ORDER OF THE PRESIDENT OF THE COURT
3 February 1989 *

In Case 352/88 R

Commission of the European Communities, represented by Guido Berardis and Thomas van Rijn, members of its Legal Department, acting as Agents, with an address for service in Luxembourg at the office of G. Kremlis, Wagner Centre, Kirchberg,

applicant,

supported by

Ireland, represented by Louis J. Dockery, Chief State Solicitor, acting as Agent, assisted by Brian Lenihan, barrister, with an address for service in Luxembourg at the Irish Embassy, 28 route d'Arlon,

intervener,

v

Italian Republic, represented by Luigi Ferrari Bravo, Head of the Contentious Diplomatic Affairs Department, acting as Agent, assisted by Oscar Fiumara, avvocato dello Stato, with an address for service in Luxembourg at the Italian Embassy, 5 rue Marie-Adelaïde,

defendant,

APPLICATION for interim measures requiring the Italian authorities to give Aer Lingus provisional authorization to operate a 'fifth-freedom' scheduled air service on the Dublin-Manchester-Milan air route pursuant to Council Decision 87/602/EEC of 14 December 1987 on the sharing of passenger capacity between air carriers on scheduled air services between Member States and on access for air carriers to scheduled air-service routes between Member States,

* Language of the case: Italian.

THE PRESIDENT OF THE COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES

makes the following

Order

1 By application lodged at the Court Registry on 9 December 1988, the Commission of the European Communities brought an action before the Court under Article 169 of the EEC Treaty for a declaration that by refusing to authorize the Irish company Aer Lingus to operate a 'fifth-freedom' scheduled air service on the route Dublin-Manchester-Milan the Italian Republic had failed to fulfil its obligations under Council Decision 87/602/EEC of 14 December 1987 on the sharing of passenger capacity between air carriers on scheduled air services between Member States and on access for air carriers to scheduled air-service routes between Member States (Official Journal 1987, L 374, p. 19), and in particular Article 8 thereof.

2 By a separate document lodged at the Court Registry on the same day, the Commission of the European Communities made application under Article 186 of the EEC Treaty and Article 83 of the Rules of Procedure for an order that the Italian Republic take all the necessary measures to give the Irish company Aer Lingus provisional authorization to operate a scheduled Manchester-Milan air service, pursuant to Article 8 (1) of the Council decision, until the Court had delivered judgment in the main proceedings.

3 By order of the President of the Court of 19 December 1988, Ireland was authorized to intervene in support of the Commission's conclusions.

4 The defendant and the intervener lodged written observations on 10 January 1989 and the parties presented oral argument on 26 January 1989.

5 Before examining the merits of the application for interim measures it is appropriate to give a brief account of the legal and factual background to the dispute.

6 According to its preamble, the purpose of the Council Decision of 14 December 1987 is to increase flexibility and competition in the Community air transport system and it constitutes a first step towards the internal market in air transport; at the end of an initial three-year period expiring on 30 June 1990 the Council is to adopt further measures of liberalization.

7 Article 6 (1) of the decision allows Community air carriers to introduce third-freedom (the right to put down, in the territory of another State, passengers, freight and mail taken up in the State in which the carrier is registered) or fourth-freedom (the right to take on, in another State, passengers, freight and mail for off-loading in the carrier's State of registration) scheduled air services between category 1 airports and regional airports.

8 However, that entitlement does not extend to certain airports or airport systems enumerated in Article 6 (2) of the decision, in particular Barcelona, Malaga and Milan-Linate/Malpensa which, according to that provision, have insufficient facilities and navigational aids to accommodate such services.

9 By virtue of Article 7 of the decision, Community carriers operating third- or fourth-freedom scheduled air services to or from two or more points in another Member State or States are to be permitted to combine scheduled air services provided that no traffic rights are exercised between the combined points.

10 Finally, Article 8 (1) of the decision, 'without prejudice to Article 6 (2)', allows Community air carriers to operate a fifth-freedom (the right to undertake the commercial air transport of passengers, freight and mail between two States other than the State of registration of the carrier) scheduled air service where third- or

fourth-freedom traffic rights exist, provided in particular that the service is operated as an extension of a service from the State of registration or as a preliminary service to that State and that the carrier uses, for fifth-freedom traffic, not more than 30% of its annual capacity on the route concerned.

11 Under a 1947 bilateral agreement between Ireland and the Italian Republic, Aer Lingus is authorized to operate a third- and fourth-freedom scheduled air service between Dublin and Milan. It is also authorized, again under a bilateral agreement, to operate a third- and fourth-freedom scheduled air service between Dublin and Manchester. Those traffic rights have been used by Aer Lingus for many years.

12 On 22 February 1988, the competent Irish authorities requested the Italian authorities to authorize Aer Lingus to operate a fifth-freedom scheduled air service between Manchester and Milan on the Dublin-Manchester-Milan air route pursuant to Article 8 (1) of the Council decision, which entered into force on 1 January 1988.

