

## DECISION ON THE WB YEATS CANCELLATIONS

Having reviewed and considered the paper from Ms Anne Graham, Chief Executive Officer, to the Board Members entitled "*Irish Ferries Cancellation of WB Yeats*" dated 6<sup>th</sup> September 2018 together with the information included in the appendices to the Board Paper and contained in the accompanying documentation, and agreeing with the observations and analysis contained therein and following a discussion on the matter at the Board Meeting of 13 September 2018 and today:-

### APPLICABILITY OF THE MARITIME REGULATION

1. The Board of the Authority decided and determined that Regulation (EU) No. 1177/2010 concerning the rights of passengers when travelling by sea and inland waterway and amending Regulation (EC) No. 2006/2004 (the "**Maritime Regulation**") applies to the cancellations of the WB Yeats sailings between Dublin and Cherbourg (the "cancelled sailings"). This decision was reached for the following reasons:
  - (a) 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.
  - (b) 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.
  - (c) The Maritime Regulation does not provide that advance notice of cancellations, even of the kind here, should result in the Regulation not applying. No temporal limitation to its application is contained in the Maritime Regulation to this effect. 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.
  - (d) 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*".
  - (e) 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.
  - (f) 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.
  - (g) 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.
  - (h) 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.

- (i) Unlike the Airline Regulation, the Maritime Regulation does not contain any temporal limitation on the availability of the rights thereby conferred.
- (j) 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:
  - (i) that were offered passenger services by Irish Ferries on 'WB Yeats'
  - (ii) that booked those passenger services, and
  - (iii) 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 OF THE MARITIME REGULATION

- 2. The Board of the Authority decided and determined that Article 18 of the Maritime Regulation applies to the cancelled sailings from 12 July 2018. The Board of the Authority is also of the opinion that Irish Ferries has failed and is failing to comply with (or has infringed and is infringing) Article 18 of the Maritime Regulation in relation to the cancelled sailings and, in particular, where in many instances:
  - (a) impacted passengers have not been offered re-routing to the final destination as they are being re-routed from Rosslare to Roscoff rather than from Dublin to Cherbourg on the outward leg of the journey and from Roscoff to Rosslare rather than from Cherbourg to Dublin on the inbound leg of the journey; and
  - (b) impacted passengers have not been offered re-routing at no additional cost as Irish Ferries has not offered to reimburse additional costs incurred by passengers in travelling to and from Rosslare rather than Dublin and to and from Roscoff rather than Cherbourg,

This decision was reached and opinion formed for the following reasons:-

- (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 Board Paper 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 Board Paper 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.
3. The Board hereby authorises 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), Dublin Transport Authority Act 2008 the function of):
- (a) to settle the form of notice(s) to be served on Irish Ferries (the “**Article 18 Notice**”) in accordance with the European Union (Rights of Passengers when Travelling by Sea and Inland Waterway) Regulations 2012 (Statutory Instrument No. 394 of 2012) in connection with such regulations, the Maritime Regulation and the cancelled sailings specifying the failures/infringements in relation to Article 18 of the Maritime Regulation and requiring Irish Ferries to take such measures that will be specified in the Article 18 Notice for the purposes of complying with the Maritime Regulation and European Union (Rights of Passengers when Travelling by Sea and Inland Waterway) Regulations 2012 (Statutory Instrument No. 394 of 2012);
  - (b) to serve (or procure the service) on Irish Ferries of the Article 18 Notice; and
  - (c) to take all other steps and action as may be necessary or desirable in connection with the Article 18 Notice, including without limitation, the consideration of any representations made in relation to the Article 18 Notice in accordance with regulation 4 of the European Union (Rights of Passengers when Travelling by Sea and Inland Waterway) Regulations 2012 (Statutory Instrument No. 394 of 2012) and the taking of any action consequential thereof.

#### ARTICLE 19 AND ARTICLE 20(4) OF THE REGULATION

4. The Authority decided and determined that:
- (a) Article 19 of the Maritime Regulation applies as Irish Ferries has not satisfied the Authority that “*extraordinary circumstances*” within the meaning of Article 20(4) exist in relation to the cancelled sailings hindering the performance of the passenger service which could not have been avoided even if all reasonable measures had been taken, and
  - (b) that it is of the opinion that Irish Ferries has failed and is failing to comply with (or has infringed and is infringing) Article 19 of the Maritime Regulation in relation to the cancelled sailings,

This decision was reached and opinion formed for the following reasons:-

- (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 event was not caused by an act outside the category of normal marine services (such as natural disasters or terrorist attacks);
- (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, and Irish Ferries could, as a matter of course, face difficulties in relation to the procurement of ships including their late delivery; as a consequence, 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 putting in place of contingency plans in early 2018 in the event of a delay in delivery of the WB Yeats by reserving space on the Oscar Wilde indicates that a delay in the delivery of the WB Yeats was something which was not out of the ordinary and was within the contemplation of Irish Ferries;
- (viii) 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;
- (ix) the cancellation of passenger services could have been avoided by the taking of all reasonable measures by Irish Ferries; in particular, by Irish Ferries not taking bookings for those passenger services and entering 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;
- (x) 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 failing within the criteria set out in Article 19(1)(a) - (d) which requests have been refused by Irish Ferries; and

- (xi) 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.

5. The Board hereby authorises 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), Dublin Transport Authority Act 2008 the function of):

- (a) to settle the form of notice(s) to be served on Irish Ferries (the “Article 19 Notice”) in accordance with the European Union (Rights of Passengers when Travelling by Sea and Inland Waterway) Regulations 2012 (Statutory Instrument No. 394 of 2012) in connection with such regulations, the Maritime Regulation and the cancelled sailings, specifying the failures/infringements in relation to Article 19 of the Maritime Regulation and requiring Irish Ferries to take such measures that will be specified in the Article 19 Notice for the purposes of complying with the Maritime Regulation and European Union (Rights of Passengers when Travelling by Sea and Inland Waterway) Regulations 2012 (Statutory Instrument No. 394 of 2012);
- (b) to serve (or procure the service) on Irish Ferries of the Notices; and
- (c) to take all other steps and action as may be necessary in connection with the Article 19 Notice, including without limitation, the consideration of any representations made in relation to the Article 19 Notice in accordance with regulation 4 of the European Union (Rights of Passengers when Travelling by Sea and Inland Waterway) Regulations 2012 (Statutory Instrument No. 394 of 2012) and the taking of any action consequential thereof.

Dated:

19<sup>th</sup> October 2018