THE HIGH COURT

2017 No. 337 JR

Between:

CORK INSTITUTE OF TECHNOLOGY,

SEFTEC NMCI OFFSHORE TRAINING LIMITED

Applicants

– and –

MINISTER FOR TRANSPORT, TOURISM AND SPORT,

ATTORNEY GENERAL, IRELAND

Respondents

JUDGMENT of Mr Justice Max Barrett delivered on 19th December, 2017.

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(Numbers in square brackets are paragraph numbers)

I

Marine Notice No.6 of 2017

1. This is a challenge to a Marine Notice (Marine Notice No.6 of 2017) (the 'Marine Notice') issued by the Minister of Transport, etc., on 13th February, 2017. That Marine Notice reads as follows:

> ***"Marine Notice No. 06 of 2017***
>
> Notice to all seafarers, Fishers, Students, Training Providers, Shipowners and Fishing Vessel Owners
>
> Training Course Statutory Certification in Ireland
>
> ***Directive 2008/106/EC of the Parliament and the Council on the minimum level of training of seafarers (recast) (Directive)1 as amended by Directive 2012/35/EU2. European Union (Training, Certification and Watchkeeping for Seafarers) Regulation 2014 (S.I. 242 of 2014)***
>
> *The Minister for Transport, Tourism and Sport is the competent authority for the approval of statutory maritime training in Ireland under both EU and Irish law. The Marine Survey Office of the Department carries out this function on behalf of the Minister.*
>
> *Those undertaking maritime training in Ireland should ensure that any course, undertaken by them which leads to certification, is approved by and complies with the statutory certification issued by the competent authority.*
>
> *Specifically, IMO STCW courses including short courses, carried out in Ireland may only be approved by the Minister for Transport, Tourism and Sport. Candidates for seafarer and fisher certification should be aware that the Department will only accept certificates issued by training providers approved by the competent authority for training carried out in Ireland. EU mutual recognition applies to certificates issued in other EU/EEA states for training approved by and carried out under the conditions set down by the competent authorities in those Member States.*
>
> *Ship owners, fishing vessel owners and those employing seafarers and fishers should ensure that crew whose training was carried out in Ireland hold appropriate certification issued under the authority of the Minister for Transport, Tourism and Sport.*
>
> *A holder of a certificate which is not valid, serving on a vessel, may adversely affect the certification of that vessel. Such vessels on inspection, may be subject to enforcement action for non-compliance with statutory requirements.*
>
> *The Department publishes a full list of approved training providers. Seafarers, fishers, employers and others should consult this list on the recently launched Departmental website: https://www.seafarers.ie/.*
>
> *Irish Maritime Administration*
>
> *Department of Transport, Tourism and Sport…*
>
> *13/02/2017…*
>
> *1 of 19 November 2008 (O.J. L323, 3.12.2008, p.33)*
>
> *2 of 21 November 2012 (OJ No. L343, 14.12.2012, p.78)".*

2. It is suggested on behalf of the respondents that the Marine Notice has no legal effect. So, for example, in their written submissions they contend that "[The] *Marine Notice…has no inherent legal status or effect. It is a statement of the Minister's position, which was the same both before and after the publication of the Marine Notice"*. In fact, as will be seen hereafter, the Marine Notice involves the communication of a decision which has had marked implications for the applicants to these proceedings. As to the contended-for fixed nature of the Minister's position "*both before and after the publication of the Marine Notice*", the extensive consideration of relevant correspondence undertaken by the court in the course of this judgment clearly evidences that in the months prior to the issuance of the Marine Notice no final position had been taken by the Minister or his officials concerning the matters at issue between the parties in the within proceedings.

II

The Parties

3. There are two applicants before the court. The first is the Cork Institute of Technology. It is pursuing the within proceedings on behalf of its constituent college, the National Maritime College of Ireland ('NMCI'), an international maritime training academy that commenced operations in 2004. The second applicant, which was generally referred to at the hearings of the within application as 'SNO' and is so referred to in the within judgment, is a joint venture between Cork Institute of Technology and SEFTEC NMCI Offshore Training Ltd, a company that specialises in safety training for offshore workers in the oil and gas industry. SNO provides various training courses at the NMCI and has been approved by the United Kingdom's Maritime & Coastguard Agency ('MCA'), an executive agency of the United Kingdom's Department for Transport.

4. The respondents require no introduction. However, it is perhaps worth noting that although it is the Minister who has ultimate responsibility in this area and thus falls to be named as respondent, day-to-day responsibilities in this area are discharged by the Irish Maritime Administration ('IMA'), which sits within the Department of Transport, etc. Within the IMA, the Marine Survey Office ('MSO') has particular responsibility for the implementation in Ireland of all national and international legislation in relation to safety of shipping. Nothing in the within judgment is intended to impugn in any way the dedication of any of the Department/IMA/MSO officials who were tasked with dealing with the matters under consideration in this judgment.

III

Key Issue Arising

5. For whatever reason, perhaps because of the United Kingdom's long and distinguished maritime history, it appears that, *inter alia*, training certificates issued under the authority of the MCA are something of a 'gold standard' within the international maritime industry. It may be, it likely is, that other jurisdictions issue training certificates that evidence training which is every bit as rigorous and useful as that which is available at bodies approved by the MCA. But again, for whatever reason, it appears that MCA training certificates enjoy a premium within the international seafaring community. While there are, as will be seen, a number of issues at play in the within application, the key issue presenting between the parties concerns Ireland's refusal (a refusal that the applicants rightly contend is contrary to European law) to recognise certificates of proficiency which are issued by SNO under the authority of the MCA, following on completion of certain training at the NMCI.

IV

A Minor Point of Style

6. It has been necessary to include in the within judgment extracts from a number of different texts, e.g., judgments, affidavit evidence, planning materials, *etc*. Any emphases and font styles shown in any such quoted texts appear in the original texts unless otherwise stated.

V

Reliefs Sought

7. In their notice of motion, the applicants seek the following reliefs:

(1) an order of *certiorari* quashing the Marine Notice;

(2) an order of *mandamus* requiring the Minister to recognise certificates of proficiency issued by SNO to seafarers pursuant to training courses approved by the MCA;

(3) a declaration that the Marine Notice is *ultra vires* and/or entirely without legal basis and/or invalid having regard to:

(a) the European Union (Training, Certification and Watch-keeping for Seafarers) Regulations 2014 (the '2014 Regulations'), in particular regs. 3 and 12 thereof,

(b) Directive 2005/45/EC of the European Parliament and of the Council of 7 September 2005 on the mutual recognition of seafarers' certificates issued by the Member States and amending Directive 2001/25 EC (O.J. L255, 30.09.2005, 160) (the '2005 Directive'),

(c) Directive 2008/106/EC of the European Parliament and of the Council of 19 November 2008 on the minimum level of training of seafarers (recast) (O.J. L323, 3.12.2008, 33) (the '2008 Directive'),

(d) Art. 56 of the Treaty on the Functioning of the European Union ('TFEU'),

(e) the provisions of the Charter of Fundamental Rights of the European Union (the 'CFREU'), in particular Arts. 7, 16 and 17 thereof,

(f) the Constitution, in particular Arts. 40 and 43 thereof,

(g) the European Convention on Human Rights (the 'ECHR'), in particular Art.8 and Art.1 of Protocol 1 thereof, and/or

(h) the general principles of European Union law, including but not limited to equal treatment, non-discrimination, transparency, competition, proportionality, good administration, objectivity, legal certainty and legitimate expectation;

(4) a declaration that the Marine Notice (a) is vitiated by manifest error, (b) is vitiated by error of fact and/or fundamental and/or material error of fact and/or error of law; (c) is irrational, (d) flies in the face of fundamental reason

and common-sense, (e) fails to take into account irrelevant considerations (*sic*), (f) fails to take into account relevant considerations, (g) breaches the applicants' legitimate expectations, (h) breaches natural and constitutional justice; and/or (i) breaches the Minister's duty to consult.

(5) insofar as necessary, a declaration that the 2014 Regulations breach the 2005 Directive and/or the 2008 Directive.

(6) insofar as necessary, an extension of time.

(7) damages. [Note: at hearing it was indicated that this relief was not being sought at this time.]

(8) interest [See Note at (7)].

(9) further or other relief.

(10) the costs of the proceedings.

VI.

The STCW Convention

8. The above-mentioned certificates of proficiency fall to be obtained by seafarers in the context of training requirements that exist under the International Convention on Standards of Training, Certification and Watchkeeping for Seafarers ('STCW'), which convention sets qualification standards for masters, officers and watch personnel on sea-going merchant ships. The STCW was adopted in 1978, significantly revised in 1995 and was the subject of various amendments in 2010 that were adopted in Manila and are known generally as the 'Manila Amendments'. The Manila Amendments were given the force of law throughout the European Union by a number of directives which it will be necessary to examine in some detail later below. But, in essence, what the Manila Amendments did was to bring in new requirements for seafarers, in particular a requirement (which did not previously exist) to have refresher training every five years, with a concomitant requirement that seafarers be able to demonstrate that they have done this refresher training (this being where the certificates of proficiency that are a focus of the within proceedings become of relevance).

VII

A Brief Overview of Certain European-level Legislation

(i) Introduction.

9. There are a number of European directives that feature to a greater or lesser extent in the within judgment. In this part of its judgment the court sets out a brief overview of those directives.

(ii) The 2001 Directive.

Directive 2001/25/EC of the European Parliament and of the Council of 4 April 2001 on the minimum level of training of seafarers (O.J. L136, 18.5.2001, 17). [NO LONGER IN FORCE].

10. Worth mentioning, though by way of background only, is the 2001 Directive. It has been replaced by the 2008 Directive, as amended by the 2012 Directive (both considered below).

11. The 2001 Directive was the first directive that laid down minimum standards of training for seafarers which were to apply throughout what is now the European Union. It was subject to the mutual recognition obligations of member states under the then mutual recognition directives (i.e. Council Directive of 21 December 1988 on a general system for the recognition of higher-education diplomas awarded on completion of professional education and training of at least three years' duration (89/48/EEC) (O.J. L19, 24.1.1989, 16) as supplemented by Council Directive 92/51/EEC of 18 June 1992 on a second general system for the recognition of professional education and training to supplement Directive 89/48/EEC (O.J. L209, 24.07.1992, 25)).

12. Recital (7) of the 2001 Directive provides as follows:

> *"Council Directives 89/48/EEC and 92/51/EEC on the general system for the recognition of professional education and training apply to maritime occupations covered by this* [2001] *Directive. They will help promote compliance with the obligations laid down in the Treaty abolishing obstacles to the free movement of persons and services between Member States."*

13. So right from the outset, going back to 2001, there has been an obligation on each member state not just to ensure that seafarers are properly trained, but to recognise training certificates issued in other member states. What the 2001 Directive did, in effect, was to lay down a standard system of certification for seafarers, with certificates issuing under that system being subject to the recognition obligations arising under the 1989 Directive. It will be necessary for the court to turn later below to certain of the case-law concerning the regime established under the 1989 Directive, the reasoning of which case-law is directly applicable by analogy to the legal regime extant under the 2005 Directive.

(iii) The 2005 Directive and the 2008 Directive.

(1) Directive 2005/45/EC of the European Parliament and of the Council of 7 September 2005 on the mutual recognition of seafarers' certificates issued by the Member States and amending Directive 2001/25 EC [i.e. the 2001 Directive]

(2) Directive 2008/106/EC of the European Parliament and of the Council of 19 November 2008 on the minimum level of training of seafarers (recast) (O.J. L323, 3.12.2008, 33).

14. When one reads the 2005 Directive, it makes clear that it aims for even greater recognition for seafarer certificates than was the case under the 1989 Directive. Under the 1989 Directive, a person holding a diploma could be made subject to so-called

'compensation measures' whereby, if there were additional things that a particular member state wished the holder of a diploma to undertake, that could be required. There is no equivalent to that arrangement in the 2005 Directive.

15. The 2005 Directive specifically applies to certificates that were issued under the 2001 Directive. It was recast by the European Union by way of the 2008 Directive and envisages that certificates will be recognised in other member states. Although the 2005 Directive was never amended so as specifically to refer to the 2008 Directive, Article 32 of the 2008 Directive provides, *inter alia*, that "*References to the repealed Directive shall be construed as references to this Directive and shall be read in accordance with the correlation table in Annex IV",* which correlation table indicates the provisions of the 2008 Directive that fall to be read in lieu of provisions of the 2001 Directive.

(iv) The 2012 Directive.

Directive 2012/35/EU of the European Parliament and of the Council of 21 November 2012 amending Directive 2008/106/EC on the minimum level of training of seafarers.

16. The 2012 Directive abolished or removed some of the definitions in the 2008 Directive. It also introduced two new forms of certificate:

– a certificate of competence, in effect a certificate which says that a holder of same is competent to undertake a particular role on a ship, and

– a certificate of proficiency, in effect a certificate which says that a holder of same has undertaken a particular course of training and is therefore capable of undertaking certain on-ship activity.

17. When one looks to the 2005 Directive, it is clear that, under that directive, a member state must recognise any certificate issued under the authority of another member state (now under the 2008 Directive). And that is the fundamental issue in this case, *i.e.* Ireland's failure, contrary to all of the relevant case-law of the CJEU, to recognise certificates issued under the authority of the MCA (which is the relevant competent authority in the United Kingdom).

(v) Interpretation of European Union legislation.

18. In passing, the court notes four points that concern the interpretation of European Union legislation, the first three of which it has brought to bear in the within judgment:

– first, as AG Kokott observed in her Opinion in *Robins v. Secretary of State for Work and Pensions* (Case C-278/05), para.34, "*According to the Court's consistent case-law, in determining the meaning of a provision of Community law, the wording, context and objectives of that provision must all be taken into account."*

– second, the Court of Justice, in its seminal decision in *Van Gend & Loos* (Case 26/62), invoked "*the spirit, the general scheme and the wording*" of the Treaty of Rome as aids in the interpretation of same; that is an approach to interpretation which applies across the broad and rich seam of European Union law.

– third, as Fennelly J. has observed in his extra-judicial writings "*The characteristic element in the Court's* [*i.e.* the Court of Justice's] *interpretive method is…the so-called 'teleological approach'", i.e.* looking for the meaning of legislation by examining its end-purpose or goal. (See Fennelly, N., "*Legal Interpretation at the European Court of Justice"* (1997) 20 *Fordham International* L.J. 656, 664).

– fourth, although the court, in the within proceedings, does not invoke explanatory memoranda to aid its interpretation of the European Union legislation under consideration, it notes for the sake of completeness that explanatory memoranda are of importance when it comes to interpreting secondary European legislation and have been relied upon in a large number of cases, both at the European level (see, *e.g., Commission v. France* (Case C-43/96), para.19, where reliance was placed by the Court of Justice on the explanatory memorandum accompanying its proposal for the sixth directive on the harmonisation of turnover taxes) and also in Ireland (see e.g., the decision of the High Court in *OCS One Complete Solution Ltd v. Dublin Airport Authority plc* [2014] IEHC 306, para.26, where reliance was placed on an explanatory memorandum and also on an impact assessment prepared in each instance by the European Commission).

VIII

Some Other Issues Presenting

19. The issue of recognition touched upon above is the principal issue arising in the within application. However, there are other issues that will require to be touched upon. These are:

(1) Article 56 TFEU (freedom to provide services);

(2) the applicants' right to property and, in particular, their right to earn a livelihood and to freedom of business pursuant to Articles 16 and 17 of the CFREU, Articles 40 and 43 of the Constitution, and Article 1 of the ECHR;

(3) the applicants' right to their good name and professional reputation under Article 7 of the CFREU, Article 40 of the Constitution, and Article 1 of Protocol 1 of the ECHR; and

(4) the applicants' rights having regard to the general principles of European Union law, including but not limited to equal treatment, non-discrimination, transparency, competition, proportionality, good administration, objectivity and legitimate expectations.

20. The applicants also submit that the Marine Notice is manifestly erroneous and irrational, and that it has been adopted in breach of fair procedures.

21. Apart from arguing that the mutual recognition rules do not apply as the applicants contest, a notable argument made by the

State is that the within application is out of time. The State also relies on various aspects of the 2012 Directive, including the requirement that member states ensure training quality standards, the requirement that member states ensure that training bodies authorised by them meet certain standards, and the requirement that a member state should impose penalties for breaches of certain provisions of the directive. However, one curious feature of this case is that when one looks to what was done in this case by

(i) in Ireland, the Minister (technically) and the MSO (in reality) and

(ii) in the United Kingdom, the MCA,

there is no difference of approach between the two jurisdictions, save that there is a thoroughness to what is done by the MCA that perhaps results from its being a bigger agency with more funds available to it. The basic approach that is taken by both authorities is to grant authorisation to issue certificates subject to a number of conditions. One of these conditions is that an authorisation can be withdrawn if standards are not observed: that is the penalty which Ireland imposes in respect of Irish authorisations; it is also the penalty which the MCA has imposed in respect of United Kingdom authorisations. Strikingly, Ireland has not chosen to establish statutory powers authorising it to impose statutory penalties in this regard. It does impose statutory penalties in relation to other things, but not training.

IX

Some Aspects of the Marine Notice

22. The detail of the impugned Marine Notice of 13th February, 2017, was recited at the outset of the court's judgment. A few points might be made concerning same. Thus the Marine Notice:

(1) describes itself as a "*Notice to all Seafarers, Fishers, Students, Training Providers, Shipowners and Fishing Vessel Owners*". This is an aspect of the Marine Notice on which the respondents place some reliance, contending that it is a general notice and not a decision which is peculiar to the applicants. However, the Marine Notice is addressed to training providers and, as will be seen later below, it was in point of fact the very first notification to the applicants of a decision (at last) by the respondents in relation to what is stated in the Marine Notice and falls therefore to be treated, insofar as it communicates that belated decision to the applicants, as no different from a letter communicating a decision. (This has the result that the time for challenging the decision must and does run from the date of receipt of the publication of the Marine Notice and thus that the within proceedings, in which leave for judicial review was granted following an ex parte application before the High Court (Noonan J.) of 24th April, 2017, was commenced well within the three-month timeframe established by O.84, r.21(1) of the Rules of the Superior Courts 1986, as amended).

(2) references the 2008 Directive, the 2012 Directive and the related implementing Regulations of 2014 (these last regulations have not yet been touched upon by the court and will be considered later below as they tell their own story which, unfortunately for the respondents, does not support the case which they have sought to make).

(3) informs candidates for seafarer and fisher certification that the Department of Transport, etc., will only accept certificates issued by training-providers approved by the competent authority for training carried out in Ireland. In other words, unless the training is carried out under the authority of the Minister, the certificate will not be accepted. That approach or decision or policy of the Minister was communicated to the applicants for the first time by way of the Marine Notice. It is true that it had been intimated by Department officials that this approach might well be the approach that would fall ultimately to be taken. However, at all times up to December 2017 the applicants were told that legal advice was being sought by the Department in this regard, with the obvious and natural conclusion which fell to be drawn being that no definite conclusion had been reached and that an alternative conclusion to that which was being flagged might yet be reached.

