latter has clearly expressed its wish, both in the way in which it has designated itself as applicant and in the entire text of its application, to act in its own name.

17 In reply to the Commission's arguments, the applicant points out that, in its order in Case C-406/06 *Landtag Schleswig-Holstein* v *Commission* (paragraph 9), the Court of Justice expressly recognised its legal personality in the following terms:

'On the other hand, in accordance with the Court's case-law concerning the right of action of regions and other local authorities … Landtag Schleswig-Holstein must be regarded as a legal person entitled to bring an action before the Court of First Instance against decisions addressed to it or which, although in the form of a regulation or a decision addressed to another person, are of direct and individual concern to it, pursuant to the fourth paragraph of Article 230 EC.'

18 It concludes that the first plea of inadmissibility raised by the Commission must be rejected.

19 In its application, the applicant also claims that it fulfils the criteria for the independent Community concept of a legal person developed by the Community judicature. Pursuant to that case-law, the applicant will have capacity to bring legal proceedings if it has the characteristic attributes of legal personality. The applicant deduces from the order of the Court of Justice in Case 15/63 *Lassalle* v *Parliament* [1964] ECR 50, at p. 51, that those attributes include independence and responsibility, even if limited, which has already led the Community judicature to recognise that local and regional authorities under public law, such as the German *Länder* and municipalities, have the capacity to bring legal proceedings under the fourth paragraph of Article 230 EC.

20 The applicant adds that as the highest institution elected by the people in the *Land* of Schleswig-Holstein, it is of the same rank as the other highest institutions of the *Land*, in particular its government. Landtag Schleswig-Holstein has partial legal capacity because the constitution of the *Land* grants it organisational independence, permitting it to constitute itself, organise itself and determine its procedure. In constitutional matters, the applicant has the capacity to bring legal proceedings or be a party before the Bundesverfassungsgericht (Federal Constitutional Court) and the Landesverfassungsgericht (Constitutional Court of the *Land*).

21 Finally, the applicant claims that, in the same way as the *Land* of Schleswig-Holstein, it has the capacity to be a party to the present proceedings, because, pursuant to the second sentence of Article 14(3) of the constitution of the *Land* of Schleswig-Holstein, the president of the Landtag directly represents the *Land* of Schleswig-Holstein in all the legal acts and legal disputes of the Landtag. To that extent, the

second sentence of Article 14(3) of the constitution constitutes a *lex specialis* in relation to Article 30 of the constitution, under which the *Land* is represented by its first minister.

Findings of the Court

22 First, it should be pointed out that, as the parties to the present proceedings accept, where actions are brought by sub-national territorial bodies, the Court assesses whether they have legal personality on the basis of national public law (see, to that effect, Case T-214/95 *Vlaams Gewest* v *Commission* [1998] ECR II-717, paragraph 28; order in Case T-238/97 *Comunidad Autónoma de Cantabria* v *Council* [1998] ECR II-2271, paragraph 43; and Joined Cases T-132/96 and T-143/96 *Freistaat Sachsen and Others* v *Commission* [1999] ECR II-3663, paragraph 81). Consequently, whether the applicant has legal personality must be considered in the light of German national law. Community law cannot trespass on the constitutional independence of the Member States by deciding that their national public-law bodies have legal personality, which could confer on them rights at Community level which they do not enjoy at national level. It follows that the applicant cannot find support in the order in *Lassalle* v *Parliament*, because in that case the body in question, the Staff Committee of the European Parliament, was exclusively governed by Community law.

23 In that context, the applicant's argument that the Court of Justice expressly recognised its legal personality in the order in Case C-406/06 *Landtag Schleswig-Holstein* v *Commission* must be rejected. In paragraph 9 of that order, the concept of 'legal person' in the fourth paragraph of Article 230 EC was referred to only by way of contrast with the concepts of 'Member State' and 'Community institution' in the second paragraph of that article, which are referred to in paragraph 8 of the order,

because the applicant, in its application before the Court of Justice, had claimed to enjoy the status of a Member State for the purposes of bringing its action. It follows that the Court of Justice did not intend, in the passage cited, to recognise that the applicant had the capacity to bring legal proceedings, but merely intended to note that since the applicant was neither a Member State nor a Community institution it could not, in any event, bring a direct action before the Court of Justice and was therefore required to bring it before the Court of First Instance. However, the Court of First Instance has sole jurisdiction to consider the admissibility of such an action.

