Reports of Cases

OPINION OF ADVOCATE GENERAL
SZPUNAR
delivered on 4 March 2021 [1]

Case C-570/19

Irish Ferries Ltd
v
National Transport Authority

(Request for a preliminary ruling
from the High Court (Ireland))

(Reference for a preliminary ruling – Rights of passengers when travelling by sea and inland waterway – Regulation (EU) No 1177/2010 – Cancellation – Notice given prior to the originally scheduled date of departure following delay in the delivery of a new vessel to the carrier – Consequences)

I. Introduction

1. While there is a wealth of case-law established by the Court concerning Regulation (EC) No 261/2004, [2] which governs the rights of passengers in the field of air transport, this is not the case as regards the instruments of EU law which govern passengers' rights in the areas of rail, [3] road [4] or – as in the present case – maritime transport. [5] The present reference for a preliminary ruling is the first in which a national court asks the Court to interpret provisions of Regulation No 1177/2010.

2. It has its origin in proceedings between Irish Ferries Ltd, a maritime carrier, and the National Transport Authority ('the NTA'), the national body designated for the enforcement of Regulation No 1177/2010, and concerns the cancellation of all the routes that one of that carrier's vessels was to operate between Ireland and France over the course of 2018, affecting over 20 000 passengers.

1 Original language: French.

2 Regulation 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, and repealing Regulation (EEC) No 295/91 (OJ 2004 L 46, p. 1).

3 See Regulation (EC) No 1371/2007 of the European Parliament and of the Council of 23 October 2007 on rail passengers' rights and obligations (OJ 2007 L 315, p. 14).

4 See Regulation (EC) No 181/2011 of the European Parliament and of the Council of 16 February 2011 concerning the rights of passengers in bus and coach transport and amending Regulation (EC) No 2006/2004 (OJ 2011 L 55, p. 1).

5 See 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 2010 L 334, p. 1).

3. By its 10 questions referred for a preliminary ruling, the referring court askes the Court to rule on the interpretation of several provisions of Regulation No 1177/2010 and on the validity of that regulation. Those questions raise a number of issues in the field of maritime transport. Since some 15 years of developments in case-law have been necessary to address similar issues in the field of air transport, it is likely that the answers given by the Court to the questions raised here will be subject to clarifications in the future.

4. In this Opinion, I will consider, with reference to those developments in case-law, whether and, if so, to what extent those developments may be transposed by analogy to maritime transport.

II. Legal context

A. EU law

5. Article 1 of Regulation No 1177/2010, which is entitled 'Subject matter', states that the regulation establishes rules for sea and inland waterway transport as regards, inter alia, the rights of passengers in cases of cancellation or delay and the handling of complaints.

6. Article 2 of that regulation, which is entitled 'Scope', provides as follows:

'1. This Regulation shall apply in respect of passengers travelling:

(a) on passenger services where the port of embarkation is situated in the territory of a Member State;

(b) on passenger services where the port of embarkation is situated outside the territory of a Member State and the port of disembarkation is situated in the territory of a Member State, provided that the service is operated by a Union carrier as defined in Article 3(e);

(c) on a cruise where the port of embarkation is situated in the territory of a Member State. However, Articles 16(2), 18, 19 and 20(1) and (4) shall not apply to those passengers.

2. This Regulation shall not apply in respect of passengers travelling:

(a) on ships certified to carry up to 12 passengers;

(b) on ships which have a crew responsible for the operation of the ship composed of not more than three persons or where the distance of the overall passenger service is less than 500 metres, one way;

(c) on excursion and sightseeing tours other cruises; or

(d) on ships not propelled by mechanical means as well as original, and individual replicas of, historical passenger ships designed before 1965, built predominantly with the original materials, certified to carry up to 36 passengers.

3. Member States may, for a period of 2 years from 18 December 2012, exempt from the application of this Regulation seagoing ships of less than 300 gross tons operated in domestic

transport, provided that the rights of passengers under this Regulation are adequately ensured under national law.

4. Member States may exempt from the application of this Regulation passenger services covered by public service obligations, public service contracts or integrated services provided that the rights of passengers under this Regulation are comparably guaranteed under national law.

…'

7. Article 3 of the regulation provides:

'For the purposes of this Regulation, the following definitions shall apply:

…

(f) "passenger service" means a commercial passenger transport service by sea or inland waterways operated according to a published timetable;

…

(m) "transport contract" means a contract of carriage between a carrier and a passenger for the provision of one or more passenger services or cruises;

(n) "ticket" means a valid document or other evidence of a transport contract'.

8. Article 18 of Regulation No 1177/2010, which is entitled 'Re-routing and reimbursement in the event of cancelled or delayed departures' and appears in Chapter III of the regulation, which is itself entitled 'Obligations of carriers and terminal operators in the event of interrupted travel', provides:

'1. Where a carrier reasonably expects a passenger service to be cancelled or delayed in departure from a port terminal for more than 90 minutes, the passenger shall immediately be offered 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 and, where relevant, a return service free of charge to the first point of departure, as set out in the transport contract, at the earliest opportunity.

2. Where a passenger service is cancelled or delayed in departure from a port for more than 90 minutes, passengers shall have the right to such re-routing or reimbursement of the ticket price from the carrier.

3. The payment of the reimbursement provided for in paragraphs 1(b) and 2 shall be made within 7 days, in cash, by electronic bank transfer, bank order or bank cheque, of the full cost of the ticket at the price at which it was purchased, for the part or parts of the journey not made, and for the part or parts already made where the journey no longer serves any purpose in relation to the passenger's original travel plan. Where the passenger agrees, the full reimbursement may also be paid in the form of vouchers and/or other services in an amount equivalent to the price for which

the ticket was purchased, provided that the conditions are flexible, particularly regarding the period of validity and the destination.'

9. Article 19 of Regulation No 1177/2010, which is entitled 'Compensation of the ticket price in the event of delay in arrival', states:

'1. Without losing the right to transport, 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 minimum level of compensation shall be 25% of the ticket price for a delay of at least:

(a) 1 hour in the case of a scheduled journey of up to 4 hours;

(b) 2 hours in the case of a scheduled journey of more than 4 hours, but not exceeding 8 hours;

(c) 3 hours in the case of a scheduled journey of more than 8 hours, but not exceeding 24 hours; or

(d) 6 hours in the case of a scheduled journey of more than 24 hours.

If the delay exceeds double the time set out in points (a) to (d), the compensation shall be 50% of the ticket price.

2. Passengers who hold a travel pass or a season ticket and who encounter recurrent delays in arrival during its period of validity may request adequate compensation in accordance with the carrier's compensation arrangements. These arrangements shall state the criteria for determining delay in arrival and for calculation of compensation.

3. Compensation shall be calculated in relation to the price which the passenger actually paid for the delayed passenger service.

4. Where the transport is for a return journey, compensation for delay in arrival on either the outward or the return leg shall be calculated in relation to half of the price paid for the transport by that passenger service.

5. The compensation shall be paid within 1 month after the submission of the request for compensation. The compensation may be paid in vouchers and/or other services, provided that the conditions are flexible, particularly regarding the period of validity and the destination. The compensation shall be paid in money at the request of the passenger.

6. The compensation of the ticket price shall not be reduced by financial transaction costs such as fees, telephone costs or stamps. Carriers may introduce a minimum threshold under which payments for compensation will not be paid. This threshold shall not exceed EUR 6.'

10. Article 20 of that regulation, which is entitled 'Exemptions', states:

'1. Articles 17, 18 and 19 shall not apply to passengers with open tickets as long as the time of departure is not specified, except for passengers holding a travel pass or a season ticket.

2. Articles 17 and 19 shall not apply if the passenger is informed of the cancellation or delay before the purchase of the ticket or if the cancellation or delay is caused by the fault of the passenger.

3. Article 17(2) shall not apply where the carrier proves that the cancellation or delay is caused by weather conditions endangering the safe operation of the ship.

4. Article 19 shall 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.'

11. Article 24 of the regulation, which is entitled 'Complaints' and features in Chapter IV of the regulation, which is itself entitled 'General rules on information and complaints', states:

'1. Carriers and terminal operators shall set up or have in place an accessible complaint-handling mechanism for rights and obligations covered by this Regulation.

2. Where a passenger covered by this Regulation wants to make a complaint to the carrier or terminal operator, he shall submit it within 2 months from the date on which the service was performed or when a service should have been performed. Within 1 month of receiving the complaint, the carrier or terminal operator shall give notice to the passenger that his complaint has been substantiated, rejected or is still being considered. The time taken to provide the final reply shall not be longer than 2 months from the receipt of a complaint.'

12. Article 25 of Regulation No 1177/2010, which is entitled 'National enforcement bodies' and features in Chapter V of the regulation, which is itself entitled 'Enforcement and national enforcement bodies', provides:

'1. Each Member State shall designate a new or existing body or bodies responsible for the enforcement of this Regulation as regards passenger services and cruises from ports situated on its territory and passenger services from a third country to such ports. Each body shall take the measures necessary to ensure compliance with this Regulation.

Each body shall, in its organisation, funding decisions, legal structure and decision-making, be independent of commercial interests.

2. Member States shall inform the Commission of the body or bodies designated in accordance with this Article.

3. Any passenger may submit a complaint, in accordance with national law, to the competent body designated under paragraph 1, or to any other competent body designated by a Member State, about an alleged infringement of this Regulation. The competent body shall provide passengers with a substantiated reply to their complaint within a reasonable period of time.

A Member State may decide:

(a) that the passenger as a first step shall submit the complaint covered by this Regulation to the carrier or terminal operator; and/or

(b) that the national enforcement body or any other competent body designated by the Member State shall act as an appeal body for complaints not resolved under Article 24.

4. Member States that have chosen to exempt certain services pursuant to Article 2(4) shall ensure that a comparable mechanism of enforcement of passenger rights is in place.'

13. Article 27 of that regulation, which is entitled 'Cooperation between enforcement bodies', provides:

'National enforcement bodies referred to in Article 25(1) shall exchange information on their work and decision-making principles and practice to the extent necessary for the coherent application of this Regulation. The Commission shall support them in that task.'

B. Irish law

14. The European Union (Rights of Passengers when Travelling by Sea and Inland Waterway) Regulations 2012 (SI No 394/2012) ('the 2012 Statutory Instrument'), adopted on 10 October 2012, designates, in Regulation 3 thereof, the NTA as the body responsible for the enforcement of Regulation No 1177/2010 within the meaning of Article 25 of the latter.

15. 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, if it is of the opinion that a provider is failing to comply with or is infringing Regulation No 1177/2010, is to cause to be served on that 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 that notice. Pursuant to Regulation 4(3) of the 2012 Statutory Instrument, non-compliance with that notice is punishable by fines.

III. The facts of the case in the main proceedings, the procedure before the Court and the questions referred for a preliminary ruling

16. In 2016, Irish Continental Group plc ('ICG'), the parent company of Irish Ferries, concluded a contract with Flensburger Schiffbau-Gesellschaft ('the shipyard'), a company governed by German law, to build a roll-on/roll-off ferry ('the vessel') scheduled for delivery to ICG with full certification no later than 26 May 2018.

17. The vessel was to enter into service for the summer season of 2018 in order to operate various routes, including a new continuous return service between Dublin (Ireland) and Cherbourg (France).

18. In view of the sailing time (approximately 18 hours), Irish Ferries had planned to operate the vessel on the route on alternate days in conjunction with another vessel which it operated during the 2018 season on the Rosslare (Ireland) – Cherbourg (France) and Rosslare – Roscoff (France) routes, thereby offering a daily service between Ireland and France, albeit from/to different ports.

19. In January 2017, the shipyard informed Irish Ferries that the vessel would be delivered no later than 22 June 2018.

20. On 27 October 2017, Irish Ferries began to take bookings for the 2018 season, with an initial sailing scheduled for 12 July 2018. On 1 November 2017, the shipyard confirmed that the vessel would be delivered on 22 June 2018.

21. By email of 18 April 2018, the shipyard informed Irish Ferries that the vessel would not be delivered before 13 July 2018 on account of a delay by external outfitters whose services it had engaged as subcontractors, and also referred to 'the possibility of later delivery, particularly as a result of negative developments in the outfitting of the public spaces'.

22. Having established on 20 April 2018 that it could not replace that vessel with a vessel from its fleet or charter a replacement vessel through a shipbroker, Irish Ferries cancelled the sailings of the vessel until the new delivery date, plus a leeway period to get the vessel ready. Irish Ferries thus cancelled the sailings scheduled from 12 July to 29 July 2018 inclusive ('the first cancellation').

23. Irish Ferries took a number of steps within the context of the first cancellation. In particular, it gave all the passengers affected 12 weeks' notice of the cancellation of the sailings, offering them an immediate, no-quibble reimbursement in full or the opportunity to rebook on alternative sailings of their choice ('the alternative sailings'). Since there was no other identical service on the routes in question, Irish Ferries offered the passengers concerned a whole range of replacement crossings from and to different ports linking Ireland and France directly (for example, the day before or the day after the original planned sailing – or any other date – subject to capacity) or indirectly, that is to say, by transiting via Great Britain ('the land bridge'). Irish Ferries' offer to all the passengers concerned to re-route them via the land bridge is, however, disputed by the NTA before the referring court.

24. Irish Ferries did not offer to reimburse the passengers who were re-routed to or from Rosslare (rather than Dublin) and/or to or from Roscoff (rather than Cherbourg) for any additional costs incurred by them as a result of the change to the port of departure or of arrival ('the additional costs'). Irish Ferries took the view that not all passengers incurred additional costs, since some of them were located closer to Rosslare and were holidaying closer to Roscoff than to Cherbourg.

25. On 9 May 2018, the NTA informed Irish Ferries that it was examining the circumstances of the first cancellation in order to establish how Regulation No 1177/2010 should be applied in this instance and requested an explanation of the reasons why Irish Ferries considered that that cancellation was attributable to extraordinary circumstances beyond its control. Irish Ferries made a detailed submission to the NTA in respect of the cancellation in question.

26. On 1 June 2018, the NTA requested that Irish Ferries provide it with information on Irish Ferries' compliance with Article 18 of Regulation No 1177/2010. Irish Ferries responded on 8 June 2018 and an exchange of correspondence followed.

27. On 11 June 2018, the shipyard informed Irish Ferries that the delivery of the vessel would be delayed until some unspecified date in September on account of a delay by a subcontractor in carrying out electrical cabling work and work related to the installation of the electrical system in the hull and deckhouse, as well as delays in the delivery of interior components for public areas. Since the vessel could not be operated, Irish Ferries decided to cancel all sailings scheduled for after 30 July 2018 ('the second cancellation'). The vessel was, in any event, not delivered until 12 December 2018, some 200 days late.

