

Legal Service
Director

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Note for the attention of Mr Jean-Marie CAVADA
Chairman of the Committee on Civil Liberties, Justice and Home Affairs.

(c/o Emilio DE CAPITANI, Head of Unit)

Re : Non-publication of legislative acts - transparency - limits on implementing powers - air safety - Commission Regulation (EC) N° 915/2007 - possible annulment proceedings

By letter of 10 September 2007 to Mr Giuseppe GARGANI, Chairman of the Committee on Legal Affairs, you requested that the committee he chairs urgently examine a number of issues arising from the non publication of Commission Regulation (EC) N° 915/2007 on common basic standards on aviation security.


In its opinion to the Committee on Legal Affairs, which I attach for information, the Legal Service has reached the following conclusions:

- (a) The systematic recourse by the Commission to Regulations whose substantive provisions are unpublished is inconsistent with the spirit and the letter of Articles 249 and 254(2) EC, as well as the principle that legislative provisions should be accessible to those whose interests are affected by their application, and the principle of openness in Community matters reflected in Article 1 EU and Article 255 EC.
- (b) The rule under Article 8(1) of Regulation 2320/2002 that certain measures be kept secret is an exception to the general principle of openness, and should therefore be interpreted restrictively. The Commission is not entitled to keep secret any implementing or technical adaptation measure which does not fall within the categories defined in this provision, and it must at the very least indicate in each

case into which category of secret measure those set out in the unpublished annex falls.

- (c) Under the terms of its 2005 Communication on compliance with the Charter of Fundamental Rights, the Commission should have provided some explanation of how unpublished regulations whose application can directly affect fundamental rights of air travellers comply with the Charter on Fundamental Rights.
- (d) The Commission's failure to provide a proper statement for reasons for not publishing the air security measures at issue means that neither Parliament, as an interested party, nor the Court of Justice can determine whether the Commission has respected the limitations on its powers to adopt implementing and technical adaptation measures laid down in Regulation 2320/2002.
- (e) It would be possible to envisage proceedings before the Court of Justice to challenge the validity of Commission Regulation 915/2007, primarily on the grounds that the Commission failed to state the reasons for the application of Article 8(1) of the basic Regulation, should the Committee on Legal Affairs consider it appropriate. In order to respect the deadline for initiating such proceedings, any recommendation would need to be adopted at the committee's meeting of 3 and 4 October 2007.
- (f) In the light of the rather limited character and probable duration of any such annulment action, the parliamentary committees concerned may wish to examine the opportunity of taking other forms of action.

The Legal Service remains at your disposal for any further information you may require.


By delegation of the Jurisconsult

Ezio PERILLO

Annex