JUDGMENT OF THE COURT (Grand Chamber)

10 March 2009 *

In Case C-345/06,

REFERENCE for a preliminary ruling under Article 234 EC from the Unabhängiger Verwaltungssenat im Land Niederösterreich (Austria), made by decision of 26 July 2006, received at the Court on 10 August 2006, in the proceedings

Gottfried Heinrich

THE COURT (Grand Chamber),

composed of V. Skouris, President, P. Jann, C.W.A. Timmermans (Rapporteur), A. Rosas, K. Lenaerts and M. Ilešič, Presidents of Chambers, A. Tizzano, J.N. Cunha Rodrigues, R. Silva de Lapuerta, J. Malenovský, J. Klučka, A. Arabadjiev and C. Toader, Judges,

Advocate General: E. Sharpston,
Registrar: J. Swedenborg, Administrator,

* Language of the case: German.

having regard to the written procedure and further to the hearing on 13 November 2007,

after considering the observations submitted on behalf of:

— the Austrian Government, by G. Eberhard, acting as Agent,

— the Czech Government, by T. Boček and M. Smolek, acting as Agents,

— the Danish Government, by B. Weis Fogh, acting as Agent,

— the German Government, by M. Lumma and C. Schulze-Bahr, acting as Agents,

— the Greek Government, by G. Alexaki and M. Tassopoulou, acting as Agents,

— the French Government, by G. de Bergues and A.'L. Hare, acting as Agents,

— the Hungarian Government, by J. Fazekas, acting as Agent,

— the Polish Government, by E. Ośniecka-Tamecka and M. Kapko, acting as Agents,

— the Finnish Government, by E. Bygglin and J. Heliskoski, acting as Agents,

— the Swedish Government, by A. Falk, acting as Agent,

— the United Kingdom Government, by C. Gibbs and J. Stratford, acting as Agents,

— the European Parliament, by K. Bradley and U. Rösslein, acting as Agents,

— the Council of the European Union, by M. Bauer and E. Karlsson, acting as Agents,

— the Commission of the European Communities, by C. Ladenburger and R. Vidal Puig, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 10 April 2008,

gives the following

Judgment

1 The reference for a preliminary ruling concerns the interpretation of Article 2(3) 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) and of Article 254(2) EC in conjunction with the Community legislation on civil aviation security.

2 That reference was submitted in the course of an action brought by Mr Heinrich against the Austrian authorities after they had refused him access on board an aeroplane on the ground that he was carrying tennis racquets in his cabin baggage, those objects being regarded by those authorities as articles prohibited by an unpublished annex to a civil aviation security regulation.

Legal context

The Community legislation on access to documents

3 Article 2(1) of Regulation No 1049/2001 provides that any citizen of the Union has a right of access to documents of the institutions, subject to the principles, conditions and limits defined in that regulation.

4 Article 2(3) of that regulation states that it 'shall apply to all documents held by an institution, that is to say, documents drawn up or received by it and in its possession, in all areas of activity of the European Union'.

5 The term 'document' is defined in Article 3(a) of Regulation No 1049/2001 as 'any content whatever its medium (written on paper or stored in electronic form or as a sound, visual or audiovisual recording) concerning a matter relating to the policies, activities and decisions falling within the institution's sphere of responsibility'.

The Community legislation on civil aviation security

6 Regulation (EC) No 2320/2002 of the European Parliament and of the Council of 16 December 2002 establishes common rules in the field of civil aviation security (OJ 2002 L 355, p. 1).

7 According to Article 1(1) of that regulation, its main objective is to establish and implement appropriate Community measures, in order to prevent acts of unlawful interference against civil aviation.

8 Article 4(1) and (2) of Regulation No 2320/2002 provide:

'1. The common basic standards on aviation security measures are based on the current recommendations of European Civil Aviation Conference (ECAC) Document 30 and are laid down in the Annex.

2. The necessary measures for the implementation and the technical adaptation of these common basic standards shall be adopted in accordance with the procedure referred to in Article 9(2), due consideration being given to the various types of operation and to the sensitivity of the measures relating to:

(a) performance criteria and acceptance tests for equipment;

(b) detailed procedures containing sensitive information;

(c) detailed criteria for exemption from security measures.'

