OPINION OF ADVOCATE GENERAL SHARPSTON

delivered on 10 April 2008 [1]

1. In the present reference, the Unabhängiger Verwaltungssenat im Land Niederösterreich (Austria) (Independent Administrative Chamber for the Land of Lower Austria) asks whether acts that are required to be published in accordance with Article 254 EC are 'documents' within the meaning of Article 2(3) of Regulation (EC) No 1049/2001 ('the Access to Documents Regulation'), [2] and whether regulations or parts thereof have binding force if, contrary to Article 254(2) EC, they have not been published in the Official Journal.

Legal framework

Relevant Community law provisions regarding publication of or access to documents

Treaty provisions

2. The second paragraph of Article 1 EU states:

'This Treaty marks a new stage in the process of creating an ever closer union among the peoples of Europe, in which decisions are taken as openly as possible and as closely as possible to the citizen.'

1 — Original language: English.

2 — Regulation 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).

3. Article 254 EC provides:

‘1. Regulations, directives and decisions adopted in accordance with the procedure referred to in Article 251 [3] shall be … published in the *Official Journal of the European Union*. …

2. Regulations of the Council and of the Commission, as well as directives of those institutions which are addressed to all Member States, shall be published in the *Official Journal of the European Union*. …

3. Other directives, and decisions, shall be notified to those to whom they are addressed and shall take effect upon such notification.’

4. Article 255 EC provides:

‘1. Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, shall have a right of access to European Parliament, Council and Commission documents, subject to the principles and the conditions to be defined in accordance with paragraphs 2 and 3.

2. General principles and limits on grounds of public or private interest governing this right of access to documents shall be determined by the Council, acting in accordance with the procedure referred to in Article 251 within two years of the entry into force of the Treaty of Amsterdam.

3. Each institution referred to above shall elaborate in its own Rules of Procedure specific provisions regarding access to its documents.’

The Access to Documents Regulation

5. The first four recitals lay the groundwork for the regulation by emphasising the importance of openness, transparency and accountability. The first recital expressly invokes Article 1 EU. The second recital explains that greater openness guarantees that the administration enjoys greater legitimacy and is more effective and more accountable to the citizen in a democratic system. The third recital indicates that the regulation ‘consolidates the initiatives that the institutions have already taken with a view to improving the transparency of the decision-making process’.

3 — Containing the so-called ‘co-decision procedure’.

The fourth recital sets out the objectives of the regulation:

'The purpose of this Regulation is to give the fullest possible effect to the right of public access to documents and to lay down the general principles and limits on such access in accordance with Article 255(2) [EC].'

6. Article 1(a) of the Access to Documents Regulation states that the purpose of the regulation is

'to define the principles, conditions and limits on grounds of public or private interest governing the right of access to European Parliament, Council and Commission (hereinafter referred to as "the institutions") documents provided for in Article 255 of the EC Treaty in such a way as to ensure the widest possible access to documents'.

7. Article 2(1) states that '[a]ny citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, has a right of access to documents of the institutions, subject to the principles, conditions and limits defined in this Regulation'.

8. Article 2(3) provides that the regulation applies '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'. Article 2(5) allows 'sensitive documents, as defined in Article 9(1)', to be 'subject to special treatment in accordance with that Article'.

9. Article 3(a) defines 'a document' 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'.

10. Articles 4 and 9 make specific provision for certain exceptions to the principle of public access to documents. Thus, Article 4 provides:

'1. The institutions shall refuse access to a document where disclosure would undermine the protection of:

(a) the public interest as regards:

— public security,

— defence and military matters,

…'

11. Article 9(1) defines 'sensitive documents' as 'documents originating from the institutions, or the agencies established by them, from Member States, third countries or International Organisations, classified as "TRES SECRET/TOP SECRET", "SECRET" OR "CONFIDENTIEL" [sic] in accordance with the rules of the institution concerned, which protect essential interests of the European Union or of one or more of its Member States in the areas covered by Article 4(1)(a), notably public security, defence and military matters'. The remainder of Article 9 provides, inter alia, that applications for access to sensitive documents must themselves be handled by persons who have a right to acquaint themselves with their content. Those persons are also to decide what reference may be made to such documents in the public register of documents provided for by Article 11. Institutions refusing access to such documents must give reasons; and the institution's rules concerning public access are to be made public.

12. Article 13 contains specific provisions on publication in the Official Journal:

'1. In addition to the acts referred to in Article 254(1) and (2) of the EC Treaty … the following documents shall, subject to Articles 4 and 9 of this Regulation, be published in the Official Journal:

(a) Commission proposals;

(b) Common positions adopted by the Council in accordance with the procedures referred to in Article 251 and 252 of the EC Treaty, and the reasons underlying those common positions, as well as the European Parliament's positions in these procedures;

…'

'2. As far as possible, the following documents shall be published in the Official Journal:

...

(c) directives other than those referred to in Article 254(1) and (2) of the EC Treaty, decisions other than those referred to in Article 254(1) of the EC Treaty, recommendations and opinions.

3. ...'

Regulation No 2320/2002

13. Article 1 of Regulation (EC) No 2320/2002 [4] explains that 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'.

14. Article 4(1) and (2) provides:

'1. The common basic standards on aviation security measures 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), [5] 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 of security measures.'

4 — Regulation of the European Parliament and of the Council of 16 December 2002 establishing common rules in the field of civil aviation security (OJ 2002 L 355, p. 1).

5 — A regulatory comitology procedure.

15. Article 6 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.’

16. Article 8 on dissemination of information provides:

‘1. Without prejudice to the public right of access to documents as laid down in [the Access to Documents Regulation]

(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);

…

shall be secret and not be published. They shall only be made available to the authorities referred to in Article 5(2),[6] 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.

…’

6 — An authority designated by each Member State.

17. Article 12 provides that penalties for breaching the provisions of the Regulation shall be 'effective, proportionate and dissuasive'.

18. The Annex referred to in Article 4(1) was duly published as an integral part of the Regulation. It contains, inter alia, common basic standards on screening of passengers (point 4.1) and screening of cabin baggage (point 4.3). All departing passengers are to be screened to prevent prohibited articles from being introduced into the security restricted areas and on board an aircraft. Their cabin baggage is to be screened prior to being allowed into security restricted areas and on board an aircraft and any prohibited articles are to be removed from the passenger's possession or the passenger denied access into the security restricted area or the aircraft as appropriate.

19. Point 1.18 of the Annex defines a 'prohibited article' as 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 such prohibited articles is found in the (published) 'Attachment' to the Annex, which contains guidelines for the classification of prohibited articles. The introductory sentence reads: 'Guidelines are given below for the possible shapes of weapons and restricted items, common sense shall however prevail in assessing whether an object gives cause to believe that it may be used as a weapon'. 'Bludgeons: Blackjacks, billy clubs, baseball clubs or similar instruments' are listed under point (iii) of the Attachment. Point (vi) states: 'Other Articles: such items as ice picks, alpenstocks, straight razors and elongated scissors, which, even though not commonly thought of as a deadly or dangerous weapon, could be used as a weapon, including toy or "dummy" weapons or grenades'. Point (vii) continues: 'Articles of any kind giving rise to a reasonable suspicion that an items [*sic*] may be used to simulate a deadly weapon; such articles shall include but not be limited to: objects resembling explosive devices or other items that may give [the] appearance of a weapon or dangerous item'.

Implementing regulations adopted by the Commission

20. The first two recitals to Regulation (EC) No 622/2003,[7] which implements Regulation No 2320/2002, explain its form and limited publication as follows:

7 — Regulation of 4 April 2003 laying down measures for the implementation of the common basic standards on aviation security (OJ 2003 L 89, p. 9). The unpublished Annex has been amended on numerous occasions, most recently by Commission Regulation (EC) No 23/2008 of 11 January 2008 (OJ 2008 L 9, p. 12). The substantive text has been modified only once, when Commission Regulation (EC) No 65/2006 of 13 January 2006 (OJ 2006 L 11, p. 4) inserted an Article 3a (dealing with new technical methods and processes).

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

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

21. Article 1 states that the regulation lays down the necessary measures for the implementation and technical adaptation of common basic standards regarding aviation security to be incorporated into national civil aviation security programmes.

22. Article 3 contains provisions on confidentiality. It indicates that the 'measures referred to in Article 1 are set out in the Annex. 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'.

23. Subsequent regulations amending the Annex to Regulation No 622/2003 each, except for Regulation No 1477/2007, [8] contain an article providing that the 'Annex to Regulation (EC) No 622/2003 is amended as set out in the Annex to this Regulation. Article 3 of that Regulation shall apply as regards the confidential nature of this [9] Annex.' [10]

24. Regulation No 68/2004, [11] the first regulation amending the Annex to Regulation No 622/2003, contains the following relevant recitals:

8 — Regulation No 1477/2007 of 13 December 2007 (OJ 2007 L 329, p. 22).

9 — 'The Annex' in Commission Regulation (EC) No 68/2004 of 15 January 2004 (OJ 2004 L 10, p. 14).

