

## DECISION ON THE WB YEATS CANCELLATIONS

Having reviewed the Representations of Irish Ferries and the accompanying documentation referred to in the Representations dated 12 November 2018, together with an additional representation made by letter dated 27 November 2018 and made pursuant to Regulation 4(2) of the 2012 Statutory Instrument in response to the Article 18 and Article 19 Notices served on Irish Ferries by the Authority pursuant to Regulation 4(1) of the 2012 Statutory Instrument and additional comments/submissions made by letter dated 20 December 2018 and the letter dated 7 January 2019, and having considered the Addendum Memorandum from Ms Anne Graham, Chief Executive Officer, to the Board Members dated 7 December 2018, together with the information included in the appendices to the Addendum Memorandum, and the Additional Addendum Memorandum from Ms Anne Graham dated 11 January 2019 (together with the information included in the appendices to the Additional Addendum Memorandum), and generally agreeing with the analysis and considerations set out in the Addendum Memorandum and the Additional Addendum Memorandum and following a discussion at the Board Meeting on 14 December 2018 and today, and taking into account the previous submissions and documentation from Irish Ferries and the analysis and considerations of same contained in the Memorandum to the Board dated 6 September 2018 and all the documentation referred to therein which was before the Board, and also taking into account the decision of the Authority dated 19 October 2018, the Authority decided to confirm the Article 18 Notice and the Article 19 Notice.

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Irish Ferries was afforded a number of opportunities to make representations to the Authority. Not only was it given the opportunity to do so in accordance with the provisions of the 2012 Statutory Instrument, it was afforded the opportunity to make such representations prior to the Authority making a decision to serve a notice pursuant to Regulation 4(1) (which it availed of). The representations made by Irish Ferries as at 19 October 2018 having been considered by the Authority when deciding to serve the Article 18 Notice and the Article 19 Notice, and the Authority confirms that all of the representations made by Irish Ferries have been carefully considered by the Authority when reaching its decision to confirm the Article 18 Notice and the Article 19 Notice.

The Decision of the Authority to confirm the Article 18 Notice and the Article 19 Notice was reached for the following reasons:

### The Maritime Regulation & the 2012 Statutory Instrument Generally

- (i) Article 2(1)(a) of the Maritime Regulation provides that the Maritime Regulation shall apply in respect of passengers travelling on passenger services where the port of embarkation is situated in the territory of a Member State. The ports of embarkation for the purposes of the cancelled sailings from 12 July 2018 are Dublin and Cherbourg, which places are situated in the territories of Member States.

- (ii) Article 2(2) – (4) of the Maritime Regulation lists exemptions and possible exemptions from the application of the Maritime Regulation. No exemption or possible exemption so listed refers to a new build ship not being available to provide the passenger services. There is nothing in the wording of the Maritime Regulation to indicate that it does not apply where a new build is not available.
- (iii) The Maritime Regulation does not provide that advanced notice of cancellations, even of the kind here, should result in the Maritime Regulation not applying. No temporal limitation to its application is contained in the Maritime Regulation. Insofar as there is a reference to time periods in Articles 16, 17 and 18 of the Maritime Regulation, these relate to the length of the delayed departure and not to the amount of notice given of it.
- (iv) The Maritime Regulation is not premised on passengers being at a port terminal when a cancellation occurs; nor does the wording of the Maritime Regulation say that it only applies to passengers “*en route or in transit*”.
- (v) If passengers have to be at the port or “*en route or in transit*” or “*waiting to depart*” for Article 18 to be applicable, then the provisions of Article 18 would not apply to impacted passengers who are given any advance notice of more than a few hours in the event of a cancellation. This does not accord with the language of Article 18 or the objectives of the Maritime Regulation and would give rise to anomalies in the treatment of passengers.
- (vi) Article 18(1) refers to the situation where a carrier “*reasonably expects*” a passenger service to be cancelled. This is what occurred in relation to the cancellation of the sailings of the WB Yeats.
- (vii) Article 18 is only dis-applied by the provisions of Article 20(1) which does not apply to the circumstances contemplated by the cancelled WB Yeats sailings.
- (viii) The reference in Article 19 to passengers “*facing a delay*” does not mean that a passenger has to be in the course of their journey when the delay or cancellation occurs in order for Article 19 to apply. The wording of Article 19 does not support such a contention and it would be contrary to the objectives of the Maritime Regulation.
- (ix) Unlike the Airline Regulation, the Maritime Regulation does not contain any temporal limitation on the availability of the rights thereby conferred.
- (x) The Authority, in discharging its functions as the National Enforcement Body in accordance with the Maritime Regulation and the 2012 Statutory Instrument, is engaged in an administrative law process. The standard to be applied by the Authority in carrying out those functions is not the criminal standard of proof of beyond reasonable doubt as suggested by Irish Ferries.
- (xi) The Authority is satisfied that, prior to reaching its decision to serve the Article 18 Notice and the Article 19 Notice, it took all relevant materials into account and did not take irrelevant materials into account in reaching that decision.

- (xii) The Authority has construed and applied the Maritime Regulation in accordance with its wording and objectives and is giving it a purposive and teleological interpretation, and
- (xiii) The objective of the Maritime 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 and it would not be consistent with that objective if impacted passengers:
  - (1) that were offered passenger services by Irish Ferries on 'WB Yeats'
  - (2) that booked those passenger services, and
  - (3) whose passenger services were subsequently cancelled thereby having an impact on such passengers,

were not able to rely on any of the provisions of the Maritime Regulation for the protection of their rights and, instead, could only rely on the voluntary actions of the carrier or on their common law rights in circumstances where the carrier did not have available to it a ship to provide those services due to the late delivery of a new build or because it had given advance notice of the cancellation.