9 Article 6 of Regulation No 2320/2002 provides:

'Member States may apply, in compliance with Community law, more stringent measures than those laid down in this Regulation. As soon as possible after their application, Member States shall inform the Commission of the nature of these measures.'

10 Article 8(1) of Regulation No 2320/2002 concerning the dissemination of information provides:

'1. Without prejudice to the public right of access to documents as laid down in Regulation (EC) No 1049/2001 …,

(a) the measures relating to

(i) performance criteria and acceptance tests for equipment;

(ii) detailed procedures containing sensitive information;

(iii) detailed criteria for exemption from security measures;

referred to in Article 4(2);

…

(c) … shall be secret and not be published. They shall only be made available to the authorities referred to in Article 5(2), which shall communicate them only to interested parties on a need-to-know basis, in accordance with applicable national rules for dissemination of sensitive information.'

11 Points 4.1 and 4.3 of the annex, to which Article 4(1) of Regulation No 2320/2002 refers, contain the common basic standards concerning the screening of departing passengers and their cabin baggage. Those provisions are intended to prevent prohibited articles from being introduced into the security restricted areas and on board an aircraft.

12 Under point 4.3(1), 'the cabin baggage of all departing passengers... shall be screened prior to being allowed into security restricted areas and on board an aircraft. Any prohibited articles shall be removed from the passenger's possession or the passenger denied access into the security restricted area or the aircraft as appropriate....'.

13 A 'prohibited article' is defined in point 1.18 of the annex to Regulation No 2320/2002 as being 'an object which can be used to commit an act of unlawful interference and that has not been properly declared and subjected to the applicable laws and regulations'. An indicative list of those prohibited articles is found in the attachment to that annex, setting out guidelines for classification of prohibited articles. Point (iii) of that attachment includes the category: 'Bludgeons: Blackjacks, billy clubs, baseball clubs or similar instruments'.

14 The implementation of Regulation No 2320/2002, and in particular Article 4(2) thereof, is governed by Commission Regulation (EC) No 622/2003 of 4 April 2003 laying down measures for the implementation of the common basic standards on aviation security (OJ 2003 L 89, p. 9), as amended by Commission Regulation (EC) No 68/2004 of 15 January 2004 (OJ 2004 L 10, p. 14, 'Regulation No 622/2003').

15 The first two recitals in the preamble to Regulation No 622/2003 state:

'(1) The Commission is required to adopt measures for the implementation of common basic standards for aviation security throughout the European Union. A Regulation is the most suitable instrument for this purpose.

(2) In accordance with Regulation (EC) No 2320/2002 and in order to prevent unlawful acts, the measures laid down in annex to this Regulation should be secret and not be published.'

16 Article 3 of Regulation No 622/2003, entitled 'Confidentiality', states that the measures at issue are set out in the annex and that 'those measures shall be secret and shall not be published. They shall be made available only to persons duly authorised by a Member State or the Commission'.

17 Article 1 of Regulation No 68/2004 confirms the confidential nature of the specifications set out in that annex.

18 Recitals 2 to 4 in the preamble to Regulation No 68/2004 provide:

'(2) In accordance with Regulation (EC) No 2320/2002 and in order to prevent unlawful acts, the measures laid down in the Annex to Regulation (EC) No 622/2003 should be secret and should not be published. The same rule necessarily applies to any amending act.

(3) There is, nonetheless, a need for a harmonised list, accessible to the public, setting out separately those articles that are prohibited from being carried by passengers into restricted areas and the cabin of an aircraft and those articles that are prohibited from being carried in baggage intended for stowage in the aircraft's hold.

(4) It is recognised that such a list can never be exhaustive. The appropriate authority, therefore, should be permitted to prohibit other articles in addition to those listed. It is appropriate that before and during the check-in phase passengers should be informed clearly of all articles that are prohibited.'