10 — Recital 6 of Regulation No 1477/2007 provides: 'The measures contained in the present Regulation are not included among those which, according to Article 8(1) of Regulation (EC) No 2320/2002, shall be secret and not published.' The second sentence of Article 1 accordingly provides that Article 3 of Regulation No 622/2003 does *not* apply as regards the confidential nature of 'this Annex'. The Annex to the regulation is duly published and reads as follows: 'Attachment 3 shall be replaced by the following text: "Attachment 3[,] Republic of Singapore[,] Changi airport"'. Since, contrary to the Commission's assurance at the hearing, the rest of the Annex to Regulation No 622/2003 (as amended) remains unpublished, the statement in the Annex to Regulation No 1477/2007 is best described as Delphic.

11 — This is the regulation identified as the relevant regulation by the referring court. During the course of the hearing, it appeared that this was because the modifications introduced by the subsequent amending regulation (Commission Regulation (EC) No 857/2005 of 6 June 2005 (OJ 2005 L 143, p. 9), the last amendment before the incident giving rise to the reference took place) did not alter the list of prohibited articles in the Annex to Regulation No 622/2003. In the remainder of this opinion, I shall refer simply to 'Regulation No 622/2003 (as amended)' to identify the version of Regulation No 622/2003 applicable at the material time. Since the Annexes to all the subsequent regulations are (like the original Annex to Regulation No 622/2003) unpublished, I have been unable to verify whether the list of prohibited articles has been amended since the version created by the Annex to Regulation No 68/2004.

'(2) In accordance with Regulation 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. [12]

be informed clearly of all articles that are prohibited.'

25. Despite the third and fourth recitals, the published text of Regulation No 68/2004 did not contain a list, accessible to the public, of prohibited articles.

(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.

26. Subsequent regulations amending the annex to Regulation No 622/2003 do not contain equivalent recitals, until Commission Regulation No 1546/2006, [13] which drew together the concepts contained in the second, third and fourth recitals to Regulation No 68/2004 in a single recital:

(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

'(3) In accordance with Regulation (EC) No 2320/2002 and in order to prevent acts of unlawful interference, 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. Notwithstanding this, passengers shall be clearly informed of rules relating to items prohibited from carriage on aircraft.'

12 — Slightly different wording, but to the same effect, was used in the third recital of Commission Regulation (EC) No 437/2007 of 20 April 2007 (OJ 2007 L 104, p. 16) and in the sixth recital of Commission Regulation (EC) No 915/2007 (OJ 2007 L 200, p. 3): 'In accordance with Regulation (EC) No 2320/2002, the measures laid down in the Annex to Regulation (EC) No 622/2003 were classified and were not published. The same necessarily applies to any amending act.'

13 — Regulation of 4 October 2006 (OJ 2006 L 286, p. 6).

27. Despite that recital, the published text of Regulation No 1546/2006 (like its predecessors) did not contain a list, accessible to the public, of prohibited articles. [14]

The drafting guidelines

28. On 22 December 1998 the European Parliament, the Council and the Commission concluded an Inter-institutional Agreement on common guidelines for the quality of drafting of Community legislation. [15] The guidelines are not legally binding. [16] Amongst the general principles that they contain are the following:

'1. Community legislative acts shall be drafted clearly, simply and precisely.

…

3. The drafting of acts shall take account of the persons to whom they are intended to apply, with a view to enabling them to identify their rights and obligations unambiguously …

…

10. The purpose of the recitals is to set out concise reasons for the chief provisions of the enacting terms … They shall not contain normative provisions …[[17]]

22. Technical aspects of the act shall be contained in the annexes, to which individual reference shall be made in the enacting terms of the act and which shall not embody any new right or obligation not set forth in the enacting terms.'

14 — It may be, given that recital, that the list of prohibited articles was modified by the annex to Regulation No 1546/2006. I have been unable to verify whether that is the case.

15 — (OJ 1999 C 73, p. 1): 'the inter-institutional agreement on drafting'.

16 — See recital 7.

17 — See also Joined Cases C-154/04 and C-155/04 *Alliance for Natural Health* [2005] ECR I-6451, paragraph 92, which refers to the inter-institutional agreement.

The main proceedings and the question referred

29. On 25 September 2005, having checked in for his flight, Dr Heinrich presented himself at the security control at Vienna-Schwechat Airport. His cabin baggage was found to contain tennis racquets. As these were allegedly prohibited articles, [18] he was not permitted to pass through the security control. It appears that he nevertheless boarded the aircraft with the tennis racquets in his cabin baggage. [19] Security staff subsequently ordered him to leave the aircraft.

30. Dr Heinrich has brought proceedings before the referring court, which points out that persons carrying prohibited articles listed in the Annex to Regulation No 622/2003 (as amended) may not pass through the security control or board aircraft and that, if they breach those provisions, they must face the 'effective, proportionate and dissuasive penalties' required by Article 12 of Regulation No 2320/2002. It therefore considers that the provisions of the Annex to Regulation No 622/2003 (as amended) are not directed solely at State bodies but also at individuals, who are required to base their conduct on the Regulation. This is, however, rendered impossible by the fact that the Annex to Regulation No 622/2003, as amended by Regulation No 68/2004, was not published in the Official Journal and is therefore not accessible to the public.

31. The referring court considers that failure to publish regulations (or parts of them) in the Official Journal, contrary to the requirement of Article 254(1) and (2) EC, is so serious a violation of the rule of law that such regulations are legally non-existent and hence not binding. It points to Article 42 of the Charter of Fundamental Rights of the European Union, which stresses the significance of 'access to law'.

32. The referring court also considers that the Access to Documents Regulation cannot be invoked to restrict access to acts which are legally binding on individuals and which, inter alia for that reason, are required to be published in the Official Journal.

18 — Tennis racquets are not listed as such in the (published) Attachment to the Annex to Regulation No 2320/2002, although points (iii), (vi) and (vii) might begin to indicate that they could be used as weapons and should possibly therefore also be prohibited.

19 — I express no view as to whether Dr Heinrich's action in boarding the aircraft after he had been stopped at the security check was a separate (aggravating) act or whether it falls to be considered as part of the overall question of whether it was permissible for him to proceed to the aircraft with his tennis racquets. That is a matter for the national court.

33. The referring court has therefore decided to refer the following questions to the Court for a preliminary ruling:

'(1) Do documents within the meaning 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 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*?'

34. Written observations were submitted by the Czech, Finnish, French, German, Greek, Hungarian, Polish and Swedish Governments, as well as by the Council and the Commission.

35. At the hearing on 13 November 2007, the parties that submitted written observations (except for the French, German and Hungarian Governments) and, in addition, the Austrian, Danish and United Kingdom Governments, and the European Parliament, were present and made oral submissions. [20]

Admissibility

36. Various Member States have suggested, for different reasons which partially overlap, that the reference is inadmissible, in whole or in part.

37. The French, German and United Kingdom Governments argue that, because the referring court specifies neither the conditions under which Dr Heinrich brought the case nor the aim of the action, it is impossible to establish whether an answer to the questions referred is necessary to decide the case before the national court. The French Government suggests further that the first question is inadmissible because the application of the Access to Documents Regulation falls outside the jurisdiction of national courts; and the second question is inadmissible because the Austrian authorities

20 — Dr Heinrich attended the hearing but was not represented and did not make submissions.

were in any case competent to prohibit objects from being taken on board an aircraft. The national court has not asked the only pertinent question, namely whether the relevant national rules are compatible with Regulation No 2320/2002. The German Government maintains that the legal basis for the contested measures is to be found in Austrian law, not in the regulations cited by the referring court, which has failed to explain how declaring those regulations invalid could affect the validity of the relevant national rules.

38. The Swedish Government, whilst not expressly challenging the admissibility of the reference, nevertheless wonders whether the non-publication of the Annex to Regulation No 622/2003 (as amended) was directly relevant to whether Dr Heinrich could ascertain his legal obligations. At the hearing, the United Kingdom Government also queried whether the non-publication of the Annex was relevant to the outcome of the national proceedings. It suggested that Dr Heinrich should have been able to obtain the necessary information from the Internet, specifically from a Commission press release [21] and/or from airport and airline websites, pointing out that a list of prohibited articles appears on the Austrian Airlines website. [22]

21 — Commission Press Release IP/04/59 of 16 January 2004, available online at http://europa.eu/rapid/pressReleasesAction.do?reference=IP/04/59&format=HTML&aged=1&language=EN&guiLanguage=en. Tennis racquets do *not* appear as prohibited articles on that list. Without the text of the unpublished Annex, there is, however, no way of knowing whether the list in the press release exactly replicates the list of prohibited articles in that Annex.

22 — It appears from the national file, however, that Dr Heinrich did not fly Austrian Airlines.

