CASENOTE: IRISH FERRIES LIMITED V NATIONAL TRANSPORT AUTHORITY (CASE C-570/19)

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On 2nd September 2021 the Court of Justice of the European Union gave its judgment in *Irish Ferries Limited v National Transport Authority,* Case C-570/19, clarifying the application and interpretation of Regulation (EU) No.1177/2010 on the Rights of Passengers When Travelling by Sea and Inland Waterway and following closely the Opinion of Advocate General Szpunar given on 4th March 2021.

The matter had been referred to the Court of Justice of the European Union by the Irish High Court with a request for a preliminary ruling on the rights of passengers intending to travel by sea and inland waterway where their journey is cancelled.

The claim arose out of a delay of 200 days in the delivery of Irish Ferries' new vessel, the *WB Yeats*, which was due to be delivered from a German shipyard in time for the 2018 summer season. In the event, the vessel was not ready in time, and at least two months prior to departure over 20,000 Irish passengers who had purchased tickets for Irish Ferries' Dublin-Cherboug route were informed that they would have to be re-routed (some via the UK 'land bridge'), or their trips would have to be cancelled. The Irish NTA stepped in, and required Irish Ferries to compensate the passengers for the cancellation and rerouting, and for any costs they incurred in re-routing; Irish Ferries contended before the High Court that this decision was irrational and disproportionate. They claimed, in the first place, that Regulation (EU) No.1177/2010 did not apply where a cancellation had occurred several weeks before the date of the scheduled sailings. In the second place, they argued that the delay in the delivery of the vessel constituted an 'extraordinary circumstance' which exempted them from the payment of the compensation provided for in Article 19 of that Regulation. In the third place, Irish Ferries criticised NTA for having infringed Article 25 by purporting to exercise its jurisdiction over transport services departing from France and heading to Ireland, whereas those services fell within the exclusive jurisdiction of the French authority. In the fourth place, they complained that the NTA had infringed Article 24 by having failed to limit the effect of its decision to passengers who had made a complaint in the form and within the deadlines specified in Article 24. In the fifth and final place, Irish Ferries contested the validity of the Regulation in the light of the principles of proportionality, legal certainty and equal treatment, and of Articles 16, 17 and 20 of the Charter of Fundamental Rights of the European Union ('the Charter').

The High Court referred ten questions relating to the interpretation of Regulation (EU) No.1177/2010 to the CJEU for preliminary ruling; the case was the first to be referred to the CJEU under this Regulation.

Irish Ferries' first argument was that the Regulation did not apply at all in circumstances where passengers had been informed of the cancellation at least seven weeks in advance of their booking. This was founded partly on the language of the Regulation itself, which refers to 'interrupted travel', and partly on the fact that air passengers do not receive compensation when their flights are cancelled more than two weeks in advance of their booking (*cf* Article 5(1)(c) of the Denied Boarding Regulation).

The Court followed the Opinion of the Advocate General in refusing to read into the Regulation a limitation which is not there on the face of it, preferring to take a purposive approach to its wording. *Prima facie,* therefore, the Regulation applies where a ferry company is forced to cancel bookings well in advance of planned departure due to late delivery of a vessel. All that is required is for a passenger to have made a reservation or purchased a ticket.

The Court also followed the Advocate General's Opinion in finding that re-routing by means of an alternative sailing or sailings taking a different route from that of the initial sailing or via a (road or rail) land bridge may constitute 're-routing to the final destination' under 'comparable conditions' within the meaning of Article 18 of the Regulation if other conditions of that sailing are comparable to those laid down for the initial sailing in the transport contract. However, under Article 18(1)(a) the passenger must be reimbursed for the additional cost of this re-routing. Furthermore, pursuant to Article 19 the passenger must also be offered compensation for the lengthy delay or cancellation of the original booking (unless he or she has opted to be reimbursed in full rather than re-routed). In addition, when considering the 'ticket price' for the purposes of Articles 18 and 19 any additional optional services selected by the passenger, such as access to lounges or kennels, must be taken into consideration.

As for Irish Ferries' defence to the claim for compensation on the grounds that the delay in delivery of the vessel amounted to an 'extraordinary circumstance', the Court relied on the caselaw determined under the Denied Boarding Regulation in limiting the application of that defence very substantially. It concurred with the Advocate General in noting that the management and operation of a fleet of vessels is inherent in the normal exercise of the

activity of a maritime carrier, and that the ordering of a new vessel is within its control; therefore, using the existing authorities under the Denied Boarding Regulation, the failure of the shipyard to deliver the vessel on time did not amount to an extraordinary circumstance so as to provide a defence to a claim for compensation. It was relevant in this regard that the contract between the carrier and the shipyard provided for the latter to compensate the former in respect of late delivery.

Pursuant to Article 24 of the Regulation a passenger must submit any complaint to a carrier within two months of the date of anticipated performance. Irish Ferries tried to import this provision into the Article 19 right to compensation, so that a passenger could only obtain compensation for delay or cancellation if he or she had asked to be compensated within two months of anticipated performance of the obligation in question. The Court did not agree that a request for compensation could be equated with a complaint, however, with the effect that passengers need not bring such claims within two months of the carrier's failure to perform the carriage.

