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Advocate General's Opinion in Case C-345/06

Gottfried Heinrich

**ADVOCATE GENERAL SHARPSTON SUGGESTS THAT THE IMPLEMENTING
REGULATION ON AVIATION SECURITY SHOULD BE DECLARED NON-
EXISTENT**

The persistent and deliberate non-publication of the Annex to that Regulation, which contained, inter alia, the list of items prohibited in cabin luggage, is a failing of such gravity that it cannot be tolerated by the Community legal order

Article 254 of the EC Treaty provides that regulations shall be published in the Official Journal of the European Union.

At the end of 2002 the Parliament and Council adopted a regulation on aviation security¹. The annex to that regulation laid down the common basic standards on aviation security. Amongst other things, the annex stated in general terms, the kind of items that would be prohibited from being brought on board aircraft, including “Bludgeons: Blackjacks, billy clubs, baseball clubs or similar instruments”. The regulation also provided that certain measures should not be published, but only made available to the appropriate authorities. This regulation and annex was published.

In April 2003 the Commission adopted a regulation² implementing this 2002 regulation. The measures in question were laid down in an annex. In accordance with the 2002 regulation, this annex was not published, although a Commission press release in January 2004 did provide some information as to the items on the prohibited list. This annex has been amended numerous times but has never been published, despite two of the amending regulations stating, in their recitals, the need for passengers to be clearly informed of the rules relating to prohibited items.

On 25 September 2005, Gottfried Heinrich was stopped at the security control of Vienna-Schwechat Airport as his cabin baggage contained tennis racquets, allegedly prohibited items. Nevertheless, he did board the plane with the tennis racquets in his baggage. Security staff subsequently ordered him to leave the aircraft.

¹ Regulation (EC) No 2320/2002 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)

² Commission Regulation (EC) No 622/2003 of 4 April 2003 laying down measures for the implementation of the common basic standards on aviation security (OJ 2003 L 11, p. 4)

Dr Heinrich brought proceedings before the Unabhängiger Verwaltungssenat im Land Niederösterreich (Independent Administrative Chamber for the Land of Lower Austria). The Austrian Court has referred questions to the Court of Justice of the EC asking whether regulations or parts thereof can have legally binding force if they have not been published in the Official Journal.

In her Opinion delivered today, Advocate General Eleanor Sharpston opines that **the publication of the 2003 implementing regulation without its Annex is a defective and inadequate publication** that does not satisfy the requirements of Article 254 EC.

In this regard she notes that the duty to publish regulations is unequivocal and without exception. An annex is an integral part of a legislative measure, to decide otherwise would allow the legislator to avoid the publication requirements by simply placing substantive provisions in an unpublished annex. This is precisely what has happened in this case. 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.

The Advocate General considers the explanation given for the lack of publication, that it was “in accordance with Regulation 2320/2002 and in order to prevent unlawful acts”, to be insufficient, while emphasising that more thorough reasoning would still not have sufficed to exempt the regulation from full publication. She highlights the “fundamental absurdity” in the Commission’s position: If the Commission was obliged under Regulation 2320/2002 to keep the list secret, then publication of the press release was a flagrant violation of that Regulation. If the Commission considered that the list fell outside the secrecy obligation, it ought of course to have been published in the Official Journal. Furthermore, if the basic “guidelines” indicating the kinds of articles that are to be prohibited can be published there is little logic behind not publishing what is presumably, a fleshed-out version of those guidelines. Finally, she considers it to be self-contradictory on the part of the Commission to state, in recitals to subsequent regulations that there is a need to inform the public of the list of prohibited articles and then fail to place such a list in the public domain.

As to the consequences of that **defective and inadequate publication**, Advocate General Sharpston considers that this **constitutes a violation of an essential procedural requirement, resulting, at the very least, in invalidity**. In this respect she highlights that non-publication was neither accidental nor unintentional. The Commission deliberately promulgated a series of new measures and failed to publish a substantive part (the Annex) each time.

However, the Advocate General suggests that the Court should go further than declaring the regulation invalid and declare it to be non-existent. She argues that the irregularity that taints the Regulation - persistent and deliberate disregard of the mandatory publication requirement of Article 254 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. Such a step would make it very clear that non-publication of regulations or parts thereof - all the more so when deliberate - is unacceptable in the legal order of the European Union.

IMPORTANT: The Advocate General’s Opinion is not binding on the Court. It is the role of the Advocates General to propose to the Court, in complete independence, a legal solution to the cases for which they are responsible. The Judges of the Court of Justice are now beginning their deliberations in this case. Judgment will be given at a later date.

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Languages available: BG CS DE EN FR HU NL PL RO SK

The full text of the Opinion may be found on the Court's internet site

<http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=EN&Submit=rechercher&numaff=C-345/06>

It can usually be consulted after midday (CET) on the day of delivery.

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