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Press and Information

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Order of the President of the Court of First Instance in Case T-411/07 R

Aer Lingus Group plc v. Commission of the European Communities

AER LINGUS'S REQUEST FOR INTERIM MEASURES TO PREVENT RYANAIR FROM EXERCISING ITS VOTING RIGHTS IN THAT COMPANY IS REJECTED

Aer Lingus has failed to fulfil the conditions required for interim relief, notably that they have a prima facie case and that measures are required as a matter of urgency so as to avoid serious and irreparable harm.

In 2006, following the privatisation of Aer Lingus by the Irish government, Ryanair acquired a 19.16% stake in that company. On 23 October 2006 Ryanair launched a public bid for the entire share capital of Aer Lingus and, one week later, notified the Commission of the proposed acquisition in accordance with the Community Merger Regulation¹. During the bid period Ryanair acquired further shares and by 26 November 2006 held 25.17% of the share capital.

On 27 June 2007 the Commission adopted a decision declaring the acquisition to be incompatible with the common market. Ryanair brought an action against that decision before the CFI (Case T-342/07). Following this decision Ryanair acquired further shares, bringing its total shareholding to 29.4%.

Both during the procedure that led to the Prohibition Decision, and subsequent to that decision, Aer Lingus asked the Commission to order Ryanair to divest itself of its shareholding in Aer Lingus. This request was refused by the Commission in a decision of 11 October 2007, stating that it was not within its power under the Merger Regulation to order such a divestiture where the intended acquisition had not been implemented and where Ryanair had only a minority shareholding which did not permit it to exercise de jure or de facto control over Aer Lingus.

On 19 November 2007 Aer Lingus lodged an action for annulment against that decision before the Court of First Instance. Simultaneously, Aer Lingus filed a request for interim measures, requesting, in essence, that Ryanair be ordered to refrain from exercising its voting rights in Aer Lingus pending the outcome of the case.

¹ Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (OJ 2004 L 24, p. 1)

In order for interim measures to be granted, three conditions must be fulfilled: there must be a *prima facie* case; the measures must be required as a matter of urgency to avoid serious irreparable harm; and it must be in the balance of interests to order such measures. These conditions being cumulative, an application for interim measures must be dismissed if any one of them is not satisfied.

Admissibility

The President rejects the Commission's contention that interim measures orders may never be addressed to parties that are not the main parties in the proceedings.

***Prima facie* case:**

Having examined each of the Aer Lingus arguments brought against the Commission in turn, the President concludes that **there is no *prima facie* case**. In particular, as regards Aer Lingus's central argument concerning the interpretation of the term “implemented” within the context of the Commission’s powers to order divestiture where a merger has been implemented, the President considers that, when the wording of the relevant provisions of the Regulation are examined, it must be concluded that, *prima facie*, the term is meant to indicate that the change of control has been carried into effect. The Aer Lingus arguments that it could be construed as involving any actions or steps taken with a view to consummating the acquisition cannot, therefore, be considered as establishing a *prima facie* case.

The President also rejects Aer Lingus's contention that the Commission's interpretation of its powers under the Merger Regulation would give rise to a lacuna which is incompatible with the aim of the Regulation. In this respect the President observes that, *prima facie*, national competition authorities may apply national legislation on competition and/or that Articles 81 and 82 EC might be applied.

Urgency:

The President also concludes that **Aer Lingus has failed to show** that interim measures are required to avoid **serious and irreparable harm**. In this respect, he notes that the judge hearing an application for interim measures must have hard evidence allowing him to determine the precise consequences which the absence of measures would entail. However, the assertions put forward by Aer Lingus that Ryanair can use its shareholding to cause serious and irreparable harm to Aer Lingus are largely hypothetical and unsubstantiated statements which do not satisfy the condition of foreseeability of harm with the required degree of probability.

As neither the condition of a *prima facie* case, nor the condition of urgency has been satisfied, the President has dismissed the request.

IMPORTANT: The Court of First Instance will deliver final judgment on the substance of this case at a later date. An order as to interim measures is without prejudice to the outcome of the main proceedings. An appeal, limited to points of law only, may be brought before the Court of Justice of the European Communities against the decision of the President of the Court of First Instance within two months of notification of the decision.

Unofficial document for media use, not binding on the Court of First Instance.

Languages available: EN, FR

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

<http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=EN&Submit=rechercher&numaff=T-411/07>

It can usually be consulted after midday CET on the day the order is made.

For further information, please contact Christopher Fretwell

Tel: (00352) 4303 3355 Fax: (00352) 4303 2731