39. It is necessary to deal with those arguments.

40. It is settled case-law that the national court must 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, in order to enable the Court to provide an interpretation of Community law that will be of assistance to the national court. [23]

41. The information provided in the order for reference 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. The Court has held repeatedly that it is its duty to ensure that that opportunity is safeguarded, bearing in mind that under that provision only the actual order for reference is notified to the interested parties. [24]

42. It is true that the order for reference does not explicitly state Dr Heinrich's aim in bringing proceedings. However, the gist of his complaint is perfectly plain. Dr Heinrich says that he was not informed that tennis racquets were prohibited articles of cabin

23 — See Case C-237/04 *Enirisorse* [2006] ECR I-2843, paragraph 17, and the case-law cited there.

24 — See *Enirisorse*, cited in footnote 23 above, paragraph 18, and the case-law cited there.

baggage and that he would render himself liable to sanctions (and would be denied boarding) if he attempted to take them into the cabin of the aircraft. He maintains that the security agents who boarded the plane and required him to leave were therefore acting illegally. [25]

43. It appears from the national file that the national authorities, both in email correspondence with Dr Heinrich and before the national court, relied on Community law, in the shape of Regulations Nos 2320/2002 and 622/2003 (as amended), as the basis for the classification (under national law) of tennis racquets as prohibited articles. [26]

44. Before the national court, Dr Heinrich therefore invoked the fact that the Annex to Regulation No 622/2003 (as amended by Regulation No 68/2004) was not published.

45. It is clear from the written and oral submissions before the Court that the information in the order for reference has enabled the parties to make meaningful submissions on the questions referred. [27] Relevant elements of the additional information available from the national court file were summarised in the Report for the Hearing and were thus brought to the attention of the parties for the purposes of the hearing, at which they had an opportunity to enlarge upon their observations. [28]

46. I consider that the referring court has fulfilled its duty to provide the Court with sufficient material as to the factual and legislative context of the dispute to enable it to interpret the Community legislation at issue having regard to the situation forming the subject-matter of the main proceedings. The reference should therefore not be declared inadmissible on that account. [29]

47. So far as the relevance of the questions referred is concerned, it is settled case-law that in the context of the instrument of cooperation that is the Article 234 EC procedure, 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

25 — Dr Heinrich himself has not lodged written observations or made oral submissions. The facts that he alleges in his written submissions in the national procedure (which are included in the national court's file lodged with the Registry), if found to be proven by the national court, would however point to a significant absence of legal certainty.

26 — No question was referred as to the interpretation or validity of Regulation No 2320/2002.

27 — Case C-109/99 *ABBOI* [2000] ECR I-7247, paragraph 44.

28 — See also *ABBOI*, cited in footnote 27 above, paragraph 45, and the case-law cited there.

29 — Again, see *ABBOI*, cited in footnote 27, paragraphs 46 and 47.

relevance of the questions which it submits to the Court. Consequently, where the questions submitted by the national court concern the interpretation of Community law, the Court of Justice is, in principle, bound to give a ruling. [30] Questions on the interpretation of Community law thus enjoy a presumption of relevance. [31]

48. It is true that in exceptional circumstances the Court will examine the conditions in which the case was referred by the national court, in order to assess whether it has jurisdiction. However, the Court may refuse to rule on a question referred for a preliminary ruling 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, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it. [32]

49. The first question arises because the referring court holds the non-publication of the Annex to Regulation No 622/2003 (as amended) to be based on Article 8 of Regulation No 2320/2002, which provides for certain categories of aviation security measures not to be published, but is 'without prejudice' to the public right of access to documents laid down in the Access to Documents Regulation. The referring court wonders whether the latter can be invoked to justify non-publication of documents for which the Treaty explicitly prescribes publication. The national court therefore requires guidance on the interpretation of the Access to Documents Regulation in order to decide the case before it.

50. The second question reflects the national court's doubts as to the binding force of provisions of Community law that have not been published but that nevertheless, in its view, impose obligations on individuals. In my view, the concept of 'binding force' requires one to examine both whether Regulation No 622/2003 imposes obligations on individuals and whether it is valid or indeed legally existent. In accordance with its obligations under *Foto-Frost*, [33] the national court has therefore decided to refer the second question to the Court for a preliminary ruling.

30 — See, inter alia, Case C-119/05 *Lucchini* [2007] ECR I-6199, paragraph 43, and the case-law cited there; and Case C-162/06 *International Mail Spain* [2007] ECR I-9911, paragraph 23.

31 — See, inter alia, Case C-355/97 *Beck and Bergdorf* [1999] ECR I-4977, paragraphs 22 to 24; Joined Cases C-94/04 and C-202/04 *Cipolla* [2006] ECR I-11421, paragraph 25; and Case C-379/05 *Amurta* [2007] ECR I-9569, paragraph 64.

32 — See *Amurta*, cited in footnote 31 above, paragraph 64 and the case-law cited there.

33 — Case 314/85 *Foto-Frost* [1987] ECR 4199, paragraphs 17 to 20, establishing the principle that only this Court may declare a Community measure invalid.

51. The Court has not seen the unpublished Annex to Regulation No 622/2003 (as amended). Nor, so far as I can establish, has the national court. Neither court is therefore in a position to say whether tennis racquets figure specifically in the list of prohibited articles contained in that Annex or whether there are other enabling or mandatory provisions elsewhere in the Annex that might have a bearing on the outcome of this case. [34] Neither court can therefore establish for certain whether Regulation No 622/2003 (as amended) through its Annex imposes obligations on individuals and, if so, what their precise content may be.

52. However, as I have indicated, the essence of this case is that the national authorities appear, before the national court, to be relying on unpublished Community legislation that is arguably invalid or non-existent precisely *because* it is unpublished. This Court can examine whether non-publication gives rise in law to those consequences without examining the content of the Annex. If it concludes that the Community legislation is invalid or non-existent, the national court will likewise be relieved of any necessity to examine its content.

34 — The fact that the Commission published a press release (see footnote 21) with a list of prohibited articles (in which tennis racquets do not figure) is interesting but not relevant in that respect. The Court has recently expressly held in Case C-161/06 *Skoma-Lux* [2007] ECR I-10841, paragraphs 47 to 50, that 'publication' of a regulation on the EUR-Lex website does not satisfy the requirements of Article 254 EC (see further points 88 and 89 below). *A fortiori*, publication through a press release in a limited subset of the Union's official languages (English, French, and German) cannot be regarded as adequate, nor as respecting legal certainty.

53. It follows that the questions referred for a preliminary ruling are admissible.

Substance

Preliminary comments

54. The EC Treaty provides for the publication and/or notification of measures that are intended to have legal effect, and for a right of access to documents of the Community institutions. The Treaty deals with these separate issues under two adjacent and complementary provisions.

55. Article 254 EC lays down the rules for making Community acts known to those whom they affect and ensures an appropriate level of mandatory communication — either publication in the Official Journal or notification — for legally binding acts. The legal acts listed in Article 254(1) and (2) EC are the object of mandatory publication in the Official Journal, in order that the widest possible public shall be aware of their contents. The legal acts of lesser public import listed in Article 254(3) EC — directives other than those addressed to all Member States, and

decisions — are the object of mandatory notification to their addressees; but are not automatically placed in the public domain through publication in the Official Journal.

56. If it is considered desirable, in the interests of transparency and more open government, to make publicly available any categories of document *not* covered by the mandatory publication requirements of Article 254(1) and (2), other (additional) mechanisms need to be put in place.

57. Article 255 makes it clear that that should happen. It establishes the principle that 'any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, shall have a right of access to European Parliament, Council and Commission documents'; and confers the necessary competences on the Council and on each institution to determine, respectively, the general principles and the specific provisions governing such access.

58. The Access to Documents Regulation duly lays down the 'general principles and limits on grounds of public or private interest governing this right of access to documents'. [35] In so doing, it expressly bases itself on Article 255 EC [36] and follows the structural indications given in that Treaty article. Thus, it first defines its purpose, which is to ensure 'the widest possible access to documents', to provide rules establishing 'the easiest possible exercise of this right' and 'to promote good administrative practice on access to documents'. [37] That can only mean to ensure access to what would *not* otherwise be public. Secondary legislation enacted under Article 255 EC is not necessary to obtain 'access' to a document that is subject to mandatory publication in the Official Journal under Article 254(1) and (2) EC. [38]

59. The obligation to publish regulations therefore clearly arises directly from Article 254(1) and (2) EC. That is so regardless of whether the text of a regulation (normally, in paper or electronic form) [39] is capable of being considered to be a 'document' for the purposes of the Access to Documents Regulation.

60. It therefore seems appropriate to deal with the questions referred in reverse order.

35 — Article 255(2) EC.

36 — See its legal base, the fourth recital and Article 1(a).

37 — Article 1(a), (b) and (c) respectively.

38 — Compare the order of the Court of First Instance in Case T-106/99 *Meyer* v *Commission* [1999] ECR II-3273: 'It is not the purpose of Decision 94/90 [a precursor to the Access to Documents Regulation] to make accessible to the public, by establishing a right of access with which the Commission must comply, documents which are already accessible by reason of their publication in the Official Journal' (at paragraph 39).

39 — As to the inadequacy of publication in an electronic form, see *Skoma-Lux*, cited in footnote 34, paragraphs 47 to 50.