(4) makes provision of particular concern to the applicants in stating that "*Ship owners, fishing vessel owners and those employing seafarers and fishers should ensure that crew whose training was carried out in Ireland hold appropriate certification issued under the authority of the Minister for Transport, Tourism and Sport*". The effect of the foregoing is that if training is carried out in Ireland under the authority of the Minister, then employers should not employ a seafarer who, consequent upon that training, obtains a certificate from the SNO acting under the authority of the MCA. The court has affidavit evidence before it that there is a significant number of people who are in this category, *i.e.* who have availed of training in Ireland that yields an MCA certificate, including a significant number of persons who may not sail on Irish ships at all and who do not want an Irish certificate, but want instead a 'gold standard' certificate that issues under the authority of the MCA. Thus, for example, Mr Conor Mowlds, the managing director of the second-named applicant has averred, *inter alia*, as follows:

"Since 21 January 2016, SNO has trained over 1,100 seafarers in the refresher training courses approved by the MCA and continues to run these refresher training courses….

SNO also continues to provide MCA approved refresher training to Irish, British, other European and non-European seafarers at the NMCI. Indeed 30% of the mariners trained at the NMCI are from overseas….

The certificates issued by SNO for mariners who have completed the training courses described above are given a unique MCA approval certificate number and each certificate expressly states that it is issued under the authority of the MCA."

(5) makes further provision of particular concern to the applicants in stating that *"A holder of a certificate which is not valid, serving on a vessel, may adversely affect the certification of that vessel. Such vessels on inspection, may be subject to enforcement action for non-compliance with statutory requirements."* This provision is of significance because it means that any ship coming into an Irish port may be detained (Arts 23 and 24 of the 2008 Directive allow a member state, *inter alia*, to inspect vessels, require production of relevant certificates and even detain a ship) if seafarer certificates are not in order. Notably, this prospect does not just affect Irish ships; it affects any ship which comes into an Irish port, so what the Marine Notice has to state in this regard is really a very serious matter.

Two Authorisations and Some Compliance Requirements

(i) Overview.

23. It is perhaps useful to consider the nature of the authorisations that issue from the MCA and the MSO respectively, even if only to show the similarity between them and the like manner in which they both operate, not least when it comes to the suspension/withdrawal of authorisations.

(ii) Example of MCA Authorisation.

24. Exhibited before the court are, *inter alia*, a letter of 21st January, 2016 from the MCA to SNO headed "*MCA approval/recognition of training/education programme", and an enclosed, numbered "approval/recognition certificate for the following training/education programme:- Updated Proficiency in Fast Rescue Boats*", stating, *inter alia*, that "*This approval/recognition only remains valid providing the conditions set out on the reverse of the certificate are complied with*." The text of the enclosed certificate reads as follows:

"Maritime & Coastguard Agency

CERTIFICATE OF APPROVAL OF

TRAINING/EDUCATIONAL PROGRAMME

Certificate Number 00 4338

This is to certify that

SEFtecNMCI Offshore Ltd

National Maritime College of Ireland

Ringaskiddy

Cork

Ireland

has been approved by the Maritime and Coastguard Agency to deliver:

Updated Proficiency in

Fast Rescue Boats

which complies with

STCW Reg. VI/1 (para 2) Sec. A-VI/2 (para 11 and 12)

and issue certificates bearing the course title, reference and this certificate number along with the following statement:

> *'This certificate is issued under the authority of the Maritime and Coastguard Agency, an executive agency of the Department for Transport of the United Kingdom of Great Britain and Northern Ireland.'*

This programme may be delivered at the above venue only.

This approval remains valid providing the conditions stated overleaf are complied with.

[Signature of MCA Official]

Issuing Officer

Date of issue: 21/01/2016

Date of expiry: 21/01/2021

This Certificate is issued by the Maritime and Coastguard Agency of the United Kingdom of Great Britain and Northern Ireland, an executive agency of the Department for Transport. If you have any queries regarding this document please contact:- [Details given]..."

25. Overleaf, the following conditions appear under the heading "*Conditions of Approval*:"

"*1. A functional Quality Management System is in place and ensures that:*

> *a. continued satisfactory delivery of the programme to the current standards, reflecting changes of technology and best practice;*
>
> *b. the training programme entry standards are met;*

c. the agreed assessment process is maintained;

d. only those who complete the training programme and meet any other necessary requirements are issued with certificates/documentary evidence;

e. certificates are issued in a format that meets the MCA requirements, as per the examples provided for the operational and management levels within sections two and three of this document;

f. records of certificates issued are securely maintained until the 70th birthday of the certificate holder or five years from the date of issue whichever is the longer;

g. the record system enables authenticity of certificates to be verified and replacement certificates issued;

h. where approved for peripatetic delivery, formal assessment is carried out to ascertain the suitability of each venue and records of such assessment are retained for five years;

i. the approving MCA Office is informed of dates, timing and venues of all courses delivered; and

j. any changes made to the course content, facilities, equipment, training staff or other matter that may affect the delivery of the programme are reported to the approving Marine Office without delay.

2. Monitoring of the training programme by the MCA proves to be satisfactory.

3. Re-approval is carried out within 5 years of the approval dated stated overleaf. Such approval will incur costs in line with the fees in force at that time.

4. Should the training establishment overleaf cease to trade then all records of certificates issued should be sent to the MCA to enable them to carry out the verification and replacement functions.

***Please note that only approved MCA training logos may be used in advertising and documentation, including certification**."*

(iii) Example of MSO Authorisation.

26. Exactly the same type of approach to certification is adopted by the MSO. Thus exhibited among the documents is an e-mail from the MSO of 15th July, 2016, to the NMCI stating, *inter alia*:

"*We refer to the above and the following submission of courses for approval:*

1. Certificate of Updated Proficiency in Fire Prevention and Fire Fighting

2. Certificate of Updated Proficiency in Personal Survival Techniques

3. Certificate of Updated Proficiency in Survival Craft & Rescue Boats other than Fast rescue Craft

4. Certificate in Updated Proficiency in Advanced Fire Fighting

5. Certificate of Updated Proficiency in Fast Rescue Boats

The above courses are now preliminarily approved in accordance with the European Union (Training, Certification and Watch-keeping for Seafarers) Regulations 2014. This training is to be delivered by Seftec NMCI Offshore at the National Maritime College of Ireland, Ringaskiddy Cork in accordance with the above submissions. This preliminary approval is valid until the 31st of October 2016.

We wish to advise that [named personnel]…*will attend on Tuesday to review the arrangements on site…".*

27. A two-hour audit by two Department officers on 19th July, 2016 followed. Contrast was made at hearing with the two-day audit carried out by the MCA prior to issuance of the MCA approval. Following the Department audit, certain certification e-mails of a like vein to that quoted above also issue. On 14th March, 2017, the following final approval then issues on Department notepaper:

"…Re: Training for the Issue of Certificates of Proficiency (UPDATE) in Fast Rescue Boats

This Department now advises Seftec NMCI Offshore that the above named training course has been approved.

The above course is approved in accordance with the European Union (Training, Certification and Watch-keeping for Seafarers) Regulations 2014/S.I. No. 242 of 2014.

Continued approval is subject to the following conditions:-

1. Course programme and requirements are as outlined in your final submission, which was received by this office on 14th July 2016.

2. Syllabus is in accordance with Regulation VI/2 of the Annex to the STCW Convention 1978, as amended and Section A-VI/2 paragraphs 11 and 12 of the STCW Code.

3. The training centre is responsible for ensuring that personnel meet the entry requirements for the training

programme and other conditions for the issue of a certificate.

4. A Certificate is to be issued only to personnel who complete the course satisfactorily. Certificate in sample form supplied only to be used. All certificates are to be numbered. ***A central register of all certificates issued is to be maintained by the training centre****. A list of all certificates issued with Numbers, Candidates full names, date of birth, & discharge book number to be submitted to the Chief Surveyor, Marine Survey Office when requested.*

5. Instructor qualifications shall be as set out in your submission. If instructors are to be changed then all changes shall be notified to the Chief Surveyor. Personnel responsible for training and assessment in accordance with this programme should be in compliance with STCW 78, as amended, Regulation I/6 and Section A-I/6 of the STCW Code. The same person must not undertake the training and assessment of an individual candidate.

6. Assessment outcomes of individual candidates are to be recorded.

7. The Chief Surveyor must be advised of any change in facilities, equipment, etc, which is likely to affect the conduct of the training and assessment.

8. Before the courses are held, the Chief Surveyor shall be notified in plenty of time of the date of each course. The Chief Surveyor will at various times appoint a Surveyor or team of surveyors to audit an individual course & assess its compliance with STCW 78, as amended, requirements.

9. We reserve the right to withdraw approval of the course at any time, if in our opinion the content of your submission & our requirements are not being fully met.

10. ***Course approval is effective from 14th July, 2016 to 13th July 2021, subject to the above conditions****.*

Yours sincerely…".

28. This approval comes against a background where there has only ever been an application made by the NMCI and there are no requirements published by the MSO as to what one has to do to get approval (unlike the MCA which sets out a significant number of things that need to be in place before approval will issue). However, as can be seen, exactly the same approach is taken in Ireland as by the MCA. Authorisation comes subject to continuing compliance with conditions, and is revocable where there is non-compliance, with no other penalty being imposed by the Irish authorities. All of this rather rebuts the case which the respondents have sought to make in the course of the within proceedings that cross-border authorisation is just not possible because in cross-border authorisation there is no scope for adequate monitoring and supervision.

(iv) Reference to Domestic Legislation.

29. There was suggestion by the respondents at hearing that something might turn on the fact that the MCA authorisation does not state on its face the United Kingdom legislation under which it is granted, whereas the MSO authorisation does contain a (cursory) reference to the Irish legislation under which it is granted. However, there is no magic to the form of an authorisation and the foregoing difference makes no difference at law. There is no requirement in the 2008 Directive, as amended, that there be any reference to the domestic legislation under which an authorisation issues. Nor is there any evidence before the court to suggest that the recipients or those relying upon MSO and/or MCA certificates care to know under what domestic legislation a certificate issues; what employers, seafarers and foreign authorities seem likely to want to know is simply and solely that certain STCW-related training has been done, nothing more. In this regard the court notes that recital (7) of the 2008 Directive makes it clear that the purpose of that directive, as now amended, is to implement the STCW Convention, stating, *inter alia*, that "[i]*t is…essential to define a minimum level of training for seafarers in the Community. That level should be based on the standards of training already agreed at international level, namely the…STCW Convention*". The MCA Certificate, the details of which have been recited previously above, makes abundantly clear that it is certifying that SNO has been approved by the MCA to provide training which complies with STCW Reg. VI/1 (para 2) Sec. A-VI/2 (para 11 and 12), with the Irish certificate likewise cross-referring into the STCW.

(v) MCA Compliance Requirements.

30. Also exhibited before the court and worth mentioning in passing is an impressively comprehensive MCA document headed "*COURSE APPROVAL AUDIT*" which identifies the substance of the audit that the MCA undertakes prior to granting any approval to a training provider. To take but one aspect of this document, its first section is headed "*Quality Standards Systems*" and refers to the STCW Convention (though covering in truth what Art. 10 of the 2008 Directive, as amended, requires). Throughout this audit material, there is an emphasis on documenting matters, doubtless so that there can be an adequate ongoing monitoring of the quality of the training provided. And, when it comes to monitoring, there was the two-day MCA audit in 2015, and there is nothing to prevent the MCA returning at any time during the operative period of the authorisation to undertake further monitoring. The MCA does not require any statutory power to enter SNO's premises to undertake such monitoring. It has a contractual right to do so pursuant to the terms of the authorisation it issues. And, for example, were SNO to behave in what would seem offhand to be a commercially irrational manner, and refuse to allow or facilitate such ongoing monitoring, doubtless its authorisation would swiftly be withdrawn by the MCA. (Of interest in this last regard is that the respondents have not identified any statutory power on their part to inspect SNO. In other words, their power to inspect appears to arise in the same way, and come subject to the same threat, as that of the MCA*, i.e.* it arises pursuant to a condition of the applicable authorisation and comes subject to the threat of a withdrawal of authorisation in the unlikely event of the power of inspection being frustrated or impeded by SNO, which has a clear commercial imperative not to frustrate or impede such monitoring).

XI

The Detail of the Directives

(i) The 1989 Directive.

a. Recitals.

31. Turning to the detail of the European measures mentioned previously above, the court pauses first to consider the 1989 Directive. That measure deals with the recognition of higher education diplomas awarded on completion of professional education and training of at least three years' duration. Thus its recitals state, *inter alia*:

*"Whereas, in order to provide a rapid response to the expectation of nationals of Community countries who hold higher-education diplomas awarded on completion of professional education and training **issued in a Member State** other than that in which they wish to pursue their professional, another method of recognition of such diplomas should also be put in place such as to enable those concerned to pursue all those professional activities which in a host Member State are dependent on the completion of post-secondary education and training, provided they hold such a diploma preparing them for those activities awarded on completion of a course of studies lasting at least three years and issued in another Member State". [Emphasis added]*

32. Notably, as will be seen in the court's consideration, later below, of certain European case-law, in particular the decision of the Court of Justice in *Khatzithanasis v. Ipourgos Igias kai Kinonikis Allilengiis and anor* (Case C-151/07), the 1989 Directive applies to courses that are undertaken in one member state under the authority of another member state. This has the consequence that the word "in" in the above-quoted text does not fall to be read in its literal sense. (And, as will be seen later below, the 2005 Directive deploys similar terminology to similar effect).

b. The Mutual Recognition Obligation.

33. Article 1 of the 1989 Directive defines the term "diploma" as meaning:

"any diploma, certificate or other evidence of formal qualifications or any set of such diplomas, certificates or other evidence…[inter alia] which has been awarded by a competent authority in a Member State, designated in accordance with its own laws, regulations or administrative provisions".

34. Article 8 of the 1989 Directive then provides, *inter alia*, as follows:

"1. The host Member State shall accept as proof that the conditions laid down in Articles 3 and 4 are satisfied [it is not necessary to consider these provisions] the certificates and documents issued by the competent authorities in the Member States, which the person concerned shall submit in support of his application to pursue the profession concerned."

35. That in effect is the mutual recognition obligation under the 1989 Directive. It has been overtaken by subsequent events in the field of maritime legislation. Notably, however, it is the mutual recognition provision that applied when the 2001 Directive was adopted.

c. Some Case-Law Concerning the 1989 Directive.

I. Commission of the European Communities *v*. Hellenic Republic

(Case C-274/05)

36. This case concerned the extent to which the provisions of the 1989 Directive could be relied upon in order to oblige a member state to recognise diplomas awarded by the authorities of another member state following studies in an individual's own member state. (So there is a clear parallel between the circumstances considered by the Court of Justice in that case and the circumstances now presenting before this Court). Per the Court of Justice, at paras. 3, 10 and 17-22 (incl.) of its judgment:

"3 According to the third and fourth recitals in the preamble to Directive 89/48, the purpose of the directive is to introduce a general system for the recognition of diplomas such as to enable nationals of Community countries to pursue all those professional activities which in a host Member State are dependent on the completion of post-secondary education and training, provided that they hold diplomas preparing them for those activities awarded on completion of a course of studies lasting at least three years and issued in another Member State.

…

Evidence which may be required by the host Member State

10 Pursuant to Article 8(1) of Directive 89/48, the host Member State is to accept as proof that the conditions laid down in Articles 3 and 4 of that directive are satisfied the certificates and documents issued by the competent authorities in the Member States, which the person concerned is to submit in support of his application to pursue the profession concerned.

…

The action

17. In its application, the Commission puts forward seven complaints in support of its action for failure to fulfil obligations. In the light of the arguments and clarifications provided by the Hellenic Government in its defence, the Commission, in its reply, withdrew its fourth and seventh complaints, so that it is no longer necessary to examine them.

The first complaint: failure to recognise education and training provided within the framework of a homologation agreement.

18. The first complaint put forward by the Commission alleges systematic refusal to recognise diplomas obtained following education and training provided within the framework of an agreement pursuant to which education and training provided by a private body in Greece is homologated by a competent authority of another Member State which awards diplomas to students who have received that education and training ('a homologation agreement').

19. It is common ground in this respect that the Hellenic Republic reserves the provision of university and higher education to public establishments only. It therefore refuses to recognise education and training provided in the framework of a homologation agreement as well as diplomas awarded by the competent authorities of other Member States following such education and training.

20. According to the Commission, that refusal constitutes an infringement of Articles 1(a) and 3 of Directive 89/48. It maintains that the diploma conferred following education and training provided in the framework of a homologation

agreement is a diploma, as defined in Article 1(a) of Directive 89/48, awarded by a competent authority in another Member State, which must therefore be recognised by the Hellenic Republic pursuant to Article 3 of that directive.

21. By contrast, the Hellenic Republic submits that a host Member State is not obliged to recognise a diploma awarded by a competent authority in another Member State if that diploma is awarded on completion of education and training received, in whole or in part, in the host Member State and which, under the legislation of that State, is not recognised as higher education.

22. First, the Hellenic Republic observes that, pursuant to Articles 149 EC and 150 EC, the content and organisation both of the education system and of professional education and training fall within the competence of the Member States. Education and training provided on the territory of a Member State are therefore governed by the domestic law of that State, which is free to establish in particular the legal form of higher education establishments, together with the content and level of the university or higher education and training offered by the public or private establishments on its territory. An obligation on a Member State to recognise education and training received on its territory as university or higher education and training, whilst, according to national law, it does not constitute such education or training, would infringe the distribution of powers resulting from Articles 149 EC and 150 EC."

37. There is a clear parallel between the arguments made by Greece and referenced above and those made by the State in the within proceedings. In the within proceedings the respondents suggest that because directives leave it to each member state to give effect to a directive by their own domestic law, it is for each member state by its own domestic law to regulate the training providers situate within its own boundaries. By reference, not to directives but to Treaty provisions, Greece was essentially making the same argument in its case. And to this argument, the Court of Justice had, *inter alia*, the following to say, at paras. 23-31 (incl.) of its judgment:

"23. The Hellenic Republic observes in that context that, pursuant to Article 16 of the Greek Constitution, university and higher education is provided in that Member State solely and exclusively by public establishments and the creation of higher education institutions by individuals is expressly prohibited. Any possibility of recognising, as a university or higher education diploma, an educational qualification awarded by a private education institution of whatever nature established in Greece is therefore precluded.

24. Second, as regards the specific provisions of Directive 89/48, the question whether an educational establishment situated a Member State is 'a university or establishment of higher education' or 'another establishment of equivalent level', within the meaning of the second indent of Article 1(a) of Directive 89/48, must be assessed solely by reference to the law of the Member State on whose territory the education and training are provided. In the present case, it is therefore solely by reference to Greek law that the status of the establishments in question must be assessed. In so far as the education and training provided within the framework of a homologation agreement are provided in establishments situated in Greece which do not satisfy the conditions required by Greek law, diplomas awarded following that education and training are not therefore diplomas within the meaning of Article 1(a) of Directive 89/48. Consequently, no obligation to recognise flows from Directive 89/48 as regards those qualifications.

25. The Commission contends in this regard that education and training provided within the framework of homologation agreements and diplomas conferred on completion of such education and training fall entirely within the education system of the Member State in which the establishment awarding the diploma is established, irrespective of the Member State where the courses took place. According to the Commission, it is therefore, pursuant to Articles 149 EC and 150 EC, for the Member State in which the establishment awarding the diploma is established to determine the content and organisation of the education and training and evaluate the level of the courses provided. By the same token, Article 16 of the Greek Constitution is not applicable to education and training provided within the framework of homologation agreements since they do not fall within the Greek education system.

