

C-570/19 - 1

THE HIGH COURT

2019 No. 118 JR
2019 No. 59 COM

BETWEEN

IRISH FERRIES LIMITED

Applicant

and

NATIONAL TRANSPORT AUTHORITY

Respondent

PRELIMINARY REFERENCE TO CJEU
UNDER ARTICLE 267

Registered at the
Court of Justice under No. 1123315
Luxembourg, 29. 07. 2019
Fax / E-mail: _____
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Cecilia Strömholm
Administrator
For the Registrar

CURIA GREFFE
Luxembourg
Date 26. 07. 2019

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Booklet of Documentation

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THE HIGH COURT

JUDICIAL REVIEW

2019 No. 118 JR

BETWEEN:

IRISH FERRIES LTD

APPLICANT

-and-

NATIONAL TRANSPORT AUTHORITY

RESPONDENT

Preliminary Reference pursuant to Article 267

INTRODUCTION TO REFERENCE

1. These proceedings involve the application of Regulation (EU) No. 1177/2010 of the European Parliament and of the Council of 24 November 2010 concerning the rights of passengers when travelling by sea and inland waterway and amending Regulation (EC) No. 2006/2004 (“**the Maritime Regulation**”).

2. The factual background in brief summary is that a new vessel the “W.B. Yeats”, which was due to be delivered to Irish Ferries Ltd (“IFL”) in May/June 2018 for a new passenger and freight service between Dublin and Cherbourg, was not ultimately delivered until December 2018. This caused IFL, who had taken advance bookings since October 2017, initially to cancel on 20 April 2018 the sailings scheduled for 12th July - 29th July 2018, and further on 11 June 2018 (after notification by the Shipyard of further delays in delivery) to cancel scheduled sailings for the remainder of the summer season. IFL was unable to charter a replacement vessel. It offered and arranged for nearly all of the 20,000 impacted passengers alternative sailings (taken up by 82%) or “re-routing” through the UK (taken up by 3%), plus re-imbusement of certain additional expense, or full re-imbusement of the fare (taken up by 15%), plus a voucher of €150 for sailings with IFL in 2019.

3. The National Transport Authority (“the NTA”) as the body designated under Irish law responsible for enforcement of the Maritime Regulation investigated these events. By a decision confirmed on 25 January 2019 the NTA determined that the Maritime Regulation applied to the cancellations and that IFL was failing to comply with its obligations under Articles 18 and 19. The NTA required IFL to comply with the measures contained in an Article 18 Notice (requiring IFL to reimburse any additional costs incurred by “re-routed” passengers) and an Article 19 Notice (requiring IFL to pay compensation to impacted passengers who had requested compensation from it).

4. IFL disputes that the Maritime Regulation, or Articles 18 or 19, apply in circumstances where the cancellations occurred some weeks before the scheduled sailings. IFL also disputes the interpretation by NTA of the Maritime Regulation and in particular Articles 18, 19 and 20, and its application of the same to the circumstances of this case. IFL asserts that Article 19 had no application *inter alia* because the cancellations were caused by “*extraordinary circumstances*” within the meaning of Article 20(4). IFL has also challenged the validity of the Maritime Regulation under European law.

5. This dispute gives rise to numerous questions as to the scope, application and proper interpretation of the Maritime Regulation, including its validity under EU law, on which there are as yet no decisions of the Court of Justice of the European Union ("CJEU") giving guidance to domestic courts. I consider that rulings on these questions are necessary to enable the Irish High Court to determine these proceedings. I also believe that preliminary rulings will be particularly useful as the questions raised are new and of general interest for the uniform application of Maritime Regulation.

6. The facts are substantially agreed between the parties, and insofar as they are not agreed this is indicated in what follows, and I do not consider such disagreements to be material for the purposes of the reference. While many questions are raised, this reflects a lack of definition of key words and phrases in the Maritime Regulation. The number of questions originally proposed was reduced following legal argument. Also, depending on what answers are given to earlier questions, some of the questions may not need to be answered. Both Counsel emphasised the parties' desire to have all questions dealt with on one reference in the interests of time-saving and efficiency, and particularly as the case concerns passenger rights arising over a year ago. I respectfully agree with Counsel.

7. As there is no CJEU jurisprudence on the Maritime Regulation to guide this court I did not consider it appropriate or an efficient use of court time to invite argument before me on all the questions raised, and in the circumstances I have refrained from expressing any provisional opinion as to the appropriate answers or principles to be applied.

A handwritten signature in black ink, appearing to read 'Robert Haughton', with a stylized, flowing script.

Mr. Justice Robert Haughton, Judge of the Irish High Court

22nd July, 2019

I. The Referring Court or Tribunal

1. The High Court of Ireland. koneill@courts.ie; ndermody@courts.ie; highcourtcentraloffice@courts.ie

II. The Parties to the Main Proceedings and their Representation

2. The applicant is Irish Ferries Limited (**Irish Ferries**), P.O. Box 19, Alexandra Road, Ferryport, Dublin 1, Ireland. It is a shipping company operating Ro-Pax (i.e., roll-on/roll off passenger) ferries between: (a) Ireland and Britain; and (b) Ireland and France. It is represented by A&L Goodbody, 25-28 North Wall Quay, Dublin D01 H104, Ireland (V.Power, E.Roberts, T.O'Donnell, B.McGrath (Irish solicitors), C.Donnelly B.L. and P.Gallagher S.C. (Irish barristers)).
3. The respondent is the National Transport Authority (**NTA**), Dún Scéine, Harcourt Lane, Dublin 2, Ireland. It is an Irish statutory body and the national enforcement body in Ireland for Regulation (EU) 1177/2010¹ (**Regulation**) which is the EU legal instrument at issue in these proceedings. The NTA is represented by McCann FitzGerald, Riverside One, Sir John Rogerson's Quay, Dublin 2, Ireland (M.Doyle, K Quigley, E O'Hanrahan (Irish solicitors), S.Murray B.L. and D.McGrath S.C. (Irish barristers)).

III. The Subject Matter of the Dispute in the Main Proceedings and an account of the facts on which the questions are based

Subject matter of the dispute

4. The proceedings involve the possible application of the Regulation to the cancellation of all 2018 sailings of the ferry, the *W.B. Yeats* (the **Vessel**), between Ireland and France. This followed the non-delivery of the €144m Vessel by a German shipyard despite a Contractual Date of Delivery of 26 May 2018. It resulted in Irish Ferries having to: (a) accommodate over 20,000 passengers booked on sailings throughout a summer season on various other sailings; and (b) refund a small proportion of the

¹ Regulation (EU) No 1177/2010 of the European Parliament and of the Council of 24 November 2010 concerning the rights of passengers when travelling by sea and inland waterway and amending Regulation (EC) No 2006/2004, OJ L 334, 17.12.2010, p. 1–16; ELI: <http://data.europa.eu/eli/reg/2010/1177/oj>. All legislative references are references to the Regulation unless otherwise stated.

passengers who chose to cancel their sailings. If the Regulation does apply to the cancellation of the sailings then various questions arise concerning, principally, Articles 18, 19, 24 and 25 of the Regulation.