#### Article 18 and the Article 18 Notice

- (i) Article 18 is not premised on passengers being at a port at the time of the cancellation;
- (ii) Nowhere in Article 18 does it say that advance notification of the cancellation of the type provided in respect the cancelled sailings dis-applies Article 18.
- (iii) Article 18 is not limited in its application to passengers who are "*en route or in transit*" at the time of the cancellation.
- (iv) Article 18 stipulates that the choice of re-routing be offered to the final destination under comparable conditions in accordance with the transport contract and at no additional cost but in this case:
  - A. Cherbourg is the final destination set out in the transport contract for the outward leg of the journey and Dublin is the final destination for the inward leg of the journey; however, the documentation accompanying the Memorandum to the Board and referred to therein shows that, in many instances, Irish Ferries has not offered to re-route passengers to Cherbourg/Dublin but rather to Roscoff/Rosslare; and
  - B. the documentation accompanying the Memorandum to the Board and referred to therein also shows that some impacted passengers have incurred or are incurring additional costs arising from the re-routing but these have not been reimbursed by Irish Ferries nor has an offer of reimbursement been made.
- (v) The fact that landbridge was one of the alternatives offered by Irish Ferries to some of the impacted passengers does not mean that Article 18 has been complied with.

- (vi) Re-routing at a later stage is a third and additional option that can be made available to impacted passengers and does not dilute the obligation under Article 18 to offer to impacted passengers the choice between:-(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; (b) reimbursement of the ticket price.
- (vii) Article 18(1) requires re-routing be to the final destination under comparable conditions as set out in the transport contract, at the earliest opportunity and at no additional cost and such rerouting does not amount to a variation of the terms of the transport contract such as to deprive impacted passengers of their rights under Article 18 of the Maritime Regulation.
- (viii) The measure set out in the Article 18 Notice is clear and unambiguous and requires the reimbursement of any additional costs that have been incurred by impacted passengers who had to travel to and from Rosslare (rather than Dublin) and/or to or from Roscoff (rather than Cherbourg).
- (ix) In many instances impacted passengers have not been offered re-routing at no additional cost as required by Article 18 as Irish Ferries has not offered to reimburse any additional costs incurred by impacted passengers when travelling to and from Rosslare rather than Dublin and to and from Roscoff rather than Cherbourg; and
- (x) Article 18 requires re-routing to the "final destination" and the Authority considers that it is clear from the Maritime Regulation that this is the port of arrival specified in the transport contract.

#### Article 19 and Article 19 Notice

- (i) The Authority is not satisfied that the unavailability of the WB Yeats is an extraordinary circumstance hindering the performance of the cancelled passenger services which could not have been avoided even if all reasonable measures had been taken.
- (ii) The non-availability of a new build ship is not listed in Recital 17 of the Maritime Regulation which provides a non-exhaustive list of extraordinary circumstances.
- (iii) 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.
- (iv) While it is acknowledged that Irish Ferries do not build ships, Irish Ferries procure ships and deliver passenger services on those ships; the procurement of ships is part of the normal exercise of the activity of a carrier. Irish Ferries could, as a matter of course, face difficulties in relation to the procurement of ships including their late delivery. Accordingly, the late or non-delivery of the ship is inherent in the normal exercise of their activity.
- (v) The use and existence of a ship is intrinsically linked to the operation of Irish Ferries' activity of providing passenger services – a key element of the provision of passenger services is to have a ship and so it is inherent in the normal exercise of Irish Ferries' activities to have a ship to provide the passenger services.

- (vi) As acknowledged by Irish Ferries, delays in any supply or construction process can occur, including delays in the delivery of new ships.
- (vii) The event is not beyond Irish Ferries' control. It is Irish Ferries who entered into the ship building contract with FSG and the negotiation of those contract terms including the date for the delivery of the ship was within the control of Irish Ferries.
- (viii) The cancellation of passenger services could have been prevented had Irish Ferries 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 in circumstances where there was a risk that it would not have possession of the ship at the time that those services were to be provided.
- (ix) The Authority is in receipt of correspondence from impacted passengers who made requests for compensation to Irish Ferries on the basis that they were facing a delay falling within the criteria set out in Article 19(1)(a) - (d) which requests have been refused by Irish Ferries.
- (x) The first and second tranches of cancellations are not as a result of "decisions by the competent authorities with regard to public order and safety" within the meaning of Recital 17 of the Maritime Regulation.
- (xi) The analogy drawn between the circumstances of Irish Ferries in this instance and the situation of "labour conflicts" being an extraordinary circumstance is not appropriate as it is premised on the assumption that a labour conflict will in every circumstance be an "extraordinary circumstance" which is not the case.
- (xii) Article 19 provides that passengers may request compensation from the carrier if they are facing a delay in arrival at the final destination as set out in the transport contract. The reason given for the delay, being a cancellation does not have to be referred to in Article 19 for Article 19 to apply.

The Board hereby authorises:

1. Ms Anne Graham, Chief Executive Officer (and to the extent applicable, confer on her as an additional function for the purposes of section 19(2) of the Dublin Transport Authority Act 2008 (as amended) the function of):
  - (a) to settle the form of notice(s) to be served on Irish Ferries in accordance with Regulation 4(2) of the 2012 Statutory Instrument confirming each of the Article 18 Notice and the Article 19 Notice; and
  - (b) to serve (or procure the service) on Irish Ferries of all and any notices required.

Dated: 25 January 2019