Findings of the Court

26. Subject to the provisions of Article 4 of Directive 89/48, subparagraph (a) of the first paragraph of Article 3 of that directive entitles any applicant who holds a 'diploma', within the meaning of that directive, enabling him to pursue a regulated profession in one Member State to pursue the same profession in any other Member State.

27. The definition of the concept of 'diploma' set out in Article 1(a) of Directive 89/48 limits, to a certain extent, the applicability of that directive to qualifications acquired in non Member States.

28. However, neither Article 1(a) nor any other provision of Directive 89/48 contains any limitation as regards the Member State in which an applicant must have acquired his professional qualifications. It follows expressly from the first paragraph of Article 1(a) that it is sufficient that the education and training were received 'mainly in the Community'. It has already been held that that expression covers both education and training received entirely in the Member State which awarded the formal qualification in question and that received partly or wholly in another Member State (Case C 102/02 Beuttenmüller [2004] ECR I 5405, paragraph 41).

[Likewise, as will be seen later below, there is no provision in the European legislation applicable to the case at hand that limits the ability of a member state to authorise training providers to those within the territory of that member state; in fact, as will be seen, that this is so has been the subject of a form of confirmation by the European Commission.]

29. Furthermore, no reason can justify such a limitation, since the main question, for the purposes of adjudicating on the applicability of Directive 89/48, is whether the applicant is or is not entitled to pursue a regulated profession in a Member State. According to the system put in place by that directive, a diploma is recognised not on the basis of the intrinsic value of the education and training to which it attests, but because it gives the right to take up a regulated profession in the Member State where it was awarded or recognised. Differences in the duration or content of education and training acquired in another Member State by comparison with that provided in the host Member State are not therefore sufficient to justify a refusal to recognise the professional qualification concerned. At most, where those differences are substantial, they may, in accordance with Article 4 of that directive, justify the host Member State requiring that the applicant satisfy one or other of the compensatory measures set out in that provision (see, to that effect, Beuttenmüller, paragraph 52, and Case C 330/03 Colegio [2006] ECR I 801, paragraph 19). [In this last regard, the court notes that there are no compensatory requirements in the scheme of mutual recognition that applies in the case of seafarers' qualifications].

[The court notes in passing that in the case at hand there is no difference between the level of training required in the United Kingdom and in Ireland. This is because in both jurisdictions the STCW requirements, as laid down by the 2008 Directive, as amended, apply. And as can be discerned from the authorisations granted in both jurisdictions, neither jurisdiction has purported to impose more stringent obligations than those imposed by the STCW Convention. The fact that the training has to be up to the same standard in all member states must and does add credence and force to the case that the applicants have come to court to make.]

30. The general system for the recognition of higher education diplomas laid down in Directive 89/48 is based on the mutual trust that Member States have in the professional qualifications that they award. That system essentially establishes a presumption that the qualifications of an applicant entitled to pursue a regulated profession in one Member State are sufficient for the pursuit of that profession in the other Member States.

[At no point have the respondents managed to explain their way out of this fundamental obligation. They have sought to suggest that in some way the applicable European directives all have to be implemented as a matter of local law; however, mutual recognition is something that falls to be applied by every member state. It is a European law obligation and Ireland must comply with it.]

31. It is inherent in that system, which does not harmonise the education and training giving access to the regulated professions, that it is for the competent authorities awarding diplomas giving such access alone to verify, in the light of the rules applicable within the framework of their professional education and training system, whether the conditions necessary for their award are fulfilled. It may be observed, in this respect, that Article 8(1) of Directive 89/48 expressly obliges the host Member State to accept, in any event, as proof that the conditions for recognition of a diploma are satisfied, the certificates and documents issued by the competent authorities in the other Member States. Consequently, the host Member State cannot examine the basis on which such documents have been issued, although they do have the possibility of carrying out a review as regards those of the conditions laid down in Article 1(a) of Directive 89/48 which, on the face of those documents, do not appear to have been satisfied already."

[The court notes the statement that "[T]*he host Member State cannot examine the basis on which such documents have been issued*". That, it seems to the court is an observation or finding that applies with equal vigour in the context of the within proceedings].

38. The court has also been referred to the decision of the Court of Justice in *Commission of the European Communities v. Kingdom of Spain* (2008) (Case C-286/06). That decision was handed down on the same day as the decision just considered, the principal question of law raised is analogous, and the conclusions reached were similar. The court does not therefore propose to consider the *Commission v. Spain* in detail. Of greater interest is another decision involving Greece and considered hereafter, that of *Khatzithanasis*.

II. Khatzithanasis *v*. Ipourgos Igias kai Kinonikis Allilengiis and anor

(Case C-151/07)

39. Mr. Khatzithanasis completed, in the university years 1997/98 and 1998/99, a two-year course in optical studies leading to a diploma from the Vinci Regional Institute for Optical Studies and Optometry (in Italy). That diploma authorised him to pursue the profession of optician in Italy. In the university year 1999/2000, Mr. Khatzithanasis also completed a one-year course in optometry leading to an educational qualification awarded by the Vinci Institute. He completed both courses at the Optometriki independent study centre in Metamorfosi (so in Greece), though he did attend at the seat of the Vinci Regional Institute to take a 300-hour advanced course there and also to sit the necessary examinations.

40. Mr Khatzithanasis wished to pursue the profession of optician in Greece. So he filed an application for recognition of the equivalence of his Italian optician's diploma with the Greek authorities. That application was rejected, essentially on the ground that the diploma, relied upon by Mr Khatzithanasis, was awarded on completion of studies the greater part of which were done at an independent study centre which had its seat in Greece but was not recognised as an educational establishment by Greek legislation. Proceedings ensued and a reference to the Court of Justice followed. Per the Court of Justice, at paras. 29-32 (incl.) of its judgment:

"The question referred for a preliminary ruling

29 By its question, the referring court asks, in essence, whether the competent authorities of a host Member State are required, under Article 3 of Directive 92/51, subject to the application of Article 4 of that directive, to recognise a diploma awarded by a competent authority in another Member State even though that diploma attests to education and training received, in whole or in part, at an establishment located in the host Member State which, according to the legislation of that State, is not recognised as an educational establishment.

30 It should be borne in mind, in that regard, that it has been held, in relation to Directive 89/48, first, that it does not contain any limitation as regards the Member State in which an applicant must have acquired his professional qualifications and, second, that it is for the competent authorities awarding diplomas giving access to a regulated profession alone to verify, in the light of the rules applicable within the framework of their professional education and training system, whether the conditions necessary for their award are fulfilled, inter alia, those relating to the educational establishment in which the holder received his education and training (see, to that effect, Case C-274/05 Commission v Greece, paragraphs 28, 31 and 32).

[Notably, what the Court of Justice is speaking of at this point of its judgment is cross-border authorisation and verification; and it is clearly envisaging that the Italian authorising authority had the ability to cross borders, not just to authorise a course but to satisfy itself that the course satisfied its requirements. That is exactly parallel to the situation which arises for consideration before this Court at this time.]

31 It is also clear from the case-law that that interpretation of Directive 89/48 does not cast doubt on the responsibility of the Hellenic Republic for the content of teaching and the organisation of the education system, since the diploma in question is covered, in the context of Directive 89/48, not by the Greek education system but rather the education system of the Member State to which the competent authority which awarded the diploma belongs. It is, therefore, for that latter authority to ensure the quality of the training and education at issue (see, to that effect, Case C 274/05 Commission v Greece, paragraphs 36 and 40).

[Again one can see in the just-quoted text that the Court of Justice is both accepting and upholding the ability to have cross-border verification. In passing, the court recalls the references in the above-mentioned recitals to the 1989 Directive to "*diplomas awarded in completion of professional education and training issued in a Member State*" (emphasis added) and "*a diploma…issued* **in** *another Member State*" (emphasis added). Clearly if one looks to para.31 of the judgment in *Khazithanasis*, the Court of Justice was accepting of the fact that even though Mr Khatzithanasis' course of study was undertaken at an institution in Greece, the actual diploma was nonetheless awarded in another member state. That again represents a clear parallel between that case and the one now before this Court. So to the extent that the respondents seek to rely upon the word "*in*" as in some way having a fiercely constraining geographical impact, the decision in *Khatzithanasis*, echoing that in *Commission v. Hellenic Republic*, clearly points in the opposite direction.]

32 *Furthermore, it has been held that the fact that a national of a Member State who wishes to pursue a regulated profession chooses to take up that profession in his preferred Member State cannot of itself constitute an abuse of the general system of recognition laid down by Directive 89/48, and that the rights of nationals of a Member State to choose the Member State in which they wish to acquire their professional qualifications is inherent in the exercise, in a single market, of the fundamental freedoms guaranteed by the EC Treaty (see Case C-286/06* Commission v Spain *[2008] ECR I-0000, paragraph 72).*

[This facet of the decision in *Khatzithanasis* touches upon a consideration that is important in the context of the within proceedings and will be returned to later below in the court's consideration of the arguments made by reference to Art. 56 TFEU.]

(ii) The 2001 Directive.

[NO LONGER IN FORCE]

a. Recitals.

41. The 2001 Directive was concerned with the minimum level of training for seafarers. Recitals (7)-(9) of that Directive provided as follows:

> *"(7) Council Directives 89/48/EEC…and 92/51/EEC…on the general system for the recognition of professional education and training apply to maritime occupations covered by this Directive. They will help promote compliance with the obligations laid down in the Treaty abolishing obstacles to the free movement of persons and services between Member States.*
>
> *(8) The mutual recognition of diplomas and certificates provided for under the general system Directives does not always ensure a standardised level of training for all seafarers serving on board vessels flying the flag of a Member State. This is, however, vital from the viewpoint of maritime safety.*
>
> *(9) It is therefore essential to define a minimum level of training for seafarers in the Community. It is appropriate that the action in this field should be based on the standards of training already agreed at international level, namely the … STCW Convention…as revised in 1995; all Member States are Parties to that Convention."*

42. The effect of Recital (7) was that, notwithstanding the adoption of the 2001 Directive (which contains similar provisions to the 2008 Directive dealing with *e.g.*, quality systems, the approval of training providers and the imposition of penalties), the 2001 Directive nonetheless envisions that the 1989 Directive (and hence mutual recognition) will continue to apply. That, it seems to the court, is relevant to the argument that the State now seeks to make that, in some way, the 2008 Directive, as amended, displaces this mutual recognition dimension of the European legal regime. Notable too about Recital (7) is the second sentence of same, i.e. "*They will help promote compliance with the obligations laid down in the Treaty abolishing obstacles to the free movement of persons and services between Member States*." That, it seems to the court, is the clearest of pointers to the correctness of the position adopted by the applicants in the within proceedings, *viz*. that whole regime in relation to the training of seafarers is subject to mutual recognition by all of the member states based, ultimately, on that natural trust which reposes between the individual member states as fellow members of the supranational community that is the European Union.

43. Recitals (8) and (9) then moved on to contemplate that, along with mutual recognition, there will be a minimum standardised level of training for all seafarers in what is now the European Union.

b. Training and Certification.

44. Moving, on at Art. 1(27), there was a definition of the term "appropriate certificate" (broadly equivalent to what is now a certificate of competency) in the following terms:

> *"'appropriate certificate' shall mean a certificate issued and endorsed in accordance with this Directive and entitling the lawful holder thereof to serve in the capacity and perform the functions involved at the level of responsibility specified therein on a ship of the type, tonnage, power and means of propulsion concerned while engaged on the particular voyage concerned".*

45. The principal reason for pausing to note that definition is because it features in Art.3 of the 1989 Directive which provides as follows, under the heading "*Training and certification":*

> *"1. Member States shall take the measures necessary to ensure that seafarers serving on ships as referred to in Article 2 are trained as a minimum in accordance with the requirements of the STCW Convention, as laid down in Annex I to this Directive, and hold certificates as defined in Article 4 or appropriate certificates as defined in Article 1(27)…",*

46. Article 4 then provided as follows, under the heading "*Certificate*":

> *"A certificate shall be a valid document by whatever name it may be known, issued by or under the authority of the competent authority of a Member State, authorising the holder to serve as stated in that document or as authorised by national regulations."*

47. An "*appropriate certificate*" was the only kind of certificate that was contemplated by the 2001 Directive. Although the position has changed since then, the basic architecture of the 2001 Directive in relation to quality standards, training and penalties, is retained in the 2008 Directive, as amended.

c. Penalties or disciplinary measures.

48. Article 8 of the 2001 Directive ("*Penalties or disciplinary measures*") provided, *inter alia*, in Art.8(1) that:

> *"Member States shall establish processes and procedures for the impartial investigation of any reported incompetence, act or omission, that may pose a direct threat to safety of life or property at sea or to the marine environment, on the part of the holders of certificates or endorsements issued by that Member State".*

49. So a penalty was to be imposed in relation to issues that arose about certificates issued by a Member State. As will be seen later below, there was a move away from this position in 2012, and the 2014 Regulations involve a like move in this regard, such that under the 2014 Regulations the State can impose penalties and can enforce the law in relation to any certificate which has been issued by the State *or* recognised by the State.

d. Quality Standards.

50. Art. 9 of the 2001 Directive ("Quality Standards" (now addressed in Art. 10 of the 2008 Directive)) provided as follows:

> *"1. Each Member State shall ensure that:*
>
> *(a) all training, assessment of competence, certification, endorsement and revalidation activities carried out by nongovernmental agencies or entities under its authority are continuously monitored through a quality standards system to ensure the achievement of defined objectives, including those concerning the qualifications and experience of instructors and accessors;*
>
> *(b) where governmental agencies or entities perform such activities, there is a quality-standards system;*
>
> *(c) the education and training objectives and related standards of competence to be achieved are clearly defined and identify the levels of knowledge, understanding and skills appropriate to the examinations and assessments required under the STCW Convention. The objectives and related quality standards may be specified separately for different courses and training programmes and shall cover the administration of the certification system;*
>
> *(d) the fields of application of the quality standards cover the administration of the certification systems, all training courses and programmes, examinations and assessments carried out by or under the authority of each Member State and the qualifications and experience required of instructors and assessors, having regard to the policies, systems, controls and internal quality-assurance reviews established to ensure achievement of the defined objectives.*
>
> *2. Member States shall also ensure that independent evaluations of the knowledge, understanding, skills and competence acquisition and assessment activities, and of the administration of the certification system, are conducted at intervals of not more than five years by qualified persons who are not themselves involved in the activities concerned in order to verify that:*
>
> *(a) all internal management control and monitoring measures and follow-up actions comply with planned arrangements and documental procedures and are effective in ensuring achievement of the defined objectives;*
>
> *(b) the results of each independent evaluation are documented and brought to the attention of those responsible for the area evaluated;*
>
> *(c) timely action is taken to correct deficiencies…".*

51. One can see in sub-article 2 a form of requirement as to independent evaluations that finds its expression, in the context of the facts at hand, in the MCA audit requirements that were touched upon previously above.

e. Certain responsibilities of Member States.

52. Article 16 of the 2001 Directive provided, *inter alia*, as follows, under the heading "*Responsibilities of Member States with regard to training and assessment*":

> *"1. Member States shall designate the authorities or bodies which shall:*
>
> *— give the training referred to in Article 3,*
>
> *— organise and/or supervise the examinations where required,*
>
> *— issue the certificates of competence referred to in Article 10, and*
>
> *— grant the dispensations provided for in Article 15.*
>
> *2. Member States shall ensure that:*
>
> *(a) all training and assessment of seafarers is:*
>
> *1. structured in accordance with the written programmes, including such methods and media of delivery, procedures and course material as are necessary to achieve the prescribed standard of competence; and*
>
> *2. conducted, monitored, evaluated and supported by persons qualified in accordance with paragraphs*

(d), (e) and (f)…

(c) instructors, supervisors and assessors are appropriately qualified for the particular types and levels of training or assessment of competence of seafarers either on board or ashore…".

53. Again, one sees in the above a legislative antecedent of the current legislative provision and practical detail that informs the MCA audit requirements that were touched upon previously above.

f. Recognition of Certificates.

54. Article 18 of the 2001 Directive provided, *inter alia*, as follows, under the heading "*Recognition of certificates*":

"1. Mutual recognition among Member States of certificates referred to in Article 4 held by seafarers who are nationals of Member States shall be subject to the provisions of Directives 89/48/EEC and 92/51/EEC.

2. Mutual recognition among Member States of certificates referred to in Article 4 held by seafarers who are not nationals of Member States shall also be subject to the provisions of Directives 89/48/EEC and 92/51/EEC."

55. What is notable about this provision is that European Union lawmakers clearly did not see the 2001 Directive as in some way displacing or modifying the then existing mutual recognition requirements of the 1989 Directive. On the contrary, the 1989 Directive apprehends that mutual recognition will be "*subject to the provisions of Directives 89/48/EEC and 92/51/EEC"*. So the fact that member states had new obligations in relation to the training of seafarers, the authorisation of training providers, *etc*., was not seen as being inconsistent in any way with the mutual recognition of certificates.

g. A Concluding Note.

56. Before the 2005 Directive was adopted, the 2001 Directive had to be read in light of the 1989 Directive and along with it. This is because the mutual recognition regime in the 1989 Directive was expressly applied to it. (It will be recalled that recital (7) of the 2001 Directive provided, *inter alia*, that "*Council Directives 89/48/EEC…and 92/51/EEC on the general system for the recognition of professional education and training apply to maritime occupations covered by this Directive*.") That mutual recognition regime is, as can be seen from the case-law considered in the context of the 1989 Directive previously above, one which accepted the whole idea of cross-border verification and accepted also that there could be cross-border authorisation in an instance such as that which presented in *Khatzithanasis* where the Vinci Institute in Italy was in no position to exercise any statutory powers over the Optometriki Institute in Greece. A purely contractual basis clearly sufficed; and as the court has outlined previously above, both the MSO in Ireland and the MCA in the United Kingdom rely on a like private-law discretion to withdraw authorisation as a means whereby compliance can be ensured and policed.

(iii) The 2005 Directive.

a. Recitals.

57. Turning next to the 2005 Directive, this directive remains in force and is the directive that the applicants rely upon when it comes to the issue of mutual recognition. A number of the recitals are worthy of especial mention, *viz*:

"(2) Maritime transport is an intensively and rapidly developing sector of a particularly international character. Accordingly, in view of the increasing shortage of Community seafarers, the balance between supply and demand in personnel can be maintained more efficiently at the Community, rather than the national level. It is therefore essential that the common transport policy in the field of maritime transport be extended to facilitate the movement of seafarers within the Community.

[In terms of facilitating that movement, mutual recognition of certificates or diplomas, is something that is clearly imperative if that objective is to be achieved.]

(3) As regards seafarers' qualifications, the Community has laid down minimum maritime education, training and certification requirements by way of Directive 2001/25/EC of the European Parliament and of the Council of 4 April 2001 on the minimum level of training of seafarers….That Directive incorporates into Community law the international training, certification and watch-keeping standards laid down by the STCW Convention.

(4) Directive 2001/25/EC provides that seafarers must hold a certificate of competency issued and endorsed by the competent authority of a Member State in accordance with that Directive and entitling the lawful holder thereof to serve on a ship in the capacity and perform the functions involved at the level of responsibility specified therein.

[The court notes in passing that the 'world-view' at the time when the 2005 Directive was adopted was that a certificate had relevance purely in the context of the ability to serve on ship.]