The dispute in the main proceedings and the questions referred for a preliminary ruling

19 On 25 September 2005, the applicant in the main proceedings presented himself at the security control at Vienna-Schwechat Airport. That control showed that he was carrying tennis racquets in his cabin baggage. Since those racquets, according to the authorities, fell under the prohibited articles in points 4.1 and 4.3 of the annex to Regulation No 2320/2002 and were listed in the annex to Regulation No 622/2003, the applicant was not permitted to pass through the security control. When he nonetheless boarded the aeroplane with the tennis racquets in his cabin baggage, he was asked to leave the plane.

20 It is evident from the file of the main proceedings that, by his action before the national court, the applicant is seeking a declaration that the measures taken against him were illegal.

21 In examining that application, the Unabhängiger Verwaltungssenat im Land Niederösterreich (Independent Administrative Chamber for the Land of Lower Austria) held that the content of Regulation No 622/2003 is not directed solely at State bodies but also at individuals. It observes, however, that it is impossible for individuals to comply with that regulation, since the annex thereto has not been published in the *Official Journal of the European Union*.

22 According to the referring court, keeping secret the rules of conduct with which individuals are required to comply constitutes such a severe impairment of the most elementary principles of the rule of law which the European Community is also required to uphold that regulations or parts of them which, contrary to the requirement of Article 254(1) and (2) EC, are not published in the *Official Journal of the European Union* are legally non-existent and hence cannot be binding.

23 The referring court is furthermore of the opinion that that means that the possibility of restricting the right of citizens of the Union to 'access documents of the Community institutions' for the purposes of Regulation No 1049/2001 (a possibility of which, it submits, the Commission clearly wished to avail itself in the present case) cannot apply to acts which are legally binding on the individual and which not least for that reason must be published in the *Official Journal of the European Union*.

24 In those circumstances, the Unabhängiger Verwaltungssenat im Land Niederösterreich decided to stay the proceedings and to refer the following two questions to the Court for a preliminary ruling:

'(1) Do documents within the meaning of Article 2(3) of [Regulation No 1049/2001] include acts which are required to be published in the *Official Journal of the European Union* pursuant to Article 254 EC?

(2) Do regulations or parts thereof have binding force if, contrary to the requirement of Article 254(2) EC, they are not published in the *Official Journal of the European Union*?'

On the questions referred

Admissibility

25 The German, French and United Kingdom Governments maintain that the questions referred are inadmissible on the ground that the order for reference specifies neither the circumstances under which Dr Heinrich brought the case nor the purpose of the action. Since the factual and legal context of the questions referred is not sufficiently clear, it is not possible to determine if they are objectively necessary to decide the case in the main proceedings.

26 Two of those governments also express doubts as regards the relevance of the questions referred to the outcome of the proceedings.

27 The German Government submits that the legal basis for the contested sanctions is to be found in Austrian law and not in the regulations referred to by the national court. That court has not explained how the possible invalidity of those regulations might lead to the invalidity of the Austrian legislation on aviation security.

28 According to the French Government, the first question is in any event inadmissible, since the national courts have no jurisdiction as regards requests for access to documents covered by Regulation No 1049/2001. The second question is inadmissible on the ground that, even if the list in the annex to Regulation No 662/2003 could not be relied on against individuals, the Austrian authorities were competent to prohibit certain articles from being brought on board aircraft.

29 The Swedish Government, while not expressly raising the issue of admissibility, admits to difficulties in assessing whether the failure to publish the annex to Regulation No 622/2003 had any direct bearing as regards whether the applicant could ascertain his obligations, the order for reference not including any information on the applicant's claims or the possible legal consequences.

30 It must first be recalled that, according to settled case-law, the need to provide an interpretation of Community law which will be of use to the national court makes it necessary that the national court should define the factual and legislative context of the questions it is asking or, at the very least, explain the factual circumstances on which those questions are based (see, inter alia, Case C-237/04 *Enirisorse* [2006] ECR I-2843, paragraph 17 and the case-law cited).

31 The information provided in the order for reference must not only enable the Court to reply usefully but must also give the governments of the Member States and the other interested parties the opportunity to submit observations pursuant to Article 23 of the Statute of the Court of Justice. It is the Court's duty to ensure that that opportunity is

safeguarded, bearing in mind that under that provision only the orders for reference are notified to the interested parties (see, inter alia, *Enirisorse*, paragraph 18 and the case-law cited).