Factual Background

5. In 2016, Irish Ferries' parent, Irish Continental Group plc (**ICG**), contracted with Flensburger Schiffbau-Gesellschaft (**Shipyards**) (established in 1872) to build a Ro-Pax ferry (i.e., the **Vessel**). Irish Ferries and ICG do not themselves build, and have never built, ships. The Shipyards was selected by ICG after a 17-month review of more than 10 shipyards worldwide, based on information from and visits to the shipyards, references and expert advice.
6. The **Vessel** was to operate various routes including a new continuous return service between Dublin (Ireland) and Cherbourg (France) (the **Route**). Services on the **Route** were to commence in, and operate throughout, the summer season of 2018 (**2018 Season**). The **Vessel** would be the only vessel operating such a service on the **Route**. This is not uncommon with many ferry services from Ireland being served by just one ferry company with only one ferry on that route.²
7. Because of the sailing time (circa 18 hours) and the need to load/discharge passengers/vehicles, the **Vessel** would sail on alternate days from Dublin and Cherbourg. It is not possible, given the distance, to operate a service with one ship offering daily departures from the same port.
8. Irish Ferries planned to operate this **Vessel** on the **Route** on alternate days to another vessel (the *Oscar Wilde*), which it operated during the 2018 Season on the Rosslare (Ireland) – Cherbourg route and the Rosslare – Roscoff route, thereby offering a daily service between Ireland and France, albeit from/to different Irish ports.³
9. The Shipyards agreed in a legally binding contract dated 27 May 2016 (based on the Baltic and International Maritime Council standard shipbuilding contract (i.e., BIMCO NEWBUILDCON)) to deliver the **Vessel** fully certified to ICG at the Shipyards on or

² E.g., Cork (Ireland)-Roscoff (France) by Brittany Ferries; Cork-Santander (Spain) by Brittany Ferries; Rosslare (Ireland)-Fishguard (UK) (Stena); Rosslare-Cherbourg by Stena; Rosslare-Pembroke Dock (UK) by Irish Ferries; and Dublin-Liverpool (UK) by P&O Ferries.

³ In fact, the vast majority of passengers on the cancelled sailings on the *W.B. Yeats* opted to sail on the *Oscar Wilde*.

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before 26 May 2018. The Shipyard also issued a press release stating that the Vessel "will be delivered in May 2018". The Vessel would then sail to Dublin to commence service.

10. Irish Ferries planned to take bookings for the 2018 Season from the end of October 2017. In the context of this service, holidaymakers (the overwhelming majority of passengers on the Vessel) tend to book months in advance. Irish Ferries says that it is standard practice that shipping companies globally and in Ireland accept advance bookings before vessels are delivered by shipyards or, in the case of charters, the vessel's owners, and that otherwise they would incur substantial losses from operating under-utilised expensive assets.
11. In January 2017, the Shipyard stated orally to Irish Ferries that the expected delivery date of the Vessel would be no later than 22 June 2018 and possibly as early as 15 June 2018.
12. On 19 October 2017, Irish Ferries asked the Shipyard if they were "still safe to assume" a delivery from the Shipyard on 15 June 2018. This would enable sailings to commence on 12 July 2018 to reconfirm Irish Ferries commenced taking bookings on 27 October 2017 for the 2018 Season. On 1 November 2017, the Shipyard confirmed in writing the scheduled delivery date as 22 June 2018 and it is Irish Ferries' position that this would, based on Irish Ferries' experience with other vessels entering into service (whether new or new to Irish Ferries), have allowed ample time for the Vessel to be ready for the first scheduled sailing on 12 July 2018.
13. Irish Ferries' position, which is based on experience over many years, is that it was clear to it that delivery of the Vessel at the Shipyard on 22 June 2018 would have allowed Irish Ferries ample time for the Vessel to be ready for the first sailing on 12 July 2018. This latitude of 20 days between delivery of the Vessel and the Vessel entering into service was in line with, or longer than, previous lead-in times for other vessels introduced into service by Irish Ferries. For example, the last vessel that Irish Ferries brought into service was the *Epsilon* and that vessel entered service 10 days after arrival in Dublin.
14. Irish Ferries proceeded with an expensive and extensive international marketing campaign about the Vessel in Ireland and continental Europe to attract custom for

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2018. Irish Ferries says that they did so confidently expecting the Vessel to arrive in time and that they would not have done so had it any concern or doubt.

15. On 18 April 2018, the Shipyard informed Irish Ferries that the Vessel would not be delivered at the Shipyard until on or about 13 July 2018. Thus, sailings could not commence on 12 July 2018 as scheduled and some later sailings would also be affected by virtue of, for example, the voyage to Dublin and berthing trials en route. It is Irish Ferries' position that the delay in delivery was a "shock". The NTA question whether the delay could have been a "shock". This is not a matter which needs to be resolved by the CJEU.
16. The Shipyard explained that this delay was due to work being conducted by third party accommodation outfitters which had been sub-contracted by the Shipyard (and who were, therefore, persons who had no contractual link with Irish Ferries). Irish Ferries says that this delay was entirely outside Irish Ferries' control and was neither foreseen nor anticipated by it but it would be likely to cause damage to its reputation and disruption for all concerned. The Shipyard also referred to in its email of 18 April 2018 of "*the possibility of later delivery, particularly as a result of negative developments in the outfitting of the public spaces*".
17. Irish Ferries' other vessels were all deployed, with thousands of long-standing bookings, so it was not feasible to reschedule any of those other vessels to the Route as that would have displaced thousands more passengers.
18. Irish Ferries therefore immediately sought to charter an alternative vessel suitable to operate the Route (bearing in mind the international safety rules which require a particular type of vessels for that Route). Irish Ferries contacted a leading international shipbroker who confirmed in writing that no suitable ships were available. Irish Ferries says that this was unsurprising as idle ferries with capacity for c.1800 passengers with c.435 berths are scarce or non-existent and all the scarcer in summer months.
19. Having established by 20 April 2018 that no suitable vessel could be sourced, Irish Ferries had to cancel sailings of the Vessel until the revised delivery date plus a leeway period to have the Vessel ready. Irish Ferries announced on the same day that it would cancel sailings from 12 July 2018 to 29 July 2018 (This is referred to in these proceedings as the **First Cancellation**).

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20. This First Cancellation attracted widespread commentary not only in the general media, but in the specialist maritime and financial media. Irish Ferries says that they had no choice because of the Shipyard's failure to deliver the Vessel, there being no other identical service on the Route and no other suitable vessel being available.

21. In relation to this First Cancellation, Irish Ferries acted to accommodate passengers by, in particular: (a) engaging with all the passengers, giving them twelve weeks' notice of cancellation) (b) opened its call centres for longer with extra staff; (c) offered all passengers (i) an immediate no-quibble reimbursement in full (i.e., a **Reimbursement Offer**) or (ii) the opportunity to rebook on alternative sailings (**Alternative Sailings**). Irish Ferries says that passengers were given the opportunity to avail of alternative sailings of their choice. The NTA does not accept that passengers had the choice suggested by Irish Ferries. . As there was no other identical service on the Route, Irish Ferries provided a range of services with various ports of departure and arrival (including in some instances Dublin and Cherbourg and in many instances Rosslare and Roscoff) directly between Ireland and France (e.g., the day before or the day after their original planned sailing – or any other date – subject to capacity) or indirectly through Landbridge. Irish Ferries did not offer landbridge as an option to all passengers affected by the First Cancellation but facilitated those passengers who wished to travel by Landbridge. The extent to which Landbridge was offered to passengers affected by the First Cancellation is a matter of fact which the High Court will ultimately have to determine to the extent that it is relevant to the resolution of the issues arising in the proceedings. Passengers who were re-routed were given a €150 voucher for use on the Ireland-France service in 2019; and (d) Irish Ferries worked with passengers to minimise disruption

22. With regard to accommodating passengers on alternative Irish Ferries vessels, Irish Ferries had reserved space on another vessel the Oscar Wilde. The parent company of Irish Ferries, ICG, stated in its trading update on 10 May 2018 that “the company activated its contingency plan of releasing capacity on the ‘Oscar Wilde’ sailings to France which had been held back in case there was any delay in the arrival of the ‘WB Yeats’.” Irish Ferries say that ferry companies usually reserve space for all means of contingencies occurring.