The second question

61. By its second question, the referring court asks whether 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*.

What constitutes adequate publication of a regulation?

62. Article 254(1) and (2) EC are quite unequivocal:

'1. Regulations … shall be published in the [Official Journal]. …

2. Regulations of the Council and of the Commission … shall be published in the [Official Journal].'

63. It follows from the Treaty and from what I have said in my preliminary comments that the duty to publish regulations under those provisions is unequivocal and without exception.

64. An annex is an integral part of a legislative measure. The contrary view would permit its authors to avoid the requirements of Article 254 EC by the simple expedient of placing substantive provisions in an unpublished annex. That is, indeed, precisely what the Commission sought to do in the present case. The published provisions of Regulation No 622/2003 are a mere skeleton. [40] The reader cannot ascertain the effects of the regulation without having sight of the Annex, because the Annex contains the whole substance of the regulation. [41]

65. Regulation No 622/2003 (as amended) is remarkably laconic in the explanation that it proffers for proceeding by way of regulation and yet placing substantive material not

40 — They contain, in sequence, the object of the regulation (Article 1), two definitions (Article 2), the cross-reference to the Annex, for which secrecy is claimed (Article 3), an enabling provision about the use of new technical methods and processes (Article 3a), a notification requirement where, under Article 4(3) of Regulation No 2320/2002, Member States apply national security measures to small airports instead of the measures in the regulation (Article 4), a similar notification requirement where compensatory measures are adopted because screened passengers and arriving passengers cannot physically be separated (Article 5) and the standard provision specifying date of entry into force and direct applicability (Article 6).

41 — Namely the 'necessary measures for the implementation and technical adaptation of common basic standards regarding aviation security to be incorporated into national civil aviation programmes': see Article 1, to which Article 3 cross-refers. The technique adopted appears to be a clear violation of point 22 of the inter-institutional agreement on drafting, which does not permit an annex to contain any new right or obligation not set forth in the enacting terms.

within the enacting terms but in an unpublished annex. Its recitals state baldly that 'a regulation is the most suitable instrument' [42] for the adoption by the Commission of measures for the implementation of common basic standards for aviation security measures throughout the European Union, without explaining why that is so. The justification advanced for placing all substantive material in an unpublished annex is similarly terse: this is said to be 'in accordance with Regulation … No 2320/2002 and in order to prevent unlawful acts'. [43] It is difficult to reconcile any of this with the guidelines contained in the interinstitutional agreement on drafting. [44] That said, in my view more thorough reasoning would still not have sufficed to exempt the regulation from full publication in the Official Journal.

66. As the European Parliament observed at the hearing, there is moreover a fundamental absurdity in the Commission's position. If the Commission thought that Article 8 of Regulation No 2320/2002 required it to keep secret the list of prohibited articles, publication of the press release [45] was a flagrant violation of that article. If, on the contrary, the Commission thought that the list of prohibited articles fell outwith Article 8, it ought of course to have published it in the Official Journal. The basic 'guidelines' indicating the kinds of articles that are to be prohibited do indeed appear in the (published) attachment to the (published) Annex to Regulation No 2320/2002. It is therefore rather difficult to discern the logic behind *not* publishing what amounts (presumably) to a fleshed-out version of that list. Finally, it is self-contradictory to state in the preamble to Regulation No 68/2004 (in my view, entirely correctly) that 'there is … a need for a harmonised list, accessible to the public …' [46] and then to fail to place such a list in the public domain.

67. The publication of the skeleton without the substance was therefore a defective and inadequate publication that does not satisfy the requirements of Article 254(2) EC.

42 — Recital 1.

43 — Recital 2.

44 — See the interinstitutional agreement on drafting, guidelines 1, 3 and 22. On the importance of this agreement, see the Opinion of Advocate General Geelhoed in *Alliance for Natural Health*, cited in footnote 17, point 88.The more detailed 'Joint Practical Guide: Guide of the European Parliament, the Council and the Commission for persons involved in the drafting of legislation within the Community institutions' (the 'JPG', available at http://eur-lex.europa.eu/en/techleg/1.htm et seq.) likewise indicates the importance of giving clear and appropriate reasons, especially in respect of repressive measures: see in particular JPG guidelines 10 (especially 10.14), 18 and 22.

45 — See footnote 21

46 — Recital 3 to Regulation No 68/2004. Recital 4 recognises that 'such a list can never be exhaustive' and that 'the appropriate authority, therefore, should be permitted to prohibit other articles in addition to those listed', adding immediately that 'it is appropriate that before and during the check-in phase passengers should be informed clearly of all articles that are prohibited'.

The legal consequences of the non-publication of a regulation

— Impossibility of enforcing non-published measures against individuals

68. If the Court decides, contrary to what I shall suggest, [47] not to rule on the validity of the regulation, it should nevertheless recall its settled case-law that Community legal acts that have not been published cannot impose obligations on the public.

69. The Court has held, variously, that the 'principle of legal certainty requires that Community rules enable those concerned to know precisely the extent of the obligations which are imposed on them' [48] and that '[i]ndividuals must be able to ascertain unequivocally what their rights and obligations are and take steps accordingly'. [49]

70. Neither this Court nor the referring court has seen the secret Annex. Neither court can therefore say with confidence whether, and if so how and to what extent, Regulation No 622/2003 (as amended) has affected Dr Heinrich. Both courts know merely that the national authorities have identified Regulation No 622/2003 (with Regulation No 2320/2002) as the basis for their actions in denying Dr Heinrich boarding.

71. If the Court decides to rule only on whether Regulation No 622/2003 (as amended) imposes obligations on individuals, I consider that it should restrict itself to holding in the abstract that the secret Annex cannot contain or be the source of *any* obligations for individuals.

72. Let me outline briefly the options for the Court if it decides to go beyond that abstract statement and to examine whether the Annex to Regulation No 622/2003 in fact intended to impose obligations on individuals.

73. It seems to me that three hypotheses are possible as to the legal basis for the measures taken against Dr Heinrich:

47 — At points 78 to 110 below.

48 — See Case C-209/96 *United Kingdom* v *Commission* [1998] ECR I-5655, paragraph 35; Case C-108/01 *Consorzio del Prosciutto di Parma and Salumificio S. Rita* [2003] ECR I-5121, paragraph 89; Case C-255/02 *Halifax and Others* [2006] ECR I-1609, paragraph 72; and Case C-158/06 *ROM-projecten* [2007] ECR I-5103, paragraph 25.

49 — See Case C-143/93 *Van Es Douane Agenten* [1996] ECR I-431, paragraph 27; Case C-248/04 *Koninklijke Coöperatie Cosun* [2006] ECR I-10211, paragraph 79. See also e.g. Case 98/78 *Racke* [1979] ECR 69, paragraph 15; and *ROM-projecten*, cited in footnote 48, paragraph 25.

(a) The measures were based on sovereign national powers or on Regulation No 2320/2002, Article 6 of which leaves Member States a fairly free rein. If that is the case, Regulation No 622/2003 (as amended) is of no importance in respect of the case before the national court;

(b) The measures were based on national powers themselves derived exclusively from, and/or circumscribed by, the Annex to Regulation No 622/2003 (as amended), without which they would not have been valid. In that case, the prohibition on taking tennis racquets into aircraft stands or falls with Regulation No 622/2003 (as amended);

(c) The measures constituted a direct application of the provisions of the Annex. The consequence for the prohibition on tennis racquets would be the same as under (b).

74. Without having seen the unpublished Annex to Regulation No 622/2003 (as amended), it is impossible for the Court to reach an informed conclusion as to which of those hypotheses is correct.

75. Regulation No 622/2003 (as amended) is an implementing regulation enacted by the Commission under Article 4(2) of Regulation No 2320/2002, in accordance with the procedure referred to in Article 9(2) thereof. It is (presumably) to be read in conjunction with Article 4(1) of, the Annex to, and the Attachment to the Annex to, that regulation. Point 4 of the Annex requires that passengers carrying prohibited articles have those articles removed or be denied access to the security restricted area or the aircraft as appropriate. The Attachment provides guidelines as to what are to be considered to be prohibited articles. It seems likely that the actual list of prohibited articles, together with any more detailed considerations as to what is also to be regarded as a prohibited article (and why), and any express or implied authorisation at Community level of additional measures are all to be found in the Annex to Regulation No 622/2003 (as amended). Article 12 of Regulation No 2320/2002 requires Member States to ensure that penalties for breaching the provisions of the regulation shall be 'effective, proportionate and dissuasive'.

76. Against that background, it seems to me intuitively likely that Regulation No 622/2003 (as amended) imposes obligations on individuals. However, that is mere speculation. The matter could only be settled by having sight of the Annex to Regulation No 622/2003 (as amended).

77. I therefore do not think that the Court is in a position to rule on whether the Annex to Regulation No 622/2003 (as amended) imposes obligations on individuals without requesting to see the Annex and reopening the oral procedure. I do not suggest that it does so.