28. In relation to the second cancellation, Irish Ferries took several steps in respect of the passengers affected, namely, in particular, giving them 7 to 12 weeks' notice of the second cancellation as soon as Irish Ferries had received confirmation that it would be impossible to charter a replacement vessel, and offering them the following options: cancel the original sailings and receive a full, immediate refund; sail on alternative routes to France without reimbursement of any additional costs; and, lastly, be re-routed via the land bridge of their choice from those offered, leaving from any Irish ferry port and heading to French ports such as Cherbourg, Roscoff, Calais and Caen. As part of the last option, the fuel costs associated with crossing Great Britain were reimbursed to the passengers.

29. The result of the steps taken was that, of the 20 000 passengers affected by those cancellations, 82% opted for alternative sailings with Irish Ferries or other carriers, 3% chose the land-bridge option, and the other 15% decided to accept a full reimbursement.

30. In the case of those passengers who opted for alternative sailings, any additional costs were not charged to the passengers but rather covered by Irish Ferries. In addition, any differences in the ticket price were reimbursed by Irish Ferries.

31. As for the passengers who chose the land-bridge option, Irish Ferries reimbursed them for the fuel costs required to cross Great Britain.

32. However, Irish Ferries did not pay compensation for the delay in arrival at the final destination to the passengers who had made a request for compensation, pursuant to Article 19 of Regulation No 1177/2010, taking the view that, since it had offered re-routing and a reimbursement of the ticket price in accordance with Article 18 of that regulation, Articles 18 and 19 of that regulation did not apply simultaneously.

33. On 1 August 2018, the NTA provided Irish Ferries with a preliminary view regarding the application of the 2012 Statutory Instrument to the cancelled sailings, to which Irish Ferries responded on 15 August 2018.

34. On 19 October 2018, the NTA adopted a decision under which it found, first, that Regulation No 1177/2010 applied to the cancellations of sailings between Dublin and Cherbourg in the summer of 2018; second, that Irish Ferries had infringed the requirements laid down in Article 18 of that regulation; and, third, that that carrier had failed to comply with Article 19 of the regulation. In accordance with Regulation 4(1) of the 2012 Statutory Instrument, that decision culminated in the service of two notices. Irish Ferries submitted its observations on that decision.

35. By decision of 25 January 2019, the NTA confirmed the notices issued under Regulation 4(1) of the 2012 Statutory Instrument and concerning Articles 18 and 19 of Regulation No 1177/2010 ('the contested decision').

36. The NTA took the view, first, that Irish Ferries had infringed Article 18 of Regulation No 1177/2010 in relation to the passengers impacted by the cancelled sailings, where those passengers had had to travel to or from Rosslare (rather than Dublin) and/or to or from Roscoff (rather than Cherbourg). The NTA requested that Irish Ferries reimburse any additional costs incurred by the passengers impacted by the cancelled sailings who had opted for re-routing to or from Rosslare (rather than Dublin) and/or to or from Roscoff (rather than Cherbourg).

37. In addition, it found that Irish Ferries had infringed Article 19 of Regulation No 1177/2010 and required it to pay compensation to the passengers whose arrival at the final destination as set out in the transport contract had been delayed.

38. Irish Ferries challenged the contested decision and the notices issued in respect of Articles 18 and 19 of Regulation No 1177/2010 before the High Court (Ireland), claiming, in the first place, that that regulation did not apply where a cancellation had occurred several weeks before the date of the scheduled sailings. In the second place, Irish Ferries disputed the NTA's interpretation and enforcement of Articles 18 to 20 of the regulation. More specifically, it argued that the delay in the delivery of the vessel constituted an 'extraordinary circumstance' which exempted it 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 of that same regulation by having acted ultra vires. In its view, the NTA exercised its jurisdiction over transport services departing from France and heading to Ireland, whereas those services fall within the exclusive jurisdiction of the French authority. In the fourth place, Irish Ferries complains that the NTA infringed Article 24 of Regulation No 1177/2010 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 of that regulation. 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').

39. It is in those circumstances that the High Court, by order of 22 July 2019, received at the Court on 26 July 2019, decided to stay the proceedings and to submit the following questions for the Court's assessment:

'A. Applicability of … Regulation [No 1177/2010]

(1) Does [Regulation No 1177/2010] (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:

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 opened by the ferry operator with no similar alternative service on the route?

B. Interpretation of Article 18 of [Regulation No 1177/2010]

This question need only be answered if Article 18 [of Regulation No 1177/2010] is capable of applying.

(2) Where a passenger is re-routed in accordance with Article 18 [of that regulation] 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?

(3) (a) If Article 18 [of the regulation] 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 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"?

(b) 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?

C. Interpretation of Article 19 of [Regulation No 1177/2010]

(4) (a) Can Article 19 [of Regulation No 1177/2010] apply when the voyage has in fact already been cancelled at least seven weeks prior to the scheduled departure? If Article 19 [of that regulation] does apply, does it apply where Article 18 [of that regulation] has been applied and the passenger has been re-routed at no additional cost and/or reimbursed and/or has chosen a later sailing?

(b) If Article 19 [of Regulation No 1177/2010] does apply, what is the "final destination" for the purposes of [that article]?

(5) If Article 19 [of Regulation No 1177/2010] is capable of applying:

(a) how is the period of delay to be measured in such circumstances?

(b) how is the *price* within the meaning of Article 19 [of that regulation] 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)?

D. Interpretation of Article 20(4) [of Regulation No 1177/2010]:

(6) If … Regulation [No 1177/2010] does apply then do the circumstances and considerations outlined in [Question] 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 [Regulation No 1177/2010]?

E. Interpretation of Article 24 [of Regulation No 1177/2010]:

(7) Does Article 24 [of Regulation No 1177/2010] have the effect of imposing a mandatory obligation on any passenger seeking to benefit from compensation under Article 19 of [that regulation] to make a complaint within two months from the date on which the service was performed or should have been performed?

F. Interpretation of Article 25 [of Regulation No 1177/2010]:

(8) Is the jurisdiction of the national competent body responsible for the enforcement of [Regulation No 1177/2010] limited to sailings involving the ports specified in Article 25 of [that regulation] or may it also extend to a return sailing *from* the port of another Member State to the state of the national competent body?

G. The validity of the Decision and the Notices

(9) (a) What principles and rules of EU law should the referring court apply in assessing the validity of the Decision and/or the Notices of the national … body [designated for the enforcement of Regulation No 1177/2010] 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 [No] 1177/2010

This question will only arise depending on the answers to the previous questions.

(10) Is Regulation [No] 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 [they inform] the airline passenger of the cancellation at least two weeks before the scheduled time of departure (Article 5(1)(c)(i) of Regulation [No] 261/2004)?

(c) The principles of proportionality, legal certainty and equal treatment?'

40. Written observations have been lodged by the parties to the main proceedings, Ireland, the European Parliament, the Council of the European Union and the European Commission. The same interested parties were represented at the hearing held on 9 September 2020.

IV. Analysis

41. The 10 questions that make up the present reference for a preliminary ruling concern various aspects of Regulation No 1177/2010. By its first question, the referring court first of all seeks to establish whether that regulation applies to the dispute in the main proceedings. Next, by its second to ninth questions, it requests the interpretation of a series of specific provisions of Regulation No 1177/2010. Finally, by its tenth question, that court asks the Court to rule on the validity of that regulation.

42. In order to examine the validity of an act of EU law, it is necessary, first of all, to rule out the possibility that such examination bears no relation to the actual nature of the case or to the subject matter of the main action.[6] The first question must therefore be considered before the tenth question.

43. Next, where the validity of the provisions of an act of EU law is called into question on account of the alleged infringement of certain general principles, it is necessary first of all to establish the meaning of those provisions. Under a general principle of interpretation, provisions of EU law must be interpreted, as far as possible, in such a way as not to affect their validity and in conformity with primary law as a whole.[7] Examining their validity without first establishing their meaning would amount to disregarding that principle. Since the second to ninth questions concern the interpretation of a series of provisions of Regulation No 1177/2010, the validity of which is referred to in the tenth question, the former must therefore be answered in the first instance.

44. My analysis will therefore follow the order of the questions submitted by the referring court. I will begin by addressing the scope of Regulation No 1177/2010 (first question), before turning to its specific provisions (second to ninth questions) and, finally, examining the validity of that regulation (tenth question).

A. The applicability of Regulation No 1177/2010

45. By its first question, the referring court asks, in general terms, about the applicability of Regulation No 1177/2010 and, more specifically, the applicability of Articles 18 and 19 thereof in the situation in which a maritime transport service is cancelled, with at least seven weeks' notice given prior to the originally scheduled departure, on the ground that the delivery of the vessel intended to operate that transport service was delayed and an alternative vessel could not be found.

46. It is true that the referring court also expresses uncertainty as to the applicability of Regulation No 1177/2010 in the light of a series of matters listed in points (a) to (e) of the first question. However, Irish Ferries, whose arguments appear to form the basis of the first question, makes reference to those matters solely in support of its argument relating to the principle of '*impossibilium nulla obligatio est*'. In the present case, it is my view that the matters referred to are incapable of altering my analysis in regard to the applicability of Regulation No 1177/2010, such that they do not have to be considered separately. Nevertheless, the same matters may be taken into account in the context of the sixth question and of the examination relating to 'reasonable measures', within the meaning of Article 20(4) of that regulation.

47. Moreover, in its first question, the referring court uses two separate terms, namely 'advance bookings' made by passengers and 'transport contracts' entered into by them. The wording of that question may therefore, a priori, suggest that that court is drawing a distinction between those terms. However, the first question concerns passengers who both made reservations and entered into transport contracts. The Court is therefore not being asked to rule separately on, on the one hand, the situation of passengers who made a reservation and, on the other hand, that of passengers who entered into a transport contract.

6 See, to that effect, judgment of 16 June 1981, *Salonia* (126/80, EU:C:1981:136, paragraph 6).

7 See, to that effect, judgment of 31 January 2013, *McDonagh* (C-12/11, EU:C:2013:43, paragraph 44).

48. For the sake of completeness, it should be noted that, unlike Regulation No 261/2004, Regulation No 1177/2010 does not use the term 'reservation' in the definition of its scope. [8]

49. Although that term is used only in Chapter II of Regulation No 1177/2010, which is entitled 'Rights of disabled persons and persons with reduced mobility', the provisions of that chapter may imply that a reservation precedes the entry into the transport contract. Articles 7 and 8 of that regulation do in fact make a distinction between the acceptance of a reservation and the issuing of a ticket.

50. In that same vein, it is apparent from the definitions contained in Article 3(m) and (n) of Regulation No 1177/2010 that the existence of a 'transport contract' is proven, inter alia, by a 'ticket'. However, that regulation does not make a similar link between a 'transport contract' and a 'reservation'. [9] Furthermore, Article 3(m) of the regulation states that the transport contract is concluded 'between a carrier and a passenger for the provision of one or more passenger services or cruises'. It cannot therefore be ruled out that the EU legislature intended to link the status of 'passenger', not *to the act of making a reservation*, but *to the entry into* a transport contract. However, as I have pointed out, [10] the conclusions drawn by the referring court, in the context of the first question, from the existence of any differences between 'advance bookings' and 'transport contracts' are irrelevant. It is clear from the wording of that question that every passenger who made a reservation also entered into a transport contract.

1. Analysis of the first question referred for a preliminary ruling

51. The first question has its origin in the argument put forward by Irish Ferries that Regulation No 1177/2010 applies to two categories of passengers only, namely, first, passengers whose imminent sailing is delayed or cancelled and who are physically at the port, and, second, passengers who are en route. By contrast, it argues that that regulation does not cover passengers who were given notice by the carrier of the cancellation of the sailing at least seven weeks prior to departure. [11]

52. In order to argue that that third category of passengers does not come within the scope of Regulation No 1177/2010, Irish Ferries refers, in the first place, to the wording of the provisions of that regulation and to its scheme.

53. In particular, Irish Ferries infers from the use of the words 'interrupted travel' in the title of Chapter III of Regulation No 1177/2010 that that regulation does not concern transport services which have not yet started.

8 Article 3(2) of Regulation No 261/2004 provides, in essence, that that regulation applies to passengers departing from an airport, on the condition that they have a confirmed reservation and present themselves for check-in.

9 Article 2(g) of Regulation No 261/2004 does, however, make a link between the 'reservation' and the 'ticket' within the meaning of Article 2(f) of that regulation. Under the former provision, the 'reservation' is the fact that the passenger has a ticket, or other proof, which indicates that the reservation has been accepted and registered by the air carrier or tour operator.

10 See point 47 of this Opinion.

11 The minimum seven weeks' notice, as mentioned in the questions referred for a preliminary ruling, is calculated in relation to the date on which Irish Ferries informed its passengers of the cancellation of the transport services. See point 28 of this Opinion.

54. Furthermore, Article 17(1) and (2) of Regulation No 1177/2010 requires carriers to provide information and certain services ('snacks, meals or refreshments' and 'accommodation on board, or ashore') to passengers in the event of a cancellation or delay of a transport service. In Irish Ferries' view, that provision is meaningless unless it applies to passengers who are already at the port or port terminal.

55. In that same vein, Irish Ferries submits that, in the event of cancelled or delayed departures, Article 18(1) and (3) of Regulation No 1177/2010, first, requires that a passenger should 'immediately' be offered re-routing or reimbursement and, second, provides that the reimbursement is equivalent to the price 'for the part or parts of the journey not made'. Similarly, Article 19 of that regulation refers to passengers 'facing a delay in arrival' and does not therefore concern passengers who are in transit or at a port. In addition, the extent of the delays in departure and in arrival, as set out in those two provisions, means, in Irish Ferries' opinion, that they are provisions applicable to passengers who are in transit or near the port.

56. In the second place, Irish Ferries submits that air and rail passengers do not receive compensation if they were informed of the cancellation of the transport service at least two weeks in advance (Article 5(1)(c) of Regulation No 261/2004) or sufficiently in advance (Commission's Interpretative Guidelines [12]). If Regulation No 1177/2010 seeks to ensure, as is stated in recital 1 thereof, a high level of protection for maritime passengers that is comparable with that for other modes of transport, it argues that that regulation cannot apply in cases where passengers were given a minimum of seven weeks' notice of cancellation.

57. In the third place, Irish Ferries claims that the circumstances mentioned in points (a) to (e) of the first question bear witness to the scale of the difficulties encountered by reason of the delayed delivery. In that context, with reference to the principle *impossibilium nulla obligatio est*, which has been recognised in the case-law of the Court, [13] it argues, first, that a provision of EU law cannot impose an obligation the performance of which is impossible. Second, it submits, in essence, that the difficulties encountered are such that the transport contracts concluded with the passengers should have been deemed to be discharged due to the impossibility of performance.

58. In view of the fact that the first question echoes the line of argument put forward by Irish Ferries, I will examine that question in the light of the three series of arguments set out above.