(5) Under Directive 2001/25/EC, mutual recognition among Member States of certificates held by seafarers, whether or not nationals of a Member State, is subject to Directives 89/48/EEC…and 92/51/EEC…setting up, respectively, a first and a second general system for the recognition of professional education and training. Those Directives do not provide for the automatic recognition of formal qualifications of seafarers, as seafarers may be subject to compensation measures.

[What does Recital (5) say? To the court, it appears that Recital (5) is saying this: 'The directives mentioned do not provide a sufficient level of recognition. We want to increase the level of recognition that the Community and its member states afford certificates (then issued under the 2001 Directive) and we do not want this enhanced regime to be subject to the compensation measures which existed under the 1989 Directive, as supplemented.']

(6) Each Member State should recognise any certificate and other evidence of formal qualifications issued by another Member State in accordance with Directive 2001/25/EC. Therefore, each Member State should permit a seafarer having acquired his/her certificate of competency in another Member State, satisfying the requirements of that Directive, to take up or to pursue the maritime profession for which he/she is qualified, without any prerequisites other than those imposed on its own nationals.

[Recital (6) uses notably wide language: "*any certificate and other evidence of formal qualifications issued by another Member State in accordance with the 2001 Directive*." The court notes too the reference to a seafarer "*having acquired*

his/her certificate of competency in another Member State". (Emphasis added.) As is clear from the court's consideration of the case-law pertaining to the 1989 Directive previously above, the use of the word "in" in this context does not mean that a course of study or training must be carried out in the member state that authorises the training.]

(7) Since this Directive is aimed at facilitating the mutual recognition of certificates, it does not regulate the conditions concerning access to employment.

[The reference to "*facilitating the mutual recognition of certificates*" is notable.]

…

(9) Today, the proliferation of certificates of competency of seafarers obtained by fraud poses a serious danger to safety at sea and the protection of the marine environment. In most cases, holders of fraudulent certificates of competency do not meet the minimum certification requirements of the STCW Convention. These seafarers could easily be involved in maritime accidents.

…

(11) Regulation (EC) No 1406/2002…established a European Maritime Safety Agency (the Agency), for the purpose of ensuring a high, uniform and effective level of maritime safety and prevention of pollution from ships. One of the tasks assigned to the Agency is to assist the Commission in the performance of any task assigned to it by Community legislation applicable to the training, certification and watchkeeping of ships' crews.

[The European Maritime Safety Agency ('EMSA') has a peripheral relevance to the application at hand, to which will turn later in its submissions.]

(12) The Agency should therefore assist the Commission in verifying that Member States comply with the requirements laid down in this Directive and Directive 2001/25/EC.

[Insofar as Ireland suggests that the United Kingdom has exceeded its power in some way under or pursuant to the European Union legislation considered in the within judgment, it seems to the court, having regard, *inter alia*, to Recital (12) the appropriate procedure to adopt would be for EMSA, as the agent of the European Commission, to review that issue. It is not for one member state to set aside the obligation of mutual trust and recognition which arises under the 2005 Directive to undertake that task.]

(13) The mutual recognition among Member States of certificates held by seafarers, whether or not nationals of a Member State, should no longer be subject to Directives 89/48/EEC and 92/51/EEC, but should be governed by this Directive.

(14) Directive 2001/25/EC should therefore be amended accordingly."

(15) Since the objective of this Directive, namely the mutual recognition of the seafarers' certificates issued by the Member States, cannot be sufficiently achieved by the Member States and can therefore be better achieved at Community level, the Community may adopt measures in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty. In accordance with the principle of proportionality, as set out in that Article, this Directive does not go beyond what is necessary in order to achieve that objective.

[What is clear from Recital (15) is that the mutual recognition of seafarer certificates is a significant concern of Community lawmakers, something that cannot be achieved at the level of member states and thus has to be achieved at Community level, with the mode whereby this is achieved being the agreed imposition of an obligation on member states to recognise such certificates.]"

b. Article 3.

58. Article 3(1) of the 2005 Directive provides that "*Every Member State shall recognise appropriate certificates or other certificates issued by another Member State in accordance with the requirements laid down in Directive 2001/25/EC.*" Appropriate certificates are now a thing of the past; however, when the court comes to look later below at the detail of the 2008 Directive, as amended, it will be seen by the reader that nowadays the certificates that fall to be issued, as mentioned previously above, are 'certificates of competency' and 'certificates of proficiency'. It follows that Art.3 must now be applied to those certificates because they are certificates that are now issued in accordance with the requirements laid down in the 2008 Directive as amended. Notable too about Art.3 is the fact that it is expressed in mandatory terms ("*shall*") and it is not subject to qualification as to compensation measures such as existed in the 1989 Directive.

(iv) The 2008 Directive.

a. Recitals.

59. A number of the recitals of the 2008 Directive appear to the court to be worthy of especial mention, *viz*:

"(3) In order to maintain and develop the level of knowledge and skills in the maritime sector in the Community, it is important to pay appropriate attention to maritime training and the status of seafarers in the Community.

(4) A consistent level of training for the award of vocational competency certificates to seafarers should be ensured in the interests of maritime safety.

(5) Directive 2005/36/EC of the European Parliament and of the Council of 7 September 2005 on the recognition of professional qualifications…applies to maritime occupations covered by this Directive. It will help promote compliance with the obligations laid down in the Treaty abolishing obstacles to the free movement of persons and services between Member States.

[It is clear from Recital (5) that the intention is to continue the 2005 Directive in conjunction with the 2001 Directive. That is important when one comes, as the court does later below, to consider the amendments made to the 2008 Directive by the 2012 Directive, and indeed when the court comes to consider the respondents' (surprising) submission that in some way the certificates to which the proceedings relate are not covered by the 2005 Directive.]

(6) The mutual recognition of diplomas and certificates provided for under Directive 2005/36/EC does not always ensure a standardised level of training for all seafarers serving on board vessels flying the flag of a Member State. This is, however, vital from the viewpoint of maritime safety.

[The court does not see Recital (6) as involving a disavowal (what, in truth, given the whole thrust of the European project and the general commitment to mutual recognition, would be a startling disavowal) of the concept of mutual recognition, even in the particular context of the subject-area affected by the 2008 Directive. Clearly, mutual recognition is to continue. Recital (6) merely involves an indication that both mutual recognition and training standards are required to achieve the wider objectives of the European Union in the area of policy that is the subject of the 2008 Directive.]

(7) It is therefore essential to define a minimum level of training for seafarers in the Community. That level should be based on the standards of training already agreed at international level, namely the…STCW Convention…as revised in 1995. All Member States are Parties to that Convention.

(8) Member States may establish standards higher than the minimum standards laid down in the STCW Convention and this Directive.

[Looking at the authorisations issued by the MSO and the MCA, neither Ireland nor the United Kingdom appears to have engaged in the 'gold-plating' contemplated by Recital (8). What is required in the respective authorisations of the MSO and the MCA is simply that courses comply with the STCW Convention]."

b. Some Definitions.

60. Before proceeding to consider the main body of the 2008 Directive, it is useful, firstly, to mention a few definitions of relevance, viz:

"1. 'master' means the person having command of a ship;

2. 'officer' means a member of the crew, other than the master, designated as such by national law or regulations or, in the absence of such designation, by collective agreement or custom;

…

9. 'radio operator' means a person holding an appropriate certificate issued or recognised by the competent authorities under the provisions of the Radio Regulations;

10. 'rating' means a member of the ship's crew other than the master or an officer;

[The court would but note the breadth of the 2008 Directive, given the range of on-board persons/positions to whom/which it relates.]

…

27. 'appropriate certificate' means a certificate issued and endorsed in accordance with this Directive and entitling the lawful holder thereof to serve in the capacity and perform the functions involved at the level of responsibility specified therein on a ship of the type, tonnage, power and means of propulsion concerned while engaged on the particular voyage concerned;

[This definition has been revoked by the 2012 Directive. However, as will be seen, there is reason for the court to note it in passing.]"

c. Scope of Directive.

61. Article 2 of the 2008 Directive provides that "*This Directive shall apply to the seafarers mentioned in this Directive serving on board seagoing ships flying the flag of a Member State* [subject to certain exceptions that are not of relevance in the context of the within application]".

d. Training and Certification.

62. Article 3 of the 2008 Directive originally provided, *inter alia*, as follows (this text has since been replaced by virtue of Art.1(2) of the 2012 Directive:

"1. Member States shall take the measures necessary to ensure that seafarers serving on ships as referred to in Article 2 are trained as a minimum in accordance with the requirements of the STCW Convention, as laid down in Annex I to this Directive, and hold certificates as defined in Article 4 or appropriate certificates as defined in Article 1(27)."

63. Obviously the summary of the STCW Convention annexed in Annex I represents the version of the STCW Convention that was in force at the time; thus it does not include the Manila Amendments (made in 2010).

64. The court will consider later below the revised Art.3(1) substituted by Art.1(2) of the 2012 Directive.

e. Certificate.

65. Article 4 of the 2008 Directive (since deleted by Art. 1(3) of the 2012 Directive) provides that "*A certificate shall be any valid*

document, by whatever name it may be known, issued by or under the authority of the competent authority of a Member State in accordance with Article 5 and with the requirements laid down in Annex I". The court will return to this aspect of matters in its consideration of the 2012 Directive.

f. Certificates and Endorsements.

66. Article 5 of the 2008 Directive, as amended, provides, *inter alia*, as follows:

> *"1. Certificates shall be issued in accordance with Article 11.*
>
> [Sub-article 1 amended by Art. 1(4)(b) of the 2012 Directive to read as follows:
>
> *"1. Member States shall ensure that certificates of competency and certificates of proficiency are issued only to candidates who comply with the requirements of this Article."]*
>
> *2. Certificates for masters, officers and radio operators shall be endorsed by the Member State as prescribed in this Article.*
>
> *3. Certificates shall be issued in accordance with Regulation I/2, paragraph 1, of the STCW Convention.*
>
> [Sub-article 3 amended by Art. 1(4)(c) of the 2012 Directive to read as follows:
>
> *"3. Certificates of competency and certificates of proficiency shall be issued in accordance with Regulation I/2, paragraph 3 of the Annex to the STCW Convention."]"*

g. Training Requirements.

67. Article 6 of the 2008 Directive then deals with training requirements as they then existed, providing that "*The training required pursuant to Article 3 shall be in a form appropriate to the theoretical knowledge and practical skills required by Annex I, in particular the use of life saving and fire-fighting equipment, and approved by the competent authority or body designated by each Member State*." (Again, this measure cross-references into the text of the STCW Convention as it then existed.)

h. Prevention of fraud and other unlawful practices.

68. Article 8 of the 2008 Directive provides, *inter alia*, as follows:

> *"1. Member States shall take and enforce the appropriate measures to prevent fraud and other unlawful practices involving the certification process or certificates issued and endorsed by their competent authorities, and shall provide for penalties that are effective, proportionate and dissuasive.*
>
> [This is obviously dealing with the certification process, as opposed to the training process; as will be seen hereafter there is another Article that deals with penalties in relation to breaches of the Directive generally. Article 8(1) has been amended by Art. 1(7) of the 2012 Directive to provide as follows:
>
> *"1. Member States shall take and enforce appropriate measures to prevent fraud and other unlawful practices involving certificates and endorsements issued, and shall provide for penalties that are effective, proportionate and dissuasive",*
>
> *i.e.* the provision is no longer confined in its terms to certificates issued by the competent authority of the member state to which the obligation under Art. 8(1) refers. The court returns to this aspect of matters in its consideration of the 2012 Directive.]
>
> *2. Member States shall designate the national authorities competent to detect and combat fraud and other unlawful practices and exchange information with the competent authorities of other Member States and of third countries concerning the certification of seafarers….*
>
> *3. At the request of a host Member State, the competent authorities of another Member State shall provide written confirmation or denial of the authenticity of seafarers' certificates, corresponding endorsements or any other documentary evidence of training issued in that other Member State."*

69. Clearly the foregoing is intended to assist in the prevention of fraud and allows one member state, so to speak, to 'knock on the door' of another member state and enquire whether a certificate is actually issued pursuant to its authority, thus allowing all member states effectively to police the validity of certificates. Again, the court will return to Art. 8 in its consideration of the 2012 Directive.

i. Quality Standards.

70. Article 10 of the 2008 Directive deals with quality standards. The equivalent provision in the 2001 Directive was Art.9. The provision has been amended by Art. 1(9) of the 2012 Directive. However, the basic requirement has remained consistent over time, viz. that member states should ensure that: there is a quality assurance standard for all training institutions or training providers; and everything is done in accordance with that standard.

j. Medical Standards.

71. Article 11, since completely replaced by Art.1(10) of the 2012 Directive, is headed 'Medical Standards', but goes beyond that and, *e.g.*, makes provision as regards the training required under the STCW Convention.

k. Revalidation of Certificates.

72. Article 12 deals with the re-validation of certificates. It has likewise been significantly amended by the 2012 Directive (Art.1(11)) and will be returned to in that context.

l. Use of Simulators.

73. Article 13 (the second sub-paragraph of which has been deleted by Art.1(12) of the 2012 Directive) deals with the use of simulators in training and sets out the standards that fall to be applied.

m. Responsibilities of Companies.

74. Article 14 of the 2008 Directive (amended by Art. 1(13) of the 2012 Directive) provides, *inter alia*, as follows (in text that has not been amended):

> *"1. In accordance with paragraphs 2 and 3 Member States shall hold companies responsible for the assignment of seafarers for service in their ships in accordance with this Directive, and shall require every company to ensure that:*
>
> *(a) each seafarer assigned to any of its ships holds an appropriate certificate in accordance with the provisions of this Directive and as established by the Member State;*
>
> *…*
>
> *(c) documentation and data relevant to all seafarers employed on its ships are maintained and readily accessible, and include, without being limited to, documentation and data on their experience, training, medical fitness and competence in assigned duties…".*

75. The effect of the foregoing is that if a seafarer wants to be employed by a ship-owning company in any of the European Union member states, s/he must be in a position to provide the ship-owning company with documents that evidence, *inter alia*, experience and training.

76. Notably, the obligation imposed by Art.14 is not just imposed on ship-owning companies. Thus Art.14(2), in text that has not been amended by the 2012 Directive, provides as follows:

> *"Companies, masters and crew members shall each have responsibility for ensuring that the obligations set out in this Article are given full and complete effect and that such other measures as may be necessary are taken to ensure that each crew member can make a knowledgeable and informed contribution to the safe operation of the ship."*

n. Responsibilities of Member States re. Training and Assessment.

77. Article 17 of the 2008 Directive, which has been very slightly amended by Art.1(15) of the 2012 Directive (the change is shown in the text quoted below) makes provision as regards the responsibilities of the different member states when it comes to training and assessment. Thus Art.17 provides as follows:

> *"1. Member States shall designate the authorities or bodies which shall:*
>
> *(a) give the training referred to in Article 3;*
>
> *(b) organise and/or supervise the examinations where required;*
>
> *(c) issue the certificates of competence referred to in Article 11;*
>
> [Art. 1(15) replaces the original text of Art.17(1)(c) with the following text:
>
> *"(c) issue the certificates referred to in Article 5;"]*
>
> *(d) grant the dispensations provided for in Article 16.*
>
> *2. Member States shall ensure that:*
>
> *(a) all training and assessment of seafarers is:*
>
> *(i) structured in accordance with the written programmes, including such methods and media of delivery, procedures and course material as are necessary to achieve the prescribed standard of competence; and*
>
> *(ii) conducted, monitored, evaluated and supported by persons qualified in accordance with points (d), (e) and (f);*
>
> [It is difficult not to recall in this regard the MCA's "*COURSE APPROVAL AUDIT"* document which deals with precisely these kinds of matters.]
>
> *(b) persons conducting in-service training or assessment on board ship do so only when such training or assessment will not adversely affect the normal operation of the ship and they can dedicate their time and attention to training or assessment;*
>
> *(c) instructors, supervisors and assessors are appropriately qualified for the particular types and levels of training or assessment of competence of seafarers either on board or ashore;*
>
> *(d) any person conducting in-service training of a seafarer, either on board or ashore, which is intended to be used in qualifying for certification under this Directive:*
>
> *(i) has an appreciation of the training programme and an understanding of the specific training objectives for the particular type of training being conducted;*
>
> *(ii) is qualified in the task for which training is being conducted; and*

(iii) if conducting training using a simulator: — has received appropriate guidance in instructional techniques involving the use of simulators, and — has gained practical operational experience on the particular type of simulator being used;

(e) any person responsible for the supervision of the in-service training of a seafarer intended to be used in qualifying for certification has a full understanding of the training programme and the specific objectives for each type of training being conducted;

(f) any person conducting in-service assessment of the competence of a seafarer, either on board or ashore, which is intended to be used in qualifying for certification under this Directive:

(i) has an appropriate level of knowledge and understanding of the competence to be assessed;

(ii) is qualified in the task for which the assessment is being made;

(iii) has received appropriate guidance in assessment methods and practice;

(iv) has gained practical assessment experience; and

(v) if conducting assessment involving the use of simulators, has gained practical assessment experience on the particular type of simulator under the supervision and to the satisfaction of an experienced assessor;

(g) when a Member State recognises a course of training, a training institution, or a qualification granted by a training institution, as part of its requirements for the issue of a certificate, the qualifications and experience of instructors and assessors are covered in the application of the quality standard provisions of Article 10; such qualification, experience and application of quality standards shall incorporate appropriate training in instructional techniques and training and assessment methods and practice and comply".

o. Recognition of Certificates.

78. Article 19 of the 2008 Directive (originally headed "*Recognition of certificates*" but, thanks to Art. 1(16)(a) of the 2012 Directive, now headed "*Recognition of certificates of competency and certificates of proficiency"*) deals, obviously, with the recognition of certificates. Of especial note in this regard is Art.19(2), as amended by Art 1(16)(c) of the 2012 Directive, which now reads as follows:

"2. A Member State which intends to recognise, by endorsement, appropriate certificates issued by a third country to a master, officer or radio operator, for service on ships flying its flag, shall submit a request for recognition of that third country to the Commission, stating its reasons.

2. A Member State which intends to recognise, by endorsement, the certificates of competency and/or the certificates of proficiency referred to in paragraph 1 issued by a third country to a master, officer or radio operator, for service on ships flying its flag, shall submit a request for recognition of that third country to the Commission, stating its reasons.

The Commission, assisted by the European Maritime Safety Agency and with the possible involvement of any Member State concerned, shall collect the information referred to in Annex II and shall carry out an assessment of the training and certification systems in the third country for which the request for recognition was submitted, in order to verify whether the country concerned meets all the requirements of the STCW Convention and whether the appropriate measures have been taken to prevent fraud involving certificates."

79. Article 19(2), especially the first paragraph of same, is of interest when it comes to the 2014 Regulations because, as will become clear when the court examines the 2014 Regulations, the State, unfortunately, has not fully implemented the directives in terms of the requirement to recognise certificates of proficiency, the error in this regard seeming to arise from what is provided in Art. 19(2).

p. Port State Control and Detention.

80. Article 22 ("*Port State Control*") and Art.23 ("*Port State control procedures*") of the 2008 Directive have been extensively amended by Art.1(18)-(20) of the 2012 Directive. As amended, they now provide as follows:

"Article 22

Port State control

1. Irrespective of the flag it flies each ship, with the exception of those types of ships excluded by Article 2, shall, while in the ports of a Member State, be subject to port State control by officers duly authorised by that Member State to verify that all seafarers serving on board who are required to be certificated by the STCW Convention are so certificated or hold appropriate dispensations.