23. Where impacted passengers were rerouted to and from Rosslare (rather than Dublin) and/or to and from Roscoff (rather than Cherbourg), Irish Ferries did not offer to

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reimburse any additional costs incurred by such passengers in travelling to and from Rosslare rather than Dublin and to and from Roscoff rather than Cherbourg ("**Additional Costs**"). Irish Ferries disputes this, given its position as set out below and as will be set out further in observations on the applicability and application of the Regulation. Further, Irish Ferries says that not all passengers incurred any additional costs, given that certain passengers were located closer to Rosslare and were holidaying closer to Roscoff than Cherbourg.

24. On 9 May 2018, the NTA wrote to Irish Ferries about the First Cancellation: (a) stating that the NTA was examining the circumstances of this First Cancellation "to establish how the Regulation should be applied in this instance"; (b) noting that "Irish Ferries have concluded that the cancellation is due to extraordinary circumstances"; and (c) asking Irish Ferries to provide an explanation of the reasons why these were extraordinary circumstances and beyond the control of Irish Ferries. Irish Ferries made a detailed submission to the NTA in respect of the First Cancellation.

25. Irish Ferries says that Landbridge is generally regarded by ferry companies and users as interchangeable in certain circumstances with direct services. Irish Ferries also says that its competitors also operate Landbridge, and that the same vessels and contracts of carriage are used for both Landbridge and direct sailings

26. On 1 June 2018, the NTA wrote to Irish Ferries seeking information on Irish Ferries' compliance with Article 18. On 8 June 2018, Irish Ferries responded and an exchange of correspondence followed.

27. On 11 June 2018, the Shipyard notified Irish Ferries that the Vessel would be further delayed - until some unspecified time in September. This caused Irish Ferries to cancel all scheduled sailings after 30 July 2018 (i.e., the entirety of the 2018 Season was cancelled) (**Second Cancellation**). Ultimately, the Vessel was not delivered until 12 December 2018, some 200 days late.

28. As with the First Cancellation, the Second Cancellation arose from delays by a sub-contractor to the Shipyard who was unconnected with Irish Ferries and was, Irish Ferries asserts, outside of its control. The Shipyard explained that this delay was mainly due to electrical cabling and delays in the delivery of interior components for public areas and on the electrical system installation in the hull and deckhouse (work

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which was undertaken by a long-established reputable global electrical sub-contractor to the Shipyard).

29. It was not possible for Irish Ferries to operate the Vessel as: (a) it could not lawfully sail without the outstanding work completed because it would not be certified by the authorities and, in any event, (b) the unfinished Vessel remained under the Shipyard's ownership and control. Irish Ferries therefore sought immediately to charter an alternative vessel suitable to operate the Route, but none was available.
30. The Second Cancellation created very serious consequences. The entire Summer 2018 season was cancelled. Over 20,000 passengers were affected by the First Cancellation and Second Cancellation.
31. Following notification of this delay, and having contacted shipbrokers, Irish Ferries contacted the NTA, passengers, and made an announcement to the Irish and London Stock Exchanges.
32. Irish Ferries acted promptly to accommodate affected passengers by, for example: (a) announcing the Second Cancellation as soon as it had confirmed that it was not possible to charter an alternative vessel; (b) facilitating contact with all the passengers;⁴ (c) extending call centres' hours and deploying more staff; (d) giving at least 7 weeks' notice to the passengers, with many passengers given up to 12 weeks' notice ; (e) offering passengers the option to cancel and receive a full immediate reimbursement (i.e., the Reimbursement Offer); (f) offering passengers the possibility of sailing on alternative routes to France (without reimbursement of Additional Costs where they arose);⁵ (g) re-routing by way of "Landbridge" through Britain and Irish Ferries says that passengers could choose from a number of different Landbridge options, and could leave from any Irish ferry port and make their way to ports in France, such as Cherbourg, Roscoff, Calais, and Caen (with the fuel costs for crossing Britain being reimbursed to the passenger) and (h) a voucher of €150 would be provided to

⁴ It succeeded in doing so, apart from one lead passenger (out of 5,746 bookings (there was often more than one passenger for each booking)) whom Irish Ferries was unable to contact and who had made no contact with Irish Ferries but whom Irish Ferries refunded in full to the address given.

⁵ E.g., on the *Oscar Wilde* the day before or the day after the original planned sailing on the *W.B. Yeats* or any other date of the passenger's choosing subject to availability, as Irish Ferries had held back capacity on the *Oscar Wilde*.

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passengers to be used in respect of sailings on Irish Ferries' Ireland-France services in 2019.

33. Irish Ferries says that they accommodated passengers wherever possible (at the height of the Summer season) by re-arranging passengers' itineraries and placing courtesy gifts to passengers in their cabins on rescheduled Irish Ferries sailings. In any event, Irish Ferries says that they worked with passengers to make whatever arrangements would minimise the disruption to their travel plans.
34. The vast majority of passengers availed of the Alternative Sailings . 82% of passengers chose alternative sailings with Irish Ferries or other carriers while 3% chose Landbridge with the other 15% accepting a full reimbursement.
35. Passengers were re-routed on alternative routes: (a) using Irish Ferries' alternative sailings on (i) the *Oscar Wilde* or (ii) Dublin and Cherbourg (on the *Epsilon* which was scheduled to operate only once a week unlike the much larger *W.B. Yeats* which was to sail seven days a week on the Route); or (b) on another operator (i.e., another shipping company) which was paid for by Irish Ferries; or (c) using Landbridge with any additional ferry costs not charged to the passenger, any ferry savings made reimbursed to the passenger and, in the case of Landbridge, the fuel costs for crossing Britain as part of Landbridge were reimbursed to the passenger.
36. In some cases, passengers that were re-routed on alternative routes - whether Landbridge or alternative sailings - arrived at their destination on the same day as they had planned or even ahead of their original schedule. (Irish Ferries had provided worked examples of various Landbridge options to the NTA in that regard ahead of the latter making its decision on this matter.⁶) Irish Ferries' position is that passengers who chose Landbridge were given a choice of routes so they could have sailed from their original port of departure (e.g., Dublin) and sailed to their original port of arrival (e.g., Cherbourg) or use any other combination of ports.
37. Irish Ferries voluntarily offered passengers alternative sailings from which the passengers could choose. Irish Ferries asserts that it let passengers choose (subject

⁶ For example – A passenger would depart Dublin at 14:15 (GMT) to arrive in Holyhead at 16:15 (GMT) (travel time: 2 hours and 30 minutes). Then at 16:15 (GMT) the passenger would drive for 6 hours to arrive at Dover at 22:15 (GMT). The passenger would depart Dover at 23:15 (GMT) (with P&O Ferries) and arrive in Calais at 01:45 (CET) (travel time: 2 hours and 30 minutes). Then at 01:45 (CET) the passenger would drive to Cherbourg for 5 hours to arrive in Cherbourg at 06:45 (CET) 4 hours and 15 minutes earlier than they would have arrived on WB Yeats after a total journey that was 3 hours shorter.