24 Moreover, as the Commission has rightly pointed out, it does not seem possible to interpret the present action as having been brought on behalf of the *Land* of Schleswig-Holstein, with the result that the provisions, customs or case-law applying to the *Land* of Schleswig-Holstein or to the *Länder* in general cannot be relied on in support of the applicant's position. That is the case, in particular, in regard to the argument based on Article 14(3) of the constitution of the *Land* of Schleswig-Holstein, in so far as that provision refers to the *Land* as a party to legal proceedings.

25 With regard to the argument that the applicant, as the highest institution elected by the people, holds the same rank as the other highest institutions of the State, in particular, the government of the *Land*, since there is nothing to show that those institutions would have the capacity to bring an action before the Community courts, the argument is irrelevant in regard to the applicant's capacity to bring such an action.

26 Even supposing that the applicant has partial legal capacity under certain provisions of the constitution of the *Land* of Schleswig-Holstein which grant it organisational independence, allowing it to constitute itself, organise itself and determine its internal procedure, it must be pointed out that Article 93(2a) of the German Basic Law and Article 44(1) and (2) of the constitution of the *Land* of Schleswig-Holstein,

relied on by the applicant as conferring on it the capacity to bring legal proceedings or to be a party before the Bundesverfassungsgericht and the Landesverfassungsgericht, concern only constitutional disputes at national level in which the rights and interests of the applicant as a parliament are not necessarily the same as those of the *Land* of Schleswig-Holstein, which is precisely not the situation in the present case.

27 Finally, with regard to the argument based on Article 14(3) of the constitution of the *Land* of Schleswig-Holstein, it is clear from the terms of that provision that the applicant's argument that it has the capacity to be a party to legal proceedings in its own name cannot be accepted. The provision in question, in so far as relevant to the present case, reads as follows:

'The President [of the Landtag] shall direct the activities of the Landtag. That includes … the representation of the *Land* in all the legal acts and legal disputes of the Landtag …'

28 It is apparent from that provision that, in disputes concerning Landtag Schleswig-Holstein, it is not the Landtag which is the party but the *Land*, represented, exceptionally, by the president of Landtag Schleswig-Holstein, inasmuch as the *Land* is normally represented by its first minister, as is clear from Article 30(1) of the constitution of the *Land* of Schleswig-Holstein.

29 That conclusion is confirmed by German legal literature on the subject. The commentary on the constitution of the *Land* of Schleswig-Holstein cited by the applicant expressly states, first, that Landtag Schleswig-Holstein, as an institution of the *Land*, does not have legal capacity and, second, that Article 14(3) of the constitution

of the *Land* of Schleswig-Holstein is to be understood as meaning that the president of Landtag Schleswig-Holstein, in the exercise of his powers of representation in legal proceedings, represents not the Landtag but the *Land* directly.

30 It must therefore be concluded that the applicant does not have legal capacity under German national law. It therefore does not have the capacity to be a party to legal proceedings before the Community judicature.

31 Consequently, the action must be dismissed as inadmissible without it being necessary to consider the other plea of inadmissibility raised by the Commission.

32 Accordingly, it is not necessary to rule on the applications to intervene by the Republic of Finland and the United Kingdom of Great Britain and Northern Ireland.

Costs

33 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs, if they have been asked for in the successful party's pleadings. Since the applicant has been unsuccessful, it must, having regard to the form of order sought by the Commission, be ordered to pay the costs.

34 Under Article 87(6) of the Rules of Procedure, where a case does not proceed to judgment, the costs are to be in the discretion of the Court. In this case, it must be decided that the parties and the applicants for leave to intervene are to bear their own costs in relation to the applications to intervene lodged by the Republic of Finland and the United Kingdom of Great Britain and Northern Ireland.

On those grounds,

THE COURT OF FIRST INSTANCE (Second Chamber)

hereby orders:

1. The action is dismissed as inadmissible.

2. There is no need to rule on the applications to intervene.

3. Landtag Schleswig-Holstein shall bear its own costs and pay the Commission's costs, except those relating to the applications to intervene.

4. Landtag Schleswig-Holstein, the Commission, the Republic of Finland and the United Kingdom of Great Britain and Northern Ireland shall bear their own costs relating to the applications to intervene.

Luxembourg, 3 April 2008.

E. Coulon — I. Pelikánová

Registrar — President