[Art. 1(18) of the 2012 Directive replaces the original Art.22(1) of the 2008 Directive with the following text:

1. Irrespective of the flag it flies, each ship, with the exception of those types of ships excluded by Article 2, shall, while in the ports of a Member State, be subject to port State control by officers duly authorised by that Member State to verify that all seafarers serving on board who are required to hold a certificate of competency and/or a certificate of proficiency and/or documentary evidence under the STCW Convention, hold such a certificate of competency or valid dispensation and/or certificate of proficiency and/or documentary evidence.]

2. When exercising port State control under this Directive, Member States shall ensure that all relevant provisions and procedures laid down in Directive 95/21/EC are applied.

Article 23

Port State control procedures

1. Without prejudice to Directive 95/21/EC, port State control pursuant to Article 22 shall be limited to the following:

(a) verification that every seafarer serving on board who must be certificated in accordance with the STCW Convention holds an appropriate certificate or a valid dispensation or provides documentary proof that an application for an endorsement attesting recognition has been submitted to the authorities of the flag State;

[Art.1(19) of the 2012 Directive replaces the original text of Art.23(1)(a) of the 2008 Directive with the following text:

(a) verification that every seafarer serving on board who is required to hold a certificate of competency and/or a certificate of proficiency in accordance with the STCW Convention holds such a certificate of competency or valid dispensation and/or certificate of proficiency, or provides documentary proof that an application for an endorsement attesting recognition of a certificate of competency has been submitted to the authorities of the flag State;]

(b) verification that the numbers and certificates of the seafarers serving on board are in accordance with the safe-manning requirements of the authorities of the flag State.

2. The ability of the ship's seafarers to maintain watch-keeping standards as required by the STCW Convention shall be assessed in accordance with Part A of the STCW Code if there are clear grounds for believing that such standards are not being maintained because any of the following has occurred:

[Art.1(20)(a) of the 2012 Directive replaces the original introductory text of Art.23(2) of the 2008 Directive with the following text:

2. The ability of the ship's seafarers to maintain watch-keeping and security standards, as appropriate, as required by the STCW Convention shall be assessed in accordance with Part A of the STCW Code if there are clear grounds for believing that such standards are not being maintained because any of the following has occurred:]

(a) the ship has been involved in a collision, grounding or stranding;

(b) there has been a discharge of substances from the ship when under way, at anchor or at berth which is illegal under an international convention;

(c) the ship has been manoeuvred in an erratic or unsafe manner whereby routing measures adopted by the IMO, or safe navigation practices and procedures have not been followed;

(d) the ship is otherwise being operated in such a manner as to pose a danger to persons, property or the environment;

[Art.1(20)(b) of the 2012 Directive replaces the original text of Art.23(2)(d) of the 2008 Directive with the following text:

(d) the ship is otherwise being operated in such a manner as to pose a danger to persons, property or the environment, or to compromise security;]

(e) a certificate has been fraudulently obtained or the holder of a certificate is not the person to whom that certificate was originally issued;

(f) the ship is flying the flag of a country which has not ratified the STCW Convention, or has a master, officer or rating holding a certificate issued by a third country which has not ratified the STCW Convention.

3. Notwithstanding verification of the certificate, assessment under paragraph 2 may require the seafarer to demonstrate the relevant competence at the place of duty. Such a demonstration may include verification that operational requirements in respect of watch-keeping standards have been met and that there is a proper response to emergency situations within the seafarer's level of competence."

81. The foregoing is of course what the last two paragraphs of the Marine Notice mean to refer to when they say that Ireland, if it carries out a check, will not be prepared to accept certificates of proficiency from training courses which are held in Ireland but which are authorised by another member state. Apparent in this regard, when one reads Arts. 22 and 23, is the impact which the stance employed by Ireland could have regard when it comes to ships stopping off in Ireland, not least when one has regard to the power to detain a ship under Art.24 of the 2008 Directive, as amended, which allows for detention, *inter alia*, for *"(a) failure of seafarers to hold certificates, to have appropriate certificates, to have valid dispensations or provide documentary proof that an application for an endorsement attesting recognition has been submitted to the authorities of the flag State".*

q. Penalties.

82. Article 30 of the 2008 Directive ("Penalties") has been replaced by a new Article 29 (also headed "*Penalties*"), as inserted by Art.1(25) of the 2012 Directive, which new Article provides as follows:

"Member States shall lay down systems of penalties for breaching the national provisions adopted pursuant to Articles 3,

5, 7, 9 to 15, 17, 18, 19, 22, 23, 24 and Annex I, and shall take all the measures necessary to ensure that they are implemented. The penalties provided for must be effective, proportionate and dissuasive."

83. As touched upon previously above, the penalty that arises under the MSO/MCA regimes as regards a training institution that, to borrow a colloquialism, is not 'up to scratch' is the penalty of withdrawing (or, presumably, suspending) authorisation. That, it is submitted by the applicants, and this submission is accepted by the court, is a penalty that is "*effective, proportionate*", and, most definitely "*dissuasive*" – after all, if a rational commercial operator considers that an authorisation, on which a lucrative stream of income is ultimately founded, is about to be withdrawn, then it is undoubtedly going to sit up and take notice of that fact and seek to avoid such an eventuality.

r. Repeal.

84. Article 32 of the 2008 Directive, as amended, provides as follows, under the heading "Repeal":

"Directive 2001/25/EC, as amended by the Directives listed in Annex III, Part A, is repealed, without prejudice to the obligations of the Member States relating to the time limits for transposition into national law of the Directives set out in Annex III, Part B.

References to the repealed Directive shall be construed as references to this Directive and shall be read in accordance with the correlation table in Annex IV."

85. When it is read in combination with the correlation table, it is clear that the intention of European lawmakers in adopting this provision was that where there are any references to the 2001 Directive, such as in the 2005 Directive, they can now be read by reference to this table. As a consequence, what presents is a seamless continuation of the pre-existing obligations, but now by reference to the recast obligations in the 2008 Directive.

(v) The 2012 Directive.

a. Recitals and Certificates.

86. Recitals (1)-(5) of the 2012 Directive set the scene for the provisions that ensue thereafter, stating as follows:

"(1) The training and certification of seafarers is regulated by the International Maritime Organisation (IMO) Convention on Standards of Training, Certification and Watch-keeping for Seafarers 1978 (the 'STCW Convention'), which entered into force in 1984 and which was significantly amended in 1995.

(2) The STCW Convention was incorporated into Union law for the first time by Council Directive 94/58/EC of 22 November 1994 on the minimum level of training of seafarers….The Union rules on training and certification of seafarers were later adapted to the subsequent amendments to the STCW Convention, and a common Union mechanism for the recognition of the systems of training and certification of seafarers in third countries was set up. Those rules are, as the result of a recast, contained in Directive 2008/106/EC of the European Parliament and of the Council…

(3) A Conference of Parties to the STCW Convention held in Manila in 2010 introduced significant amendments to the STCW Convention (the 'Manila amendments'), namely on the prevention of fraudulent practices for certificates, in the field of medical standards, in the matter of training on security, including piracy and armed robbery, and with respect to training in technology-related matters. The Manila amendments also introduced requirements for able seafarers and established new professional profiles, such as electro-technical officers.

(4) All Member States are parties to the STCW Convention and none of them has objected to the Manila amendments under the procedure foreseen to that effect. Member States should therefore align their national rules with the Manila amendments. A conflict between the international commitments of Member States and their Union commitments should be avoided. Moreover, given the global nature of shipping, Union rules on training and certification of seafarers should be kept in line with international rules. Several provisions of Directive 2008/106/EC should, therefore, be amended in order to reflect the Manila amendments.

(5) Improved training for seafarers should cover proper theoretical and practical training so as to ensure that seafarers are qualified to meet security and safety standards and are able to respond to hazards and emergencies."

87. Also of note are Recitals (13)-(14), which provide as follows:

"(13) The Union shipping sector has maritime expertise of high quality which helps to underpin its competitiveness. The quality of training for seafarers is important for the competitiveness of this sector and for attracting Union citizens, in particular young people, to the maritime professions.

(14) In order to uphold quality standards regarding training for seafarers, measures to prevent fraudulent practices associated with certificates of competency and of proficiency need to be improved."

88. What the 2012 Directive does, in effect, is to realise, via a European directive, the substance of the Manila amendments. So it is thanks to the Manila amendments that one finds in the 2012 Directive, the abolition of the concept of "*appropriate certificate*", which featured in the 2005 Directive, and the introduction of the concepts of a "*certificate of competency*" and a "*certificate of proficiency*", which certificates testify to the attainment of certain standards under the STCW Convention as amended, *inter alia*, by the Manila amendments. So it will be recalled that Art.1(27) of the 2008 Directive defined the term "*appropriate certificate*". That definition is deleted by Art. 1(1)(c) of the 2012 Directive. In its place, thanks to Article 1(1)(e) of the 2012 Directive are the following definitions of the terms "*certificate of competency*" and "*certificate of proficiency*":

"'certificate of competency' means a certificate issued and endorsed for masters, officers and GMDSS radio operators in accordance with Chapters II, III, IV or VII of Annex I, and entitling the lawful holder thereof to serve in the capacity and perform the functions involved at the level of responsibility specified therein…

'certificate of proficiency' means a certificate, other than a certificate of competency, issued to a seafarer stating that the relevant requirements of training, competencies or seagoing service in this Directive have been met;"

89. Also of note in this regard is the introduction, by Art.1(1)(e)(38) of the 2012 Directive of the related concept of "documentary evidence", being "documentation other than a certificate of competency or certificate of proficiency, used to establish that the relevant requirements in this Directive have been met".

b. Training and Certification.

I. Article 3.

90. It will be recalled that Article 3 of the 2008 Directive, *inter alia*, required member states to "*take the measures necessary to ensure that seafarers serving on [defined] ships…are trained as a minimum in accordance with the requirements of the STCW Convention, as laid down in Annex I to this Directive, and hold certificates as defined in Article 4 or appropriate certificates."* The court mentioned above how the summary of the STCW Convention annexed in Annex I of the 2008 Directive represented, of course, the version of the STCW Convention that was in force at the time; thus it does not include the Manila Amendments (made in 2010). As mentioned in the context of the court's consideration of the 2008 Directive, Article 3(1) of that directive has, by virtue of Art.1(2) of the 2012 Directive, been replaced such that Article 3(1) of the 2008 Directive, as amended, now reads as follows:

> *"1. Member States shall take the measures necessary to ensure that seafarers serving on ships as referred to in Article 2 are trained as a minimum in accordance with the requirements of the STCW Convention, as laid down in Annex I to this Directive, and hold certificates as defined in Article 4 or appropriate certificates as defined in Article 1(27).*
>
> *1. Member States shall take the measures necessary to ensure that seafarers serving on ships as referred to in Article 2 are trained as a minimum in accordance with the requirements of the STCW Convention, as laid down in Annex I to this Directive, and hold certificates as defined in points (36) and (37) of Article 1, and/or documentary evidence as defined in point (38) of Article 1."*

91. There is now, therefore, a new training-related provision which refers to certificates of competence and to certificates of proficiency. There is also a related deletion of Art. 4 of the 2008 Directive by Art. 1(3) of the 2012 Directive. That Art.4, now gone, had provided, under the heading "*Certificate*" that "*A certificate shall be any valid document, by whatever name it may be known, issued by or under the authority of the competent authority of a Member State in accordance with Article 5 and with the requirements laid down in Annex I* [of the 2008 Directive]."

II. Applicability of the 2005 Directive.

92. It is useful to stop at this point and consider an issue that arose in the submissions. In their written submissions, at paras. 51-53, the respondents submit as follows:

> *"51. The Applicants state that under Article 3 of the Mutual Recognition Directive [the shorthand term used by the respondents in their written submissions when referring to the 2005 Directive] that the Minister must recognise 'appropriate certificates' and 'other certificates'. They further state that Article 4 of the Training Directive [the shorthand term used by the respondents in their written submissions when referring to the 2008 Directive] defined the concept of a 'certificate' and as such that the certificates are subject to mutual recognition. The Applicants' argument is based exclusively on Article 4 of the Training Directive. This Article, however, was expressly deleted by the amending Directive 2012/35. The Court cannot interpret this repeal away. There is no new or equivalent provision to replace Article 4.*
>
> *52. It follows that the certificates the subject of this case are not 'certificates' within the Directive, and (following the reasoning given by the Applicants) they are not 'other certificates'. Additionally, and correctly, the Applicants in their submission admitted that they are not 'appropriate certificates' either. Thus as the certificates do not fall into either of these two categories, it means they are not entitled to the protection of the Mutual Recognition Directive.*
>
> 53. *The Applicants posit that the Minister is obliged to extend mutual recognition to MCA-approved Certificates of Proficiency notwithstanding that these have been approved by the United Kingdom authorities in excess of jurisdiction. The obligation to extend mutual recognition, however, is in respect of certificates; and 'certificate' is defined in Article 2(b) of the Mutual Recognition directive as meaning a* 'valid document within the meaning of Article 4 of Directive 2001/25/EC [i.e. the 2001 Directive]'" *(emphasis added). Yet the Minister maintains that the Certificates herein are not valid documents by reference to the provisions of the Training Directive, for all the reasons set out previously."*

93. Article 4 of the 2008 Directive has, as stated, been repealed by Art. 1(3) of the 2012 Directive. The applicants fairly acknowledged in their oral submissions that they had mistakenly placed reliance, in their written submissions, on a repealed provision, the repeal of which is not disputed by them. The court, like the parties, must and, of course, does accept that fact of repeal. However, it respectfully does not accept the submission made in paras. 52-53 of the respondents' written submissions. As it happens, there is a procedural problem with the submission in any event because it involves an argument that was not made in the statement of opposition. However, leaving that procedural issue aside, the court does not in any event accept that the submission is substantively correct for the reasons that follow.

94. What the respondents essentially contend by way of paras.52-53 of their written submissions is that the 2005 Directive can no longer be relied upon. But that, with respect, is patently wrong. If one but looks to the text of the 2005 Directive itself, it provides in Art. 3(1) that "*Every Member State shall recognise appropriate certificates or other certificates issued by another Member State in accordance with the requirements laid down in Directive 2001/25/EC*." Notably, there is no reference in that text to the notion of validity to which reference is made in para.53 of the respondents' written submissions, just a straightforward obligation to "*recognise appropriate certificates or other certificates issued by another Member State in accordance with the requirements laid down in [the 2001] Directive*". That reference to the 2001 Directive, as the court indicated previously above, in its consideration of the 2008 Directive, has since become, thanks to the combined operation of Art.32 of the 2008 Directive and Annex IV of same, a reference to the 2008 Directive (as since amended by the 2012 Directive). It is clear, as touched upon above, that the 2008 Directive, as amended by the 2012 Directive, envisions two different kinds of certificate – a certificate of competence and a certificate of proficiency – to each of which Article 3(1) of the 2005 Directive manifestly applies.

III. The Committee on Safe Seas.

95. The court is satisfied that the foregoing is correct as a proposition of law, and it cannot but note that the State has, certainly at times, seemed rather less assured of the contrary proposition. Thus in the book of pleadings, there are exhibited, *inter alia*, the

minutes of a meeting of 23rd June, 2016 of the Committee on Safe Seas, a European-level committee established under Regulation (EC) No 2099/2002 of the European Parliament and of the Council of 5 November 2002 establishing a Committee on Safe Seas and the Prevention of Pollution from Ships (COSS) and amending the Regulations on maritime safety and the prevention of pollution from ships (O.J. L324, 29.11.2002, 1). In Item 6 of those minutes, under the heading *"STCW related matter – Mutual recognition of Certificates of Seafarers under Directive 2005/45/EU* [the 2005 Directive]", the following text appears:

> *"In reaction to a number of enquiries and complaints concerning non-recognition by certain Member States of seafarers' certificates issued by or under the authority of another Member State, the Commission considered [it] necessary to clarify the scope of the application of [the 2005 Directive]….This Directive is meant to cover both Certificates of Competency and Certificates of Proficiency issued by a Member State in accordance with the requirements of [the 2008 Directive]….*
>
> *The Commission highlighted with regard to CoPs that they are covered by the mutual recognition scheme, and as such have to be recognised by another Member State, even if they are not issued directly by the administration of the Member State, but by a training institution approved by a Member State. In such cases the Member State approving a training program bears still the ultimate responsibility with regard to the certificates issued by a recognised institution.*
>
> *The Commission also announced that it has initiated the evaluation of [the 2005 Directive and the 2008 Directive]…and a public consultation will be launched in July, to be followed by a targeted consultation (which will include the consultation of the maritime administrations). A possible future solution could entail the publication of a list of approved institutions.*
>
> *The Committee took note of this information. Some MS [Member States] (BE, PL, IT) mentioned that they are having difficulties in determining whether a training institution is approved by another MS, thus concluding on the authenticity of a CoP. The Commission highlighted that in the case of doubt the administration should always contact the administration of the other Member State. PL underlined that such verification creates a significant administrative burden for both the MS requesting verification and MS requested to confirm recognition of the training institution. To address this, PL proposed to consider a system where MS administrations publish on their website the list of recognised training institutions under their systems.*
>
> *IE…concurred with the Commission in relation to mutual recognition covering also certificates of proficiency."*

96. This last statement is directly contrary to what has been submitted by the respondents to this Court.

IV. Certain Averments of Mr Hogan.

97. In his affidavit evidence, Mr Hogan, the Chief Surveyor in the MSO, avers, *inter alia*, as follows:

> *"There are three types of documentation under the STCW Convention. These are* [the] *Certificate of Competency (CoC),* [the] *Certificate of Proficiency and Documentary Evidence. The requirement for update training in the IMO STCW Convention requires seafarers to prevent documentation evidence and not specifically a Certificate of Proficiency. In particular, I beg to refer to Regulation 3 of Section A-VI/I of Chapter VI of the STCW Convention….As it happens, a Certificate of Proficiency (CoP) may not be appropriate for the update training the subject to this case; however, in all three cases the training that underlies the CoC, CoP or Documentary Evidence must be approved by the competent authority of each Member State…*
>
> *The European mutual recognition provisions only apply to CoCs, some CoPs and not to Documentary Evidence. This will be dealt with more fully in legal submission, but to summarise: owing to certain mismatch between the former Directive 2001/25* [the 2001 Directive] *and the current Directive 2008/106 [the 2008 Directive], I believe that certificates falling within the ambit of Directive 2005 [the 2005 Directive] are those which state the position in which the holder is to serve, which does not include CoPs in as much as they do not authorise the holder to serve in any particular position (unlike CoCs)."*

98. That is a position which seems inconsistent with the above-noted extract from the minutes of the meeting of the Committee on the Seas. But more, as can be seen from the extract from the written submissions of the respondents quoted above, it sits askance with the case that is made in the written submissions furnished by the respondents in the within proceedings.

99. Mr Hogan continues:

> *"The only CoPs that may be amenable to mutual recognition are those that state the type of ship on which a seafarer may serve. The CoPs covered by the courses offered by the second applicant are in effect statements of training completed. Such simplified CoPs do not fall under the mutual recognition mechanism in Article 3 of* [the 2005] *Directive… and thus do not fall to be recognised even when duly issued by a training institution in another Member State approved by the Competent Authority of that State."*

100. Perhaps two observations might be made in this regard:

> – first, the position as averred to does not seem on 'all fours' with the submission that is now made in the respondents' written submissions.
>
> – second, the position as averred to does not seem consistent with the approach that the MSO itself took. If one recalls the MSO's letter of authorisation of 14th March, 2017 (quoted previously above), the authorisation that is granted specifically envisions the issues of certificates of proficiency. (It is headed "*Re: Training for the issue of Certificates of Proficiency (UPDATE) in Fast Rescue Boats*". So it is difficult to see how Mr. Hogan, who signed the letter of 14th March and thus authorised the issue by SNO of certificates of proficiency (for MSO-authorised courses, though it was also, of course, doing so for MCA-authorised courses) can aver that certificates of proficiency do not come within the Directive.

c. Certificates of Competency, Certificates of Proficiency and Endorsements.