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to availability) a date before, on or after the original sailing date. The NTA does not accept this. Irish Ferries' asserts that insofar as any passengers departed *after* their original sailing date and experienced a delay in arrival by reference to their original contract, this was due to the *choice* of those passengers to travel after their original sailing date. The NTA does not accept that all affected passengers were given a choice of alternative sailings before, on, or after the original sailing date. Irish Ferries asserts that passengers could have chosen a date before, or on, the original date subject to availability (whether direct or Landbridge). Irish Ferries also asserts that it put no temporal restriction on the sailing date chosen by the passenger and the only constraints were the passengers' choices and capacity on the sailings chosen by the passengers. The NTA does not accept this. These issues do not have to be determined by the CJEU.

38. For those passengers who availed of the Alternative Sailings: (a) any additional fares arising were not charged to the passengers but were paid by Irish Ferries; and (b) any difference in "on-board expenses" were reimbursed by Irish Ferries. For passengers availing themselves of Landbridge, they were reimbursed by Irish Ferries for the fuel for crossing Britain.

39. Passengers were in contact with the Irish Ferries' call centre. They discussed their individual circumstances with Irish Ferries staff. Irish Ferries' position is that, in all cases, changes to the booking were only made with the passenger's agreement.

40. It is the NTA's position that Irish Ferries did not pay compensation to impacted passengers who have requested compensation for delay in arrival at the final destination as set out in the transport contract pursuant to the provisions of Article 19 of the Regulation. Irish Ferries disputes this, given, in particular, its position as to the applicability and application of the Regulation and its contention that Articles 18 and 19 of the Regulation do not apply simultaneously.

41. The NTA formed a "Preliminary View" that was provided to Irish Ferries on 1 August 2018. It records that the NTA formed the following preliminary views (which Irish Ferries deny):

- i. the Regulation applied to the *W.B. Yeats* cancellations;

- ii. Article 18 of the Regulation applied to the *W.B. Yeats* cancellations and that certain requirements of Article 18 had not been complied with and set out the basis upon which this preliminary view was formed; and
- iii. Article 19 of the Regulation applies to the cancellations of the *W.B. Yeats* sailings and that Irish Ferries had not discharged the burden of proving that “extraordinary circumstances” exist hindering the performance of the passenger service which could not have been avoided even if all reasonable measures had been taken such that Article 20(4) would dis-apply the provisions of Article 19.

42. Irish Ferries were given the opportunity to make a submission on the Preliminary View which they did on 15 August 2018. The Board of the NTA made its Decision of 19 October 2018.

43. The Decision of 19 October 2018 contained the reasons for the decision and the following specific determinations (which Irish Ferries deny):

- i. that the Regulation applied to the cancellations of the *W.B. Yeats* sailings between Dublin and Cherbourg in Summer 2018;
- ii. that the NTA was of the opinion that Irish Ferries had failed, and was failing to comply with (or had infringed and was infringing), Article 18 of the Regulation in relation to the cancelled sailings in the manner and for the reasons set out in the Decision of 19 October 2018; and
- iii. that the NTA was of the opinion that Irish Ferries had failed, and was failing to comply with (or had infringed and was infringing), Article 19 of the Regulation in relation to the cancelled sailings for the reasons set out in the Decision.

44. Irish Ferries disputes the adequacy of the reasons.

45. A notice under Article 18 (the “**Article 18 Notice**”) and a notice under Article 19 (the “**Article 19 Notice**”) was served on Irish Ferries on 22 October 2018 pursuant to Regulation 4(1) of the European Union (Rights of Passengers when Travelling by Sea and Inland Waterway) Regulations 2012 (SI No. 394 of 2012) (“**2012 Statutory Instrument**”). Also furnished to Irish Ferries was a copy of the Decision of 19 October

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2018 and a full copy of all of the materials that were before the Board when it made the Decision of 19 October 2018.

46. In accordance with Regulation 4(2) of the 2012 Regulations, Irish Ferries were entitled to make representations to the NTA within 21 days of service of the Article 18 Notice and the Article 19 Notice. The NTA was required to consider any such representations and by Notice(s) confirm, modify or withdraw the Article 18 Notice and Article 19 Notice. Representations were received from Irish Ferries on 12 November 2018, and 27 November 2018.

47. By decision dated 25 January 2019 (which is the subject of these proceedings), the Board of the NTA decided to confirm the Article 18 Notice and the Article 19 Notice.

48. Pursuant to the Decision of 25 January 2019, the NTA issued Irish Ferries with notices confirming the Article 18 Notice and the Article 19 Notice along with the Article 18 Notice as confirmed and the Article 19 Notice as confirmed.

a. The Article 18 Notice provides:

"in relation to passengers impacted by the cancelled sailings, where such impacted passengers had to travel to and from Rosslare (rather than Dublin) and/or to and from Roscoff (rather than Cherbourg), Irish Ferries is to reimburse any additional costs incurred by the impacted passengers in travelling to and from Rosslare rather than Dublin and to and from Roscoff rather than Cherbourg"; and

b. The Article 19 Notice requires Irish Ferries:

"to pay compensation to impacted passengers who have already requested compensation from Irish Ferries for the delay in arrival at the final destination as set out in the transport contract, where such delay falls within the criteria set out in Article 19(1)(a)-(d) of the...Regulation, in accordance with the provisions of Article 19 of the...Regulation".

49. For completeness, there were some interactions between (a) INTERFERRY (a body which represents ferry companies including Irish Ferries) and officials from the European Commission's Directorate General for Transport (DG MOVE) and (b) the NTA and DG MOVE. Details of those interactions are in the underlying pleadings on the file of the referring court. Suffice it to say that Irish Ferries and the NTA each

interpret DG MOVE's comments as favourable to its own position. As the European Commission is entitled to intervene in these proceedings, it is proposed to let the Commission make its own views known on the matter.

IV. Relevant Legal Provisions

50. Regulation (EU) No 1177/2010 of the European Parliament and of the Council of 24 November 2010 concerning the rights of passengers when travelling by sea and inland waterway and amending Regulation (EC) No 2006/2004, OJ L 334, 17.12.2010, p. 1–16; ELI: <http://data.europa.eu/eli/reg/2010/1177/oj>.
51. The attention of the Court of Justice of the European Union is brought to the Regulation generally but particularly, recitals 1, 2, 3, 12, 13, 14, 15, 17, 19, 22 and Articles 2, 18, 19, 20, 24 and 25 thereof as well as EU law generally including Regulation (EC) No. 161/2004 of the European Parliament and of the Council of 11 February 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights.
52. Irish Ferries also relies on Articles 16, 17, 20 and 47 of the Charter of Fundamental Rights of the European Union, as well as on the general principles of proportionality, legal certainty and equal treatment.
53. The relevant national legislation is the 2012 Statutory Instrument. The NTA is designated as the national enforcement body pursuant to regulation 3 of the 2012 Statutory Instrument.
54. Under regulation 4(1) of the 2012 Statutory Instrument, the NTA, either on its own initiative, or following a complaint made to it by a passenger, being of the opinion that a provider is failing to comply with or is infringing the Regulation "*shall cause to be served on the provider a notice specifying the failure or infringement concerned and requiring the provider to take such measures as are specified in the notice, within such period as may be specified, for the purpose of complying with the notice.*"
55. Regulation 4(2) further provides that where there a notice is served under regulation 4(1), the provider may within 21 days of service of the notice make representations to the NTA. The NTA shall consider any such representations and shall by notice, confirm, modify or withdraw the notice.