2. The wording and the scheme of Regulation No 1177/2010

59. It should be noted from the outset that paragraph 1 of Article 2 of Regulation No 1177/2010, which is entitled 'Scope', determines the categories of passengers to which it is to apply, and that Article 2(2) of that regulation defines those categories to which it is not to apply. There are no grounds for the view that the fact of having been informed of the cancellation beforehand excludes a passenger from the scope of that regulation. A condition to that effect quite simply does not appear in that provision.

[12] Communication from the Commission, Interpretative Guidelines on [Regulation No 1371/2007] (OJ 2015 C 220, p. 1), https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52015XC0704(01)&from=EN.

[13] Irish Ferries relies, in this context, on the judgments of 3 March 2016, *Daimler* (C-179/15, EU:C:2016:134, paragraph 42), and of 6 November 2018, *Scuola Elementare Maria Montessori* v *Commission*, *Commission* v *Scuola Elementare Maria Montessori* and *Commission* v *Ferracci* (C-622/16 P to C-624/16 P, EU:C:2018:873, paragraph 79).

60. It is, admittedly, the case that, under Article 2(1) of Regulation No 1177/2010, that regulation is to apply to passengers travelling on passenger services or on a cruise. However, it cannot be inferred from that fact that that regulation does not apply to passengers whose travel is not underway.

61. Indeed, Regulation No 1177/2010 contains provisions which are undoubtedly applicable to the stage prior to that of the actual travel. For instance, Article 4(2) of that regulation provides, in essence, that the contract conditions and tariffs applied by carriers or ticket vendors are to be offered to the general public without discrimination. Similarly, Article 7(1) of the regulation prohibits the refusal to accept a reservation, to issue or otherwise provide a ticket or to embark persons on the grounds of disability or of reduced mobility as such.

62. Furthermore, in the proposal for a Regulation of the European Parliament and of the Council concerning the rights of passengers when travelling by sea and inland waterway and amending Regulation (EC) No 2006/2004[14] ('the proposal for a regulation'), Article 2 of that proposal did not refer to the passengers to whom that regulation would apply. That article stated that the regulation 'shall apply to commercial passenger maritime and inland waterway services'. Further to the opinion at first reading of the Parliament[15] and the position at first reading of the Council,[16] the wording of that provision was essentially finalised. There are, however, no grounds for taking the view that those institutions intended to restrict the scope of Regulation No 1177/2010 in the manner envisaged by Irish Ferries. In view of the objective of ensuring a high level of protection for passengers that is comparable with that for other modes of transport, the underlying objective of the proposal for a regulation at the start of the *travaux préparatoires* which is set out in recital 1 thereof, particular attention would have to have been devoted to such an intention. Restricting the scope of Regulation No 1177/2010 would in fact amount to lowering the level of protection for passengers.

63. Next, with regard more specifically to the applicability of the provisions of Chapter III of Regulation No 1177/2010, in particular Articles 18 and 19 thereof, it is my view that, contrary to Irish Ferries' claim, the words 'interrupted travel', which appear in the actual title of that chapter, cannot be interpreted as meaning that part of the travel must have already taken place before the travel was interrupted in order for a situation to be covered by that chapter. According to Irish Ferries' interpretation, the definition of the concept of 'travel' determines, in essence, the scope of the provisions of that chapter. Since that concept is not defined in that regulation, the meaning of that concept would have to be established with utmost precision.

64. Furthermore, Article 20 of Regulation No 1177/2010, which is entitled 'Exemptions', sets out the situations in which Articles 18 and 19 of that regulation are not to apply. Those situations do not include having been informed of the cancellation beforehand or having one's travel interrupted. In addition, it has been observed in legal literature that the situations in which a carrier is rendered liable under those provisions without travel being interrupted are more frequent and more significant from a practical standpoint.[17]

14 COM(2008) 816 final.

15 According to the opinion of the Parliament, P6_TC1-COD(2008)0246, the regulation was to apply 'to the commercial transport of passengers travelling by sea and inland waterway by passenger ship'. See also amendment No 9 of the Report on the Proposal for a Regulation (2008/0246(COD)).

16 According to position (EU) No 5/2010 of the Council (OJ 2010 C 122 E, p. 19), the regulation was to apply to passengers travelling on passenger services or on a cruise.

17 See, to that effect, Stec, M., 'Ochrona pasażera w transporcie morskim i w żegludze śródlądowej w świetle rozporządzenia (UE) nr 1177/2010', in Kostański, P., Podrecki, P. and Targosz, T. (eds), *Experientia docet. Księga jubileuszowa ofiarowana Pani Profesor Elżbiecie Traple*, Wolters Kluwer, Warsaw, 2017, p. 1408.

65. It is true that the services offered free of charge to passengers under Article 17(1) and (2) of Regulation No 1177/2010 appear relevant to passengers, particularly while they are travelling. However, the obligation to apply that provision in situations such as that described in the first question is 'relaxed' by the clarifications contained therein, in accordance with which those services must be provided, in the case of snacks, meals or refreshments, 'in reasonable relation to the waiting time, provided they are available or can reasonably be supplied' and, in the case of accommodation on board or ashore, where this becomes necessary.

66. Lastly, it is sufficient to note that Articles 18 and 19 of Regulation No 1177/2010 make no mention of the obligation to be informed of the cancellation beforehand as a condition for them being rendered inapplicable. Furthermore, in the course of the *travaux préparatoires*, amendment No 59, which was proposed by the Parliament in its opinion at first reading, under which compensation is not payable by the carrier in the case where it informed the passenger of the cancellation of the sailing no later than three days before the scheduled departure, was not included in Regulation No 1177/2010. That fact supports the view that the legislature did not intend to restrict the scope of that regulation or of Articles 18 and 19 thereof in the manner envisaged by Irish Ferries.

3. The parallel between Regulations No 261/2004, No 1371/2007, No 1177/2010 and No 181/2011

67. Under recital 1 of Regulation No 1177/2010, that regulation seeks to ensure *a level of protection for passengers travelling by sea that is comparable* with other modes of transport. *De lege ferenda*, some draft legislation seeks to establish a similar level of protection for consumers within the European Union.[18] However, it is settled case-law that *the situations of undertakings operating in the different transport sectors are not comparable* since the different modes of transport, having regard to the manner in which they operate, the conditions governing their accessibility and the distribution of their networks, are not interchangeable as regards the conditions of their use.[19]

68. For instance, the rights enjoyed by rail passengers under EU law are laid down in Regulation No 1371/2007. That regulation provides, inter alia, that, in the case of a delay for which the ticket price has not been reimbursed in accordance with Article 16 of that regulation, a passenger facing a delay between the places of departure and destination stated on the ticket may, without losing the right of transport, request compensation from the railway undertaking.[20] That regulation does not provide that railway undertakings are exempted from the obligation to pay compensation laid down in Article 17(1) of Regulation No 1371/2007 where the delay is attributable to a case of *force majeure*. In such circumstances, the question could arise as to whether the grounds for the carrier's exemption from liability, as provided for in Regulations No 261/2004, No 1177/2010 and No 181/2011, relating, respectively, to the transport of passengers by air, by boat and by bus or coach, may be applied by analogy to rail transport.

[18] See Erceg, B. and Vasilj, A., 'Current affairs in passengers rights protection in the European Union', *EU and Comparative Law Issues and Challenges*, 2018, Vol. 2, pp. 222 and 223.

[19] See judgments of 10 January 2006, *IATA and ELFAA* (C-344/04, EU:C:2006:10, paragraph 96); of 31 January 2013, *McDonagh* (C-12/11, EU:C:2013:43, paragraph 56); and of 26 September 2013, *ÖBB-Personenverkehr* (C-509/11, EU:C:2013:613, paragraph 47).

[20] See Article 17(1) of Regulation No 1371/2007.

69. In the judgment in *ÖBB-Personenverkehr*,[21] the Court answered that question in the negative. With reference to the case-law that I cited in point 67 of this Opinion, the Court acknowledged that the EU legislature had been entitled to establish rules for providing a level of customer protection that varied according to the transport sector concerned.[22]

70. Given those clarifications in case-law, a parallel drawn between the legislation on the different modes of transport cannot be used as a means of introducing, via case-law, solutions that lead to the harmonisation – in relation to all modes of transport – of the obligations of carriers in the event of the cancellation of, or a delay in, a passenger service. The EU legislature's intention not to establish such parallelism between that legislation must therefore be respected.

4. The principle impossibilium nulla obligatio est

71. According to this principle, obligations which are objectively and absolutely impossible to perform cannot be imposed by such law on individuals[23] and provisions of EU law are to be interpreted in such a way that the imposition of such obligations is precluded.[24]

72. However, the existence of difficulties in performing obligations arising from EU law cannot be treated as akin to an objective and absolute impossibility. In addition, the importance of the objective of consumer protection, which includes the protection of maritime passengers, may justify even substantial negative economic consequences for certain economic operators.[25] Moreover, whereas Articles 18 and 19 of Regulation No 1177/2010 impose obligations on carriers, Article 20(3) and (4) of that regulation allows those carriers to be granted exemptions from those obligations in specific circumstances and guarantees that the carriers are not in a situation comparable to that of absolute impossibility.

73. For the same reasons, in order to determine whether, on the basis of national law, the contracts entered into with passengers must be deemed to have been discharged because they were impossible to perform, the referring court must take into account the fact that, regardless of the law applicable to those contracts, the latter involve obligations under Regulation No 1177/2010, which, as I have just explained, does not make it impossible for the carrier to perform its contractual obligations.

74. I conclude my analysis of the first question referred for a preliminary ruling by proposing that it be answered to the effect that Regulation No 1177/2010, in particular Articles 18 and 19 thereof, applies in the situation in which a maritime transport service is cancelled and notice is given, prior to the initially scheduled departure, on the ground that the delivery of the vessel intended to operate that transport service was delayed and an alternative vessel could not be found.

[21] Judgment of 26 September 2013 (C-509/11, EU:C:2013:613, paragraph 48).

[22] See judgment of 26 September 2013, *ÖBB-Personenverkehr* (C-509/11, EU:C:2013:613, paragraph 47).

[23] See, by analogy with the case-law on the application of this principle to Commission decisions, judgment of 6 November 2018, *Scuola Elementare Maria Montessori* v *Commission*, *Commission* v *Scuola Elementare Maria Montessori* and *Commission* v *Ferracci* (C-622/16 P to C-624/16 P, EU:C:2018:873, paragraph 82 and the case-law cited).

[24] See, to that effect, judgment of 3 March 2016, *Daimler* (C-179/15, EU:C:2016:134, paragraph 42).

[25] See, by analogy, judgment of 23 October 2012, *Nelson and Others* (C-581/10 and C-629/10, EU:C:2012:657, paragraph 81).

B. The concept of the 'final destination' in Articles 18 and 19 of Regulation No 1177/2010

75. By part (a) of its third question, the referring court asks the Court to clarify whether the re-routing of the passengers, either by means of an alternative sailing or sailings following a different itinerary from the initial sailing or by using a (road or rail) land bridge, constitutes 're-routing to the final destination' under 'comparable conditions' within the meaning of Article 18 of Regulation No 1177/2010.

76. By part (b) of its third question, that court seeks to ascertain whether, where a direct alternative sailing is not available on the initial crossing, the re-routed passengers, for the purposes of Article 18 of Regulation No 1177/2010, must receive compensation for any additional financial costs incurred by them, first, in travelling to the alternative port of embarkation and disembarkation and, second, in leaving those ports.

77. Part (b) of the fourth question is likewise concerned with the interpretation of the term 'final destination' in the light of the right to compensation provided for in Article 19 of Regulation No 1177/2010.

78. In order to answer those questions, that concept of the 'final destination' contained in the provisions of that regulation must be interpreted.[26] I therefore propose to address those questions jointly.

1. The concept of 'final destination'

79. The concept of 'final destination' contained in Articles 18 and 19 of Regulation No 1177/2010 relates to the final destination *as set out in the transport contract*. Within the scheme of that regulation, that concept therefore always corresponds to a destination agreed by the parties. Since a 'ticket', within the meaning of Article 3(n) of the regulation, is, in essence, evidence that a transport contract exists, the final destination, as an essential element of that contract, must in principle also appear on the ticket.

80. In addition, within the scheme of Regulation No 1177/2010, the concept of 'final destination' is used to determine the place to which the passenger had to be conveyed (and, in conjunction with the arrival time, at what time) following transportation by means of passenger services in order to be able to take the view that that service was actually and properly performed. On the one hand, by entering into a transport contract, the passenger acquires the right of transport to the final destination[27] and, in the event of cancelled or delayed departure, as provided for in Article 18 of that regulation, the passenger is entitled to be re-routed to that destination. On the other hand, if the passenger faces a delay in arrival at the final destination, the carrier is in principle required to compensate him or her pursuant to Article 19 of the regulation.

81. The concept of 'final destination' therefore plays a crucial role in regard to the liability of a carrier for the performance of a passenger service. It must therefore be a precisely determined destination which the carrier can 'control'; the carrier must be able to calculate the duration of the journey and the arrival time according to that destination. Furthermore, in view of the fact that the circumstances in which a carrier is liable under Articles 18 and 19 of Regulation

[26] See my analysis concerning the second question and part (a) of the fourth question.

[27] Article 19(1) of Regulation No 1177/2010 provides that, in the event of delay in arrival, a passenger may request compensation *without losing the right to transport*.

No 1177/2010 are, in principle, established for all passengers in the context of the passenger service concerned, it is unlikely that the final destination can be established on an individual basis in the transport contracts. The view should therefore be taken that the concept of the 'final destination' corresponds, in principle, to the port of disembarkation stated in the transport contract for an original sailing.

82. That consideration is not called into question by Irish Ferries' argument that Regulation No 1177/2010 uses the term 'port of disembarkation' and that therefore the concept of the 'final destination' cannot have the same meaning as that term. The term 'port of disembarkation' is in fact used only in Article 2 of that regulation with a view to determining the scope of the regulation. The terminological convention established in that provision is the reason why it does not use the concept of the 'final destination': under Article 2 of Regulation No 1177/2010, the regulation applies to passenger services where *the port of embarkation is situated in the territory of a Member State* and, mirroring that passage, in the case of services from a third country, *where the port of disembarkation is situated in the territory of a Member State*.

2. Re-routing to the final destination

83. Although Article 18 of Regulation No 1177/2010 does provide that, in the event of cancelled or delayed departure, a passenger is to be offered, inter alia, 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, it may be that, following his or her transportation by sea, the passenger does not arrive at the port of disembarkation stated in the transport contract for an original sailing.