32 In that regard, the file in the main proceedings shows that Mr Heinrich is seeking a declaration that the behaviour of the national security officials who, first, prevented him from passing through the security control and, then, after he had boarded the aircraft anyway, ordered him to leave it, are illegal.

33 In its decision the referring court also states that the decision of the competent national authorities to prevent Mr Heinrich from passing through the security control with his tennis racquets was taken on the basis of Regulations Nos 2320/2002 and 622/2003. It submits that those regulations are not only addressed to the national authorities but also impose obligations on individuals. However, individuals are not able to comply with those obligations in the absence of publication of the annex to Regulation No 622/2003.

34 It follows that the referring court has given an adequate description of the factual and legal framework of its request for an interpretation of Community law and has provided the Court with all the information necessary to respond effectively to that request.

35 Furthermore, it is apparent from the observations submitted pursuant to Article 23 of the Statute of the Court of Justice by the governments mentioned above and by the other interested parties that the information in the order for reference enabled them effectively to adopt a position on those questions.

36 As regards the relevance of the questions referred, it is settled case-law that, in proceedings under Article 234 EC, it is solely for the national court before which the

dispute has been brought, and which must assume responsibility for the subsequent judicial decision, to determine in the light of the particular circumstances of the case both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court (see, inter alia, Case C-162/06 *International Mail Spain* [2007] ECR I-9911, paragraph 23 and the case-law cited).

37 The Court may refuse to rule on a question referred by a national court only where it is quite obvious that the interpretation of Community law that is sought bears no relation to the actual facts of the main action or its purpose, or where the problem is hypothetical (see, inter alia, Case C-379/05 *Amurta* [2007] ECR I-9569, paragraph 64 and the case-law cited).

38 The first question referred by the national court results from the finding made by that court that the failure to publish the annex to Regulation No 622/2003 is founded on Article 8(1) of Regulation No 2320/2002 which precludes, on grounds of maintaining aviation security, the publication of certain categories of measures and information, without prejudice to the public right of access to documents as laid down in Regulation No 1049/2001. The relevance to the outcome of the proceedings of that question, by which the national court is essentially inquiring as to the possibility of justifying, in the light of that latter regulation, the failure to publish Community acts which must be published under Article 254 EC, is beyond doubt.

39 The second question concerns the binding force of the regulations or parts thereof which are not published in the *Official Journal of the European Union* and, thus, the enforceability of the obligations provided for in those regulations against individuals. Since it is for the referring court to define the legislative framework applicable to the dispute in the main proceedings and that court has established that the Austrian authorities relied on the regulations at issue in order to justify their refusal to allow Mr Heinrich to pass through the security control at Vienna-Schwechat airport, the connection between that question and the purpose of the main proceedings cannot be disputed.

40 Accordingly, the questions referred for a preliminary ruling must be held to be admissible.

Substance

The second question

41 By its second question, which should be examined first, the referring court is essentially inquiring of the Court whether the annex to Regulation No 622/2003, which has not been published in the *Official Journal of the European Union*, has binding force in so far as it seeks to impose obligations on individuals.

42 It must be noted at the outset that, under Article 254(2) EC, regulations of the Council and of the Commission are published in the *Official Journal of the European Union* and enter into force on the date specified in them or, in the absence thereof, on the twentieth day following that of their publication. It is evident from the very wording of the provisions of that article that a Community regulation cannot take effect in law unless it has been published in the *Official Journal of the European Union* (see Case C-161/06 *Skoma-Lux* [2007] ECR I-10841, paragraph 33).

43 Moreover, an act adopted by a Community institution cannot be enforced against natural and legal persons in a Member State before they have the opportunity to make themselves acquainted with it by its proper publication in the *Official Journal of the European Union* (*Skoma-Lux*, paragraph 37).

44 In particular, the principle of legal certainly requires that Community rules enable those concerned to know precisely the extent of the obligations which are imposed on them.

Individuals must be able to ascertain unequivocally what their rights and obligations are and take steps accordingly (see Case C-158/06 *ROM-projecten* [2007] ECR I-5103, paragraph 25 and the case-law cited).