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56. Non-compliance with the Notices served is, by virtue of Regulation 4(3) of the 2012 Statutory Instrument, an offence creating a liability: (i) on summary conviction, to a class A fine (i.e., €5,000); or (ii) on conviction on indictment, to a fine not exceeding €250,000.

57. The Regulation has not been interpreted by the CJEU.⁷ The questions in these proceedings are novel and the answers unclear.

V. The Grounds for the Reference

58. The Regulation is critical to the outcome of the proceedings. The parties have identified disputes on the interpretation and application of the Regulation on which there is no relevant jurisprudence. A summary of the legal arguments advanced by both Irish Ferries and the NTA is set out below.

Summary of Irish Ferries' Legal Arguments

59. Irish Ferries' arguments, insofar as they are relevant to this Request for Preliminary Ruling, include:

- a. **Misinterpretation of the Regulation** – the NTA failed to interpret the Regulation by reference to its wording, scheme, purpose and in the manner in which EU law (including the Charter of Fundamental Rights (**Charter**) and general principles of EU law) must be interpreted;
- b. **Misapplication of the Regulation Generally** – the Regulation does not apply where weeks or months of notice are provided to passengers. The scheme and wording makes it clear that it applies to passengers who are en route and/or in transit (e.g., references to minutes of delay and being in the terminal). Irish Ferries believes that its position is supported by the wording and context of the Regulation, the objective, the legislative history and the principles of proportionality and equal treatment. In particular in this regard, Irish Ferries relies on Articles 16(1), 17(1), 18(1), 18(3), and Recitals (12) and (13), and Chapter III. Irish Ferries also relies on the fact that Recital (1) of the Regulation makes it clear that its objective is ensure “*a high level of protection for*

⁷ For completeness, Reg.1177/2010 was mentioned in the following cases: Case C-509/11 *ÖBB-Personenverkehr AG* ECLI:EU:C:2013:613, paras.27 and 46.

passengers **that is comparable with other modes of transport** and in this respect, Irish Ferries refers to the position under Regulation 261/2004 (“**the Air Passengers Regulation**”). Irish Ferries’ position is supported by the initial Commission Proposal for the Regulation and by the *Opinion Of The European Economic And Social Committee On The ‘Proposal For A Regulation Of The European Parliament And Of The Council Concerning The Rights Of Passengers When Travelling By Sea And Inland* (“**EESC Opinion**”). Nor does the Regulation apply where a ferry operator does not have a vessel available to it for reasons beyond its control. For the avoidance of doubt, Irish Ferries pays compensation under the Regulation whenever it applies, but believes that it was not applicable here;

- c. **Errors in the Scheme of the Regulation** – even if the Regulation applied, the NTA erred in believing that Article 18 and Article 19 may apply conjunctively and simultaneously to the same passenger. The Regulation was not intended to impose double penalties on carriers. It would be erroneous to interpret Article 19 (relating to delays in "arrival") as applying where the departure has been "cancelled". In this regard, again, Irish Ferries relies on the wording, context and objective of the Regulation, and in particular, on Articles 3 and 19(1). Irish Ferries also relies on the fact that the Regulation has to be interpreted in accordance with the principle of proportionality. At the very least, it cannot be correct, in Irish Ferries’ submission, for Article 19 of the Regulation to apply to passengers who have benefited from reimbursement pursuant to Article 18. Equally, there were extraordinary circumstances in this case;
- d. **Errors in Finding that Irish Ferries did not comply with Article 18 and/or Article 19** – even if the Regulation applied, the NTA erred in not finding that Irish Ferries had complied with it. In respect of Article 18, Irish Ferries immediately offered passengers the choice between: re-routing to their final destination under comparable conditions at no additional cost (i.e., the “**New Contract Offer**”); or reimbursement of the ticket price. In respect of Article 19, the passengers who accepted the New Contract Offer were not delayed in "arrival at the final destination as set out in the transport contract", namely, the final destination as set out in the new contract, which was the only applicable and relevant "transport contract" at their time of travel for the purpose of Article 19. (If the second sailing was delayed then Article 19 would apply to *that* sailing

but not the first cancelled sailing otherwise a passenger would be able to claim compensation for two delayed sailings including one on which they never sailed.) Further, and for the avoidance of doubt, Irish Ferries contends that Landbridge comprises re-routing under comparable conditions, in particular, given extensive evidence as to its interchangeability with direct routes and its popularity with passengers. Landbridge remains an option for both passengers and freight to travel between Ireland and France even when direct Ireland/France sailings are available. Switching between direct services and Landbridge options occurs frequently. There are times of the year when Landbridge is the only way of sailing between Ireland and France.

- e. **Misinterpretation and/or Misapplication of Article 18** – even if it is accepted that the Regulation applied, the NTA has erred in concluding that Article 18(1)(a)—requiring “re-routing to the final destination”—requires re-routing through the same ports and/or “port of embarkation” and/or “port of disembarkation” and/or “port of arrival” (Dublin-Cherbourg), rather than re-routing to the same “final destination” through different ports (and achievable through rerouting, for example, via Rosslare-Roscoff). Irish Ferries relies on its offer of travel by Landbridge with payment of additional fuel costs as being alternative redress under Article 18. Irish Ferries’ position is supported by a contextual reading of the Regulation.

- f. **Misinterpretation and/or Misapplication of Article 19** – even if the Regulation applied, the NTA misinterpreted and/or misapplied Article 19. The NTA adopted an Article 19 Notice in respect of “cancellation” of services. However Article 19 does not deal with “cancellation”. Article 19 deals with “delay in arrival”, as shown by its title (“Compensation of the ticket price in the event of delay in arrival”) and content. In this respect, Article 19 is also to be contrasted with Article 18, which deals with re-routing and reimbursement in the event of cancelled or delayed departures. At the very least, again, a distinction ought to be drawn between passengers who have been reimbursed pursuant to Article 18 and passengers who have been rerouted.

Further, the NTA has erred in not finding that Article 19 has been disapplied by Article 20(4), and that the circumstances arising here are extraordinary. In this regard, Irish Ferries relies on the range of cases decided under the Air

Passengers Regulation, which it regards as helpful to it. Irish Ferries contends that it falls within the scope of the types of circumstances recognised by the Court as “extraordinary”.

Irish Ferries notes that the circumstances outlined in Recital (17) are not exhaustive. Shipbuilding is not within the normal exercise of Irish Ferries' activities. The legislative history is supportive of Irish Ferries, and in particular, it relies on the *Report of COREPER on the proposal for a Regulation of the European Parliament and of the Council concerning the rights of passengers when traveling by sea and inland waterway and amending Regulation (EC) No. 2006/2004 on cooperation between national authorities responsible for the enforcement of consumer protection law* and the EESC Opinion and Position (EU) No 5/2010 of The Council At First Reading With a View to the Adoption of Regulation of the European Parliament and of The Council Concerning The Rights Of Passengers When Travelling By Sea And Inland Waterway.