84. In view of the limited number of passenger services available and of ports that can accept passenger vessels, it cannot be required that passengers must always be offered transportation on a route identical to that initially agreed. As Irish Ferries points out, there may be no alternative service to transport those passengers on the same route or on the same day. To impose such a requirement would therefore in effect prolong the 'earliest opportunity' within which the re-routing must take place. For similar reasons, in the context of Regulation No 261/2004, the carrier may offer an alternative flight to an airport other than that for which the booking was made,[28] despite the fact that the concept of the 'final destination' is strictly defined in that regulation. This is especially the case in relation to transport services conveying passengers by sea or inland waterway which, in practice, are not frequently used to travel to the port of disembarkation and to stay there.

85. However, in a case of re-routing, the carrier must ensure transportation to the final destination, as set out in the transport contract for an initial sailing, or cover the transfer costs.[29] Article 18(1) of Regulation No 1177/2010 provides that the passenger is entitled to be re-routed to the final destination and, as I have stated in point 81 of this Opinion, the concept of 'final destination' corresponds, in principle, to the port of disembarkation indicated in the transport contract for an original sailing.

[28] Under Article 8(3) of Regulation No 261/2004, 'when, in the case where a town, city or region is served by several airports, an operating air carrier offers a passenger a flight to an airport alternative to that for which the booking was made, the operating air carrier shall bear the cost of transferring the passenger from that alternative airport either to that for which the booking was made, or to another close-by destination agreed with the passenger'.

[29] See points 91 to 94 of this Opinion.

86. If, as part of an alternative passenger service, the carrier is not required to convey the passenger, by sea, to the port of disembarkation indicated in the transport contract for an original sailing, the route taken by the alternative mode of transport does not, a fortiori, necessarily have to be identical to that stated in the transport contract for the original sailing.

87. However, re-routing must always be carried out under 'comparable conditions' within the meaning of Article 18 of Regulation No 1177/2010. In that context, the referring court thus asks whether an alternative sailing which takes a different route can entail the use of other modes of transport, such as road or rail transport via a land bridge.

88. Regulation No 1177/2010 does not define the concept of 'comparable conditions', stating merely, in its recital 13, that a passenger should obtain re-routing 'under satisfactory conditions'. The conditions of the passenger service are laid down in the transport contract and, therefore, the question of whether the alternative service's conditions are 'comparable' must be assessed having regard to that contract. The words 'comparable conditions' therefore relate to essential elements of the contract, such as the total duration of the travel, the arrival time, the number of additional changes and the ticket class. It is true that, given the objective of ensuring a high level of protection for passengers, re-routing must not be to the detriment of the passenger and the perspective of that passenger must therefore be adopted in order to determine whether those conditions are 'satisfactory' as compared with those laid down in the transport contract. However, the reference to the contractual conditions ensures that the interests of the carrier are not disregarded.

89. Although, under EU law, there is no existing legislative framework that directly concerns the protection of passengers' rights in a multimodal context,[30] that does not mean that multimodal transport is not an acceptable solution for the system of passenger protection established under EU law. It is, in fact, a solution that is frequently used by passengers. It is likewise possible that, in certain circumstances, that solution will be the only alternative service available at the earliest opportunity.

90. 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 therefore constitute 're-routing to the final destination' under 'comparable conditions' within the meaning of Article 18 of Regulation No 1177/2010 if other conditions of that sailing[31] are comparable to those laid down for the initial sailing in the transport contract.

3. The additional costs incurred by a re-routed passenger

91. Consideration must now be given to whether the carrier is required to reimburse a re-routed passenger, first, for the additional costs incurred by that passenger in travelling to the ports of embarkation and disembarkation and, second, for those which that passenger incurs in leaving those ports.

92. Article 18(1)(a) of Regulation No 1177/2010 provides that, where a transport service is cancelled, the passenger is to be offered the choice between reimbursement of the ticket price or re-routing to the final destination 'at no additional cost'.

30 See Erceg, B. and Vasilj, A., op. cit., p. 230.

31 See, in this regard, point 88 of this Opinion.

93. As I have already noted in point 88 of this Opinion, re-routing must not be to the detriment of the passenger. Nor does re-routing mean placing the passenger in a disproportionately more advantageous situation than that provided for in the transport contract into which he or she entered.

94. In that context, it must be borne in mind that, in the case of uninterrupted passenger services, the passenger still has to travel to the respective ports and the costs incurred in those circumstances are not reimbursed to him or her. In view of the considerations set out in the previous point, the words 'at no additional cost', contained in Article 18 of Regulation No 1177/2010, must be construed as meaning that the costs incurred as a result of re-routing that are greater than those which that the passenger would have had to bear in the case of an uninterrupted passenger service are to be reimbursed to the passenger.

95. In summary, having considered parts (a) and (b) of the third question and part (b) of the fourth question, I am of the view that:

– the concept of 'final destination', within the meaning of Articles 18 and 19 of Regulation No 1177/2010, corresponds, in principle, to the port of disembarkation specified in the transport contract for an original sailing;

– 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 Regulation No 1177/2010 if other conditions of that alternative sailing are comparable to those laid down for the initial sailing in the transport contract;

– Article 18(1)(a) of Regulation No 1177/2010 is to be interpreted as meaning that re-routing must occur at no additional cost, such that the carrier must reimburse the costs incurred by passengers in travelling to the alternative ports of embarkation and disembarkation as well as those borne in leaving those ports in so far as those costs are attributable to the re-routing and are greater than those which the passengers would have incurred in the case of an uninterrupted passenger service.

C. Compensation under Article 19 of Regulation No 1177/2010 in the light of the choice afforded to the passenger pursuant to Article 18 of that regulation

96. By its second question, part (a) of the fourth question and part (a) of the fifth question, the referring court seeks to establish, in essence, whether, in the case where a passenger service has been cancelled at least seven weeks prior to the scheduled departure and a passenger has been reimbursed or re-routed or has opted for a sailing on a later date, that passenger may claim compensation for the delay in arrival under Article 19 of Regulation No 1177/2010, having regard to the arrival time established for the original sailing.

1. Analysis of the questions

97. The referring court includes two sub-questions in part (a) of its fourth question. The first sub-question concerns whether Article 19 of Regulation No 1177/2010 applies in the case where the passenger service was cancelled at least seven weeks prior to the scheduled departure. The second sub-question, which is raised only if the first sub-question should be answered in the

affirmative, concerns whether a passenger who, following such a cancellation, was reimbursed or re-routed or opted for a sailing on a later date, in accordance with Article 18 of Regulation No 1177/2010, may claim compensation under Article 19 of that regulation.

98. By part (a) of its fifth question, the referring court seeks to know how the length of the delay within the meaning of Article 19(1) of Regulation No 1177/2010 is determined in the circumstances corresponding to those set out in part (a) of the fourth question, namely where the voyage was cancelled at least seven weeks prior to the scheduled departure and the passenger was re-routed or reimbursed or opted for a sailing on a later date.

99. The second question likewise essentially concerns the issue of whether a passenger's choice to opt for re-routing pursuant to Article 18 of Regulation No 1177/2010 entails the conclusion of a new transport contract, such that the right to compensation provided for in Article 19 of that regulation is to be assessed, not having regard to the arrival time established for the original sailing, but in the light of that established in that 'new' transport contract.

100. Inasmuch as those questions relate to the cumulative application of Articles 18 and 19 of Regulation No 1177/2010 in identical circumstance, I propose to examine them together.

2. The cumulative application of Articles 18 and 19 of Regulation No 1177/2010

101. It should be noted in the first place that, as is apparent from my analysis of the first question, the fact that advance notice was given of the cancellation of the passenger service does not preclude the application of Article 19 of Regulation No 1177/2010. [32]

102. In the second place, in order to answer the second question and part (a) of the fourth question, it is necessary to establish whether Articles 18 and 19 of that regulation can apply cumulatively, such that a passenger who avails himself or herself of that first provision may still claim compensation under that second provision.

103. In order to place that question within a broader context, it should be noted that Articles 16 to 18 of Regulation No 1177/2010, on the one hand, and Article 19 of that regulation, on the other, concern, respectively, cases of delayed departure and cases of delayed arrival. According to legal literature, the EU legislature made that distinction because, in the case of maritime transport, unlike other modes of transport, a delay in departure may be made up in the course of the journey, meaning that a passenger may reach the final destination at the time established in the transport contract without any delay. [33]

104. That being said, the question may be asked whether, in the case where the passenger service has been cancelled, the scenario of a delayed arrival still arises and affords the passenger the right to compensation under Article 19 of Regulation No 1177/2010.

105. A reading of recital 14 of Regulation No 1177/2010 suggests that that question should be answered in the affirmative. That recital states that 'carriers should provide for the payment of compensation for passengers *in the event of the cancellation* or delay of a passenger service based on a percentage of the ticket price'. [34] In that same vein, the original proposal for a regulation

[32] See points 63 to 66 of this Opinion.

[33] See, to that effect, Stec, M., op. cit., p. 1409.

[34] Emphasis added.

stated, in one of its provisions, that a passenger facing a delay in arrival *due to a cancellation* or a delay in departure may request compensation on that basis. However, following the opinion of the Parliament at first reading,[35] the decision was taken, in line with that opinion, not to specify the potential grounds for a delay in arrival; such grounds do, however, appear in recital 14 of Regulation No 1177/2010.

106. Furthermore, according to Article 20(2) and (4) of Regulation No 1177/2010, Article 19 of the regulation does not apply, respectively, 'if the passenger is informed of the *cancellation* or delay before the purchase of the ticket or if the cancellation or delay is caused by the fault of the passenger' and 'where the carrier proves that the *cancellation* or delay is caused by weather conditions'.[36] Within the scheme of Regulation No 1177/2010, the cancellation of a passenger service per se does not result in the loss of the right to transport, but rather entails a choice between a reimbursement and re-routing such that the passenger can reach the final destination without delay. Where, in the event of cancellation, the passenger retains his or her right to transport, he or she may still rely on Article 19 of that regulation.

107. In the third place, the question arises as to whether the fact that a passenger has had recourse to Article 18 of Regulation No 1177/2010 (and has obtained reimbursement or re-routing or opted for a later sailing) affects the applicability of Article 19 of that regulation.

108. In that context, Article 19(1) of Regulation No 1177/2010 provides that compensation in the event of delay in arrival may be requested by a passenger *without losing the right to transport*. The passenger is entitled to the transport for which he or she has paid. Although the cancellation of a passenger service does not cause that right to be lost,[37] the situation is different where, following a cancellation, the passenger has requested and obtained reimbursement in full pursuant to Article 18(1)(b) of that regulation. In such a situation, the passenger loses the right to transport, which is why Article 18(1)(b) of the regulation provides that the reimbursement of the ticket price is accompanied, 'where relevant, [by] a return service free of charge to the first point of departure, as set out in the transport contract, at the earliest opportunity'.

109. By contrast, where a passenger has opted not for a reimbursement but for re-routing or a sailing at a later date, he or she still has the right to the transport for which he or she has paid and, accordingly, may request compensation under Article 19 of Regulation No 1177/2010.

110. It now remains to be determined whether, in the case where the passenger was re-routed or opted for a sailing on a later date, the compensation provided for in Article 19 of Regulation No 1177/2010 is to be established having regard to the arrival time defined for the original sailing.

3. Calculation of the length of the delay

111. Under Article 19(1) of Regulation No 1177/2010, compensation is payable where the length of the delay exceeds the thresholds laid down in that provision, according to the duration of the journey. That provision concerns the right to compensation of passengers facing a delay in *arrival at the final destination as set out in the transport contract*. Thus, the issue of whether the length of the delay exceeds those thresholds must be assessed having regard to the arrival time and the duration of the journey specified in that contract which sets out the final destination.

[35] See amendment No 57 of the Report on the Proposal for a Regulation (COM(2008)0817, C6-0476/2008, 2008/0246(COD)).

[36] Emphasis added.

[37] See point 106 of this Opinion.

112. The same is true of the rights of re-routed passengers and of those of passengers who have opted for a sailing on a later date.

113. In the context of re-routing, in the event of cancelled or delayed departure, Article 18(1)(a) of Regulation No 1177/2010 also refers to *the final destination as set out in the transport contract*, and stipulates that the re-routing must take place under *comparable conditions*. In that regard, it is clear that the 'final destination' is that determined at the time of the conclusion of the contract in which the conditions of transport are agreed and that the re-routing is conducted under conditions comparable to those originally agreed.

114. In view of the fact that Articles 18 and 19 of Regulation No 1177/2010 can apply cumulatively and use the same form of words ('the final destination'), the view must be taken that that form of words has the same meaning in those two provisions. The existence of a right to compensation under Article 19 of that regulation must therefore be determined having regard to the arrangements agreed by the parties to the transport contract for the original sailing.

115. Accordingly, the delay corresponds to the difference between the arrival time laid down in the contract and the actual time of arrival at the final destination.

116. If, further to an alternative passenger service, the passenger was not conveyed to the final destination originally agreed, the delay should, in principle, as the NTA proposes and where the passenger so requests, be calculated as compared with the time at which the passenger arrived at the final destination as set out in the transport contract, assuming that the re-routing continued from the alternative port of disembarkation to that destination.

117. However, as I observed in point 108 of this Opinion, where the passenger has been reimbursed in full, in accordance with Article 18(1)(b) of Regulation No 1177/2010, the question of compensation under Article 19 of that regulation does not arise.

118. Contrary to what Irish Ferries appears to claim, the fact that the re-routing or the selection of a sailing on a later date is the result of a choice made by a passenger cannot call into question the foregoing considerations. On conclusion of the initial transport contract, that passenger has already chosen the final destination, the arrival time and the duration of the voyage. The fact that the passenger service was not carried out in line with those arrangements is the result of facts attributable to the carrier. Taking the view that the subsequent choice imposed on the passenger, as a result of those facts, deprives him or her of his or her right to compensation would amount to affording a carrier the right to release itself from its obligations under Article 19 of Regulation No 1177/2010 by virtue of a re-routing of the passenger to the final destination.[38] Unlike the situation in which reimbursement is made in full, there is nothing in the provisions of that regulation to support adopting such a solution in the case of re-routing.[39] Furthermore, the situations in which that provision does not apply are set out in Article 20 of that regulation and no mention is made therein of the fact that the passenger is offered the option of re-routing.

[38] I would point out, for the sake of completeness, that a passenger who has opted to be re-routed may also face a delay in the arrival of the alternative sailing. In such a situation, it would be necessary to determine whether Article 19 of Regulation No 1177/2010 likewise applies to that delay. See, by analogy, judgment of 12 March 2020, *Finnair* (C-832/18, EU:C:2020:204), in the context of which the Court held that an air passenger who has received compensation for the cancellation of a flight and has accepted the re-routing flight offered to him or her is entitled to compensation for the delay of the re-routing flight. It is true that Article 7(2) of Regulation No 261/2004 does not leave room for any doubt that the compensation is likewise payable in the situation in which re-routing to the final destination, on another flight, is offered to the passenger. It follows from my analysis that that is also the case in the context of Regulation No 1177/2010. However, although Irish Ferries does mention such a situation, no reference is made to it in the questions referred for a preliminary ruling.