45 Those principles must also be observed, and have the same consequences, where Community legislation obliges Member States, in order to implement it, to adopt measures imposing obligations on individuals. The measures adopted by the Member States to implement Community law must comply with the general principles of that law (see, to that effect, Case C-313/99 *Mulligan and Others* [2002] ECR I-5719, paragraphs 35 and 36, and Case C-384/05 *Piek* [2007] ECR I-289, paragraph 34). Therefore, national measures which, to implement Community legislation, impose obligations on individuals, must be published in order for the individuals to be able to ascertain those obligations (see, to that effect, *Mulligan and Others*, paragraphs 51 and 52).

46 Moreover, in such a situation the individuals must also have the possibility of determining the source of the national measures imposing obligations upon them, since it is in order to implement an obligation imposed by Community law that the Member States have adopted such measures.

47 That is all the more vital in the case of Community regulations since individuals must be able, if necessary, to request a national court to ascertain whether national implementing measures comply with a Community regulation (see, to that effect, Case 230/78 *Eridania-Zuccherifici nazionali and Società italiana per l'industria degli zuccheri* [1979] ECR 2749, paragraph 34). In such a situation, not only the national legislation at issue must be published but also the Community regulation which forces the Member States to take the measures imposing obligations on individuals.

48 As regards the list of prohibited articles, it is necessary to consider whether the unpublished Community legislation at issue in the main proceedings, namely the annex to Regulation No 622/2003, might have been intended to impose obligations on individuals.

49 According to Article 1 of Regulation No 2320/2002, the main objective of that regulation is to establish and implement appropriate Community measures in order to prevent acts of unlawful interference against civil aviation. That regulation also aims to provide a basis for the common interpretation of the relevant provisions of the Chicago Convention of 7 December 1944 on International Civil Aviation, in particular annex 17 thereto, that annex providing for minimum standards with the aim of guaranteeing the safety of civil aviation. The methods used to attain those objectives are, first, the definition of common basic standards applicable to aviation security measures and, secondly, the implementation of appropriate mechanisms to assess compliance.

50 As stated in Article 4(1) of Regulation No 2320/2002, those common basic standards are based on the current recommendations of European Civil Aviation Conference (ECAC) Document 30 and are laid down in the annex to that regulation. With the exception of a section for definitions, that annex provides for security, control and screening measures relating to, inter alia, passengers and cabin baggage.

51 The effect of points 4.1 and 4.3 of that annex is that all departing passengers and their cabin baggage are to be screened to prevent prohibited articles from being introduced into the security restricted areas and on board an aircraft. Any prohibited articles are removed from the passenger's possession, or the passenger is denied access into the security restricted area or the aircraft, as appropriate. An indicative list of those prohibited articles is included in the attachment to that annex. Although those provisions appear to be addressed primarily to the competent authorities in the Member States, it cannot be denied that they also seek to impose obligations on individuals.

52 Regulation No 2320/2002 confers, in Article 4(2) thereof, a power of implementation on the Commission in order to adopt, according to the procedure laid down in Article 9 of that regulation, the necessary measures for the implementation and technical adaptation of the common basic standards referred to in paragraph 49 of this judgment.

53 In the exercise of that power, the Commission adopted Regulation No 622/2003 laying down measures necessary for the implementation and technical adaptation of the common basic standards regarding aviation security. Those measures are included in the annex to that regulation and are not published. That annex was amended in accordance with the annex to Regulation No 68/2004, which was not published either.

54 It follows from the foregoing that it is possible that the measures laid down in Regulation No 622/2003 also concern the list of prohibited articles included in the attachment to the annex to Regulation No 2320/2002.

55 It is at least indicative in this connection that Regulation No 68/2004, in the third recital in the preamble thereto, specifies that there is a need for a harmonised list, accessible to the public, setting out separately those articles that are prohibited from being carried by passengers into restricted areas and the cabin of an aircraft. The need, emphasised in that recital to Regulation No 68/2004, to draw up a harmonised list implies that the list annexed to Regulation No 2329/2002 has in fact been amended.

