

# Case T-411/07 R

## Aer Lingus Group plc

v

## Commission of the European Communities

(Interim measures — Control of concentrations — Decision declaring a concentration to be incompatible with the common market — Article 8(4) and (5) of Regulation (EC) No 139/2004 — Application for suspension of operation and for interim relief — Measure incompatible with the distribution of powers between institutions — Powers of the Commission — Interim measures addressed to an intervener — Application for suspension of operation — Admissibility — No prima facie case — Lack of urgency — Absence of serious and irreparable damage — Damage dependent on future, uncertain events — Insufficient reasons — Weighing of all the interests involved)

Order of the President of the Court of First Instance, 18 March 2008 . . . . . II - 417

### Summary of the Order

1. *Applications for interim measures — Suspension of operation of a measure — Interim measures — Conditions for granting — Provisional nature of the measure*  
(Arts 242 EC and 243 EC; Rules of Procedure of the Court of First Instance, Art. 104(2))

2. *Applications for interim measures — Suspension of operation of a measure — Conditions for granting — Interest of the applicant in obtaining the suspension sought*  
(Art. 242 EC; Rules of Procedure of the Court of First Instance, Art. 104(2))
3. *Applications for interim measures — Interim measures — Measures incompatible with the distribution of powers between institutions*  
(Arts 233 EC and 243 EC; Council Regulation No 139/2004, Art. 8(4) and (5))
4. *Applications for interim measure — Conditions governing admissibility — Application — Formal requirements*  
(Art. 243 EC; Rules of Procedure of the Court of First Instance, Art. 104(2))
5. *Applications for interim measures — Jurisdiction of the judge hearing the application for interim relief — Imposition of orders addressed to third parties — Limits*  
(Art. 243 EC)
6. *Competition — Concentrations — Powers of the Commission — Adoption of measures against the parties to an unlawful concentration — Conditions — Implementation of the concentration*  
(Arts 81 EC and 82 EC; Council Regulations No 1/2003, Art. 7(1), and No 139/2004, Arts 3, 7 and 8(4) and (5))
7. *Applications for interim measures — Suspension of operation of a measure — Interim measures — Conditions for granting — Urgency — Serious and irreparable damage*  
(Arts 242 EC and 243 EC; Rules of Procedure of the Court of First Instance, Art. 104(2))

1. According to Article 107(4) of the Rules of Procedure of the Court of First Instance, an order prescribing interim measures may have only an interim effect and is without prejudice to the decision on the substance of the case by the Court of First Instance. It follows that, in principle, the duration of the effects of such

an order cannot extend beyond that of the main proceedings.

(see para. 45)

2. An application for suspension of operation of a negative administrative decision cannot be envisaged, since the grant of such suspension could not have the effect of changing the applicant's position. As it cannot be of any interest to the applicant, such an application must be rejected, except to the extent to which suspension might be necessary for the purposes of adopting other interim measures requested by the applicant, should the judge dealing with the application for interim measures consider them to be admissible and well founded.

(see paras 46-48)

3. In principle, the judge dealing with an application for interim measures cannot adopt an interim measure which, were it to be ordered, would constitute an interference with the exercise of the powers of another institution which would be incompatible with the distribution of powers between the various Community institutions as intended by the authors of the Treaty.

Such is the case, with the consequent need for it to be rejected as being inadmissible, with an application for interim measures seeking to require the Commission to apply in a particular manner Article 8(4) and (5) of Regulation No 139/2004 on the control of concentrations between undertakings by adopting certain measures against the

other party to a prohibited concentration. Were it to be decided in the judgment in the main application that the Commission has a power to order the measures set out in Article 8(4) and (5) of Regulation No 139/2004, it would be for the Commission, should it consider it necessary in the context of the powers of control accorded to it in the field of concentrations, to take the necessary measures to comply with the judgment, in accordance with Article 233 EC. Accordingly, should the judge dealing with the application for interim measures grant this request, this would amount to an injunction addressed to the Commission to draw precise inferences from the annulment decision, and consequently to ordering a measure which would exceed the Court's powers in the main action. Under the system for the division of powers established under the Treaty and by Regulation No 139/2004, however, it is for the Commission, if it considers it necessary in the context of the powers of control accorded to it in the field of concentrations, and in particular by Article 8(4) and (5) of Regulation No 139/2004, to adopt the restorative measures which it deems appropriate.

(see paras 49-51)

4. An application for interim measures pursuant to Article 243 EC cannot be

vague and imprecise. However, in cases in which the content of the measures sought by the applicant is sufficiently clear from the rest of the application, the judge hearing the application may conclude that the request is not vague and imprecise in nature and may thus consider it admissible.

(see paras 52, 53)

5. With regard to applications for interim measures, Article 243 EC states clearly that ‘the Court of Justice may in any cases before it prescribe any necessary interim measures’. Such broad wording is obviously intended to grant sufficient powers to the judge hearing an application to prescribe any measure which he deems necessary to guarantee the full effectiveness of the definitive future decision, in order to ensure that there is no lacuna in the legal protection provided by the Court of Justice.