[39] See point 108 of this Opinion.

119. I therefore propose that the second question, part (a) of the fourth question and part (a) of the fifth question should be answered to the effect that, where notice has been given of the cancellation of the passenger service, prior to the scheduled departure, and a passenger opts to be re-routed or for a sailing at a later date, that passenger may claim compensation under Article 19 of that regulation, having regard to the delay in arrival at the final destination as set out in the transport contract for the original sailing. Where the passenger requests such compensation, the delay corresponds to the difference between the arrival time provided for in the contract and the time at which the passenger arrived at the final destination, as set out in the transport contract, assuming that the re-routing continued from the alternative port of disembarkation to that destination. By contrast, a passenger who opted for and has received reimbursement in full cannot claim that compensation.

D. The concept of the 'ticket price' within the meaning of Article 19 of Regulation No 1177/2010

120. By part (b) of its fifth question, the referring court seeks to determine the components of the 'ticket price' within the meaning of Article 19 of Regulation No 1177/2010. In that context, it asks whether the ticket price includes the costs related to additional optional services chosen by the passenger, such as the booking of a cabin or a kennel or even access to premium lounges.

121. Although the concept of the 'ticket price' is used in Articles 18 and 19 of Regulation No 1177/2010, that regulation does not, however, contain a definition of that concept.

122. In the course of the *travaux préparatoires* relating to Regulation No 1177/2010, the Parliament proposed the introduction of a definition of the concept of the 'ticket price', upon which 'any compensation will be based'. Under that proposal, it would mean 'the cost paid for the transport and accommodation on board. It excludes the costs of meals, other activities and any on-board purchases'.[40] That proposal was not adopted by the Council. However, the Council did lay down detailed methods for calculation of the amounts to be paid to the passenger, in accordance with Articles 18 and 19 of that regulation.

123. It is clear from Article 19 of Regulation No 1177/2010 that the ticket price serves as the basis for the calculation of the compensation in the event of a delay in arrival. That compensation corresponds to a percentage (a minimum of 25% or 50%) of the ticket price and is calculated, in accordance with Article 19(3) of that regulation, in relation to the price which the passenger *actually paid for the* delayed *passenger service*.

124. I infer from this that the ticket price, within the meaning of Article 19(3) of Regulation No 1177/2010, equates to the total amount paid by the passenger for the passenger service. The compensation referred to in that provision is calculated in relation to that price and is intended to offset the amount paid for a passenger service that was not performed in accordance with the transport contract.[41] Having regard to the contract, the fault in the service provided by the carrier concerns not only the failure to convey the passenger to the final destination, but also the failure to comply with the conditions of transport for which the passenger paid. Those conditions

[40] See amendment No 22 of the Report on the Proposal for a Regulation (COM(2008) 817, C6-0476/2008, 2008/0246(COD)).

[41] See, by analogy, with regard to the compensation provided for in Article 17 of Regulation No 1371/2007, which is worded similarly to Article 19 of Regulation No 1177/2010, judgment of 26 September 2013, *ÖBB-Personenverkehr* (C-509/11, EU:C:2013:613, paragraph 38), in which the Court stated that the compensation, 'in so far as it is calculated on the basis of the ticket price, is to compensate the passenger for the consideration provided for a service which was not ultimately supplied in accordance with the transport contract'.

concern, inter alia, the choice of a cabin, a kennel or a ticket class. By contrast, the amounts paid for services external to the passenger service, such as the commission collected by a travel agent, are not to be included in the ticket price.

125. As the Commission observes, unlike Regulation No 261/2004, Regulation No 1177/2010 does not provide for standard, flat-rate compensation for each passenger, because the amount of that compensation depends on the price of the ticket purchased by the passenger. In those circumstances, a failure to take into account the ticket type and factors such as the class (first or second) or the on-board accommodation would run counter to the choice made by the EU legislature not to introduce such flat-rate compensation.

126. Furthermore, the interpretation of Article 19 of Regulation No 1177/2010 that I propose allows the passenger to identify easily the amount of compensation to which he or she is entitled in the event of cancellation. Following that logic, it is possible to exclude from the concept of the 'ticket price', within the meaning of that provision, the portion of the ticket price corresponding to the amounts paid for services separate from the passenger service, provided that that portion of the ticket price is clearly identifiable and 'separable' from the amount paid for the passenger service.

127. In the light of the foregoing considerations, it is my view that part (b) of the fifth question should be answered to the effect that Article 19 of Regulation No 1177/2010 is to be interpreted as meaning that the ticket price includes the costs related to the additional optional services chosen by the passenger, such as the booking of a cabin or a kennel or even access to premium lounges.

E. Interpretation of Article 20(4) of Regulation No 1177/2010

1. Preliminary observations on the sixth question referred for a preliminary ruling

128. By its sixth question, the referring court asks the Court whether a delay of 200 days in the delivery of a passenger transport vessel which led to the cancellation of all the sailings scheduled for a new sea link may be regarded as an extraordinary circumstance within the meaning of Article 20(4) of Regulation No 1177/2010 and whether such a delay releases the carrier from its obligation to compensate the passengers.

129. It follows from Article 20(4) of Regulation No 1177/2010 that the carrier is not required to compensate passengers under Article 19 of that regulation where it proves that the cancellation or delay is caused by extraordinary circumstances hindering the performance of the passenger service which could not have been avoided even if all reasonable measures had been taken.

130. In this question, and with a view to describing the circumstances that it wishes to be examined in the light of Article 20(4) of Regulation No 1177/2010, the referring court refers merely to the 'circumstances and considerations outlined in [the first question]'. It is apparent from a joint reading of the first and sixth questions that, in the view of that court, the delay in delivery was essentially the reason why performance of the passenger service at issue was hindered.

131. Furthermore, although the first question does refer to other circumstances, some of them, in particular the fact that a suitable alternative vessel could not be obtained, that there was no similar alternative service and that over 20 000 passengers were impacted by the delayed delivery, should be regarded not as 'extraordinary circumstances' but rather, in my view, as 'reasonable measures' within the meaning of Article 20(4) of Regulation No 1177/2010.

2. The criteria for determining 'extraordinary circumstances'

132. Like the comparable provisions of Regulation No 261/2004, Article 19 of Regulation No 1177/2010 lays down the principle that passengers have the right to compensation, whereas Article 20(4) of that regulation determines the situations in which the carrier is not obliged to pay that compensation. The latter provision must therefore be regarded as derogating from the principle laid down in Article 19 of the regulation and most not be interpreted extensively. [42]

133. Furthermore, recital 17 of Regulation No 1177/2010 provides a list of events which may fall under the concept of 'extraordinary circumstances'. [43] That list is not exhaustive ('but not be limited to'). In any event, such events are not naturally part of the undisturbed exercise of maritime transport and are not within the carrier's control.

134. In that same vein, recital 19 of Regulation No 1177/2010 makes reference to the case-law of the Court according to which only events which, first, are not inherent in the normal exercise of the activity of the carrier concerned and, second, are beyond its actual control can be covered by the concept of 'extraordinary circumstances'. Those two criteria were established by the Court in its case-law regarding Regulation No 261/2004. Recital 19 of Regulation No 1177/2010 thus demonstrates the EU legislature's intention to equate the interpretation of the concept of 'extraordinary circumstances' within the meaning of Regulation No 1177/2010 with that established by the Court in its case-law on Regulation No 261/2004. [44]

135. Lastly, it follows from that case-law that the two criteria are cumulative [45] and are determined having regard to the nature or origin of the event which hindered the performance of the passenger service. [46] It may also be inferred from the case-law that those two criteria are the only valid criteria in finding that extraordinary circumstances exist. Indeed, neither the frequency [47] nor the unexpected nature [48] of an event means that the latter constitutes an extraordinary circumstance.

[42] See, to that, effect, judgment of 22 December 2008, *Wallentin-Hermann* (C-549/07, EU:C:2008:771, paragraph 20).

[43] According to that recital, 'extraordinary circumstances should include, but not be limited to, natural disasters such as fires and earthquakes, terrorist attacks, wars and military or civil armed conflicts, uprisings, military or illegal confiscations, labour conflicts, landing any sick, injured or dead person, search and rescue operations at sea or on inland waterways, measures necessary to protect the environment, decisions taken by traffic management bodies or port authorities, or decisions by the competent authorities with regard to public order and safety as well as to cover urgent transport needs'.

[44] The concept of 'extraordinary circumstances' is used to classify those circumstances in which a carrier is released from its obligation to provide compensation, which is payable, under Regulation No 261/2004, in the case of *cancelled or delayed departures* and, pursuant to Regulation No 1177/2010, in the event a *delay in arrival*. That difference does not, in my opinion, preclude the criteria for determining 'extraordinary circumstances' established by the Court in the context of Regulation No 261/2004 from being transposed to that of Regulation No 1177/2010.

[45] See, recently, judgment of 11 June 2020, *Transportes Aéreos Portugueses* (C-74/19, EU:C:2020:460, paragraph 37).

[46] See, recently, judgment of 11 June 2020, *Transportes Aéreos Portugueses* (C-74/19, EU:C:2020:460, paragraph 37).

[47] See, to that effect, judgment of 22 December 2008, *Wallentin-Hermann* (C-549/07, EU:C:2008:771, paragraph 36).

[48] See, to that effect, judgment of 17 September 2015, *van der Lans* (C-257/14, EU:C:2015:618, paragraph 41).

136. In view of the foregoing clarifications, it must be observed that, contrary to the claims made by Irish Ferries and Ireland, the exceptional and unusual or unpredictable nature of the delay in delivery does not mean that that delay may be classified as an 'extraordinary circumstance'. [49]

137. In addition, the distinction between extraordinary circumstances and those which are not extraordinary cannot be made on the basis of a simplified differentiation between external and inherent circumstances. In its case-law, the Court has already found that, in certain situations, the actions of third parties do not release the carrier from its obligation to pay compensation on the ground that they constitute extraordinary circumstances. [50]

3. The criterion that the event is inherent in the normal exercise of the activity of the maritime carrier

138. With regard to the criterion that the event is inherent in the normal exercise of the activity of the carrier concerned, I am compelled to note that, in order for a maritime carrier to be able to operate a passenger service, it must be in possession of a vessel used for that purpose. Having a fleet at its disposal is, a fortiori, essential to, if not inherent in, the normal exercise of the maritime carrier's activity. Drawing a parallel to the line of reasoning developed by the Court in its judgment in *Krüsemann and Others*, [51] the view may thus be taken that the organisation and maintenance of the fleet are part of the normal management undertaken by a maritime carrier and that certain risks that go with such management are likewise inherent in the normal activity of that carrier.

139. It is true that a carrier may decide to look ahead to the delivery of a vessel and offer bookings to passengers before that vessel is provided to it. In that regard, Irish Ferries submits that such an approach is common in the maritime-passenger sector. Where a carrier takes a decision of that kind, even though the vessel in question is the only one that can be used to operate the transport services on a particular route, it does, however, leave itself open to an economic risk that it must also manage. From the perspective of the scheme of Regulation No 1177/2010, the carrier in question takes that risk on board, incorporating it into its normal activity.

140. Furthermore, the arrangements concerning the ordering and delivery of the vessel are laid down in the contract concluded by the carrier. However, first, any contract includes risks. [52] In the present case, the delay in delivery is the result of circumstances relating to the conduct of one

[49] By contrast, the circumstances relating to aspects of the delay may be taken into consideration in order to determine whether the hindering of the performance of the transport service could not have been avoided even if all reasonable measures had been taken.

[50] In the judgment of 17 April 2018, *Krüsemann and Others* (C-195/17, C-197/17 to C-203/17, C-226/17, C-228/17, C-254/17, C-274/17, C-275/17, C-278/17 to C-286/17 and C-290/17 to C-292/17, EU:C:2018:258, paragraphs 40 to 44), the Court held that a 'wildcat strike' cannot be classified as an 'extraordinary circumstance' since the risks arising from the social consequences that go with the restructuring and reorganisation of undertakings must be regarded as inherent in the normal exercise of activity. Furthermore, in the judgment of 4 April 2019, *Germanwings* (C-501/17, EU:C:2019:288, paragraph 29), the Court found, with reference to the order of 14 November 2014, *Siewert* (C-394/14, EU:C:2014:2377), that the collision of an airport's mobile boarding stairs with an aircraft cannot be regarded as an 'extraordinary circumstance'. The Court took the view that the fact that *the use of such equipment ordinarily takes place in collaboration with the crew of the aircraft concerned* was capable of illustrating the fact that the event that caused the failure on the part of the carrier was within that carrier's control. However, that consideration does not change the fact that the impairment at issue had been caused by the actions of third parties.

[51] Judgment of 17 April 2018 (C-195/17, C-197/17 to C-203/17, C-226/17, C-228/17, C-254/17, C-274/17, C-275/17, C-278/17 to C-286/17 and C-290/17 to C-292/17, EU:C:2018:258, paragraphs 40 to 42).

[52] See, inter alia, Moisan, P., 'Technique contractuelle et gestion des risques dans les contrats internationaux : les cas de force majeure et d'imprévision', *Les Cahiers de Droit*, 1994, Vol. 35(2), p. 286.

of the contracting parties or to the conduct of that party's subcontractors.[53] This is therefore a disturbance that is part and parcel of ordinary contractual risk. There is nothing to indicate that the delay was caused by an act unconnected with the performance of the contractual obligations of the contractor or of its subcontractors, or even with the normal services of a shipyard.[54] In that context, ordinary contractual risk also includes non-performance of the contract. Accordingly, the fact that the length of the delay was 200 days cannot call that consideration into question.

141. Second, any contract can constitute a risk-management mechanism. The Commission points out that the ordering of a new vessel is planned in advance and is generally the subject of a detailed contract that includes clauses on late delivery. In that same vein, at the hearing, the NTA made the point that the contract concluded in 2016 was based on a standard model used in international practice and provided for a compensation mechanism in the case of unauthorised delays. The existence of risk-management mechanisms in contracts for the delivery of vessels confirms, to my mind, the recognition of the existence of the ordinary contractual risk that goes with such a delivery.

142. That finding was not called into question by Irish Ferries, which stated in that connection that that mechanism was insufficient to cover the losses and damages that it had suffered. Given the level of protection for passengers which the scheme of Regulation No 1177/2010 seeks to establish, the fact that the mechanism for managing normal contractual risk is insufficient, in the view of one of the contracting parties, cannot lead to the situation in which that risk is borne by passengers. The carrier cannot outsource, to the detriment of passengers, the economic risk which it incorporated into its normal activity.[55]

143. Thus, I propose that the Court find that Article 20(4) of Regulation No 1177/2010 is to be interpreted as meaning that a delay in the delivery of a vessel, which is the result of the conduct of one of the contracting parties or of that party's subcontractors, is inherent in the normal exercise of the activity of the carrier concerned where that carrier has begun offering bookings and entered into transport contracts with passengers before the vessel has been provided to it and, therefore, does not come under the concept of 'extraordinary circumstances' within the meaning of that provision.