— The validity of Regulation No 622/2003 (as amended)

78. The second question does not explicitly raise the issue of validity. However, the order for reference makes it clear that the national court has serious doubts as to the binding force of Regulation No 622/2003 (as amended) and that those doubts led to the reference. [50]

79. In these circumstances, the Court may rule on the validity of the Community measure at issue. [51] Although it is for the national courts to decide the relevance of the questions they refer to the Court of Justice, the function of the Court is then to 'extract from all the information provided by the national court those points of Community law which, having regard to the subject-matter of the dispute, require interpretation, or whose validity requires appraisal'. [52]

80. I therefore turn to the question of how failure to publish a regulation affects its validity.

81. In *Opel Austria*, [53] the Court of First Instance held that deliberate backdating of the issue of the Official Journal in which the contested regulation had been published, with the effect that the regulation entered into force before its publication, had infringed the principle of legal certainty. [54] The regulation was therefore annulled.

82. The Court has held on numerous occasions that the principle of legal certainty precludes, in general, a Community measure from taking effect from a point in time before its publication, adding that it may 'exception-

50 — See points 31 and 50 above.

51 — See Case 16/65 *Schwarze* [1965] ECR 877, at p. 886; Case 62/76 *Strehl* [1977] ECR 211; and Case 145/79 *Roquette Frères* [1980] ECR 2917, paragraphs 6 and 7.

52 — *Roquette Frères*, cited in footnote 51, paragraph 7.

53 — Case T-115/94 *Opel Austria* v *Council* [1997] ECR II-39.

54 — Paragraphs 127 to 133. See also paragraph 124 in general on the principle of legal certainty, which requires in particular that rules involving negative consequences for individuals should be clear and precise and their application predictable for those subject to them (see also, to this effect, Case 325/85 *Ireland* v *Commission* [1987] ECR 5041; *Van Es Douane Agenten*, cited in footnote 49, paragraph 27; Case C-63/93 *Duff and Others* [1996] ECR I-569, paragraph 20; and Case C-17/03 *VEMW and Others* [2005] ECR I-4983, paragraph 80).

ally' be otherwise where the purpose to be achieved so demands and where the legitimate expectations of those concerned are duly respected. [55] There is, in consequence, limited authority for the proposition that Community legal instruments may have a legal effect even at a time when they are unpublished. [56]

83. Those cases concerned delayed publication. [57] In the present case, the Annex was never intended to be published. The conclusion of the Court of First Instance in *Opel Austria* would therefore seem to be a fortiori applicable. Moreover, when the Court permits retroactivity, two conditions must be satisfied: the purpose to be achieved must require it and the legitimate expectations of those concerned must be duly respected. [58] It is difficult to see how either condition can be said to be fulfilled here.

84. The Court's judgment in *Sevince* [59] does not provide relevant guidance in the present case. There, the Court held that the non-publication of Decisions No 2/76 and No 1/80 of the EEC-Turkey Association Council did not prevent those provisions having direct effect upon which an individual could rely. [60] There is, however, no obligation either in Article 254 EC or in the EEC-Turkey Association Agreement [61] to publish such acts. [62]

85. The case-law on the obligation to notify (individual) decisions to those to whom they apply, pursuant to Article 254(3) EC, may however assist, since that notification requirement can be viewed as the functional equivalent of the publication requirement in Article 254(1) and (2) EC. The point of both requirements is to inform those affected by legal rules of their content.

55 — See, inter alia, Case C-331/88 *Fedesa and Others* [1990] ECR I-4023, paragraph 45; Case C-259/95 *Parliament* v *Council* [1997] ECR I-5303, paragraph 21; and Case C-413/04 *Parliament* v *Council* [2006] ECR I-11221, paragraph 75.

56 — See *Racke*, cited in footnote 49, paragraph 20, and Case 99/78 *Decker* [1979] ECR 101, paragraph 8 (both concerned with monetary compensatory amounts for the wine trade) and Joined Cases C-143/88 and C-92/89 *Zuckerfabrik* [1991] ECR I-415, paragraph 52 (levy on sugar producers for previous marketing year). See also the 'isoglucose cases': Case 108/81 *Amylum* v *Council* [1982] ECR 3107; Case 110/81 *Roquette Frères* v *Council* [1982] ECR 3159 and Case 114/81 *Tunnel Refineries* v *Council* [1982] ECR 3189.

57 — See also Case 185/73 *König* [1974] ECR 607, in which the Court held that the belatedness of publication affected the date from which the regulation could be applied and take effect, but not its intrinsic validity (paragraph 6).

58 — See, similarly, the Opinion of Advocate General Tizzano in Case C-376/02 *'Goed Wonen'* [2005] ECR I-3445, points 31 and 35, paraphrasing the cases referred to in footnote 55 above.

59 — Case C-192/89 [1990] ECR I-3461.

60 — The Court was careful to distinguish between consequences for the Member State and consequences for the individual, indicating that '[a]lthough non-publication of those decisions may prevent their being applied to a private individual, a private individual is not thereby deprived of the power to invoke, in dealings with a public authority, the rights which those decisions confer on him' (paragraph 24).

61 — OJ 1973 C 113, pp. 1.

62 — Compare Case C-149/96 *Portugal* v *Commission* [1999] ECR I-8395. The contested decision in that case (Council Decision 96/386/EC of 26 February 1996 concerning the conclusion of Memoranda of Understanding between the European Community and the Islamic Republic of Pakistan and between the European Community and the Republic of India on arrangements in the area of market access for textile products (OJ 1996 L 153, p. 47)) was a decision without a specific addressee. It thus fell outside the category of acts that require publication under Article 254 EC (contrary to what will be the case under Article 297 of the Treaty on the Functioning of the European Union if the Treaty of Lisbon comes into force). It was nevertheless a measure that evidently merited publication. Against that background, the Court was clearly right to hold that 'the belated publication of a Community measure in the *Official Journal of the European Communities* does not affect the validity of that measure' (paragraph 54).

86. The Court made it clear in *Hoechst* that '[complete] non-notification [can] have no consequence other than a finding of the non-existence or annulment of the act in question'. The Court added that 'Community law does not accept an intermediate situation between a finding that an act is non-existent and its annulment', and that that 'conclusion is not open to the objection that, pursuant to Article 254(3) EC, decisions take effect upon notification and that, in the absence of notification, the decision is devoid of any effect. As regards notification of an act, like any other essential procedural requirement, either the irregularity is so grave and manifest that it entails the non-existence of the contested act, or it constitutes a breach of essential procedural requirements that may lead to its annulment'. [63]

87. In *Spain* v *Commission* [64] the Court held that failure to notify can in certain circumstances justify the annulment of an act of a Community institution. [65] In so doing, the Court treated lack of notification as not merely an impediment to a measure entering into force, [66] but rather as a fundamental flaw affecting its validity. The intellectual basis for that approach might be thought to be readily transposable to the non-publication of a regulation.

88. Very recently, in *Skoma-Lux*, [67] the Court had to consider the legal consequences of the fact that a Community regulation that Skoma-Lux was alleged to have infringed had not, at the material time, been published in Czech in the Official Journal. It stated unequivocally [68] that 'it is evident from the very wording of the provisions of Article 254(2) EC that a Community regulation cannot take effect in law unless it has been published in the *Official Journal of the European Union*'. Read in isolation, that statement might lead to the conclusion that Regulation No 622/2003 (as amended), which was not fully published, could not generate any legal effects whatsoever. In *Skoma-Lux* itself, the Court was careful to avoid such a conclusion. Rather, it considered separately, first, whether the regulation in question was enforceable against individuals (concluding that it was unenforceable), [69] and, second, whether the regulation was nevertheless binding on the Member State concerned as from its accession (holding that it was) [70] before dealing, third, with the consequences, namely whether national decisions taken pursuant to that regulation which had become definitive under the applicable national rules had to be called into question (which the Court answered in the negative, save for 'administrative measures or judicial decisions, in particular of a coercive nature, which would compromise fundamental rights'). [71]

63 — Case C-227/92 P *Hoechst* v *Commission* [1999] ECR I-4443, paragraphs 68, 71 and 72.

64 — Case C-398/00 [2002] ECR I-5643.

65 — At paragraph 33; see also Case T-323/00 *SAT.1* v *OHMI (SAT.2)* [2002] ECR II-2839, paragraph 12, where the Court of First Instance held that, on the facts, there had been no real breach.

66 — See Case 48/69 *ICI* v *Commission* [1972] ECR 619, paragraphs 39 and 40. See also Joined Cases T-78/96 and T-170/96 *W* v *Commission* [1998] ECR-SC I-A-239 and II-745, paragraph 183.

67 — Cited in footnote 34.

68 — At paragraph 33.

69 — See paragraphs 32 to 51 and 60.

70 — See paragraphs 57 to 59.

71 — See paragraphs 67 to 73. The Court left it to the competent national authorities to ascertain whether that proviso was applicable in particular cases.