I. A New Variety of Certificates.

101. The text of Art. 5 of the 2008 Directive has been amended by Art.1(4) of the 2012 Directive, so that now it reads as follows, under the heading "*Certificates of competency, certificates of proficiency and endorsements*"):

> *"1. Member States shall ensure that certificates of competency and certificates of proficiency are issued only to candidates who comply with the requirements of this Article."*
>
> *2. Certificates for masters, officers and radio operators shall be endorsed by the Member State as prescribed in this Article.*
>
> *3. Certificates of competency and certificates of proficiency shall be issued in accordance with Regulation I/2, paragraph 3 of the Annex to the STCW Convention."*

102. The effect of the amendments made is that whereas Art.5 previously dealt simply with certificates, it now deals with two different kinds of certificates, viz. certificates of competency and certificates of proficiency (and endorsements), both of which are incorporated into the 2008 Directive, and, ipso facto, covered by the 2005 Directive.

II. Recognition of Third-Country Certificates.

103. In passing, the court notes that Art.1(4) of the 2012 Directive replaces the previously existing Art.5(6)-(7) of the 2008 Directive with a new Art.5(6), which provides as follows:

> *"A Member State which recognises a certificate of competency, or a certificate of proficiency, issued to masters and officers in accordance with Regulations V/1-1 and V/1-2 of the Annex to the STCW Convention under the procedure laid down in Article 19(2) of this Directive shall endorse that certificate to attest its recognition only after ensuring the authenticity and validity of the certificate. The form of the endorsement used shall be that set out in paragraph 3 of Section A-I/2 of the STCW Code."*

104. Article 19(2) of the 2008 Directive is concerned with the recognition by a member state of certificates issued by a third country. If one looks to Regulation V/1-1 and V/1-2 of the Annex to the STCW Convention, as set out in Annex I to the 2012 Directive, these are headed respectively "*Mandatory minimum requirements for the training and qualifications of masters, officers and ratings on oil and chemical tankers*" and "*Mandatory minimum requirements for the training and qualifications of masters, officers and ratings on liquefied gas tankers"*. This aspect of matters, as will be seen later below, is relevant when the court comes to look at the way in which the 2012 Directive has been implemented by the State by way of the 2014 Regulations.

d. Prevention of Fraud and Other Unlawful Practices.

105. The substance of Article 8 was touched upon by the court in its consideration of the 2008 Directive. Article 1(7) of the 2012 Directive replaces the previously existing Art.8(1) of the 2008 Directive with the following text:

> *"Member States shall take and enforce appropriate measures to prevent fraud and other unlawful practices involving certificates and endorsements issued, and shall provide for penalties that are effective, proportionate and dissuasive."*

106. This new wording is significantly different from the previous text of Art.8(1) which provided as follows:

> *"Member States shall take and enforce the appropriate measures to prevent fraud and other unlawful practices involving the certification process or certificates issued* ***and endorsed by their competent authorities****, and shall provide for penalties that are effective, proportionate and dissuasive." [Emphasis added]*

107. The omission of the highlighted text has the effect that Art.8 is no longer confined to certificates which are issued by the member state that is taking and enforcing the appropriate measures, and that, as will be seen later below, is clearly the interpretation that Ireland placed on Art.8(1), as revised, when it came to making the 2014 Regulations.

e. Responsibilities of Companies.

108. Article 14 of the 2008 Directive, as amended by Art. 1(13)(a) of the 2012 Directive, now includes a new sub-paragraph (f) and thus Art.14 now provides, *inter alia*, as follows:

> *"1. In accordance with paragraphs 2 and 3 Member States shall hold companies responsible for the assignment of seafarers for service in their ships in accordance with this Directive, and shall require every company to ensure that…*
>
> > *(f) seafarers assigned to any of its ships have received refresher and updating training as required by the STCW Convention".*

109. The new sub-paragraph (f) derives ultimately from the Manila amendments.

f. Penalties.

110. A new Art.29, headed "*Penalties*" has been inserted by Art.1(25) of the 2012 Directive to take the place of the provision previously made in Art.30 of the 2008 Directive. The revised provision has been considered in the context of the 2008 Directive, including the court's conclusion that the contractual or contractual-style means of enforcing authorisations in Ireland (and indeed in the United Kingdom) appears to the court readily to satisfy the requirement in Art.29 that "*The penalties provided for* [for breaching national provisions] *must be effective, proportionate and dissuasive*". This is an aspect of matters to which the court will return later below in its consideration of the 2014 Regulations.

(vi) Some Conclusions.

111. In summary, what appears from the foregoing is a clear (if somewhat mosaic) European-level code on seafarer training and certification, which code comprises the 2005, 2008 and 2012 Directives. That code requires European Union member states to recognise a certificate issued under the 2008 Directive, with the certificates envisioned by the 2008 Directive, as amended, being both certificates of competency (which are not of particular relevance in the context of the within proceedings) and certificates of proficiency (which are relevant). Moreover, the MSO itself contemplates certificates of proficiency as coming within the 2008 Directive, as amended; that this is so, as shown above, follows from the nature of the authorisation that the MSO gave in its letter of letter of authorisation of 14th March, 2017. Yes, the 2008 Directive has been amended and Art.4 is gone. However, Art.3 of the 2008 Directive, as amended, provides that "*Member States shall take the measures necessary to ensure that seafarers serving on* [defined] *ships…are trained as a minimum in accordance with the requirements of the STCW Convention*". That Convention now

requires proficiency training and updated proficiency training for all seafarers. Article 5(1) of the 2008 Directive, as amended, provides that "*Member States shall ensure that certificates of competency and certificates of proficiency are issued only to candidates who comply with the requirements of this Article".*

112. When one looks at the just-mentioned provisions of the 2008 Directive, as amended, and then turns to Art.3(1) of the 2005 Directive (which, it will be recalled, provides that "*Every Member State shall recognise appropriate certificates or other certificates issued by another Member State in accordance with the requirements laid down in* [the 2001 Directive]", this last reference falling – thanks to Art.32 and Annex IV of the 2008 Directive – to be read as a reference to the 2008 Directive, as now amended by the 2012 Directive), it is clear that the reference to every member state recognising "*appropriate certificates or other certificates*" relates now to certificates of competency and also to certificates of proficiency issued pursuant to the 2008 Directive. Those forms of certificate come within the straightforward language of Art. 3(1) of the 2005 Directive. They are certificates issued by another member state in accordance with the 2008 Directive. They must, therefore, be recognised by Ireland.

113. Additionally, the mutual recognition obligations arising in the 2005 Directive fall to be construed in a like manner to the similar provision made in the 1989 Directive and interpreted by the Court of Justice in the above-considered European case-law, most especially in *Khatzithanasis*. That case-law clearly envisions cross-border authorisation and cross-border verification. Moreover, when the court looks at the way in which the MCA has approached the impugned authorisation process, it has clearly complied with its obligations under the 2008 Directive, as amended. Thus the MCA ensured that the quality system that was in place satisfied the requirements of Art.10 of the 2008 Directive, required that there should be appropriate procedures and assurances in place to ensure that Art.17 standards were complied with, and laid down very detailed provisions in relation to the use of simulators so that Article 13 could be said to be complied with. It also has the ability to impose a manifestly dissuasive penalty in the form of a withdrawal of authorisation in the event of non-compliance with such conditions as the MCA imposes (a form of penalty that within the territory of Ireland has been adopted by the MSO). Nor is the SNO-MCA arrangement some sort of atavistic over-reach on the part of the United Kingdom towards a former colony: the MCA has authorised training providers across Europe and indeed the rest of the world.

XII

Some Points Made by the Respondents

concerning the 2008 Directive (as amended)

(i) Recital 6.

114. The respondents placed some emphasis on recital (6) of the 2008 Directive which provides that "*The mutual recognition of diplomas and certificates provided for under Directive 2005/36/EC does not always ensure a standardised level of training for all seafarers serving on board vessels flying the flag of a Member State. This is, however, vital from the viewpoint of maritime safety*" – the notion that mutual recognition does not always ensure a standardised level of training seeming to the respondents to be some intended qualification of the mutual recognition regime. The court does not read recital (6) so. To the court, all that recital is saying, in effect, is 'We are going to improve training standards'. It seems to the court to be entirely understandable in circumstances where there is a mutual recognition regime that one would also seek to improve standards on a harmonised or a community wide basis. Indeed recital (6) is, in truth, something of a preliminary to recital (7) which reads, *inter alia*, that "*It is therefore essential to define a minimum level of training for seafarers in the Community…*".

(ii). Recital 15.

115. Counsel for the respondents also drew the attention of the court to recital (15) of the 2008 Directive which provides as follows:

> *"It is essential to ensure that seafarers holding certificates issued by third countries and serving on board Community ships have a level of competence equivalent to that required by the STCW Convention. This Directive should lay down procedures and common criteria for the recognition by the Member States of certificates issued by third countries, based on the training and certification requirements as agreed in the framework of the STCW Convention."*

116. That recital, however, is dealing with the position of non-member states which is not the position presenting in the within application (which is concerned with Ireland and the United Kingdom, both, for now, still member states of the European Union).

(iii). Recital 17.

117. Recital (17) of the 2008 Directive provides that "*Where appropriate, maritime institutes, training programmes and courses should be inspected. Criteria for such inspection should therefore be established.*" This recital, counsel for the respondents submitted, "*suggests that maritime institutes/training programmes should be inspected. And I say it would seem to be absolutely clear from any reading of the Directive that any inspections and approval of training is to be done by the competent authority* [i.e. the competent authority within which the training occurs]. *That is the structure that is laid out in the Directive and that that is what is intended to happen.*" Respectfully, the court differs. Here what has happened is that the MCA has inspected the applicants' training facility and thus honoured the obligation that arises under recital (17) and the specific obligations arising in the main body of the 2008 Directive itself; there is nothing in the 2008 Directive, as amended, no text that can be pointed which states that such a form of inspection is not what is contemplated by that legislation. Indeed, the court concludes by reference to the scheme established by the sweep of European Union legislation under particular consideration (the 2005 Directive, the 2008 Directive and the 2012 Directive), such a form of inspection is entirely within the scheme of recognition, training and certification established thereby.

(iv). Article 3.

118. No little emphasis was placed by counsel for the respondents on Art.3(1) of the 2008 Directive which, it will be recalled, following amendment by the 2012 Directive, provides as follows:

> *"Member States shall take the measures necessary to ensure that seafarers serving on ships as referred to in Article 2 are trained as a minimum in accordance with the requirements of the STCW Convention, as laid down in Annex I to this Directive, and hold certificates as defined in points (36) and (37) of Article 1, and/or documentary evidence as defined in point (38) of Article 1."*

119. The point made by the respondents in this regard was, in effect, that Article 3 imposes a mandatory obligation on each of the 28 member states to ensure that seafarers trained within its boundaries are trained in accordance with the STCW Convention. However, it seems to the court that Art. 3(1) but imposes a general obligation on member states in relation to training and, in any event, has to

be read with the rest of the 2008 Directive, as amended, because it is the rest of that directive, particularly Art.17 *("Responsibilities of Member States with regard to training and assessment"*) that spells out how effect is to be given to the said mandatory obligation.

(v). Article 5.

120. The respondents place some reliance on Art.5(3)(a) of the 2008 Directive, as inserted by Art.1(4)(d) of the 2012 Directive, which provides, under the general heading "*Certificates of competency, certificates of proficiency and endorsements*" that "*Certificates of competency shall be issued only by the Member States following verification of the authenticity and validity of any necessary documentary evidence and in accordance with the provisions laid down in this Article*." Counsel for the respondents pointed in this regard to the extent of the obligations placed on member states under Art.5: "*They*", he said, "*must approve the training, they must ensure that the training is in accordance with the requirements of the Convention, they must ensure that certificates of competency are issued following verification of the authenticity and validity of any 2 necessary documentary evidence.*" However, it does not seem to the court, with respect, that Art.5 seeks in any way to supplant the mutual recognition regime established by the 2005 Directive. Obviously there are documents that a member state does have to verify. So, for example, under Art.5(11) of the 2008 Directive, as inserted by Art.1(4)(g) of the 2012 Directive:

> *"'11. Candidates for certification shall provide satisfactory proof: (a) of their identity; (b) that their age is not less than that prescribed in the Regulations listed in Annex I relevant to the certificate of competency or certificate of proficiency applied for; (c) that they meet the standards of medical fitness, specified in Section A-I/9 of the STCW Code; (d) that they have completed the seagoing service and any related compulsory training prescribed in the Regulations listed in Annex I for the certificate of competency or certificate of proficiency applied for; and (e) that they meet the standards of competence prescribed in the Regulations listed in Annex I for the capacities, functions and levels that are to be identified in the endorsement of the certificate of competency…".*

121. As can be seen from the above, there are a significant number of things member states do have to check; and under Art.8(3) member states can check with each other whether a particular certificate is authentic or not: "*At the request of a host Member State, the competent authorities of another Member State shall provide written confirmation or denial of the authenticity of seafarers' certificates, corresponding endorsements or any other documentary evidence of training issued in that other Member State*." However, in no way could it be said that this last provision or indeed any of the foregoing overrides the mutual recognition obligation that arises under the 2005 Directive. The reliance placed on Art.5 in support of such a proposition is, with respect, misplaced.

122. Some reliance was also sought to be placed on Art.5(12) of the 2008 Directive, as amended, which provides, *inter alia*, that "*Each Member State shall undertake: (a) to maintain a register or registers of all certificates of competency and certificates of proficiency and endorsements for masters and officers and, where applicable, ratings which are issued, have expired or have been revalidated, suspended, cancelled or reported as lost or destroyed, as well as of dispensations issued…*". It follows from the wording of this provision ("*…a register or registers…*") that there does not have to be a single register. The court has seen from the papers in this case that both the MCA and the MSO, when it came to approving SNO, were each very careful to ensure that there would be a system in place where all certificates would be appropriately numbered and recorded in such a manner that there would be a register available if anyone ever wanted to check that register in the future. What this shows is that Art.12 is entirely capable of being complied with, whether it is the home member state or a foreign member state that is authorising a particular course.

(vi). Article 5(a).

123. There was brief mention by the respondents of Art.5a of the 2008 Directive, as amended. That provision provides as follows:

> ***"Information to the Commission***
>
> *Each Member State shall make available to the Commission on a yearly basis the information indicated in Annex V to this Directive on certificates of competency, endorsements attesting the recognition of certificates of competency as well as, on a voluntary basis, certificates of proficiency issued to ratings in accordance with Chapters II, III, and VII of the Annex to the STCW Convention, for the purposes of statistical analysis only and exclusively for use by Member States and the Commission in policy-making."*

124. Notably, however, the provision of information requirement does not extend to Chapter VI of the STCW Convention which is the relevant chapter for the purposes of the within judgment.

(vii). Article 6.

125. Article 6 of the 2008 Directive, as amended, provides, under the heading "*Training requirements*" that "*The training required pursuant to Article 3* [considered previously above*] shall be in a form appropriate to the theoretical knowledge and practical skills required by Annex I, in particular the use of life saving and fire-fighting equipment, and approved by the competent authority or body designated by each Member State*". Some emphasis was placed by the respondents on this provision; however, that emphasis is misplaced: Art.6 merely identifies training requirements and requires that they be approved by whichever is the competent authority; there is no partitioning between member states in that (and it would, in truth, be surprising to find a European Union measure that sought to partition in the manner contended for by the respondents). The court returns to this point in the context of its further consideration of Art.17 below.

(viii). Article 8.

126. The respondents also placed some reliance on Art. 8 and seemed to suggest that in some way this cuts across cross-border approval of training. Article 8 *("Prevention of fraud and other unlawful practices"*) provides, *inter alia*, as follows:

> *"1. Member States shall take and enforce appropriate measures to prevent fraud and other unlawful practices involving certificates and endorsements issued, and shall provide for penalties that are effective, proportionate and dissuasive.*
>
> *2. Member States shall designate the national authorities competent to detect and combat fraud and other unlawful practices and exchange information with the competent authorities of other Member States and of third countries concerning the certification of seafarers. Member States shall forthwith inform the other Member States and the Commission of the details of such competent national authorities.*
>
> *…*

3. At the request of a host Member State, the competent authorities of another Member State shall provide written confirmation or denial of the authenticity of seafarers' certificates, corresponding endorsements or any other documentary evidence of training issued in that other Member State."

127. There is, with respect, nothing in this article that 'cuts across' the issue of cross-border approval of training. In fact, it is clear that Art.8 does envision cross border application, as is clear from Art.8(1). That sub-article is clearly concerned with the authenticity of certificates (and combating fraud); what is significant is that it does not impose what might be styled an 'insular' obligation on each member state in relation to certificates issued by that member state. Rather, it applies to certificates generally. So clearly Art.8, as amended, is capable of being applied in any member state in relation to any certificates issued by any other member state. The court is buttressed in this conclusion when it has regard to the original wording of Art. 8(1) which stated that

"Member States shall take and enforce the appropriate measures to prevent fraud and other unlawful practices involving the certification process or certificates issued and endorsed ***by their competent authorities****, and shall provide for penalties that are effective, proportionate and dissuasive."*

[Emphasis added].

128. The highlighted text is now gone. The new Art. 8(1) refers merely to "*certificates and endorsements issued"*. That change reflects the mobility of seafarers, and the fact that there is, *inter alia*, cross-border authorisation of courses, with the result that it is important that Art.8 makes clear that enforcement action can be taken anywhere in the Union when it comes to a difficulty or fraud in relation to a certificate. Art.8(2) and (3) likewise have cross-border significance. There was suggestion by the respondents that Art.8(3) presents a difficulty for the MSO in terms of providing the requisite "*written conformation or denial*" in circumstances where the SNO (in Ireland) gives courses and issues certificates on behalf of the MCA (in the United Kingdom). But that, it seems to the court, rather misses the point: the relevant member state that has the obligation in relation to the certificate is the authorising member state under Article 17 of the Directive. Therefore the MCA must take responsibility for the certificates that are issued by SNO under courses authorised by it (and that is doubtless one reason why the MCA has, *inter alia*, been very careful to require appropriate record-keeping by the applicants).

(ix). Article 9.

129. It will be recalled that Art.9 of the 2008 Directive, as amended, provides, *inter alia*, as follows under the heading "*Penalties or disciplinary measures*":

"1. Member States shall establish processes and procedures for the impartial investigation of any reported incompetence, act, omission or compromise to security that may pose a direct threat to safety of life or property at sea or to the marine environment, on the part of the holders of certificates of competency and certificates of proficiency or endorsements issued by that Member State in connection with their performance of duties relating to their certificates of competency and certificates of proficiency and for the withdrawal, suspension and cancellation of such certificates of competency and certificates of proficiency for such cause and for the prevention of fraud.