144. Since the two criteria for determining 'extraordinary circumstances' are cumulative, that consideration should be enough for the view to be taken that the delayed delivery of a vessel cannot constitute a circumstance of that kind. However, in the event that the Court were not to accept that consideration, I will now consider the second criterion.

[53] As I noted in the summary of the facts, according to the referring court, the delayed delivery is the result of delays by external outfitters whose services had been engaged as subcontractors by the shipyard and/or of negative developments in the outfitting of the public spaces and in the delivery of interior components for public areas.

[54] One possible scenario, for example, would be the case of a vessel under construction that is covered by military confiscation measures. See, by analogy, order of 14 November 2014, *Siewert* (C-394/14, EU:C:2014:2377, paragraph 19), in which the Court held that damage to the aircraft due to operate the flight at issue which was *caused by an act outside the category of normal airport services*, such as an act of sabotage or terrorism, comes within the concept of 'extraordinary circumstances'.

[55] See, by analogy, Malenovský, J., 'Regulation 261: Three Major Issues in the Case Law of the Court of Justice of the EU', in Bobek, M. and Prassl, J. (eds), *EU Law in the Member States: Air Passenger Rights, Ten Years On*, Hart Publishing, Oxford, 2016, p. 32, which states that requiring passengers to bear the economic risk of the activity freely undertaken by the carrier would run counter to the objective of guaranteeing a high level of protection for passengers. Furthermore, in its judgment of 4 July 2018, *Wirth and Others* (C-532/17, EU:C:2018:527, paragraph 23), the Court found that, in view of the objective of ensuring a high level of protection for passengers, the interpretation of the concept of the 'operating air carrier' that should be adopted is that which *enables the passengers carried to be ensured compensation without needing to take account of arrangements made by the air carrier* which decided to perform the flight in question with another carrier for the purposes of actually performing that flight.

4. The criterion of actual control

145. In its case-law on the air-passenger sector, the Court refers to the criterion of the carrier's competence to assess whether the event could have been beyond its actual control. [56]

146. In that context, in the judgment in *van der Lans*, [57] the Court took the view that the prevention of a breakdown or the repairs occasioned by a breakdown are not beyond the actual control of the air carrier in question, since that carrier is required to ensure the maintenance and proper functioning of the aircraft which it operates for the purposes of its business.

147. As I noted in point 138 of this Opinion, the organisation and maintenance of the fleet used for a maritime carrier's business come within the competence of that carrier. To those ends, it concludes inter alia, as the present case shows, contracts for the construction of vessels. Therefore, unlike the situation at issue in the judgment in *van der Lans*, [58] in such a situation the carrier is not yet operating the vessel ordered.

148. In that context, the conclusion of the contracts and their content is not beyond the actual control of the carrier in question, thus enabling it to manage certain risks, including the economic risk to which it is exposed. This therefore raises the following question: is the performance of the contractual obligations by one of the parties and by its subcontractors within the deadline specified *actually under the control* of the carrier? [59]

149. In its case-law, the Court has already ruled on the criterion of actual control in the light of acts by third parties which constitute – or had caused – events capable of coming within the concept of 'extraordinary circumstances'. It follows from the case-law that the acts of third parties that occurred in collaboration with the carrier or those acts undertaken on the basis of a decision by that carrier are not beyond the carrier's actual control. [60]

150. In its judgment in *Transportes Aéreos Portugueses*, [61] the Court recently provided new clarifications relating to that case-law. First of all, in paragraph 42 of that judgment, the Court explained that a transport contract exists between a passenger and the carrier and that it is for the passenger to ensure that he or she does not jeopardise the proper performance of that contract. The Court went on to find, in paragraph 43 of that judgment, first, that the unruly behaviour of a passenger that justified the flight concerned being diverted is not, in principle, under the control of the operating air carrier concerned, since a passenger's behaviour and reactions to the crew's requests are not foreseeable and, second, on board an aircraft, both the flight commander and the crew have only limited means of controlling such a passenger. I infer from this that the fact that the carrier lays down the clauses of the contract concluded with the passenger does not automatically mean that that passenger's behaviour is under the control of that carrier. However, again in relation to the criterion of actual control, the Court clarified that it is necessary to ascertain whether the carrier contributed to the occurrence of the unruly behaviour

[56] See, recently, judgments of 26 June 2019, *Moens* (C-159/18, EU:C:2019:535, paragraph 20), and of 4 April 2019, *Germanwings* (C-501/17, EU:C:2019:288, paragraph 26).

[57] Judgment of 17 September 2015 (C-257/14, EU:C:2015:618, paragraph 43).

[58] Judgment of 17 September 2015 (C-257/14, EU:C:2015:618).

[59] It should be noted that the 2016 contract was concluded not by Irish Ferries but by ICG. However, there is nothing in the present reference for a preliminary ruling to suggest that, given the relationship between those entities, what was under the control of ICG was not under the control of Irish Ferries.

[60] See footnote 50.

[61] Judgment of 11 June 2020 (C-74/19, EU:C:2020:460).

of the passenger concerned or whether that carrier was in a position to anticipate such behaviour and to take appropriate measures, on the basis of warning signs.[62] In the Court's view, in such circumstances, the unruly behaviour of a passenger would be within the carrier's control.[63]

151. In that regard, I must note that Irish Ferries states that, prior to the conclusion of the 2016 contract, shipyards were evaluated and a careful selection process was undertaken. That statement is not called into question by NTA. There is therefore no basis for finding that Irish Ferries or ICG contributed, within the meaning of the case-law arising from the judgment in *Transportes Aéreos Portugueses*,[64] actively or out of negligence to the late delivery of the vessel. On those grounds, if the Court were to disagree with my analysis regarding the first criterion for determining 'extraordinary circumstances' and consider the second criterion, I propose that the view be taken that the late delivery of a vessel was not under the control of the carrier. Consequently, that late delivery could exempt the carrier from liability because it constitutes an extraordinary circumstance.

5. The reasonable measures

152. Even assuming that the delay in the delivery of a vessel can constitute an 'extraordinary circumstance', it would still be for the carrier to establish that, even adopting all reasonable measures, that is to say, even if it had deployed all its resources in terms of staff or equipment and the financial means at its disposal, it would clearly not have been able, unless it had made intolerable sacrifices in the light of the capacities of its undertaking at the relevant time, to prevent the extraordinary circumstances with which it was confronted from leading to the cancellation or the delay of the transport service.[65] In that context, consideration must be given only to the measures that the carrier concerned was actually in a position to take, to the exclusion of measures falling within the competence of third parties.[66]

153. It is true that it should be left to the referring court to assess whether, in the circumstances of the present case, the carrier had reasonable measures in place to prevent the extraordinary circumstance in question. However, with a view to offering guidance to the referring court and providing a useful answer to the question put by it, the Court could provide clarifications regarding the most contentious issue between the parties to the main proceedings.[67]

154. The NTA in fact contends that Irish Ferries did not take the reasonable measures available to it to prevent the cancellation of the passenger services. In particular, it argues, Irish Ferries took bookings for passenger services on the vessel at a time when it had neither ownership nor possession of the vessel and when it could not be certain that, at the time when the passenger

62 See, recently, judgment of 11 June 2020, *Transportes Aéreos Portugueses* (C-74/19, EU:C:2020:460, paragraph 45).

63 See, recently, judgment of 11 June 2020, *Transportes Aéreos Portugueses* (C-74/19, EU:C:2020:460, paragraph 47).

64 Judgment of 11 June 2020 (C-74/19, EU:C:2020:460).

65 See, by analogy, judgment of 12 May 2011, *Eglītis and Ratnieks* (C-294/10, EU:C:2011:303, paragraph 25).

66 See, by analogy, judgments of 4 May 2017, *Pešková and Peška* (C-315/15, EU:C:2017:342, paragraph 44), and of 26 June 2019, *Moens* (C-159/18, EU:C:2019:535, paragraph 27).

67 In so doing, the Court's response would be more abstract in scope having regard to the question of 'reasonable measures' and would be of use to all national courts and tribunals of the European Union, whilst leaving it to the referring court in the present case to assess whether, in the circumstances of the case, reasonable measures within the meaning of Article 20(4) of Regulation No 1177/2010 were available to the carrier. See, to that effect, Šváby, D., 'La responsabilité en matière de transport aérien de passagers à l'intersection de trois systèmes juridiques', in Petrlík, D., Bobek, M. and Passer, J.M. (eds), *Évolution des rapports entre les ordres juridiques de l'Union européenne, international et nationaux. Liber amicorum Jiří Malenovský*, Bruylant, Brussels, 2020, p. 491.

services were to be provided, it would have ownership or possession of the vessel. Conversely, Irish Ferries claims that refraining from taking bookings for transport services on a new route would constitute an intolerable sacrifice within the meaning of the case-law.

155. It could indeed be argued that the period of time anticipated by Irish Ferries between the delivery of the vessel and its entry into service was not sufficient to find that that carrier did not have more appropriate measures available to it to prevent the failure in the performance of the transport service.

156. That being said, if, contrary to my proposal in this Opinion, the Court should take the view that the delay in the delivery of a vessel for a new route is not an event inherent in the normal exercise of the activity of the carrier concerned (first criterion for determining 'extraordinary circumstances'), that carrier could not then be required, in my view, to refrain from taking bookings up until that vessel is provided to it by the shipyard, with all the necessary certification. To regard refraining from taking bookings until the – unforeseeable – time at which that delay is overcome, or even without any time limit, as a 'reasonable measure' would be at odds with the consideration that that delay is not inherent in the normal exercise of activity and is, therefore, capable of coming under the concept of an 'extraordinary circumstance'.

157. Without prejudice to my foregoing remarks on the second criterion for determining 'extraordinary circumstances', I stand by the view which I set out in point 143 of this Opinion. Given that, in accordance with that view, the first criterion for determining 'extraordinary circumstances' is not met in the present case, there is no need to examine the second criterion or the issue of whether the carrier had 'reasonable measures' in place.

F. Interpretation of Article 24 of Regulation No 1177/2010

158. By its seventh question, the referring court wishes to ascertain, in essence, whether a request for compensation under Article 19 of Regulation No 1177/2010 may be treated in the same way as a complaint within the meaning of Article 24 thereof, such that a passenger must submit his or her request for compensation to the carrier within two months from the date on which the transport service was performed or should have been performed in order for the national body responsible for enforcing that regulation to be able to impose penalties for the non-payment of that compensation.

159. Although the referring court does not specify the number of passengers or the moment at which they submitted the requests for compensation under Article 19 of Regulation No 1177/2010, the seventh question appears to stem from Irish Ferries' argument that the NTA failed to limit the effect of the decision and the notices to those passengers who had lodged a complaint in accordance with Article 24 of that regulation. That question cannot therefore be regarded as manifestly bearing no relation to the actual nature of the case or to the subject matter of the main action.

160. It must be observed from the outset that Article 24(2) of Regulation No 1177/2010 determines not only the period within which a complaint must be submitted, but also the periods within which the carrier is required to examine the complaint and accept or reject it. Similarly, Article 19 of that regulation provides for a specific deadline for the processing of requests for compensation made on the basis of that provision. Indeed, Article 19(5) of Regulation No 1177/2010 requires the carrier to pay the compensation owed to the passenger within one month after the submission of the request for compensation. In those circumstances, it could

indeed, a priori, be argued that that provision constitutes a *lex specialis* in comparison with Article 24(2) of Regulation No 1177/2010, since both provisions concern the periods within which requests for compensation are to be processed, without affecting the period specified for the submission of a complaint in Article 24(2) of that regulation.

161. Furthermore, Article 24(1) of Regulation No 1177/2010 requires carriers to have in place a complaint-handling mechanism for rights and obligations covered by that regulation. That provision might suggest that the concept of a 'complaint' relates to all the rights and obligations covered by Regulation No 1177/2010, including the right to compensation provided for in Article 19 of that regulation.

162. However, I take the view that, within the scheme of Regulation No 1177/2010, a request for compensation cannot be equated with a complaint.

163. In the first place, when describing the event triggering the start of the deadline for the carrier, Article 19(5) of Regulation No 1177/2010 refers not to the date of receipt of the complaint but rather to that of submission of the request for compensation.

164. In the second place, unlike Article 24(2) of Regulation No 1177/2010, Article 19(5) of that regulation does not provide that the carrier is to examine the request for compensation and may accept or reject it. Under the latter provision, 'the compensation shall be paid within 1 month after submission of the request for compensation'. That difference between the method of handling complaints and requests for compensation is entirely consistent with the nature of such requests. In accordance with Article 19(1) of Regulation No 1177/2010, a delay in arrival gives rise to a pecuniary claim on the part of the passenger, and that passenger may request payment of that claim from the carrier, a request with which the latter, as the debtor, must comply.

165. In the third place, according to Article 25(3) of Regulation No 1177/2010, any passenger may submit a complaint to the competent body responsible for enforcement of that regulation about an alleged infringement of it.[68] That provision likewise states that a Member State may decide that the passenger must, as a first step, submit his or her complaint to the carrier, or that the national body handles that complaint as an appeal body. I infer from the foregoing that the carriers and national bodies are responsible for handling complaints that have the same purpose or for handling the same complaints.

166. In that context, recital 24 of Regulation No 1177/2010 explains that the designation of the national bodies responsible for ensuring compliance with that regulation does not affect the rights of passengers to seek legal redress from courts under national law. The passenger may therefore rely on his or her claim under Article 19 of Regulation No 1177/2010 before national courts and tribunals. The two-month period would not apply in the context of such judicial proceedings. The reference to national law contained in recital 24 of that regulation supports that interpretation. If the two-month period were regarded as being applicable in a non-judicial context, this would in effect require the passenger to proceed ahead with judicial proceedings, without allowing the national bodies responsible for ensuring compliance with Regulation No 1177/2010 to penalise the refusal to compensate that passenger because that period of time has expired.

[68] It should be noted that, in giving the example of a complaint, recital 23 of Regulation No 1177/2010 refers to the assistance provided at a port or on board.

167. Thus, Article 24(2) of Regulation No 1177/2010 must be interpreted as meaning that the imposition of a penalty on the carrier for non-payment of the compensation owed to the passenger under Article 19 of that regulation is not subject to the condition that the passenger made a request for compensation to the carrier within two months from the date on which the service was performed or should have been performed.

G. Interpretation of Article 25 of Regulation No 1177/2010

168. By its eighth question, the referring court seeks to establish whether the jurisdiction of a national body responsible for the enforcement of Regulation No 1177/2010, as established by a Member State in accordance with Article 25(1) thereof, is limited to the transport services from the ports situated on the territory of that Member State or whether it also covers the return transport services from another Member State to those ports.