89. The Court's nuanced approach in *Skoma-Lux* was justified by the fact that that case involved not complete non-publication of a regulation in any language, but lack of timely publication in the official language of the Accession State concerned. A distinction between the consequences for Member States and individuals therefore seemed appropriate. Individuals need to be able to ascertain their rights and obligations in (one of) the official language(s) of the Member State of which they are nationals, which is likely to be their mother tongue. However, the Member State was already aware of, and had expressly accepted, the *acquis communautaire*. It was therefore reasonable that it should be bound by that regulation, which formed part of that (published) acquis.

90. In the present case, the text of the Annex has never been published. Non-publication was, moreover, neither accidental nor unintentional. [72] The Commission deliberately promulgated a series of new measures (Regulation No 622/2003 and its progeny, including in particular Regulation No 68/2004) and published each in turn only in part, keeping the (substantive) Annex secret. There was, in other words, a consistent and intentional practice of non-publication.

91. I conclude that complete failure to publish a regulation or an integral part thereof, in violation of Article 254 EC, constitutes a violation of an essential procedural requirement, resulting, at the very least, in invalidity.

— Temporal limitation

92. If the Court declares Regulation No 622/2003 (as amended) to be invalid, the question arises as to the point in time from which that finding takes effect. At the hearing, the Austrian and Polish Governments and the United Kingdom Government asked the Court to declare that all measures taken under the contested regulation are definitive until the Commission has adopted a new measure. They have, however, failed to specify which consequences of the invalidity of Regulation No 622/2003 (as amended) would justify limiting the temporal effect of this judgment.

93. It is true that the Court has on occasion maintained the effects of invalid rules until new rules were adopted. In *Van Landschoot*, [73] the Court found that the contested regulation was discriminatory, in so far as the rules for exemption from a levy for which it provided did not extend to certain categories of economic operators. A straightforward declaration of invalidity would have had the result that, pending the adoption of new provisions, all exemptions would be precluded. The Court applied Article 174(2) of the EEC Treaty (now Article 231 EC) by analogy, under which the Court may state which of the effects of a regulation which it

72 — See point 113 below.

73 — Case 300/86 *Van Landschoot* [1988] ECR 3443.

has declared void are to be considered definitive. [74] Thus, it concluded that, pending the adoption of new rules, the competent authorities were required to continue to apply the exemption and to grant it also to the operators affected by the discrimination found to exist. [75]

94. Thus, the group of operators entitled to the exemption was enlarged — an effect that could not have been attained merely by declaring the contested regulation invalid. [76]

95. I am not convinced that the effects of Regulation No 622/2003 would need to be preserved in the present case.

96. A declaration that Regulation No 622/2003 is invalid would leave untouched the obligations already imposed on Member States under Regulation No 2320/2002 to take the necessary measures, in the exercise of their competence under national law, to prevent prohibited articles from being brought into a restricted area or onto an aircraft, and indeed to comply with the other measures there set out or referred to in respect of civil aviation security. The attachment to the Annex to Regulation No 2320/2002 states that 'guidelines are given below for the possible shapes of weapons and restricted items, common sense shall however prevail in assessing whether an object gives cause to believe that it may be used as a weapon'. On that basis, Member States are fully capable of ensuring that rules are enacted under national law so as to prohibit the carrying of potential weapons into restricted areas or onto aircraft pending the adoption of a replacement regulation (containing a list of prohibited articles) that is duly published.

97. The specific obligations already imposed on Member States by Regulation No 2320/2002 are reinforced by the more general duty, under Article 10 EC, to 'take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations … resulting from action taken by the institutions of the Community', to 'facilitate

74 — See, for example, Joined Cases C-38/90 and C-151/90 *Lomas and Others* [1992] ECR I-1781, paragraph 23; and Case C-228/99 *Silos* [2001] ECR I-8401, paragraphs 35 to 38.

75 — At paragraphs 22 to 24.

76 — The Opinion of Advocate General Stix-Hackl in Case C-475/03 *Banca Popolare di Cremona* [2006] ECR I-9373, points 132 to 134, provides a useful overview of the situations in which the Court has limited the temporal effect of a preliminary ruling on the validity of a measure adopted by the Community institutions. For an example of an action for annulment in which the Court has maintained the validity of part of a provision from Community law until the adoption of a new provision, see: Case C-299/05 *Commission* v *Parliament and Council* [2007] ECR I-8695, paragraphs 74 and 75. There, the straightforward annulment of the inclusion of the United Kingdom's disability living allowance ('DLA') in the list in Annex IIa to Council Regulation (EEC) No 1408/71 as amended would have led to the United Kingdom being forced to grant the 'mobility' element of that benefit to an unspecified number of recipients throughout the European Union, although that part of the DLA was indisputably a non-contributory benefit and could therefore lawfully be included in the Annex IIa list as a non-exportable benefit.

the achievement of the Community's tasks' and to 'abstain from any measure which could jeopardize the attainment of the objectives of the Community'. It is plain from Regulation No 2320/2002 itself what those objectives are and how they are to be attained and the Member States have (of course) had sight of the contents of the unpublished Annex to Regulation No 622/2003.

98. The Commission is also in a position to give thought, during the period that will elapse after this Opinion is delivered whilst the Court is deliberating, to how to ensure that any specific airport security measures that are laid down solely in the Annex to Regulation No 622/2003 (as amended) will not be jeopardised in the event that the Court rules generally on the legal effects of that regulation. [77]

99. The Court has, moreover, always used the possibility of limiting the temporal effect of a judgment in order to satisfy the requirements of legal certainty. In the present case, it is clear that legal certainty for individuals in respect of the only known component [78] of the Annex to Regulation No 622/2003 (as amended) would, on the contrary, suffer further by keeping the regulation in force until new measures to replace the regulation in its entirety have been adopted.

100. Finally, it may perhaps be suggested that the public interest in preserving rules enhancing airport security requires that the Court should either turn a Nelsonian blind eye to the clear breach of a mandatory publication requirement, or make use of the exceptional power to maintain, definitively, the effects of a defective measure. In my view that argument is a specious one. As I have just indicated, there is no need for the Court to exercise that power in order to prevent public safety at airports being jeopardised. Similar arguments are raised not infrequently in difficult times to justify departure from the ordinary rule of law — whether that be by suspending guarantees of fundamental rights, restricting judicial scrutiny or softening the consequences of such scrutiny. They have no place in a European Union that is governed by the rule of law and whose Court is under the Treaty obligation to ensure that 'the law is observed'. [79]

101. I therefore suggest that no temporal limitation should be put upon the judgment in this case.

77 — As to what the Commission may do, see points 111 to 120 below.

78 — Even though the content of the list of prohibited articles is not known, it is certain that the Annex to Regulation No 622/2003 *contains* such a list

79 — Article 220 EC (ex Article 164). Compare the Opinion of Advocate General Poiares Maduro in Case C-402/05 P *Kadi* v *Council*, Opinion of 16 January 2008, point 35: '… [W]hen the risks to public security are believed to be extraordinarily high, the pressure is particularly strong to take measures that disregard individual rights … [I]n those instances, the courts should fulfil their duty to uphold the rule of law with increased vigilance'.

— Should the court go further and declare Regulation No 622/2003 (as amended) non-existent?

102. The referring court takes the view that the non-publication of a regulation entails its non-existence.

103. The Court has held on several occasions that measures of the Community institutions are in principle presumed to be lawful and produce legal effects until they are withdrawn, annulled in an action for annulment or declared invalid following a reference for a preliminary ruling or a plea of illegality. [80]

104. An exception to this principle is the doctrine of the non-existent act. Under that doctrine, measures tainted by an irregularity whose gravity is so obvious that it cannot be tolerated by the Community legal order must be treated as having no legal effect, even provisional — that is, they are regarded as legally non-existent. The purpose of this doctrine is to maintain a balance between two fundamental, but sometimes conflicting, requirements with which a legal order must comply, namely stability of legal relations and respect for legality. [81]

105. The gravity of the consequences attaching to a finding that a measure of a Community institution is non-existent means that, for reasons of legal certainty, such a finding is reserved for quite extreme situations. [82] Certain academic commentators have argued that the non-publication of a regulation falls into that category. [83]

106. To my knowledge, the Court of Justice has only once declared an act to be non-existent: in *Société des usines à tubes de la*

80 — See, to that effect, Case C-137/92 P *Commission* v *BASF and Others* [1994] ECR I-2555, paragraph 48; *Hoechst*, cited in footnote 63, paragraph 69; Case C-245/92 P *Chemie Linz* v *Commission* [1999] ECR I-4643, paragraph 93; and Case C-475/01 *Commission* v *Greece* [2004] ECR I-8923, paragraph 18.

81 — *Commission* v *BASF*, *Chemie Linz* and *Commission* v *Greece*, all cited in footnote 80, respectively at paragraphs 49, 94 and 19; and *Hoechst*, cited in footnote 63, paragraph 70.