2. Member States shall take and enforce appropriate measures to prevent fraud and other unlawful practices involving certificates of competency and certificates of proficiency and endorsements issued."

130. Again, counsel for the respondents pointed in effect to the essential insularity of the above-quoted text, referring to "*a general remit that the State* [and each member state (on a state-by-state basis)] *has under this Directive*". Such an insular approach, however, does not ring true. In truth, the obligation to have in place processes and procedures to deal with the matters mentioned has to be operated on a cross-border basis. This must be so if one has regard to the real-life context within which Art.9 operates. Suppose, for example, that a certificate issues to a seafarer in Ireland. That seafarer, as recital (2) of the 2005 Directive states, is working in "*an intensively and rapidly developing sector of a particularly international character*" and, of course, does not have to stay in Ireland. So s/he will go abroad and the certificate will travel with that seafarer wherever s/he goes. So Art. 9(1) clearly has to apply even in circumstances where the said seafarer has left the shores of Ireland and gone somewhere else. Thus to suggest that Art. 9 is only capable of being applied in the insular circumstances or style contended for by the respondents is, with respect, plainly wrong. The court is buttressed in this conclusion when it looks to Art.9(4), which provides as follows:

"4. Member States within the jurisdiction of which any company which or any person who is believed on clear grounds to have been responsible for or to have knowledge of any apparent non-compliance with this Directive specified in paragraph 3, is located shall extend cooperation to any Member State or other Party to the STCW Convention which advises them of its intention to initiate proceedings under its jurisdiction."

131. Again, that provision points to cross-border involvement and cross-border activity.

(x). Article 10.

132. Article 10 of the 2008 Directive, as amended, provides, *inter alia*, as follows:

"1. Each Member State shall ensure that:

(a) all training, assessment of competence, certification, including medical certification, endorsement and revalidation activities carried out by non-governmental agencies or entities under their authority are continuously monitored through a quality standards system to ensure the achievement of defined objectives, including those concerning the qualifications and experience of instructors and assessors, in accordance with Section A-I/8 of the STCW Code…".

133. Again in this regard, the respondents raised what might be styled the 'insular' approach to reading the 2008 Directive, as amended. So, for example, per counsel for the respondents:

"[A]*ll* [the] *obligations* [arising under Art.10 are] *imposed on the member state. Each member state shall ensure that all of these things take place. And, once again, we say that in circumstances where it's the competent authority that approves training institutions, must ensure that training standards are in accordance with the* [STCW] *Convention,* [and] *is urged under the recitals to organise regular inspections, we say it is an unescapable inference, in circumstances where all of these obligations are imposed on the member state, that it's the member state who must control training within the jurisdiction and that it is not some other member state who has these obligations in relation to institutions in*

Ireland."

134. Turning, however, to the text of Art.10, the phrase "*under their authority*", it seems to the court, refers very clearly to Art.17 of the 2008 Directive, as amended, and is much wider language than 'in their territory' or 'in their jurisdiction' or anything of that kind. Thus what Art.10 (to the court's mind, clearly) contemplates is that any training carried out under the authority of a member state (the authority being granted under Article 17 of the 2008 Directive) has to comply with the provisions of Art. 10. And one can see on the facts underpinning the within case that the MCA was careful to ensure that the course carried out by SNO met the requirements of Art.10. When one looks through all of the different provisions of Art.10 it is quite clear that the MCA is in as good position as the MSO to give effect to every such provision, and has done so (as can be seen in the pre-approval audit process).

(xi). Article 17.

135. Article 17 ("*Responsibilities of Member states with regard to training and assessment*") is the provision that, as the Commission made clear at the COSS meeting of 23rd June, 2016, gives no indication that cross border authorisation is restricted in any way. Counsel for the respondents submitted that it is implicit in the Article that it is confined to training institutions within the jurisdiction of each member state. However, there is, with respect, nothing in the language of Art.17 to suggest that. In truth, the fact that the MCA has been able in its pre-approval process to ensure all of the things set out Art.17(2) shows how matters can be successfully structured on a cross-frontier basis, as European Union law contemplates.

(xii). Article 25.

136. Article 25 of the 2008 Directive, as amended, ("*Regular monitoring of compliance*") provides, it will be recalled, that "*Without prejudice to the powers of the Commission under Article 226 of the Treaty, the Commission, assisted by the European Maritime Safety Agency, shall verify on a regular basis and at least every five years that Member States comply with the minimum requirements laid down by this Directive*." The respondents contested that EMSA will struggle to operate in a cross-frontier basis. It is, with respect, puzzling to see how this could be so; and, in point of fact, it is not so. EMSA is a European-level agency. Recital (5) of the EMSA Regulation provides, *inter alia*, that it "*should favour the establishment of better cooperation between the Member States and should develop and disseminate best practices in the Community*". Article 2(3) of the EMSA Regulation endows EMSA with a number of core tasks, including, *e.g.*, "[to] *organise, where appropriate, relevant training activities in fields which are the responsibility of the Member States*". To use a colloquialism, EMSA is entitled, within its area of activity, to 'knock on the door' of any member state and to see what is happening in that member state. It can visit the MCA in the United Kingdom, it can visit the SNO in Ireland; it is uniquely well-placed to police cross-border operations such as those presenting on the facts of the within proceedings.

(xiii). Article 29.

137. It will be recalled that the new Art.29 of the 2008 Directive, as inserted by Art.1(25) of the 2012 Directive, requires of member states that they *"lay down systems of penalties for breaching the national provisions adopted pursuant to Articles 3, 5, 7, 9 to 15, 17, 18, 19, 22, 23, 24 and Annex I"*, that they "*take all the measures necessary to ensure that they are implemented*" and that "[t]*he penalties provided for must be effective, proportionate and dissuasive*". Counsel for the respondents spent some time looking at Art.29 drawing attention to the need for penalties. But there is nothing to suggest that the reference to "*penalties*" contemplates only criminal sanction. Indeed, a striking common feature of the Irish and United Kingdom implementing regimes is the reliance on civil sanction (withdrawal of authorisation). But if someone does commit a criminal offence in Ireland or the United Kingdom, *e.g.*, some form of fraudulent activity, that is a matter that can be dealt with, as appropriate, by the legal system in the jurisdiction where such activity transpires. To the extent that there was a hint (and there was a hint) in the submissions of the respondents that Ireland considers itself not to have implemented properly the 2008 Directive, as amended, by not having in place a statutory system for the imposition of penalties relating to training, the court can, hopefully, allay any concern in this regard: it does not read the 2008 Directive, as amended, to require a statutory system for the imposition of penalties relating to training.

XIII

The 2014 Regulations

(i) Interpretation.

138. The European Union (Training, Certification and Watch-keeping for Seafarers) Regulations 2014 seek to transpose the 2012 Directive into Irish law. A number of terms of interest are defined in sub-reg.(1) of Reg.2 ("*Interpretation*"), *viz*:

> *"'certificate' means a valid document, by whatever name it may be known, issued by or under the authority of the Minister under these Regulations, or recognised by the Minister, authorising the lawful holder to serve as stated in the document;*

[This definition is notable because when one looks at the penalty provisions in relation to the forgery of certificates, it is clear that the State has decided that those provisions are not just applicable in relation to certificates issued by the Minister, but also to certificates recognised by the Minister (which is clearly consistent with Art.8 of the 2008 Directive, as amended).]

> *'certificate of competency' means a certificate, other than a certificate of proficiency, issued under Regulation 10;*
>
> *'certificate of equivalent competency' means a document entitled 'certificate of equivalent competency' issued under Regulation 12(1) or (2);*
>
> *'certificate of equivalent proficiency' means a document entitled 'certificate of equivalent proficiency' issued under Regulation 12(1) or (2);*
>
> *'certificate of proficiency' means a certificate, other than a certificate of competency, issued under Regulation 10;*
>
> *'code' means the Seafarers' Training, Certification and Watch-keeping Code and any amendments thereto up to and including those amendments adopted by the Maritime Safety Committee of the International Maritime Organisation at its eighty-fourth session held between 21 to 25 June 2010".*

(ii) Competent authorities.

139. Regulation 3(1) of the 2014 Regulations provides that "*Subject to paragraph (2), the Minister is designated as the competent*

authority for the purposes of these Regulations and Articles 6, 8(2) and 17." (Article 17 of the 2008 Directive, as amended, is, it will be recalled, the provision of the 2008 Directive which says that member states "*shall designate the authorities or bodies*" which shall "*(a) give the training referred to in Article 3* ['Training and certification']; *(b) organise and/or supervise the examinations where required; (c) issue the certificates referred to in Article 5* ['Certificates of competency, certificates of proficiency and endorsement']; *(d) grant the dispensations provided for in Article 16* ['Dispensation']". Regulation 3(2) of the 2014 Regulations provides that "*The Minister may designate by Marine Notice a person or any category of person as an authority for— (a) the provision of training under Regulation 7, and (b) the conduct of examinations under Regulation 8*". Between them these provisions represent the way in which Ireland has chosen to implement the 2012 Directive: the Minister may designate by Marine Notice any person for the provision of training under Reg.7 or the conduct of examinations under Reg.8. Notably, there are no detailed requirements as to what the Marine Notice should lay down or what standards the training provider should live up to; presumably one looks to the 2008 Directive, as amended, to see what is the standard that must be applied.

(iii) Application and Prohibition on Serving.

140. Regulation 4(1) of the 2014 Regulations provides that the 2014 Regulations "*apply to all masters and seafarers serving on board a seagoing Irish ship wherever it may be",* subject to certain exceptions. Regulation 5(1) then provides that "(*1) A person shall not serve, or attempt to serve, on a seagoing Irish ship in any capacity to which these Regulations relate unless the person— (a) is qualified in accordance with Regulation 6, (b) has completed the training specified in Regulation 7, and (c) has passed the relevant examination, if any, conducted under Regulation 8*". Regulation 5(2) makes it an offence for a person to act in breach of any of Reg.5(1)(a), (b) or (c).

(iv) Qualification, Training and Examinations.

a. Qualification.

141. Under reg.6(1) "*A person is qualified for the purposes of these Regulations if such a person holds a certificate of competency, a certificate of equivalent competency or a certificate to which Regulation 30(2) relates in respect of any function the person is to perform in one of* [various prescribed on-ship]…*capacities*". (Regulation 30(2) provides a saver in respect of, *inter alia*, certificates issued under certain regulations revoked by the 2014 Regulations). Under reg. 6(2) "*A person is qualified for the purposes of these Regulations if such a person holds a certificate of proficiency, a certificate of equivalent proficiency or a certificate to which Regulation 30(2) relates in respect of any function the person is to perform in one of* [various prescribed on-ship]…*capacities*", including "*(f) any person designated to perform any of the emergency, occupational safety, security, medical care and survival functions as specified in Chapter VI.*" (Chapter VI of the STCW convention is the section of that convention referenced in Annex I to the 2008 Directive, as amended). So what Ireland clearly envisions in these regulations, contrary it might be noted to what Mr. Hogan avers on affidavit, is that any person designated to perform any of these functions will hold a certificate of proficiency.

b. Training.

142. Regulation 7 provides that "*The training in relation to a certificate shall— (a) be provided by a person designated under Regulation 3(2), (b) be approved, (c) be, at a minimum, the training as required by the Regulation in Annex I corresponding to that certificate, and (d) be in a form appropriate to the theoretical knowledge and practical skills required by the Regulation in Annex I corresponding to that certificate."* When it comes to training, Ireland has simply adopted what is in the underlying STCW convention by reference to Annex I of the Directive. Ireland has not chosen to impose more stringent or higher standards than is imposed by the 2012 Directive.

c. Examinations.

143. Regulation 8 provides simply that "*The Minister may conduct or arrange for the conduct of examinations of persons who are applying or might apply for a certificate."*

(v) Certificates and Endorsements.

a. General.

144. Regulation 10(1)-(3) provides as follows:

> "*(1) Certificates shall be issued and endorsed by the Minister as provided for by this Regulation.*
>
> *(2) A certificate of competency shall be issued by the Minister in accordance with paragraphs 1 and 3 of Regulation I/2 of the Annex to the Convention.*
>
> *(3) A certificate of proficiency shall be issued by the Minister in accordance with paragraph 3 of Regulation I/2 of the Annex to the Convention."*

145. Regulation 10(19) is also of interest, providing as follows:

> "*(19) A person seeking a certificate, other than a person seeking recognition of an endorsement under Regulation I/10 of the Convention, shall provide satisfactory proof to the Minister—*
>
> > *(a) of their identity,*
> >
> > *(b) that their age is not less than the age prescribed in Annex I corresponding to the certificate applied for,*
> >
> > *(c) that they meet the standards of medical fitness, specified in the Regulations of 2005,*
> >
> > *(d) that they have completed the seagoing service and any related compulsory training prescribed in Annex I corresponding to the certificate applied for, and*
> >
> > *(e) that they meet the relevant standards of competence prescribed in Annex I for the capacities, functions and levels that are to be identified in the endorsement of the certificate."*

b. Revalidation of Certificates.

146. Regulation 11(1) of the 2014 Regulations provides that "*The Minister may, in accordance with this Regulation* [11], *revalidate a certificate*." Regulation 11(2) then moves on to provide that "*A person, referred to in Regulation 6(1)* [*i.e.* a person whom, it will be recalled, acts in one of various prescribed on-ship capacities, and*], who holds a certificate of competency issued or recognised by the Minister under any part of Annex I other than Chapter VI, who is serving at sea or intends to return to sea after a period ashore shall, at intervals not exceeding 5 years, in order to continue to qualify for seagoing service and revalidation of such certificate – (a) meet the standard of medical fitness prescribed by the Regulations of 2005, and (b) establish continued professional competence in accordance with section A-I/11 of the code."*

c. Recognition of Certificates.

147. Regulation 12(1) provides that "*The Minister shall recognise— (a) a certificate of competency, and (b) a certificate of proficiency for masters or officers serving on board oil, chemical or liquefied gas tankers*, **issued by another Member State."** [Emphasis added].

148. This provision touches upon an aspect of matters which the court flagged in its consideration of Art. 19 of the 2008 Directive, as amended, (which provision was originally headed "*Recognition of certificates*" but, thanks to Art. 1(16)(a) of the 2012 Directive, is now headed "*Recognition of certificates of competency and certificates of proficiency"*). That provision deals, obviously, with the recognition of certificates, and of especial note in this regard is Art.19(2), as amended by Art 1(16)(c) of the 2012 Directive, which provides, *inter alia*, that "A *Member State which intends to recognise, by endorsement, the certificates of competency and/or the certificates of proficiency referred to in paragraph 1 issued by a third country to a master, officer or radio operator, for service on ships flying its flag, shall submit a request for recognition of that third country to the Commission, stating its reasons…*". Article 19(2) clearly is applicable in the context of the certification or recognition of certificates by third-countries. Article 19(1), to which it cross-refers, states itself to be concerned with "[s]*eafarers who do not possess the certificates of competency issued by Member States and/or the certificates of proficiency issued by Member States to masters and officers in accordance with Regulations V/1-1 and V/1-2 of the STCW Convention"*. And Regulations V/1-1 and V/1-2 of the STCW Convention are headed respectively "*Mandatory minimum requirements for the training and qualifications of masters, officers and ratings on oil and chemical tankers*" and "*Mandatory minimum requirements for the training and qualifications of masters, officers and ratings on liquefied gas tankers".*

149. Obviously, Regulation 12 must, in accordance with established jurisprudence, including the decision of the court in *Environmental Protection Agency v. Harte Peat Ltd and anor* [2014] IEHC 308, be read in light of the 2012 Directive and, if it has not properly transposed, the directive one must look to the Directive itself. Unfortunately, when one looks to the 2012 Directive, there is no authority there for the proposition that Regulation 12(1) ought to apply in the context of a certificate issued by another European Union member state. Article 19(2) refers solely to "*the certificates of competency and/or the certificates of proficiency referred to in paragraph 1* **issued by a third country**" [emphasis added], *i.e*. other than a member state, which is precisely the opposite of what is provided for in the above-emphasised text of reg. 12(1) of the 2014 Regulations. To this extent, it appears that the 2014 Regulations have not properly transposed the 2012 Directive.

d. Responsibilities of Companies and Masters.

150. Regulation 16 of the 2014 Regulations closely mirrors Art.14 of the 2008 Directive, as amended. Among the things that a company (as defined in the 2008 Directive, as amended) must ensure, is, per Reg. 16(1)(f) and consistent with the Directive, that "*seafarers assigned to any of its Irish ships have received refresher and updating training as required by the Convention*".

151. Regulation 16(2) further provides that "*Companies and seafarers shall take all reasonable measures to ensure that the obligations set out in this Regulation are given full and complete effect and that such other measures as may be necessary to ensure that each crew member can make a knowledgeable and informed contribution to the safe operation of an Irish ship are taken.*" That is obviously an obligation that is imposed not just on companies but on seafarers themselves. Under reg. 16(6) "*A company that fails to comply with this Regulation* [16] *commits an offence."*

152. Under reg.17(1) "*A master shall ensure that every person engaged by them is certified in accordance with these Regulations*"; and, as with breaches of reg.16, "*A master who fails to comply with this Regulation* [17] *commits an offence*."

e. Inquiry.

153. Under reg.19(1) of the 2014 Regulations "*Where it appears to the Minister that the holder of a certificate is unfit to discharge his or her duties relating to that certificate, due to – (a) the holder's incompetence, or (b) an act, omission or compromise to security by the holder, in a manner that may cause a direct threat to safety of life or property at sea or to the marine environment, the Minister may cause an inquiry to be held by a person appointed by him or her for that purpose and may, pending the outcome of the inquiry, suspend any certificate issued to the holder in relation to whom the inquiry is to be held and require the holder to surrender the certificate to the Minister*." Thanks to the definition of "*certificate*" in reg.2(1), this power of inquiry does not just apply to certificates issued by the Minister; it also extends to certificates recognised by the Minister under reg.12.

f. Forgery.

154. As with the 2008 Directive, forgery is touched upon at some length by the 2014 Regulations, reg.23 of which provides, *inter alia*, as follows:

> *"(1) A person shall not forge or utter knowing it to be forged a certificate, an endorsement, a dispensation, a document or other thing required by these Regulations.*
>
> *(2) A person shall not alter with intent to defraud or deceive, or utter knowing it to be so altered a certificate, an endorsement, a dispensation, a document or other thing required by these Regulations.*
>
> [Again, thanks to the definition of "*certificate*" in reg.2(1), the various references to a certificate in reg.23 do not just apply to certificates issued by the Minister but also to any certificate recognised by the Minister under reg.12.]
>
> *…*
>
> *(5) A person who contravenes this Regulation commits an offence."*

g. Powers of Authorised Officers.

155. Regulation 24 endows *'authorised officers'* with various powers. It is not necessary to recite them. It suffices to note that the various powers so endowed fall to be exercised in relation to an Irish ship, *i.e.* they are not powers that are exercisable in relation to a training institution.

h. Penalties and Fixed Payment Notices.

156. Under reg.25, under the heading "*Penalties*", "*A person who commits an offence under these Regulations is liable, on summary conviction, to a class A fine*." By way of alternative to the straightforward commencement of criminal proceedings, reg.26 establishes the 'fixed payment notice' process whereby, per reg.26(1), if "*an authorised officer has reasonable grounds for believing that a person is committing or has committed an offence under Regulation 5(2), 10(23), 16(6), 17(3), 20(2), 23(5) or 24(4) and is liable to summary prosecution in respect thereof, the authorised officer may give to the person a notice in writing*", in effect giving the recipient the option of making a payment or facing prosecution.