56 Furthermore, should that be the case, it must be pointed out that the Commission's implementing legislation is clearly inconsistent in this respect, since on the one hand it considers it necessary to keep secret the measures on prohibited articles, whilst on the other it declares there is a need to draw up a harmonised list of those articles accessible to the public.

57 In any event, the alleged amendments referred to above to the list attached as an annex to Regulation No 2320/2002 were not published in the *Official Journal of the European Union*.

58 Secondly, Regulation No 2320/2002 sets out in detail, in Article 8 thereof, the rules on confidentiality, listing the categories of measures and information which are treated as secret and which are not published. As the Commission itself conceded at the hearing in response to a question asked by the Court, the list of articles prohibited in the security restricted areas and on board an aircraft does not fall within any of those categories. That list therefore does not fall under the rules on confidentiality laid down by Article 8 of Regulation No 2320/2002, which is also confirmed by the fact that the indicative list of those articles set out in the attachment to the annex to that regulation was published without any restriction in the *Official Journal of the European Union.*

59 Regulation No 2320/2002, specifically Article 4(2) thereof, therefore does not grant the Commission, in the exercise of its power of implementation under that provision, any legal basis for applying the rules on confidentiality laid down in Article 8 of that regulation to the measures for the adaptation of the list of prohibited articles attached as an annex to Regulation No 2320/2002.

60 It follows that, if Regulation No 622/2003 had in fact made adaptations to that list of prohibited articles — the premiss on which the referring court bases its decision — that regulation would, for that reason, have to be held invalid.

61 Moreover, and without it being necessary to answer the question of whether there can be exceptions to the obligation to publish a regulation under Article 254(1) and (2) EC, such adapting measures must in any event be published in the *Official Journal of the European Union* in so far as they seek to impose obligations on individuals. The issue of whether those measures and the rules they concern directly impose obligations on

individuals, or oblige the Member States to do so, is irrelevant in this connection, as is apparent from paragraphs 42 to 47 of this judgment. In both cases the measures must be published in the *Official Journal of the European Union*.

62 It follows that, since the annex to Regulation No 622/2003 was not published in the *Official Journal of the European Union*, the measures adapting the list of prohibited goods, in so far as they are set out in that annex, cannot be enforced against individuals.

63 Therefore, the answer to the second question is that the annex to Regulation No 622/2003, which was not published in the *Official Journal of the European Union,* has no binding force in so far as it seeks to impose obligations on individuals.

Temporal limitation

64 In the event that the Court declares Regulation No 622/2003 to be invalid, the Austrian and Polish Governments and the Government of the United Kingdom request that, under the second paragraph of Article 231 EC, all the measures in the annex to that regulation and the measures taken pursuant to that regulation should be considered as definitive pending the adoption of new measures by the Commission.

65 In that regard, it must first be pointed out that the Court in this judgment is not making a declaration of the invalidity of Regulation No 622/2003, in whole or in part.

66 It must be added that declaring that the annex to Regulation No 622/2003 has no binding force in so far as that annex seeks to impose obligations on individuals does not affect the obligations imposed on Member States by Regulation No 2320/2002 in the field of civil aviation security, in particular those on the prevention of introducing prohibited articles into the security restricted areas or on board an aircraft.

67 In addition, the guidelines in the attachment to the annex to Regulation No 2320/2002 provide detailed information in that regard, so that the national authorities are in a position to safeguard civil aviation security, in accordance with the objectives of Regulation No 2320/2002.

68 Lastly, it is contrary to the requirements of legal certainty to allow the annex to Regulation No 622/2003 to remain effective, in so far as that annex seeks to impose obligations on individuals, pending the adoption by the Commission of any necessary measures to confer upon it binding force with regard to individuals.

69 Accordingly, the effects of this judgment should not be subject to any temporal limitation.

The first question

70 In the light of the answer given to the second question, there is no need to answer the first question.

Costs

71 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

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

The annex to Commission Regulation (EC) No 622/2003 of 4 April 2003 laying down measures for the implementation of the common basic standards on aviation security, as amended by Commission Regulation (EC) No 68/2004 of 15 January 2004, which was not published in the *Official Journal of the European Union*, has no binding force in so far as it seeks to impose obligations on individuals.

[Signatures]