82 — *Commission* v *BASF*, *Chemie Linz* and *Commission* v *Greece*, all cited in footnote 80, respectively at paragraphs 50, 95 and 20; *Hoechst*, cited in footnote 63, paragraph 76. Occasions on which the Court has decided that the contested act was *not* non-existent include Joined Cases 7/56, 3/57 to 7/57 *Dineke Algera and Others* v *Common Assembly* [1957] ECR 39, at 60; Joined Cases 15/73 to 33/73, 52/73, 53/73, 57/73 to 109/73, 116/73, 117/73, 123/73, 132/73 and 135/73 to 137/73 *Roswitha Schots, née Kortner, and Others* v *Council, Commission and Parliament* [1974] ECR 177, paragraph 33; Case 15/85 *Consorzio Cooperative d'Abruzzo* v *Commission* [1987] ECR 1005, paragraphs 10 and 11 ('without there being any need even to consider the gravity of the irregularities alleged by the Commission, it is sufficient to state that neither of them is manifest. Neither irregularity could be detected by reading the decision'); Case 226/87 *Commission* v *Greece* [1988] ECR 3611, paragraph 16; Case C-199/92 P *Hüls* v *Commission* [1999] ECR I-4287, paragraphs 84 to 88; Case C-200/92 P *ICI* v *Commission* [1999] ECR I-4399, paragraphs 70 to 73; Case C-235/92 P *Montecatini* v *Commission* [1999] ECR I-4539, paragraphs 96 to 100; Case C-107/99 *Italy* v *Commission* [2002] ECR I-1091, paragraph 45; *Commission* v *Greece*, cited in footnote 80, paragraphs 18 to 21; and Joined Cases T-27/03, T-46/03, T-58/03, T-79/03, T-80/03, T-97/03 and T-98/03 *SP and Others* v *Commission* [2007] ECR II-4331, paragraph 122.

83 — See, for example, H. Von der Groeben, J. Thiesing, and C.-D. Ehlermann (eds), *Kommentar zum EU-/EG-Vertrag, 6. Auflage, Band 4: Art. 189 — 314* (2004), p. 834, point 14.

Sarre.[84] There, the question was whether a letter sent by the High Authority could be considered to be an opinion within the meaning of Article 54(4) CS. Such opinions are required, inter alia, to be reasoned. The letter was not. The Court held that the statement of reasons for an opinion was clearly required by Articles 5, 15 and 54 CS, and was moreover an essential and constituent element. Without a statement of reasons, the opinion could not legally exist. Since the act that the application sought to annul was in law a non-existent act, the Court declared the application inadmissible for want of subject-matter.

107. In *BASF* v *Commission*,[85] the Court of First Instance held a Commission decision to be non-existent. The Court reversed that ruling on appeal, because it took the view that, whether considered in isolation or together, the irregularities of competence and form found by the Court of First Instance were not of such obvious gravity that the decision had to be treated as legally non-existent.[86]

108. It seems to me that the irregularity that taints Regulation No 622/2003 (as amended) — persistent and deliberate disregard of the mandatory publication requirements in Article 254(2) EC in respect of the *whole* substance of the regulation — is one whose gravity is so obvious that it cannot be tolerated by the Community legal order. My preference is therefore to declare Regulation No 622/2003 (as amended) non-existent. The question of the possible temporal limitation of the judgment then ceases to be relevant.

109. Should the Court not wish to go that far, it is clear that, at the very least, there has been a breach of an essential procedural requirement. As a minimum, the Court should therefore declare Regulation No 622/2003 (as amended) to be invalid.

110. Either finding will make it clear that non-publication of regulations or parts thereof — a fortiori when deliberate — is unacceptable in the legal order of the European Union.

What ought the Commission to have done?

111. At the hearing, both the European Parliament and the Council expressed the view that Article 8 of Regulation No 2320/2002 does not authorise the Commission to adopt an implementing regulation with an unpublished annex containing the detailed measures necessary to implement and adapt the common basic standards on aviation security measures. The Commission,

84 — Joined Cases 1/57 and 14/57 [1957] ECR 105, at 112.

85 — Joined Cases T-79/89, T-84/89 to T-86/89, T-89/89, T-91/89, T-92/89, T-94/89, T-96/89, T-98/89, T-102/89 and T-104/89 *BASF and Others* v *Commission* [1992] ECR II-315.

86 — *Commission* v *BASF*, cited in footnote 80, paragraph 52.

for its part, indicated that it would find it helpful if the Court were to give guidance as to what form of legal instrument the Commission should use in order to comply with its obligation, under Article 4(2) of Regulation No 2320/2002, to adopt such measures.

112. Although I have been critical of the Commission's promulgation of Regulation No 622/2003 (as amended), I have some sympathy for its underlying predicament. I therefore offer the following comments.

113. Article 8(1) of Regulation No 2320/2002 provides that the measures relating to the functioning of airport security measures [87] 'shall be secret and not be published'. That is stated to be 'without prejudice' to the Access to Documents Regulation. From that I deduce that the draftsman did not envisage that such measures would ever form part of a Community legal act that would be subject to mandatory publication in the Official Journal by virtue of Article 254 EC. Rather, the intention was that they would be contained in an unpublished document and that access would only be possible via the Access to Documents Regulation (under which, presumably, access would then be refused on the basis that the document in question fell within the exceptions listed in Article 4 and/or was a 'sensitive document' within the meaning of Article 9).

114. I emphasise that Article 8 of Regulation No 2320/2002 operates as an exception to the normal obligation of transparency and accessibility of information. As such it is to be interpreted restrictively. It follows that only material that, viewed objectively, truly falls within the various categories of secret information specified in Article 8(1) [88] should be earmarked for such treatment. In particular, successor material to material that is already in the public domain because it was published as part of Regulation No 2320/2002 should remain in the public domain.

115. So far as the list of prohibited articles is concerned, it is abundantly clear to me that that list should not be secret, but public. It — and any other measures that, viewed objectively, do not need to be kept secret — should therefore be published in the Official Journal as an annex to a regulation.

87 — That is: (a) performance criteria and acceptance tests for equipment; detailed procedures containing sensitive information; and detailed criteria for exemption from security measures; (b) specifications for compliance monitoring; and (c) inspection reports and answers in respect of compliance monitoring. Article 8(2) and (3) also provide for confidentiality 'as far as possible and in accordance with applicable national law' for information arising from inspection reports and answers of Member States relating to other Member States.

88 — See footnote 87

116. What of material that genuinely relates to the functioning of airport security measures and that genuinely, therefore, needs to be kept secret?

117. If it is thought prudent to make sure that some of, or all, such material is contained in a legally binding act, the Commission has, in theory, an unrestricted choice of legal instrument. The legal basis of Regulation No 2320/2002 was Article 80(2) EC. [89] Although the Council chose to use a regulation, it was not obliged to do so.

118. However, in practice neither a regulation nor a directive addressed to all the Member States is an appropriate legal instrument for material that should properly be kept secret. Both are subject to the mandatory publication requirement contained in Article 254(2) EC.

119. The more natural choice would therefore be a decision (within the meaning of Article 249 EC) addressed to all the Member States. Article 254 EC does not require such an act to be published, but merely to be 'notified to those to whom it is addressed'. [90] A decision 'shall take effect upon such notification'. [91] I note that Article 13(2)(c) of the Access to Documents Regulation provides that such decisions shall be published in the Official Journal 'as far as possible'. If the contents of the decision were such as to fall within Article 4 (exceptions) or Article 9 (sensitive documents) of that regulation, it would be legitimate to refuse access to the decision and, *a fortiori*, not to publish it.

120. The Commission, indeed, recalls in its written observations that it adopted a similar solution in respect of confidential and non-confidential material when enacting Regulation No 1683/95. [92] The published annex to that regulation contained certain specifications for the format of visas to be issued by the Member States. Article 2 of the regulation provided that further technical specifications for the uniform format for visas regarding additional elements and security requirements including enhanced anti-forgery, counterfeiting and falsification standards and technical standards and methods to be used for the filling in of the uniform visa were to be

89 — 'The Council may, acting by a qualified majority, decide whether, to what extent and by what procedure appropriate provisions may be laid down for sea and air transport.'

90 — Article 254(3) EC.

91 — Idem.

92 — Council Regulation (EC) No 1683/95 of 29 May 1995 laying down a uniform format for visas (OJ 1995 L 164, p. 1), amended most recently by Council Regulation (EC) No 1791/2006 of 20 November 2006 adapting certain Regulations and Decisions in the fields of free movement of goods, freedom of movement of persons, company law, competition policy, agriculture (including veterinary and phytosanitary legislation), transport policy, taxation, statistics, energy, environment, cooperation in the fields of justice and home affairs, customs union, external relations, common foreign and security policy and institutions, by reason of the accession of Bulgaria and Romania (OJ 2006 L 363, p. 1).

adopted by the Commission. Article 3 provided for those specifications to remain secret. The Commission therefore adopted an implementing decision, addressed to all Member States, which was not published. [93] It seems to me that the Commission can properly adopt a similar solution when implementing Regulation No 2320/2002 in order to keep secret material that, objectively, requires such protection.

The first question

121. If the Court answers the second question as I have suggested, it becomes unnecessary to answer the first question. However, since the first question generated intense disagreement between the parties in both their written and oral submissions, [94] I shall offer the following observations.