In order to ensure the full effectiveness of Article 243 EC, therefore, it cannot be ruled out that the judge hearing the application may impose orders directly on third parties, if necessary, as the wide powers of the judge hearing such an application are limited only, in so far as an impact on the rights and interests of third parties is concerned, in cases where such rights and interests may be seriously affected. Such broad discretion

should, in this respect, be exercised with due regard to the procedural rights, and in particular the right to be heard, of the addressees of the interim measures and of parties directly affected by those measures. When deciding whether to grant the interim measures applied for in this type of case, the judge hearing the application will also have due regard to both the strength of the *prima facie* case and the imminence of serious and irreparable harm in the specific case. Even where a third party has not had an opportunity to be heard in the context of proceedings for interim measures, it cannot be excluded that interim measures might be imposed on that party, in exceptional circumstances and bearing in mind the temporary nature of such measures, if it appears that, without such measures, the applicant would be exposed to a situation liable to endanger its very existence. The judge hearing the application carries out such assessments when balancing the various interests at stake.

(see paras 56, 59)

6. The Commission does not err in applying the provisions of Article 8(4) and(5) of Regulation No 139/2004 on the control of concentrations between undertakings, which authorise it to take measures against the parties to a prohibited concentration which has already been

carried out where, after having declared incompatible with the common market a projected concentration providing for the acquisition of the entire capital of an undertaking, it considers that it lacks the power to prevent the acquiring undertaking from exercising voting rights arising from a minority shareholding which it has finally acquired in so far as it is not in a position to exercise *de jure* or *de facto* control over the undertaking concerned by means of that shareholding.

While it is true that the term 'implemented' in the English version may, in principle, leave room for confusion as to the precise scope of those provisions in view of the fact that the definition of the term 'implementation' may encompass both 'the fact of having accomplished some aim' and 'the carrying into effect', the manner in which that expression is rendered in the French, German and Italian versions, the comparison of the French version with other Community texts in which the term 'implementation' is clearly meant to indicate 'carrying into effect' rather than 'the act of accomplishing some aim', and the fact that the Commission may, under Article 8(4) of Regulation No 139/2004, require the undertakings concerned to 'dissolve the concentration', indicate, however, that, *prima facie*, the definition of 'implementation' envisaged by those provisions involves the full implementation of the concentration, as defined in Article 3 of Regulation No 139/2004, and thus the acquisition of control.

That conclusion cannot be brought into question by any alleged practice on the Commission's part by which the latter treats partial implementation, even as regards steps falling short of transfer of control, as being precluded by Article 7(1) of Regulation No 139/2004, under which a concentration with a Community dimension may not be implemented until it has been declared compatible with the common market, and indicates to parties that they should refrain from taking such steps. First, as the interpretation of Community law is a prerogative of the Court of Justice and not of the Commission, the Commission's practice, albeit influential and important in determining whether any legitimate expectations may be justified, is not conclusive in that regard. Second, even if Article 7(1) of Regulation No 139/2004 were to be interpreted as prohibiting only a change of control pending the Commission's review, and not steps falling short of change of control, such as the exercise of voting rights arising from minority shareholdings, taking into account the time-limit within which the Commission must review a notified concentration and the combinations of factors which might confer control in any given case, it would remain legitimate for the Commission to request the parties not to take any action which might lead to a change of control.

Finally, this interpretation of Article 8(4) and (5) of Regulation No 139/2004,

in conjunction with the prohibition under Article 21(3) thereof of Member States applying their national competition legislation to any concentration having a Community dimension, does not *prima facie* give rise to a lacuna which is incompatible with the aim of Regulation No 139/2004. In so far as the remaining minority shareholding is no longer linked to an acquisition of control, ceases to be part of a 'concentration' and lies outside the scope of Regulation No 139/2004, Article 21 thereof does not *prima facie* in principle, under those circumstances, prevent the application by national competition authorities and national courts of their national legislation on competition. Furthermore, whilst a minority shareholding of the type in question cannot, *prima facie*, be regulated under Regulation No 139/2004, it might be envisaged that the Treaty provisions on competition, and in particular Articles 81 EC and 82 EC, may be applied by the Commission to the conduct of the undertakings involved.

(see paras 89-92, 94, 98, 100, 101, 103)

7. The urgency of an application for interim relief must be assessed in the light of the need for an interlocutory order in order to avoid serious and irreparable damage to the party seeking the relief. It is for that party to prove that it cannot await

the outcome of the main proceedings without suffering damage of that kind.

Where damage depends on the occurrence of a number of factors, it is enough for that damage to be foreseeable with a sufficient degree of probability. However, the party seeking the interim relief is still required to prove the facts which are deemed to show the probability of serious and irreparable damage. In order to be able to determine whether the damage feared is serious and irreparable and therefore provides grounds for ordering interim measures, the judge hearing the application must have hard evidence allowing him to determine the precise consequences which the absence of the measures applied for would in all probability entail for each of the parties concerned.

The claim by the party seeking interim relief that the judge hearing the application should apply the 'precautionary principle' and is entitled to apply 'protective measures' without having to await proof of the reality of the risk alleged cannot therefore be entertained.

(see paras 116-119)