169. The wording of Article 25 of Regulation No 1177/2010 may suggest that that question should be answered in the negative. Indeed, under that provision, the national body designated by a Member State is responsible for the enforcement of that regulation in respect of passenger services from ports situated on the territory of that Member State and those from a third country to such ports.

170. The referring court appears to be perfectly aware of the implications of the literal interpretation of that provision. The wording of the eighth question makes clear that that court wishes to know whether the fact that the jurisdiction of a national body is exercised in respect of passenger services where the transport involved a return journey, from Ireland to France, could call for the same provision to be interpreted differently.

171. In that context, at the hearing, Irish Ferries stated that, for some passengers, the transport did not relate to a return journey from a port situated in Irish territory. According to Irish Ferries, more than half of the sailings began in France. However, the wording of the eighth question expressly refers to a return sailing, and that question should therefore be considered from that perspective.

1. Article 25(1) and (3) of Regulation No 1177/2010

172. Consideration must be given, first of all, to the NTA's argument based on Article 25(3) of Regulation No 1177/2010, in accordance with which any passenger may submit a complaint to the competent body designated pursuant to Article 25(1) of that regulation or to any other competent body designated by a Member State. The NTA interprets the reference to 'any other competent body designated by a Member State' as meaning that a passenger may submit his or her complaint relating to transport for a return journey to the bodies of the two Member States on the territories of which the ports concerned by that transport are situated.

173. I am, however, unconvinced by the interpretation of Article 25 of Regulation No 1177/2010 put forward by the NTA, according to which a passenger may choose the body to which he or she may submit his or her complaint, since that interpretation would amount to recognising the existence of the alternative jurisdiction of the national bodies of two Member States, as part of which those bodies would ensure compliance with that regulation in respect of the same passenger services.

174. The eighth question asks not only in which Member State a passenger may submit his or her complaint but rather concerns, in more general terms, the jurisdiction of the national bodies responsible for enforcing Regulation No 1177/2010 and designated by the Member States in accordance with Article 25(1) of that regulation.

175. In that regard, a national body designated by a Member State is responsible for carrying out its general monitoring of the enforcement of Regulation No 1177/2010 as regards the passenger services departing from ports situated on the territory of that Member State and the passenger services arriving from a third country in those ports. That being the case, such a body is to take, as is made clear by that provision, the measures necessary to ensure compliance with that regulation.

176. In accordance with Article 28 of Regulation No 1177/2010, the Member States are, in turn, to lay down the system of penalties applicable to infringements of the provisions of that regulation and to take all the measures necessary to ensure that they are applied. Under Irish law, non-compliance with the notices relating to such infringements, which are issued by the NTA, is punishable by fines. In addition, the power to issue such notices must be exercised by a national enforcement body, such as the NTA, within the limits provided for in Article 25(1) of the same regulation.

177. The view cannot therefore be taken that any national body whatsoever has jurisdiction in relation to the general monitoring of the passenger services concerned, because that jurisdiction entails the imposition of penalties for infringements of Regulation No 1177/2010 coming within the territorial scope of that jurisdiction.

178. Turning now to Article 25(3) of Regulation No 1177/2010, it must be observed that that provision concerns only the handling of complaints. In addition, under that provision, such complaints may be submitted to the *competent body designated under Article 25(1) of that regulation* or to *any other competent body designated by a Member State*. I infer from this that the national enforcement body is not necessarily the only body with jurisdiction to deal with complaints. A Member State may establish another body for that purpose. The jurisdiction to handle the complaints of maritime passengers may therefore be independent from the jurisdiction within the context of which the general monitoring is conducted. [69]

179. In an extension of that reading of Article 25(3) of Regulation No 1177/2010, the NTA argues that the reference to a competent body designated *by a Member State* means that the passenger may also bring his or her complaint before competent bodies of a Member State other than that on the territory of which the port of embarkation is situated.

[69] It is true that, in the judgment of 17 March 2016, *Ruijssenaars and Others* (C-145/15 and C-146/15, EU:C:2016:187, paragraph 30), the Court found, in relation to similar provisions in force in the field of air transport, that the jurisdiction to handle complaints, as provided for in Article 16(2) of Regulation No 261/2004, is one aspect of the task of conducting general monitoring that falls to the body mentioned in Article 16(1) of that regulation. However, first, that judgment concerned a national body responsible for enforcing Regulation No 261/2004. It was therefore not 'another competent body designated by a Member State'. Second, Article 25(3) of Regulation No 1177/2010 did not reproduce the exact wording of Article 16(2) of Regulation No 261/2004.

180. In that context, first, Article 25(3) of Regulation No 1177/2010 was interpreted differently in the course of the *travaux préparatoires*. The Parliament and the Council understood that provision to mean that it related to *a number of competent bodies established by the same Member State*,[70] that is, the Member State on the territory of which the port of embarkation is situated.

181. However, the Commission appears to understand that provision to mean that the passenger may choose to bring his or her complaint before the national body responsible for enforcing Regulation No 1177/2010 designated by another Member State,[71] *without, however, stating that that national body is competent* within the meaning of Article 25(3) of that regulation. In the context of the similar provisions of Regulation No 261/2004, the Commission explicitly states that, in such a situation, *the body to which the air passenger refers the matter is not the competent body* and that the complaint must be transferred to a competent enforcement body designated by another Member State.[72]

182. In those circumstances, although I do take the view that the passenger may submit the complaint relating to the transport on a return journey to the bodies of one of the two Member States on the territories of which the ports concerned by that transport are situated, this does not, however, mean that all those bodies are competent to conduct the general monitoring, referred to in Article 25(1) of Regulation No 1177/2010, of the passenger services to which reference is made in the complaint.

2. The concept of a 'passenger service' in the case of a return journey

183. One line of reasoning based on a particular reading of the concepts used in Article 25(1) of Regulation No 1177/2010 could call into question the implications of the literal interpretation of that provision.

184. Indeed, taking the view that, in the context of Article 25(1) of Regulation No 1177/2010, the concept of a 'passenger service' includes, where the transport relates to a return journey, one outbound sailing and one return sailing would amount to recognising the jurisdiction of the national bodies of the Member State on the territory of which the ports of embarkation of that first sailing are situated.

[70] See Amendment No 68, as clarified, in the Report on the Proposal for a Regulation (COM(2008) 816, C6-0476/2008, 2008/0246(COD)) and the common position of the Council on the adoption of a Regulation of the European Parliament and of the Council concerning the rights of passengers when travelling by sea and inland waterway and amending Regulation (EC) No 2006/2004, 14849/09 ADD 1, p. 9.

[71] See Commission document entitled 'National Enforcement Bodies (NEB) for maritime transport have to guarantee the good application of Regulation [No]1177/2010 and passengers can lodge a complaint with them if [they] believe that their rights were not respected', https://ec.europa.eu/transport/themes/passengers/maritime_en, according to which 'the competent NEB is the NEB of the EU country of departure except when the service departs from a third country. Then, the NEB of the EU country of arrival is competent. However, passengers are free [to] contact the NEB of their choice'.

[72] Under Article 16(2) of Regulation No 261/2004, 'each passenger may complain to *any body designated under paragraph 1*, or to *any other competent body designated by a Member State*, about an alleged infringement of this Regulation at any airport situated on the territory *of a Member State* or concerning any flight from a third country to an airport situated on the territory of a Member State or concerning any flight from a third country to an airport situated on that territory' (emphasis added). In an information document on the handling of complaints in the context of Regulation No 261/2004 (NEB – NEB Complaint Handling Procedure under Regulation (EC) No 261/2004, Version February 2019, paragraph 2, https://ec.europa.eu/transport/sites/transport/files/neb-neb_complaint_handling_procedures.pdf), the Commission states that 'a NEB is competent for the complaints related to delays or cancellations of flights departing from its territory (MS A)'. Furthermore, in that document, like the Commission's initial proposal, upon which Regulation No 261/2004 is based (see Article 18 of the proposal for a Regulation of the European Parliament and of the Council establishing common rules on compensation and assistance to air passengers in the event of denied boarding and of cancellation or long delay of flights, and repealing Regulation (EEC) No 295/91 (COM(2001) 784 final – (COD 2001/0305)), reference is explicitly made to the transmission of complaints between the bodies established by different Member States. It follows from this that the body of another Member State is not *competent* within the meaning of Article 16(2) of that regulation.

185. Irish Ferries alludes to that line of reasoning when it states that, in the context of Regulation No 261/2004, the Court took the view that the concept of a 'flight' within the meaning of that regulation consists essentially in an air transport operation, being as it were a 'unit' of such transport.[73] At the hearing, the NTA appeared to echo that consideration, arguing that, in the case of Regulation No 1177/2010, where the transport relates to a return journey the reserved service has two parts.

186. Although Article 3(f) of Regulation No 1177/2010 defines the concept of a 'passenger service', that definition does not contain any information on the basis of which it may be determined whether transport consisting in a return journey is a single service. Such information can, however, be found in other provisions of that regulation.

187. In that context, Article 19(4) of Regulation No 1177/2010 lays down the method for calculating the compensation payable to a passenger in the event of a delay in arrival in the case of *transport for a return journey*, and provides, in the French-language version of that regulation, that where the delay occurs in the outward or the return leg, that compensation is to be calculated in relation to half of the price paid for the transport by *the passenger service*. However, other language versions state that that compensation is to be calculated in relation to half of the price paid for the transport by *that passenger service*[74] or in relation to half of the price paid for *that passenger service*.[75] In those language versions, the use of a demonstrative pronoun in the words '*that* service' appears to be a reference to Article 19(3) of that regulation, which concerns *the delayed passenger service*.

188. Article 19(4) of Regulation No 1177/2010 may, prima facie, lead to the conclusion that transport that is for a return journey is provided by a single passenger service.

189. However, first, that provision links such transport and such a service only in the event that one of the two sailings was delayed.

190. Second, with the exception of Article 19(1) of Regulation No 1177/2010, the concept of 'transport' is not used in other provisions of that regulation. Although the concept of 'travel' is an equivalent to the concept of a 'passenger service', the question could be asked why the legislature did not use the latter concept in the wording of Article 19(4) of that regulation.

191. Third, Article 18(1) of Regulation No 1177/2010 provides that, in the situations covered by that provision, the passenger is immediately to be offered the choice between 're-routing to *the final destination*, … as set out in the transport contract' or 'reimbursement of the ticket price and, where relevant, a return service free of charge to *the first point of departure*, as set out in the transport contract, at the earliest opportunity'.[76] Taking the view that, where the transport is for a return journey, there is a single passenger service would therefore amount to considering that the final destination of that service is the same as its first point of departure.[77]

73 Judgment of 10 July 2008, *Emirates Airlines* (C-173/07, EU:C:2008:400, paragraph 40).

74 See the English-language version ('… shall be calculated in relation to half of the price paid for *the transport by that passenger service*') and the Spanish-language version ('… se calculará en relación con el 50% del precio abonado por *el transporte en dicho servicio de pasaje*').

75 See the German-language version ('wird … auf der Grundlage des halben Fahrpreises für *diesen Personenverkehrsdienst* berechnet') and the Polish-language version ('… obliczane jest na podstawie połowy ceny zapłaconej za *tę usługę przewozu pasażerskiego*').

76 Emphasis added.

77 See, by analogy, judgment of 10 July 2008, *Emirates Airlines* (C-173/07, EU:C:2008:400, paragraph 34).

192. Therefore, where the transport is for a return journey, the view cannot be taken that the passenger service is a single service.

193. It is now necessary to determine whether the fact that the jurisdiction to conduct general monitoring is exercised with regard to passenger services in connection with which the transport was for a return journey is capable of relaxing the implications of the literal interpretation of Article 25(1) of Regulation No 1177/2010, without resorting to a qualified interpretation of the concept of a 'passenger service'.

3. The national body responsible for enforcing Regulation No 1177/2010 in the case of transport for a return journey

194. In order to provide the context for the following considerations, I would recall that, under the traditional approach adopted in public law, or even that under public international law, the jurisdiction of a body established by a Member State should, in principle, be confined to the territory of that Member State or, to be more precise, to the situations exhibiting a sufficiently close link to that Member State and/or its territory.

195. Furthermore, as I have already mentioned, Article 25(1) of Regulation No 1177/2010 explicitly provides that the jurisdiction of a national body also includes conducting monitoring of the transport services from third countries to one of the Member States. The EU legislature does not therefore deny passengers the opportunity to refer a matter to a national body designated by one of the Member States if the transport service is not performed from ports situated within the European Union.

196. Article 25 of Regulation No 1177/2010 must be read in the light of Article 2 of that regulation, which determines that regulation's scope. Under Article 2(1)(b) thereof, Regulation No 1177/2010 is to apply in respect of passengers travelling on passenger services from a third country to one of the Member States, provided that the service is operated by a carrier established on the territory of a Member State or offers transport by passenger services operated to or from the territory of a Member State.

197. It follows from the foregoing that, first, the close link existing between the Member State in which the port of disembarkation is situated and the passenger services from a third country is, in principle, sufficient to confer jurisdiction, in relation to the monitoring of those services, on the national body designated by that Member State.

198. Second, the extent of the jurisdiction of the national bodies designated by the Member States for the purpose of enforcing Regulation No 1177/2010 coincides, in principle, with the territorial scope of the protection afforded by that regulation to passengers. Those bodies must be competent in all situations in which the rights of passengers recognised by that regulation could have been potentially infringed,[78] and the sharing of jurisdiction between them is merely subordinate to the goal of guaranteeing such coincidence. In order to provide an answer to the eighth question, it is now necessary to determine how jurisdiction is shared within the European Union.

[78] See, to that effect, in relation to the European Union trade mark, Szpunar, M., 'Territoriality of Union Law in the Era of Globalisation', in Petrlík, D., Bobek, M. and Passer, J.M. (eds), *Évolution des rapports entre les ordres juridiques de l'Union européenne, international et nationaux. Liber amicorum Jiří Malenovský*, op. cit., p. 155.

199. In that regard, I am of the opinion that, given the mutual trust that exists between Member States, which allows an area without internal borders to be created and retained, the sharing of jurisdiction between them does not necessarily have to observe the traditional principles of public law or public international law. That said, within the scheme of Regulation No 1177/2010, such sharing of jurisdiction appears consistently to be based on the link between the territory of the Member State on the territory of which the port of embarkation or disembarkation is situated and the passenger service in question.