While the NTA suggests that Irish Ferries cannot rely on the existence of extraordinary circumstances given that it accepted advance bookings, this position is misconceived. In particular, it would be an intolerable and unreasonable burden on shipping companies not to accept bookings until after the vessel has been delivered; for example, typically, most passengers travel once a year in the Summer months on the Ireland-France-Ireland route and they typically book many months in advance. Irish Ferries acted in accordance with the normal and reasonable standards of the sector. If the *W.B. Yeats* was to arrive in, say, early Summer 2018 then no booking could have been taken (according to the NTA) until after then so no revenue would have been earned on the Ireland-France-Ireland route (which is a Summer service) until bookings were made for Summer 2019 (i.e., almost a year later). This would be intolerable in the context of multimillion euro assets being unable to generate revenue.

- g. **Excess of Jurisdiction** – the Decision and Notices were adopted in excess of jurisdiction. Article 25(1) obliged each Member State to designate a body to be responsible for the enforcement of the Regulation “as regards passenger services and cruises from ports situated on its territory and passenger services from a third country to such ports.” The NTA sought to exercise jurisdiction in

respect of services from France which is within the jurisdiction of the French authority.

- h. **Failure to Apply Article 24** – even if the Regulation applies, the NTA failed to apply Article 24 properly. The legal effect of Article 24 is to impose a mandatory obligation on any passenger seeking compensation under the Regulation to complain within two months from the date on which the service was performed or when a service should have been performed. The NTA failed to limit the effect of the Decision and the Notices to those passengers who had made a complaint in accordance with Article 24.
- i. **Breach of the Principle of Legal Certainty** - the NTA breached the principle of legal certainty insofar as: the Decision and/or Notices do not identify the addressee with sufficient clarity referring to “*many instances*” of impacted passengers not being offered re-routing at no “*additional cost*”, while failing to identify these concepts; the NTA has purported to apply Articles 18 and 19 to a sailing which has been superseded by a second sailing; the Decision and the Notices fail to define concept of “ticket price” in Article 19(2) of the Regulation (and in particular, fail to clarify if the term includes “add-ons” such as cabin price);
- j. **Breach of the Principle of Proportionality** - the NTA has breached the principle of proportionality, given, in particular, the oppressive impact of the Decision and/or the Notices on Irish Ferries;
- k. **Breach of Irish Ferries’ Rights under the Charter** - the NTA has breached Irish Ferries’ rights under the Charter (in particular, Articles 16 and 17), In particular, the Decision and the Notices result in a gross and unjustified interference with Irish Ferries’ rights and interfere with Irish Ferries’ freedom of contract, precluding it from cancelling any contract with any passenger even in accordance with the terms of the said contract, without incurring liability under the Regulation;
- l. **Manifest Error** - the Decision and Notices are vitiated by manifest error;
- m. **Breach of the duty to give reasons and/or Article 47 of the Charter** - the NTA has failed to provide adequate reasons, in particular, given the criminal penalties for non-compliance with the Notice;

- n. **The Invalidity of the Regulation** – if the NTA has correctly interpreted and applied the Regulation, Irish Ferries contends that the Regulation is nonetheless invalid. In particular, Irish Ferries contends that the Regulation breaches the General Principles of EU law; the principle of legal certainty insofar as it imposes onerous obligations on carriers in the absence of a clear legal basis for same and/or Article 19(1) imposes an obligation to pay compensation by reference to a percentage of the “*ticket price*” without defining the concept of “*ticket price*”; breaches the principle of proportionality; the Charter, and in particular Articles 16, 17 and 20 thereof; and the principle of equal treatment insofar as it fails to treat ferry operators and airline operators equally in equal circumstances.

Summary of the NTA's Legal Arguments

- a. **Proper interpretation of the Regulation** –The objective of the Regulation is to ensure a high level of protection to passengers using waterborne transport anywhere in the EU by establishing certain rights and a minimum quality of service across the EU. The NTA, in making the Decision and issuing the Notices, construed and applied the Regulation in accordance with its wording, scheme and objectives and gave it a purposive and teleological interpretation in accordance with the requirements of EU law.
- b. **Application of the Regulation Generally** – The NTA's position is that the Regulation applies to the cancellations of the sailings on the Route during the 2018 Season.
- c. **Advance Notice** – Article 18(1) of the Regulation applies whenever there is a reasonable expectation that a cancellation of a passenger service will occur and Article 18(2) applies when the cancellation of the passenger service has occurred. In this case the sailings on the *W.B. Yeats* were cancelled and therefore Article 18 applies. Article 18 is only disapplied where the requirements of Article 20(1) are met which is not the case here. The Regulation does not provide that where advance notice of cancellations, or advance notice of any particular duration (be it weeks or months), is given that the Regulation does not apply.
- d. **Passengers en route and/or in transit** – Article 18 is not premised on passengers being at a port at the time of the cancellation and there is nothing in the wording of Article 18 to suggest that it only applies where a passenger is en route/in transit.

Furthermore, such an interpretation would not accord with the language of Article 18 or the objectives of the Regulation to ensure a high level of protection to passengers using waterborne transport in the EU. Similarly, there is nothing in the wording of Article 19 that suggests that it does not apply where (1) advance notice of a cancellation is given and/or (2) that it only applies to passengers who are en route and/or in transit.

- e. **Ports of embarkation and availability of a vessel** – Article 2 of the Regulation provides that the Regulation applies wherever passenger services are provided to passengers travelling where the port of embarkation is situated in the territory of a Member State. As the ports of embarkation (Dublin and Cherbourg) are located in the territory of a Member State, the Regulation applies in respect of the passenger services at issue unless Irish Ferries can bring itself within an exemption to the application of the Regulation. There is no support in Article 2 or elsewhere for the proposition that the Regulation is disapplied if the ship is not available to provide passenger services.
- f. **Scheme of the Regulation** – Article 18(1) applies whenever there is a reasonable expectation that a cancellation of a passenger service will occur and Article 18(2) applies when the cancellation of the passenger service has occurred. While it is accepted that Article 19 does not use the word “cancellation” as a reason for delay in arrival, where passenger services are cancelled and where impacted passengers are rerouted such that they arrive at the final destination as set out in the transport contract at a later time, then they are “*facing a delay in arrival at the final destination as set out in the transport contract*” pursuant to Article 19. On the facts of an individual case, neither, one or both of Articles 18 and 19 may be applicable. Articles 18 and 19 can apply conjunctively and simultaneously. The application of Article 18 and 19 to the same passenger does not result in a double penalty for the carrier and/or an unintended windfall for the passenger and such an application is consistent with the intention of the Regulation.

The NTA does not accept that, where a passenger agrees to a “*re-routing to the final destination, under comparable conditions, as set out in the transport contract, at the earliest opportunity and at no additional cost*” under Article 18(1)(a), this results in a variation of the terms of the transport contract such as to deprive impacted passengers of rights under Article 19 in respect of that transport contract and replace it with a new transport contract. For the purposes of the Regulation, the transport contract was that

entered into between the passenger and Irish Ferries in respect of the sailing on the *W.B. Yeats* and accordingly, the NTA denies that passengers were not delayed in "arrival at the final destination as set out in the transport contract". The reference to "transport contract" in Article 19(1) is a reference to the "transport contract" entered into between the passenger and the carrier. It is not accepted that a "New Contract Offer" is made or a new contract entered into between the passenger and the carrier where the passenger agrees to re-routing or a reimbursement under Article 18(1) in the manner as asserted by Irish Ferries.

g. Finding that Irish Ferries did not comply with Article 18 and/or Article 19 –

It is accepted that Irish Ferries offered at least some affected passengers a choice between re-routing and reimbursement but the exact details of what options were offered to individual passengers are not known to the NTA.