Irish Ferries had also attempted to limit the involvement of the Irish NTA in respect of any passengers travelling from France to Ireland. However, the Court concluded that Article 25(1) must be interpreted as meaning that the jurisdiction of a national body responsible for enforcing the Regulation covers transport services from ports situated in the territory of that Member State and, where the transport is for a return journey that has been cancelled in its entirety, return transport services from another Member State to ports situated on the territory of that first Member State. The Irish NTA therefore had jurisdiction over passengers on both legs of the ferry's proposed journeys.

The wholesale challenge to the Regulation based on the Charter also failed. Irish Ferries had argued that the fact that maritime carriers were subject to a different, and arguably more onerous, regime than air and rail carriers infringed the principle of equal treatment under Article 20 of the Charter. But the Court found that the situations of undertakings operating in different transport sectors are not comparable; and the legislative regimes governing those different sectors were never intended to be the same. It did not consider the requirement for maritime carriers to compensate passengers to be disproportionate given the intention of the legislature to provide consumers with a high level of protection and the fact that the level of compensation is pegged to the price paid by the consumer; nor was it invalid by way of legal uncertainty.

In summary, the CJEU answered the questions raised by the Irish High Court as follows:

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 must be interpreted as meaning that it applies where a carrier cancels a passenger service giving several weeks' notice prior to the originally scheduled departure because the delivery of the vessel required to provide that service was delayed, and could not be replaced.

2. Article 18 of Regulation No 1177/2010 must be interpreted as meaning that, where a passenger service is cancelled and there is no alternative service on the same route, the carrier is required to offer to the passenger, by virtue of the passenger's right to re-routing under comparable conditions and at the earliest opportunity to the final destination provided for in that provision, an alternative service that follows a different itinerary from that of the cancelled service or a maritime service coupled with other modes of transport, such as rail or road transport, and is required to bear any additional costs incurred by the passenger in re-routing to the final destination.

3. Articles 18 and 19 of Regulation No 1177/2010 must be interpreted as meaning that, where a carrier cancels a passenger service giving several weeks' notice before the originally scheduled departure, a passenger has a right to compensation under Article 19 of that regulation where he or she decides, in accordance with Article 18 of that regulation, to be re-routed at the earliest opportunity or to postpone the journey to a later date and that passenger arrives at the originally scheduled final destination with a delay that exceeds the thresholds laid down in Article 19 of that regulation. By contrast, where a passenger decides to be reimbursed for the ticket price, he or she does not have such a right to compensation under that article.

4. Article 19 of Regulation No 1177/2010 must be interpreted as meaning that the concept of 'ticket price', referred to in that article, includes the costs relating to the additional optional services chosen by the passenger, such as the booking of a cabin or a kennel, or access to premium lounges.

5. Article 20(4) of Regulation No 1177/2010 must be interpreted as meaning that the late delivery of a passenger transport vessel which led to the cancellation of all sailings to be operated by that vessel in the context of a new maritime route does not fall within the concept of 'extraordinary circumstances' within the meaning of that provision.

6. Article 24 of Regulation No 1177/2010 must be interpreted as meaning that it does not require a passenger who requests compensation under Article 19 of that regulation to submit his or her request in the form of a complaint to the carrier within two months from the date on which the service was performed or when a service should have been performed.

7. Article 25 of Regulation No 1177/2010 must be interpreted as meaning that the competence of a national body responsible for the enforcement of that regulation designated by a Member State covers not only the passenger service provided from a port situated in the territory of that Member State, but also a passenger service provided from a port situated in the territory of another Member State to a port situated in the territory of the first Member State where the latter service is part of a return journey which has been entirely cancelled.

8. Examination of the tenth question has not revealed any factor capable of affecting the validity of Articles 18 and 19 of Regulation No 1177/2010.

The decision follows closely the reasoning of the Advocate General, and in particular his method of reading over into the Regulation the caselaw interpreting the Denied Boarding Regulations, for example in relation to the definition of 'extraordinary circumstances'. Notwithstanding this aid to interpretation, the Court made it clear that different considerations underpin the two regulatory regimes, with the result that a transportation provider in one sector might find itself in an entirely different legal position to a provider in another sector. It is suggested that this must be right; there is no obvious reason why providers in the shipping sector should owe equivalent duties to airlines, given the differences between the two sectors in terms of availability of provision. Furthermore, although only mentioned once by the ECJ in its judgment, it is probable that the Court had it in mind that it is open to a provider to insulate itself against losses arising from cancellations in these circumstances either by way of insurance or by way of contractual indemnity, and providers in all sectors will no doubt be conducting a review of their arrangements in this respect.

In any event, the judgment amounts to a wholesale rejection of Irish Ferries' arguments, a result all too familiar to airlines in their ongoing struggle with the Denied Boarding Regulations. It will be interesting to see whether the CJEU continues the trend when claims arising out of Covid-19 are referred to it.

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