200. Where the transport for a return journey, including two separate sailings, which should have been provided by the carrier, has been cancelled entirely, the link between the return sailing and the territory of the Member State on which the port of embarkation for that sailing is situated does not appear to be more relevant than the link between that sailing and the territory of the Member State on which the port of disembarkation for that sailing is situated. The latter port is also, in principle, the port of embarkation for the outbound crossing. I, like the Commission, take the view that, in such a situation, the national body of the Member State in which the latter port is situated is, in principle, best placed to assess disruptions and to oversee the assistance provided to passengers for those two cancelled sailings in their entirety.

201. It is therefore my view that the jurisdiction of that national body to conduct general monitoring also includes ensuring respect for the rights of any passenger whose port of embarkation for the outbound crossing is situated in the territory of the Member State of that body, as well as with regard to the return crossing. Where the transport that has been entirely cancelled is for a return journey, the perspective of a passenger should be adopted in order to determine the extent of the jurisdiction of the national bodies, even though Article 25(1) of Regulation No 1177/2010 mentions the bodies responsible for enforcing that regulation not in relation to *the passengers* but in relation to *the passenger services*. The purpose of such jurisdiction is to ensure compliance with Regulation No 1177/2010, which is primarily concerned with passengers' rights.

202. Furthermore, as the Commission notes, that interpretation would be consistent with the objective of ensuring a high level of protection for passengers because it would mean avoiding the multiplication of procedures where the reasons for the cancellation of the two sailings are identical.

203. In the light of all of those arguments, I propose that the Court find that Article 25(1) of Regulation No 1177/2010 must be interpreted as meaning that the jurisdiction of a national body responsible for enforcing that regulation, as designated by a Member State, 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.

H. The validity of the decision and of the notices

204. The ninth question is divided into two sub-questions. By the first sub-question, the referring court asks the Court to clarify 'what principles and rules of EU law [must be applied] in assessing the validity of the Decision and/or the Notices of the national enforcement body by reference to Article[s] 16, 17, 20 and/or 47 of the Charter and/or principles of proportionality, legal certainty, and equal treatment'. By its second sub-question, that court asks the Court to clarify whether 'the test of unreasonableness that should be applied by the [referring] court [is] that of manifest error'.

205. The basis for those sub-questions appears to be claims made by Irish Ferries before the referring court and contested by NTA. However, in the case of the first sub-question, its wording, even read in the light of those claims, remains particularly broad and ambiguous.

206. First, as the Commission observes, the decision and the notices to which that sub-question refers are based on a certain interpretation of the substantive provisions of Regulation No 1177/2010 by the NTA. That interpretation essentially forms the subject matter of the first eight questions submitted by the referring court. In the context of that interpretation, account must likewise be taken of the provisions of the Charter and of the general principles of EU law. In addition, as part of its observations on the tenth question, Irish Ferries claims that, if the NTA correctly interpreted and applied Regulation No 1177/2010, that regulation – and not the NTA's decision or its notices – is invalid.

207. Second, assuming that the question arises as to whether, in assessing the validity of the measures adopted by national bodies, which come within the scope of EU law, a national court is required to apply the provisions of the Charter or general principles of EU law, including those explicitly mentioned in the first sub-question, the answer can only be in the affirmative.

208. In the absence of a statement of the precise reasons which prompted the referring court to inquire about the interpretation of EU law, only an answer worded in general, bordering on abstract terms can therefore be provided given the wording of the first sub-question. In those circumstances, the view should be taken that, in so far as the first sub-question is concerned, the request for a preliminary ruling does not satisfy the requirements laid down in Article 94 of the Rules of Procedure of the Court and prevents the Court from providing the referring court with an answer that will be of use to it in settling the dispute in the main proceedings, and is therefore inadmissible.[79] That finding is borne out by a reading of the observations submitted to the Court by the parties, which contain merely general claims.[80]

209. That finding likewise applies to the second sub-question. The summary of the arguments of the parties to the main proceedings amounts to just two sentences: Irish Ferries takes the view that the decision and the notices are vitiated by a manifest error, whereas the NTA denies that such an error exists. In addition, the referring court fails to explain the nature of the 'test of unreasonableness' which it is apparently required to apply under Irish law when assessing the validity of the NTA's decision and notices.

210. In those circumstances, I consider that the second sub-question is also inadmissible and, therefore, that the ninth question must be regarded as inadmissible in its entirety.

I. The validity of Articles 18 and 19 of Regulation No 1177/2010

211. By its tenth question, the referring court asks the Court to examine the validity of Articles 18 and 19 of Regulation No 1177/2010 having regard to the principles of equal treatment, proportionality and legal certainty and in the light of Articles 16, 17 and 20 of the Charter.

[79] See, to that effect, order of 19 December 2019, *Bezirkshauptmannschaft Hartberg-Fürstenfeld* (C-140/19, C-141/19 and C-492/19 to C-494/19, not published, EU:C:2019:1103, paragraphs 49 and 50).

[80] See, by analogy, order of 19 March 2020, *Boé Aquitaine* (C-838/19, not published, EU:C:2020:215, paragraph 26).

212. Although the wording of that question refers, in general terms, to Regulation No 1177/2010, it is clear from the statement of grounds in the request for a preliminary ruling that that question echoes Irish Ferries' argument that that regulation, in Articles 18 and 19 thereof, imposes, contrary to the abovementioned principles and provisions of the Charter, onerous obligations on maritime carriers. In that same vein, in its written observations, Irish Ferries refers more specifically to Articles 18 and 19 of Regulation No 1177/2010 and states that the carrier may be rendered liable under those provisions.

1. The principle of equal treatment and Article 20 of the Charter

213. It should be observed first of all that I considered the compliance of Articles 18 and 19 of Regulation No 1177/2010 with the principle of equal treatment, which is enshrined in Article 20 of the Charter, in my analysis of the first question. In the context of the discussions pertaining to that question, Irish Ferries relies on an argument based on the parallelism between the regulations on the various modes of transport. It is therefore sufficient to recall that, in accordance with settled case-law, the situations of undertakings operating in the different transport sectors are not comparable. [81]

214. Accordingly, and in the light of the considerations already presented in the context of the first question, I propose that the Court find that Articles 18 and 19 of Regulation No 1177/2010 are not invalid by virtue of an infringement of the principle of equal treatment or a breach of Article 20 of the Charter.

2. The principle of proportionality

215. The validity of Articles 18 and 19 of Regulation No 1177/2010 having regard to the principle of proportionality must also be examined in the light of Irish Ferries' argument that imposing an obligation to pay compensation is disproportionate if the carrier informs the passengers of the cancellation of a service several weeks or months before the date of the service.

216. Furthermore, in its written observations, Irish Ferries merely claims that, since the objective of Regulation No 1177/2010 is to ensure for maritime passenger transport a level of protection comparable to that of other modes of transport, it is disproportionate to treat maritime transport less favourably than the other modes of air and rail transport.

217. In that context, it must be pointed out, first, that, contrary to what Irish Ferries appears to claim, the liability of a carrier in respect of the obligations laid down in Articles 18 and 19 of Regulation No 1177/2010 is far from unlimited or even unreasonable. The situations in which those provisions do not apply are already set out in Article 20 of that regulation, which is entitled 'Exemptions'. [82] In those circumstances, the specific financial consequences for maritime carriers cannot be regarded as disproportionate to the objective of a high level of protection for passengers.

218. Second, with regard to Irish Ferries' argument that it is disproportionate to treat maritime transport less favourably than other modes of transport, it need only be observed that that argument is, in essence, merely a criticism of the compliance of Regulation No 1177/2010 with

[81] See point 67 of this Opinion.

[82] See point 64 of this Opinion.

the principle of equal treatment, a matter which I have already dealt with in my analysis. [83] For the sake of completeness, I would observe that the Court has already held that provisions of Regulation No 261/2004 which lay down the obligation to provide care to passengers in the event of the cancellation of a flight owing to 'extraordinary circumstances' are not invalid having regard to the principle of proportionality, even where that obligation is not subject to a temporal or monetary limitation. [84]

219. I am therefore of the view that Articles 18 and 19 of Regulation No 1177/2010 cannot be regarded as invalid on account of an alleged infringement of the principle of proportionality.

3. The principle of legal certainty

220. In so far as the tenth question concerns the principle of legal certainty, that question must also be read in the light of Irish Ferries' argument that Regulation No 1177/2010 infringes that principle by imposing onerous obligations on carriers without any clear legal basis.

221. Furthermore, Irish Ferries claims that that principle has been infringed because Article 19(1) of Regulation No 1177/2010 lays down the obligation to pay compensation by reference to a percentage of the 'ticket price' without defining that concept. To put that claim into context, I am bound to note that, in the context of its observations on the ninth question, Irish Ferries calls the validity of the NTA's Decision and Notices into question in so far as they do not define the concept of the 'ticket price' within the meaning of Article 19(2) of that regulation and, in particular, fail to specify whether that concept includes 'optional extras', such as the price of a cabin. Irish Ferries must be regarded as levelling the same criticism in the context of the tenth question.

222. The principle of legal certainty is a fundamental principle of EU law which requires, inter alia, that legislation should be clear and precise so that individuals are able to understand their rights and obligations clearly and to make arrangements accordingly.

223. That being said, first, it is impossible to determine to what the criticism made by Irish Ferries relates since that criticism is based on a general claim that Regulation No 1177/2010 imposes obligations without any clear legal basis in that regulation. In any event, the provisions of that regulation concerning the obligations of carriers are considered inter alia in the context of the second to sixth questions.

224. Second, although Article 3 of Regulation No 1177/2010 does not contain a definition of the concept of the 'ticket price', Article 19(3) of that regulation explains that the compensation payable to the passenger in the event of a delay in arrival is to be calculated in relation to the price which the passenger *actually paid* for the delayed passenger service. Furthermore, as is shown in my analysis of the fifth question, the issue of the inclusion of 'optional extras' in the ticket price can be resolved by interpreting the regulation in the light of its scheme and purpose. Taking the view that any provision necessitating the use of methods of interpretation other than the textual method infringes the principle of legal certainty amounts in practice to dismissing those other methods of interpretation.

[83] See points 213 and 214 of this Opinion.

[84] Judgment of 31 January 2013, *McDonagh* (C-12/11, EU:C:2013:43, paragraphs 45 to 50).

225. I therefore propose that the Court find that Article 19 of Regulation No 1177/2010 is not invalid on account of an infringement of the principle of legal certainty in so far as that provision concerns the concept of the 'ticket price'.

4. Articles 16 and 17 of the Charter

226. In so far as the tenth question refers to Articles 16 and 17 of the Charter, that question should be understood as meaning that, by submitting it, the referring court asks whether, in accordance with Article 52(1) of the Charter, Articles 18 and 19 of Regulation No 1177/2010 constitute permissible restrictions on the exercise of the freedom to conduct a business and of the right to property.

227. The referring court does not set out the factors which led it to submit that question, which appears to have its origin exclusively in the line of argument invoked by Irish Ferries. Although the request for a preliminary ruling does not present that line of argument in detail, Irish Ferries does expand on it in its written observations in so far as they relate to the first and tenth questions. It is apparent from those observations that, by the line of argument, Irish Ferries is referring primarily to the observance of the principle of proportionality by the restrictions that follow from the application of Articles 18 and 19 of Regulation No 1177/2010.

228. As the Court has already found in the context of assessing the validity of Regulation No 261/2004 from the perspective of its compliance with Articles 16 and 17 of the Charter, that assessment must be carried out in accordance with the need to reconcile the requirements of the protection of those various rights and striking a fair balance between them.[85] In view of the context of the legislation on passengers' rights, account must also be taken of Article 38 of the Charter, which seeks to ensure a high level of protection for consumers, including, consequently, passengers.

229. As is clear from my analysis of the question concerning the validity of Articles 18 and 19 of Regulation No 1177/2010 from the perspective of their compliance with the principle of proportionality,[86] those considerations can be transposed to that regulation and lead me to conclude that those provisions do comply with the principle of proportionality.

230. I am therefore of the view that Articles 18 and 19 of Regulation No 1177/2010 are not contrary to Articles 16 and 17 of the Charter.

231. It follows from the foregoing considerations that examination of the tenth question has not revealed anything capable of affecting the validity of Articles 18 and 19 of Regulation No 1177/2010.

[85] See, to that effect, judgment of 31 January 2013, *McDonagh* (C-12/11, EU:C:2013:43, paragraph 62).

[86] See points 217 and 218 of this Opinion.

V. Conclusion

232. In the light of the foregoing considerations, I propose that the Court answer the questions referred for a preliminary ruling by the High Court (Ireland) 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 that regulation, in particular Articles 18 and 19 thereof, applies in the situation in which a maritime transport service is cancelled and notice is given, prior to the initially scheduled departure, on the ground that the delivery of the vessel intended to operate that transport service was delayed and an alternative vessel could not be found.

2. The concept of 'final destination', within the meaning of Articles 18 and 19 of Regulation No 1177/2010, corresponds, in principle, to the port of disembarkation specified in the transport contract for an original sailing.

   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 Regulation No 1177/2010 if other conditions of that alternative sailing are comparable to those laid down for the initial sailing in the transport contract.

   Article 18(1)(a) of the regulation must be interpreted as meaning that re-routing must occur at no additional cost, such that the carrier must reimburse the costs incurred by passengers in travelling to the alternative ports of embarkation and disembarkation as well as those borne in leaving those ports in so far as those costs are attributable to the re-routing and are greater than those which the passengers would have incurred in the case of an uninterrupted passenger service.

3. Article 19 of Regulation No 1177/2010 must be interpreted as meaning that, where notice has been given of the cancellation of the passenger service, prior to the scheduled departure, and a passenger opts to be re-routed or for a sailing at a later date, that passenger may claim compensation under Article 19 of that regulation, having regard to the delay in arrival at the final destination as set out in the transport contract for the original sailing. Where the passenger requests such compensation, the delay corresponds to the difference between the arrival time provided for in the contract and the time at which the passenger arrived at the final destination, as set out in the transport contract, assuming that the re-routing continued from the alternative port of disembarkation to that destination.

   By contrast, a passenger who opted for and has received reimbursement in full cannot claim that compensation.

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

5. Article 20(4) of Regulation No 1177/2010 must be interpreted as meaning that a delay in the delivery of a vessel, which is the result of the conduct of one of the contracting parties or of that party's subcontractors, is inherent in the normal exercise of the activity of the carrier concerned where that carrier has begun offering bookings and entered into transport

contracts with passengers before the vessel has been provided to it and, therefore, does not come within the scope of the concept of 'extraordinary circumstances' within the meaning of that provision.

6. Article 24(2) of Regulation No 1177/2010 must be interpreted as meaning that the imposition of a penalty on the carrier for non-payment of the compensation owed to the passenger under Article 19 of that regulation is not subject to the condition that the passenger made the request for compensation to the carrier within two months from the date on which the service was performed or should have been performed.

7. Article 25(1) of Regulation No 1177/2010 must be interpreted as meaning that the jurisdiction of a national body responsible for enforcing that regulation, as designated by a Member State, 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.

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