122. By its first question, the referring court wishes to know whether acts that are required to be published in accordance with Article 254 EC are 'documents' within the meaning of Article 2(3) of the Access to Documents Regulation. [95]

123. In keeping with the purpose of the regulation laid down in Article 1, [96] the definition of scope in Article 2(3) is appropriately broad. The regulation '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'. Before the Access to Documents Regulation came into force, an institution was not empowered to disclose documents originating from third parties, and the party requesting access was required to address its request directly to the author of the document (the so-called authorship rule). [97] The broad definition of scope in Article 2(3) reverses that rule. Provided the institution actually *has* the document, access

93 — The Commission in its written submissions cites German academic writers suggesting that a decision is intended for individual cases only: see, for example, H. Von der Groeben, J. Thiesing, and C.-D. Ehlermann (eds), *Kommentar zum EU-/EG-Vertrag,* cited in footnote 83, p. 791, point 43. However, other writers have taken a contrary view: see J. Bast, 'On the Grammar of EU Law: Legal Instruments', Jean Monnet Working Paper 9/03, Heidelberg, 2003, pp. 65 and 66 available online at http://www.jeanmonnetprogram.org/papers/03/030901-05.pdf. See also R. Greaves 'The Nature and Binding Effect of Decisions under Article 189 EC', *European Law Review*, 1996, pp. 3 to 16, who points out that decisions addressed to all Member States tend to be of a quasi-legislative nature. One clear example is Council Decision 65/271/EEC of 13 May 1965 on the harmonisation of certain provisions affecting competition in transport by rail, road and inland waterway (OJ Special Edition 1965, p. 67), at issue in Case 9/70 *Grad* [1970] ECR 825.

94 — Thus the Czech, Polish, and Finnish Governments contend that a regulation is clearly *not* a document within the meaning of the Access to Documents Regulation, whilst the Austrian, Danish, French, Greek, Hungarian, Swedish, and United Kingdom Governments, as well as the Council and the Commission argue with equal vehemence that it clearly *is*.

95 — See point 49 above. I have already drawn attention to the wider context of Articles 254 and 255 EC: see points 54 to 60 above.

96 — See point 58 above.

97 — See, for example, Joined Cases T-110/03, T-150/03 and T-405/03 *Sison* v *Council* [2005] ECR II-1429, paragraph 92

can be sought, irrespective of authorship. Thus, the institutions may have to disclose documents originating from third parties, including (in particular) Member States. [98]

124. The definition of the term 'document' is equally broad: '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'. [99]

125. Articles 4 ('Exceptions') and 9 ('Sensitive documents') define the limits, on grounds of public or private interest, to the right of access to documents. They follow the structure of Article 255 EC. As exceptions, these provisions are to be construed narrowly, in accordance with the usual canons of construction in Community law. [100] The need to read them in that way is underscored by the fact that they are mandatory exceptions [101] to a regulation whose whole purpose is otherwise to ensure 'the widest possible access to documents'. [102]

126. Article 13 deals with 'Publication in the Official Journal'. Article 13(1) explains in terms that '*[i]n addition* to the acts referred to in Article 254(1) and (2) of the EC Treaty', [103] various classes of documents 'shall, subject to Articles 4 and 9 of this Regulation, be published in the Official Journal'. It seems to me clear beyond argument that the draftsman is there identifying certain further categories of text (*additional* to the texts that will be published anyway by virtue of Article 254(1) and (2) EC) as meriting, systematically, the wide dissemination that flows from publication in the Official Journal. Yet further additional categories of document are also to be published 'as far as possible'. [104]

127. Only documents that are covered neither by Article 12 nor by Article 13 will have to be requested individually. [105]

98 — See recital 10. See also Case C-64/05 P *Sweden* v *Commission and Others* [2007] ECR I-11389, paragraphs 55 and 56, and the Opinion of Advocate General Poiares Maduro in that case, at points 27 and 28.

99 — Article 3(a).

100 — See, as regards Article 4, Case C-266/05 P *Sison* v *Council* [2007] ECR I-1233, paragraph 63; and *Sweden* v *Commission*, cited in footnote 98, paragraph 66.

101 — Thus, Article 4(1) provides that the institutions shall refuse access to documents falling within the categories there identified. Once Article 9 has identified what documents are 'sensitive documents' (Article 9(1)), it contains no principal verb that is not a mandatory instruction.

102 — Article 1(a).

103 — Emphasis added.

104 — Article 13(2); the institutions are given additional discretion to publish even more widely under Article 13(3).

105 — See generally Articles 6, 7, 8 and 10. Article 12 requires the institutions 'as far as possible' to make documents widely accessible by direct access in electronic form or through a register. In particular, 'legislative documents, that is to say, documents drawn up or received in the course of procedures for the adoption of acts which are legally binding in or for the Member States should, subject to Articles 4 and 9, be made directly accessible'.

128. Against that background, the answer to the first question becomes rather clearer. The text of a regulation is capable of falling within the very broad definition of a document contained in Article 3(a) of the Access to Documents Regulation. Such a text has a 'content … concerning a matter relating to the … decisions falling within the institution's sphere of responsibility' and it will be in a medium specified in Article 3(a). Thus, the definition of 'document' in Article 3(a) of the Access to Documents Regulation is broad enough to encompass the legal instruments subject to publication pursuant to Article 254(1) and (2) EC. That does not mean, however, that such legal instruments fall within the scope of the Access to Documents Regulation, so that Article 4 or Article 9 may be invoked to refuse access to them. In my view, the reverse is the case.

129. Article 2(3) of the Access to Documents Regulation states that the regulation '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'. [106] It is of course true that an institution is likely to have copies of the final text of a regulation as finally approved. However, the text should also already be in the public domain by virtue of its (mandatory) publication in the Official Journal. Technically, the institution 'holds' the text as a 'document'. However, reading the Access to Documents Regulation in that literal way ignores the fact that the purpose of the regulation is to give access to documents that are *not* otherwise automatically accessible. Teleology and common sense alike point to the conclusion that, if a text is (or should be) accessible by virtue of mandatory publication under Article 254(1) and (2) EC, it does not need to be (and therefore should not be) regarded as a 'document' that is 'held' by an institution within the meaning of (respectively) Articles 3(a) and 2(3) of the Access to Documents Regulation. Moreover, Article 1 (a) defines the purpose of the Access to Documents Regulation by reference to ensuring 'the widest possible access to documents'. This in itself implies that the right of access to a document via the regulation would be redundant when the document is to be published anyway by virtue of Article 254 EC. Publication in the Official Journal already guarantees the 'widest possible access'.

130. Article 13 of the Access to Documents Regulation confirms this analysis. It is meaningless unless one reads the regulation as complementing Article 254 EC rather than undermining it. There is no need to create (additional) access, or indeed publication, through the Access to Documents Regulation for a document that is one of the texts listed in Article 254(1) or (2) EC. Conversely, if a document is *not* such a text, there is every reason for treating it as falling within the scope of the Access to Documents Regulation and then looking to Article 13 to see whether it is publishable under that provision. The correct reading must therefore be that the Access to Documents Regulation deals with documents (in every guise) that are *not* already covered by Article 254(1) or (2) EC.

106 — Emphasis added.

131. The question may be asked, what is the status of the text of a regulation between the date of its adoption by the relevant institution and the date of publication in the Official Journal? In my view, the regulation qua regulation is not a 'document' within the Access to Documents Regulation (because the publication requirement under Article 254 EC has already attached to it). However, any *copy* of that regulation (for example, in printed or electronic form) in the institution's possession would be such a document; and access to it could accordingly be obtained under the Access to Documents Regulation. In practical terms, there is, I think, always going to be such a copy somewhere. There will therefore be no hiatus during which the regulation is accessible neither through the Access to Documents Regulation nor by virtue of its mandatory publication under Article 254 EC.

132. As a corollary, the Access to Documents Regulation cannot be used to restrict publication of a document falling within Article 254(1) or (2) EC. The regulation, being secondary legislation, cannot be read in a way that contradicts primary law in the form of a Treaty provision. The exceptions to access contained in Articles 4 and 9 of the Access to Documents Regulation therefore apply only to documents to which access is available by virtue of that regulation. In particular, they cannot be invoked so as to bring in, by the back door, an exception to mandatory publication under the Treaty.

133. It follows that the answer to the first question should be that acts that require publication in the Official Journal pursuant to Article 254(1) or (2) EC do not constitute documents within the meaning of Articles 2(3) and 3(a) of Regulation No 1049/2001, because they are already subject to a mandatory publication requirement under the Treaty and are therefore fully accessible to the public.

Conclusion

134. For the reasons given above, I am of the view that the questions referred by the Verwaltungssenat im Land Niederösterreich should be answered as follows:

— Regulations that, contrary to the requirement of Article 254(2) EC, have not been published in the *Official Journal of the European Union* are legally non-existent;

— Acts that require publication in the Official Journal pursuant to Article 254 EC do not constitute documents held by an institution within the meaning of Articles 2(3) and 3(a) 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, because they are already subject to a mandatory publication requirement under the Treaty and are therefore fully accessible to the public.