However, the NTA's position is that the offers made by Irish Ferries to affected passengers did not satisfy Irish Ferries' obligations under Article 18.

The re-routing offered by Irish Ferries failed to comply with the requirements of Article 18(1)(a) in that (a) re-routing was required to be to the final destination, under comparable conditions, as set out in the transport contract but some impacted passengers were not offered re-routing to the final destination as they were re-routed from Rosslare to Roscoff rather than from Dublin to Cherbourg (and the inverse on the return leg of the Route) and (b) in many instances impacted passengers were not offered re-routing "at no additional cost" as Irish Ferries did not reimburse additional costs incurred by passengers in travelling to and from Rosslare rather than Dublin and to and from Roscoff rather than Cherbourg.

With regard to Landbridge, Irish Ferries did not offer Landbridge as an option to all passengers affected by the First Cancellation but facilitated those passengers who wished to travel Landbridge. The NTA accept that Landbridge was offered to those passengers affected by the Second Cancellation.

The NTA maintain that the fact that Irish Ferries facilitated some passengers affected by the First Cancellation who wished to travel Landbridge and that Landbridge was one of the alternatives offered by Irish Ferries to passengers affected by the Second Cancellation does not mean that Article 18 has been complied with. While the NTA made no determination as to whether Landbridge constituted "re-routing under

comparable conditions" for the purposes of Article 18, the NTA does not accept the contention advanced by Irish Ferries that the Landbridge option constituted "*re-routing under comparable conditions*" for the purposes of Article 18.

In addition, it is not accepted that the provision of a €150 voucher exceeded Irish Ferries' obligations under the Regulation.

- h. **Interpretation and Application of Article 18** –The NTA denies that it erred in concluding that the requirement for "*re-routing to the final destination*" requires re-routing through the same ports. It is denied that the interpretation and/or application of Article 18 taken by the NTA is erroneous because of the fact that there was no other comparable available service from Dublin to Cherbourg. There is no definition of the term "final destination" in the Regulation but it is clearly intended to refer to the destination specified in the transport contract rather than the ultimate destination of a passenger.
- i. **Interpretation and Application of Article 19** – The NTA has not misinterpreted and/or misapplied Article 19. The NTA construed and applied the Regulation in accordance with its wording and objectives and gave it a purposive and teleological interpretation.
- j. **Delays in arrival at the final destination as set out in the transport contract** – While Article 19 does not use the word "cancellation" as a reason for delay in arrival, where services are cancelled and passengers are rerouted so they arrive at the final destination as set out in the contract at a later time, then they "*are facing a delay in arrival at the final destination as set out in the transport contract*". There is no justification for treating those passengers who are delayed differently to those whose sailing is cancelled.

It is clear that Article 19 applies to delays caused by cancellations. Article 20(4) of the Regulation specifies the circumstances where Article 19 does not apply and provides that Article 19 should not apply where the carrier proves that the cancellation or delay is caused by weather conditions endangering the safe operation of the ship or by extraordinary circumstances hindering the performance of the passenger service which could not have been avoided even if all reasonable measures had been taken. Further, Recital 19 of the Regulation also states that the CJEU has already ruled that problems leading to cancellations or delays can be covered by the concept of extraordinary

circumstances only to the extent that they stem from events which are not inherent in the normal exercise of the activity concerned and are beyond its actual control.

- k. **Extraordinary Circumstances** – The burden of proving “extraordinary circumstances” such that Article 19(1) of the regulation was dis-applied falls on Irish Ferries and has not been discharged.

The non-availability of a new build ship does not give rise to an "extraordinary circumstance" within the meaning of Article 20(4). The test under Article 20(4) involves examining whether extraordinary circumstances hindering the performance of the passenger service could not have been avoided even if all reasonable measures had been taken. The NTA maintain that the circumstances arising were not outside the control of Irish Ferries and/or that Irish Ferries took all reasonable measures to avoid the situation arising, as required by Article 20(4). The cancellation of the passenger services could have been prevented if Irish Ferries had not taken bookings for those passenger services and entered into transport contracts at a time when it did not own or have possession of the ship on which those passenger services were to be provided and where there was an inherent risk that it would not have possession of the ship at the time that those passenger services had to be provided in accordance with the relevant transport contract.

While the NTA accepts that Irish Ferries does not build ships and relies upon others to do so, the NTA is of the view that the *"non-availability of a new build ship is not an event which is not inherent in the normal exercise of the activity of a carrier"* and/or that *"the late delivery of the ship is inherent in the normal exercise of Irish Ferries' activity"*. For the purposes of Article 20(4), the length of delay in the delivery of the vessel does not have any bearing on whether the circumstances were extraordinary.

- l. **Excess of Jurisdiction** –Article 25(1) provides that (a) each Member State is to designate a body responsible for the enforcement of the Regulation as regards passenger services and cruises from ports on its territory and passenger services from a third country to such ports and (b) that such designated body has an obligation to ensure compliance with the Regulation.

The Regulation envisages co-operation between the National Enforcement Bodies and this is expressly provided for in Article 25(3) which provides that a passenger can

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submit a complaint to a body under Article 25(1) and such complaint may be submitted “to any other competent body designated by a Member State”.

It would be inconsistent with the scheme of the Regulation and the objective of a high level of protection to passengers using waterborne transport anywhere in the EU if passengers who entered into a transport contract with a ferry company for a return sailing were required to make two separate complaints to two separate National Enforcement Bodies in respect of that transport contract with the possibility of inconsistent results.

- m. **Failure to apply Article 24** - Article 24 is a standalone provision relating to complaints and does not refer to compensation at all. Furthermore, Article 24 does not impose a mandatory obligation on any passenger seeking compensation under the Regulation to make a complaint within two months from the date on which the service was performed or when a service should have been performed as contended for by Irish Ferries.

The rights of the passenger under Article 18 and Article 19 are not predicated on the making of a complaint under Article 24 to either the carrier or the National Enforcement Body. Accordingly, there was no requirement that the Notices issued under Article 18 and Article 19 be limited to passengers who had made a complaint in accordance with Article 24.

- n. **Validity of the Regulation** - The NTA does not accept that the Regulation is invalid.
- o. **Breach of the Principle of Legal Certainty** – The Article 18 and Article 19 Notices are clear and they set out precisely the measures to be taken by Irish Ferries.

The term “ticket price” is not defined in either the Decision of 25 January 2019, the Article 18 Notice or the Article 19 Notice, nor was it necessary to do so as (1) the Decision of 25 January 2019 was a decision to confirm the Article 18 Notice and the Article 19 Notice and it was not necessary to define “ticket price” for the purpose of that decision, (2) the Article 18 Notice does not refer to “ticket price” and (3) the Article 19 Notice does not define “ticket price” for the purposes of that Notice as Article 19(3) of the Regulation clearly provides that “*compensation shall be calculated in relation to the price which the passenger actually paid for the delayed passenger service.*”

- p. **Breach of the Principle of Proportionality** - The NTA denies that the Decision of 25 January 2019 and/or the Article 18 Notice and/or the Article 19 Notice are

disproportionate to the aim of ensuring a high level of protection for passengers, which is one of the objectives of the Regulation.