13 On 7 March 1988 the Italian authorities refused to grant that request, taking the view that the Milan-Linate/Malpensa airport system was excluded from the scope of Article 8 of the decision by virtue of the reference in that article to Article 6 (2), which, with respect to the introduction of third- and fourth-freedom scheduled air services, expressly excludes that and other airport systems. However, on 27 March 1988 the Italian authorities authorized Aer Lingus to combine its Dublin-Manchester and Dublin-Milan services pursuant to Article 7 of the decision, but without traffic rights.

14 The matter having been brought to its attention by the Irish authorities, the Commission, considering that the refusal on the part of the Italian authorities constituted an infringement of Community law, initiated the procedure under Article 169 of the EEC Treaty on 10 June 1988.

15 It must also be emphasized that, despite certain differences of interpretation regarding Article 8 of the Council Decision, it is common ground that the request for authorization for a fifth-freedom Manchester-Milan service submitted by the Irish authorities satisfies all the conditions expressly laid down by that provision and that the dispute relates only to the scope of the expression 'without prejudice to Article 6 (2)' contained in Article 8 (1).

16 In that connection the Government of the Italian Republic contends essentially that by virtue of those words the exceptions made in respect of certain airports or airport systems regarding the introduction of third- or fourth-freedom services apply also to the introduction of fifth-freedom services.

17 The Commission, on the other hand, claims essentially that those words are intended only to ensure that fifth-freedom traffic rights are not used to circumvent the exceptions made regarding the introduction of third- or fourth-freedom rights.

18 Finally, it must be borne in mind that under Article 83 (2) of the Rules of Procedure a decision ordering interim measures such as those applied for may be granted only if there are circumstances giving rise to urgency and the factual and legal grounds establishing a prima-facie case for the measures are stated.

19 The Court has consistently held that the urgency of an application for interim measures must be assessed in relation to the need to grant interim relief in order to prevent serious and irreparable damage to the party requesting the interim measure.

20 On the issue of urgency, the Commission claims that by virtue of the Italian authorities' unjustified refusal to authorize the fifth-freedom traffic rights at issue it is confronted with a flagrant infringement of Community law that is causing clear and serious damage to the credibility of that law, which the Commission has the duty to uphold.

21 In its oral submissions the Commission conceded that the risk that an infringement of Community law may persist throughout the course of the proceedings is inherent in any action for failure by a Member State to fulfil its obligations which is contested by the defendant and that it is therefore necessary to show the existence of a particular imperative justifying the grant of interim measures in such a case. The Commission considers that such an imperative lies in the need to ensure that in the forthcoming negotiations for further liberalization as from 30 June 1990 the Council does not take as the starting point liberalization which falls short of that provided for in the decision in issue, correctly interpreted.

22 In that regard it must be observed that where, as in this case, the issue is precisely the interpretation of a provision of Community law, proceedings for interim measures are not an appropriate means of providing the Community legislature with an interpretation of the provision which may form a solid basis for future legislative development. By reason of the very nature of proceedings for interim measures, any order made must be without prejudice to the decision on the substance of the case. It follows that the risk that subsequent liberalization might be based on an incorrect interpretation of the liberalization so far achieved cannot amount to urgency within the meaning of the abovementioned provision of the Rules of Procedure.

23 Moreover, the interim measure applied for is not intended to maintain the existing situation or restore the *status quo ante* but rather to establish right away the situation which, according to the applicant, should be brought about by the judgment to be given by the Court in the present case.

24 The Commission and the intervener also claim that the Italian authorities' refusal to grant Aer Lingus the requested fifth-freedom traffic rights is causing Aer Lingus serious and irreparable damage which, according to that company, may be estimated as IRL 1 640 000 per year.

25 That figure constitutes a loss of potential profit calculated on the basis of the possible transfer to Aer Lingus of traffic at present carried by British Airways and Alitalia, which already operate a Manchester-Milan service. It is not necessary to assess the comparative interests of those three companies or to determine the possibility of their obtaining compensation for any loss of profit by bringing

proceedings before the national courts; it need merely be pointed out they are national airline companies whose business is of such a magnitude that a loss of the amount in question cannot be regarded as constituting sufficient damage to establish urgency.

26 The Commission and the intervener also drew attention to the loss of competitiveness caused to Aer Lingus by its late entry into the market concerned. Any such damage is, however, so uncertain that it cannot justify the grant of interim measures.

27 Since the Commission and the intervener have not proved the existence of circumstances establishing the urgency of the interim measure which they seek, it is unnecessary to consider the other conditions which must be satisfied before interim measures can be granted.

On those grounds,

THE PRESIDENT,

by way of interim decision,

hereby orders as follows:

(1) The application for interim measures is dismissed.

(2) Costs are reserved.

Luxembourg, 3 February 1989.

J.-G. Giraud
Registrar

O. Due
President