The Decision of 25 January 2019 and/or the Article 18 Notice and/or the Article 19 Notice are tailored to the different circumstances of different affected passengers. In particular the Article 18 Notice is limited to those passengers that had to travel to and from Rosslare (rather than Dublin) and/or to and from Roscoff (rather than Cherbourg) and requires Irish Ferries to reimburse any additional costs incurred by the impacted passengers in travelling to and from Rosslare rather than Dublin and to and from Roscoff rather than Cherbourg. The Article 19 Notice is restricted to passengers who have already requested compensation from Irish Ferries for the delay in arrival at the final destination as set out in the transport contract where such delay falls within the criteria set out in Article 19(1)(a) to (d) of the Regulation.

- q. **Breach of Irish Ferries' Rights under the Charter** - The Decision of 25 January 2019 and/or the Article 18 Notice and/or the Article 19 Notice are not a gross and unjustified interference with Irish Ferries' rights to property, to earn a livelihood, to freedom of contract and business, to the extent that those rights are protected under the Charter. To the extent that those rights are protected by the Charter, they may be limited by law, such as the Regulation, which pursues an important public interest, namely seeking to ensure a high level of protection for passengers. It is not accepted that the Decision of 25 January 2019 and/or the Article 18 Notice and/or the Article 19 Notice interfere with Irish Ferries' contracts with its passengers and preclude Irish Ferries from cancelling any contract with any passenger even in accordance with the terms of the contract without incurring liability under the Regulation;
- r. **Manifest Error** - The NTA denies that its decision is vitiated by manifest error.
- s. **Breach of the duty to give reasons and/or Article 47 of the Charter** - The reasons for the Decision of 25 January 2019 are clearly set out in that Decision, which itself expressly refers to the Addendum Memorandum dated 7 December 2018 and the Additional Addendum Memorandum dated 11 January 2019 and records the Board "generally agreeing with the analysis and considerations set out in the Addendum Memorandum and the Additional Addendum Memorandum" and also referred to the Decision of 19 October 2018 and the Memorandum dated 6 September 2018. The reasons for the Decision of 25 January 2019 to confirm the Article 18 Notice and Article

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19 Notice are to be found in those documents. Those reasons meet the standard required by decision making bodies and comply with the requirements of EU law.

THE HIGH COURT

Commercial

BETWEEN:

2019 No. 118 JR

IRISH FERRIES LIMITED

Applicant

-and-

NATIONAL TRANSPORT AUTHORITY

Respondent

QUESTIONS FOR REFERRAL TO THE COURT OF JUSTICE OF THE EUROPEAN COMMUNITY

A.	Applicability of the Regulation
Q.1	<p>Does the Regulation (in particular Articles 18 and/or 19) apply in circumstances where passengers have made advance bookings and entered into transport contracts and where the passenger services are cancelled with a minimum of seven weeks' notice prior to the scheduled departure due to the delay in the delivery of a new vessel to the ferry operator? In that regard, are any (or all) of the following matters relevant to the applicability of the Regulation:</p> <ul style="list-style-type: none">a. Delivery was ultimately delayed by 200 days;b. The ferry operator had to cancel a full season of sailings;c. No suitable alternative vessel could be obtained;d. Over 20,000 passengers were rebooked by the ferry operator on different sailings or refunded their fares;e. The sailings were on a new route being opened by the ferry operator with no similar alternative service on the route?
B.	Interpretation of Article 18 of the Regulation
	This question need only be answered if Article 18 is capable of applying.
Q.2	Where a passenger is re-routed in accordance with Article 18 does a new transport contract come into existence such that the right to compensation under Article 19 is to be determined in accordance with that new contract rather than the original transport contract?
Q.3 (a)	If Article 18 is applicable then if a sailing is cancelled and there was no alternative service operating on that route (i.e. no direct service between those two ports) does providing an alternative sailing on any other route or routes available and

	<p>chosen by the passenger including by "landbridge" (e.g., travelling from Ireland to the UK by ferry and then driving, with the fuel costs reimbursed to the passenger by the ferry operator, to a UK port with a connection to France and travelling from there to France with the passenger choosing each of the sailings) amount to "re-routing to the final destination" for the purposes of Article 18? If not, what criteria are to be employed in determining if a re-routing is "under comparable conditions"?</p>
(b)	<p>If there is no alternative sailing on the cancelled route, such that the affected passenger cannot be accommodated on a direct sailing from the original port of embarkation to the final destination as set out in the transport contract, is the carrier required to pay any additional costs incurred by a re-routed passenger in travelling to and from the new port of embarkation and/or to and from the new port of destination?</p>
C.	Interpretation of Article 19 of the Regulation
Q.4	<p>Can Article 19 apply when the voyage has in fact already been cancelled at least seven weeks prior to the scheduled departure? If Article 19 does apply, does it apply where Article 18 has been applied and the passenger has been re-routed at no additional cost and/or reimbursed and/or has chosen a later sailing?</p>
(a)	
(b)	<p>If Article 19 does apply what is the "final destination" for the purposes of Article 19.</p>
Q.5	<p>If Article 19 is capable of applying:</p>
(a)	<p>How is the period of delay to be measured in such circumstances?</p>
(b)	<p>How is the <i>price</i> within the meaning of Article 19 to be calculated when determining the level of compensation payable and in particular does it include costs referable to extras (e.g., cabins, kennels and premium lounges)?</p>
D.	Interpretation of Article 20(4)
Q.6	<p>If the Regulation does apply then do the circumstances and considerations outlined in Q.1 amount to "extraordinary circumstances which could not have been avoided even if all reasonable measures had been taken" for the purposes of Article 20(4) of the Regulation?</p>
E.	Interpretation of Article 24
Q.7	<p>Does Article 24 have the effect of imposing a mandatory obligation on any passenger seeking to benefit from compensation under Article 19 of the Regulation to make a complaint within two months from the date on which the service was</p>

	performed or should have been performed?
F.	Interpretation of Article 25
Q.8	Is the jurisdiction of the national competent body responsible for the enforcement of the Regulation limited to sailings involving the ports specified in Article 25 of the Regulation or may it also extend to a return sailing <i>from</i> the port of another Member State to the state of the national competent body?
G.	The validity of the Decision and the Notices
Q.9.	What principles and rules of EU law should the referring court apply in assessing
(a)	the validity of the Decision and/or the Notices of the national enforcement body by reference to Article 16, 17, 20 and/or 47 of the Charter and/or principles of proportionality, legal certainty, and equal treatment?
(b)	Is the test of unreasonableness that should be applied by the domestic court that of manifest error?.
H.	Validity of Regulation 1177/2010
	This question will only arise depending on the answers to the previous questions.
Q.10	Is Regulation 1177/2010 valid as a matter of EU law having regard in particular to:
	(a) Articles 16, 17, and 20 of the Charter?
	(b) The fact that airline operators have no obligation to pay compensation if it informs the airline passenger of the cancellation at least two weeks before the scheduled time of departure (Article 5(1)(c)(i) of Regulation 261/2004)?
	(c) The principles of proportionality, legal certainty and equal treatment?



Mr Justice Robert Haughton, Judge of the Irish High Court.

22 July 2019.