157. It is worth recalling what the provisions mentioned in reg.26(1) are concerned with: reg.5(2) (prohibition on serving on board in certain circumstances); reg.10(23) (non-retention of original certificate on-board ship where serving); reg.16(6) (responsibilities of companies); reg.17(3) (responsibilities of masters); reg.20(2) (non-return of suspended/cancelled certificate); reg.23(5) (forgery); and reg.24(4) (obstructing, *etc*., authorised officer). Thus, as can be seen, there is nothing in the fixed payment notice that deals with the obligations of training providers to keep up to their quality standards, or to make sure that the people who provide courses that the training providers have the necessary qualifications to carry out those courses. That this is so has a certain resonance where, in the affidavit evidence before the court, Mr Hogan has pointed to the battery of steps that can be taken under the 2014 Regulations. Undoubtedly there is much that the State can do under the 2014 Regulations. However, the 2014 Regulations do not purport to create any offence for a training provider who fails to live up to standard. The way in which such behaviour falls to be addressed under the 2014 regulations is exactly the same way in which the MCA falls to deal with such non-compliance in Ireland, *viz*. through withdrawal of authorisation.

XIV

Merchant Shipping (Certification of Seamen) Act 1979

158. The long title of the Act of 1979 describes it as being, *inter alia*, "*An Act to Provide for the Issue by the Minister…of Certificates of Competency to Certain categories of Seamen…and to Provide for Other Matters Connected with the Above Matters*". Some emphasis has been placed by the State on this statutory scheme. However, the court does not see that the Act makes any difference to the scheme of the European legislation (as implemented) that is herein considered. Once, under the scheme established by the 2008 Directive, as amended, the relevant authorising authority makes sure that the approved training provider is living up to the standards required by the directive, as amended, that is all that is required. The penalty required by Art.29 of the 2008 Directive (as inserted by Art.1(25) of the 2008 Directive) "*must be effective, proportionate and dissuasive*" and, as touched upon previously above, the ability to withdraw a certificate is about as dissuasive a penalty as can be conceived of in the context of the ability of training providers to continue to provide training. The Act is short, comprising 15 sections, with the 'meat' of the Act set out at ss.3-12 of same, none of which assist the respondents in making the argument that a member state needs to have statutory penalties in place to satisfy the scheme established by and pursuant to the European legislative scheme herein considered.

XV

Previous Interaction between Parties

159. The court turns now to consider the (extensive) interaction between the applicants and the respondents prior to the commencement of the within proceedings, which proceedings, the respondents emphasised more than once, were brought very much as a last resort. A consideration of this documentation is relevant, *inter alia*, (i) to the argument made by the respondents that (a) the within proceedings have been commenced late, (b) the certificates in issue in the within proceedings are not certificates that come within the regime established by and under the European law regime herein considered, and (c) that the impugned Marine Notice was nothing more than a general notice of no particular application to the applicants, and (ii) to the European Union law obligations contended by the applicants to have been breached by the respondents, *viz*. the obligations of transparency and good administration, and the doctrine of legitimate expectation. The key documents presenting are identified and considered hereafter.

(1) E-mail of 25th April, 2016, from MSO to Donegal Seamanship Centre.

160. The Donegal Seamanship Centre is also authorised by the MCA and it appears that there is a certain amount of legitimate interaction between the Donegal Seamanship Centre and SNO in what is a small market. The e-mail states, *inter alia*, as follows:

> *"DTTAS* [*i.e.* the Department] *has requested information from the MCA in connection with granting of approval to course providers in this jurisdiction and is still awaiting clarification in this regard.*
>
> *Until such clarification is received, recognition of all STCW certification (approved by the MCA), issued by Irish course providers, will be held in abeyance.*
>
> *You may wish to contact the MCA in this regard."*

161. Prior to receipt of this e-mail, the following events of relevance occurred vis-à-vis the applicants, the description that follows being extracted from the affidavit evidence of Mr Mowlds, the managing director of SNO:

> *"124. On 4 January 2016, Captain Roger Towner of MCA called the NMCI to explain that he had been contacted by the Department for Transport of the United Kingdom ('the UK Department for Transport') regarding a complaint it had received from Brian Hogan (the Chief Surveyor at the [Irish] Department) and Captain Towner requested that James O'Byrne (General Manager, SNO) and I (acting in my capacity as Managing Director of SNO) travel to the UK to meet with him as soon as possible.*
>
> 125. *On 8 January 2016, James O'Byrne and I met with Captain Towner in Southampton* [the court cannot but note in passing how responsive the SNO was to the MCA's request] *and were briefed fully on the meeting of the UK Department for Transport with the Irish authorities, including being shown correspondence between the Department and the UK Department for Transport and minutes of a meeting between the UK Department for Transport and the* [Irish]

Department.

126. *At this meeting between the UK Department for Transport and the* [Irish] *Department, it seems that Mr Hogan had asserted that MCA approval for 'his' NMCI was an infringement of Irish sovereignty and that he viewed it as the NMCI 'flagging out'. He had apparently been extremely annoyed and demanded that the MCA withdraw the approval immediately.*

127. Mr O'Byrne and I pointed out that the NMCI, a constituent college of CIT, was an independent college with a remit to provide education and training to both Irish and non-Irish seafarers and to engage in research. It was also noted that the NMCI does not report to the Department and that it had the right to seek approval both nationally and internationally, and that it actually held approvals from Liberia, the Marshall Islands, the American Bureau of Shipping, the MCA and OPITO….It was also noted that SNO provided MCA approved refresher training to Irish, British, other European and non-European mariners. In addition, it was noted that withdrawal of the MCA Approval would cause very significant if not irretrievable damage to SNO, that it would lose key customers, with consequential loss of jobs, and that there would be very significant damage to its international standing, as well as to the local economy in Cork.

128. *Shortly after this meeting, on 4 February 2016, I met the Assistant Secretary of the Department, Deirdre O'Keeffe, in the Department's offices. When I approached Ms O'Keeffe regarding the meeting between the* [Irish] *Department and the UK Department for Transport, she denied having met with the UK Department…until I explained to her that I had seen the minutes of that meeting. When I suggested that a further meeting should be arranged between the British and Irish Authorities which the NCI would attend, Ms O'Keeffe refused to arrange such a meeting*."

162. Returning, however, to the text of the MSO's e-mail of 25th April, 2016, that was the first formal communication from the MSO that there was a problem with the MCA authorisation and that approval of MCA-approved STCW documentation would, for the time being, be held in abeyance. Notably, given the position adopted by the respondents in the within proceedings that the position of the respondents has been their position (and known position) since 2008, it is notable that the e-mail of 25th April, 2016, does not say 'This is the longstanding position of the MSO'. If anything it suggests the contrary, in effect 'There may be a problem. We've contacted the MCA to seek clarification. Maybe you should contact them too.' That is not a message which bespeaks a longstanding and final view on the perceived issue(s) presenting.

(2) Letter of 8th June, 2016, from Cork Institute of Technology

to Department of Transport, *etc*.

163. Matters seem to have ratcheted up fairly quickly within Cork Institute of Technology ('CIT'). By 8th June, 2016, the President of CIT was writing to the Department seeking an urgent meeting concerning the 'holding in abeyance' stance that was being adopted by the MSO. That letter reads, *inter alia*, as follows:

"Re: Recognition by the competent authority of Ireland of certificates of proficiency issued under the authority of the Maritime and Coastguard Agency of the United Kingdom for 'refresher' training provided at the National Maritime College of Ireland.

…The National Maritime College of Ireland ('NMCI') is a constituent college of Cork Institute of Technology. The NMCI is a state of the art international maritime training centre and represents a significant ongoing State investment in maritime education and training.

I would like to arrange an urgent meeting with you and the Minister…to discuss the matter referenced above, which is of considerable importance to the Institute and the business of the NMCI.

…

Institute's Position

Pursuant to the above, it is the Institute's position that:

1. The MSO is clearly in breach of Regulation 12(1) of the 2014 Regulations….

2. The Minister…is obliged to recognise all certificates of proficiency issued by other Member States under the relevant directives…

3. The MSO cannot question the legal basis on which MCA has approved [SNO]…and that this course of action is contrary to EU law and [SNO's]…rights to engage in cross-border provision of services; and

4. The State has failed to properly transpose the relevant directives and [SNO]…may enforce those directives directly in the courts.

I hope that it is possible to resolve this matter urgently, and without recourse to legal process.

Accordingly, I would be obliged if you could revert with possible times and dates for a meeting. I am available to travel to Dublin along with other relevant senior management and advisors [next week]."

164. A number of points jump out from this letter. It bespeaks urgency. It has clearly been drafted with the benefit of legal advice and sets out the (to this day, continuing) view of the applicants as to the applicable law, and hopes for an amicable resolution of matters while raising the possibility of litigation in the event that a rapprochement is not achieved between the parties.

(3) Letter of 16th June, 2016, from Dr O'Keeffe,

the Director of the Irish Maritime Administration, to CIT.

165. This letter reads, *inter alia*, as follows:

"Your letter raises a number of complex legal and jurisdictional issues, involving a number of States, which we will need to consider fully before replying in more detail.

I will revert again when we have further clarified these matters."

166. Notably, given the position adopted by the respondents in the within proceedings that the position of the respondents has been their position (and known position) since 2008, it is notable that the letter of 16th June, 2016, does not say 'We refer to the longstanding position of the MSO. With respect, you are wrong in your interpretation of the law.' If anything it suggests that the Department does not have a final view and needs to consider the issues presenting before it could even contemplate meeting with CIT. That is not a message which bespeaks a longstanding and final view on the perceived issue(s) presenting.

(4) Letter of 23rd June, 2016 from CIT to MSO.

167. This letter from the President of CIT reads, *inter alia*, as follows:

"I appreciate that the Department needs to consider the legal issues arising. Equally, you will appreciate that this is a very serious matter for CIT and for [SNO]*…which must be resolved urgently. It was for this reason that we have requested an urgent meeting with the Minister….*

It is imperative that this matter be resolved within the next two weeks. If it is not resolved, then CIT and [SNO]*…will have to take such steps as they are advised to take to protect their interests."*

168. Again this letter bespeaks urgency and raises the possibility of litigation in the event that a rapprochement is not achieved between the parties.

(5) E-mail of 30th June, 2016, from Department official to Seafarer #1 seeking recognition of MCA-approved certificate obtained consequent upon attendance at course in Ireland.

169. This e-mail reads, *inter alia*, as follows:

"The examiner has informed me that you submitted two MCA-approved certificates…issued by an Irish Course provider and completed in Ireland.

DTTAS has requested information from the MCA in connection of granting of approval to course providers in this jurisdiction and is still awaiting a clarification in this regard.

Until such clarification is received from the MCA, your application for certification has been held in abeyance.

You may wish to discuss this with his course provider.

You might also consider contacting the MCA in the UK with regard to your qualification for a UK Able Seafarers certificate of proficiency on foot of your recent qualifications."

(6) E-mail of 1st July, 2016, from Seafarer #2 to NMCI headed

"Re: Dept of Transport not accepting MCA certs".

170. This e-mail reads, *inter alia*, as follows:

"*I went into the Dept of Transport…this morning to revalidate my COC* [certificate of competency] *and took all of my documents needed for the renewal. I showed them my NMCI STCW refresher courses that I recently completed in NMCI and was told I will have a problem with them as they were not approved courses as per the DOT. I was then told that I should e-mail a Harvey Menzez to query these as he is the person that approves courses In Ireland. He said that my ticket will be validated once processed but I will be applying for my Chiefs licence and exams in September and wanted to make sure that these would be valid and also that they are an STCW requirement from January 2017 onwards. Also the matter that having an Irish licence and courses completed in Ireland but not approved by the Irish DOT just doesn't make sense when they are in fact UK MCA approved. I just wanted clarification in case this causes any hassle when I'm away at sea with authorities or the likes.*

As you can imagine I was a bit shocked at this as I've done all my training with NMCI since starting as a cadet there in 2004 and never had an issue. I queried the fact that they were STCW approved but was told they were never approved courses by the DOT which I fail to see how they can't be accepted if they are internationally STCW approved."

171. The very real concerns of Seafarer #2 ring through the above-quoted text.

(7) E-mail of 4th July, 2016, from Seafarer #2 to NMCI and Department headed "Important query Re: NCI/Department of Transport STCW course certification".

172. A more detailed e-mail of complaint issued from Seafarer #2 on 4th July, 2016. The complaint is illuminating because it shows the predicament that the NCI has been placed in by virtue of the Department declining to recognise certificates issued under the authority of the MCA. This e-mail reads, *inter alia*, as follows:

"*My specific query relates to the recent Standards of Training Certification and Watch-keeping ('STCW') refresher courses that I completed in the NMCI on 31 May, 1 June, 7 June and 8 June. I researched all of the requirements needed to ensure compliance with new STCW requirements effective from January 2017 onwards and was being proactive by applying to do these in good time. I paid €810 to do these courses and obtained all of the corresponding certificates. I consulted the NMCI website…where it clearly states that the training course was approved by the* [MCA]*…and the lecturer during the course told us that because the courses were MCA-approved, they would be automatically approved by the equivalent body in Ireland, the Department of Transport.*

You cannot begin to imagine my disappointment when, during the course of renewing my Certificate of Competency

licence, I was informed by an individual in the Mercantile Marine Office that the certificates I produced (having earned them at NMCI courses just weeks previously) were ineffective due to the fact that NMCI had not obtained the necessary certifications from the Department before offering these courses. There is only one maritime college in Ireland and I have completed the vast majority of my training here since I started my training as a cadet so it seems incredible to me that NMCI would offer a course that would not be approved by the Department of Transport. Please bear in mind these courses are STCW approved and the STCW is the main governing body that approves all such courses worldwide. I presumed that if NMCI, the only maritime college in Ireland, were offering these STCW courses, that they would of course be approved by the Department of Transport, the Irish governing body.

When I called into the office in Leeson Lane, I was told…to contact one of the examiners…to ask about the approval/certification of these courses offered by NMCI – respectfully, that is not my responsibility. I am not personally responsible for ensuring that NMCI have obtained the proper certifications for their courses – I expect that to be done as a matter of course before any such courses are convened and certificates are issued.

I'm copying the Department…".

173. Apart from the natural sympathy that one would have for Seafarer #2 and the predicament in which he found himself, one can immediately see the consequences for the commercial reputations of the applicants on reading the above.

(8) Letter of 5th July, 2016, from O'Flynn Exhams, Solicitors

(acting for the applicants) to Minister for Transport, etc.

174. On 5th July, O'Flynn Exhams wrote to the Minister for Transport, *etc*. seeking his "*urgent intervention in relation to an issue which has very serious implications for the National Maritime College of Ireland, in excess of 400 mariners and the availability of appropriate training facilities for Irish mariners generally. We hope that you will intervene in order to prevent what will otherwise become a very serious crisis."* There follows a detailed analysis of the applicable facts and an account of the applicable law that accords fully with that adopted by the applicants in the course of the within proceedings. Indeed, the court cannot but note in passing that the applicable law is so carefully and comprehensively addressed by O'Flynn Exhams that if the Department stood possessed of some alternative view of the law (whether since 2008 or otherwise) it ought, not just as a matter of courtesy, but in order to comply with the European law requirements (considered later below) of transparency and good administration, to have reverted with a proper and full response. Regrettably, it did not.

(9) E-mail of 11th July, 2016, from SNO to MSO.

175. Following the O'Flynn Exhams letter of 5th July, a 'holding' e-mail of 7th July issued from the Minister's private secretary on 7th July, acknowledging receipt of the letter of 5th July and promising that "A further reply will issue to you as soon as possible." On 11th July, one finds an e-mail issuing from SNO to the MSO identifying the topics to be discussed at a meeting to be held the following day, perhaps (perhaps even probably) in response to the letter of the 5th. That e-mail states, *inter alia*, as follows:

"For the sake of good order, please find below our topics for discussion at our meeting with you tomorrow:

☐ *Clarification on the holding in abeyance of MCA-approved Certificates of Proficiency undertaken in Ireland.*

☐ *Recognition by the Irish Authorities of the requirement for the NMCI/SNO to hold multiple flag state approvals to enable us to best service the needs of the Irish and International maritime community and customers.*

☐ *Can you clarify why has this issue has only recently become an issue given the MSO have accepted training by MCA approved training centres based in Ireland for many years? - Is this as a direct reaction to the NMCI/SNO securing other flag approvals and furthermore, if so, do you believe this to be discriminatory?*

☐ *Should SNO seek MSO approvals for Certificates of Proficiency, are you in a position to provide clear guidance as flag administration, on course outline, course pre-requisites and entry requirements….*

☐ *Can you confirm that the MSO have never approved a training provider outside of Ireland?"*

(10) (Disputed) Minutes of Meeting of 12th July, 2016.

176. The court has had exhibited before it the minutes of the meeting of 12th July, as prepared by the applicants. The substance of these minutes has been disputed by the respondents, at least in the course of these proceedings. However, they have not put before the court any notes that they 'jotted down' in the course of the meeting, let alone some more formal document that they believe to represent more accurately what transpired at the meeting of the 12th. And were there such notes/minutes, they ought by now to have been produced, consistent with the following observations of the court in *Murtagh v. Kilrane and ors* [2017] IEHC 384, para. 25, especially points (1)-(2) and (5)-(8) (both inclusive):

"It appears to the court that the following principles can be gleaned from the foregoing analysis:

(1) In judicial review proceedings a respondent should disclose to the court all the materials in its possession which are relevant to the decision sought to be impugned; this duty does not require the respondents to disclose material in respect of which in a discovery process they would be entitled to claim privilege…

(2) *Save as referred to in* O'Neill [v. *Governor of Castlerea Prison* [2004] 1 I.R. 298], *there is no duty of general disclosure in judicial review proceedings. There is, however, a very high duty on public authority respondents to assist the court with full and accurate explanations of all the facts relevant to the issue/s the court must decide…*

(3) The said duty (often referred to as a 'duty of candour') springs in part from the fact that the modern development of judicial review has created a new relationship between the courts and public bodies, being one of partnership based on the common aim of maintaining the highest standards of public administration…

(4) The object of a public body in judicial review proceedings is not to win litigation at all costs but to assist the court in reaching the correct result and thereby to improve standards in public administration…

(5) Proceedings for judicial review should not be conducted in the same manner as hard-fought commercial litigation. A respondent authority owes a duty to the court to cooperate and to make candid disclosure, by way of affidavit, of the relevant facts and (so far as they are not apparent from contemporaneous documents which have been disclosed) the reasoning behind the decision challenged in the judicial review proceedings…

(6) The notion that it is not for a public body to make out an applicant's case for him is only partially correct. It is for the applicant to satisfy the court of his entitlement to judicial review and it is for the respondent to resist his application, if it considers it unjustified. But it is a process which falls to be conducted with all the cards face upwards on the table and the vast majority of the cards will start in the public body's hands…

(7) Put shortly, the duty of candour which rests on a respondent in judicial review proceedings to make full and fair disclosure of relevant material embraces (1) due diligence in investigating what material is available, (2) disclosure which is relevant or assists the claimant, including on some as yet un-pleaded ground, and (possibly) (3) disclosure at the permission stage if permission is resisted ('possibly' because point (3) is not at issue in the within application)…

(8) The purpose of disclosure is to explain the full facts and reasoning underlying the decision challenged, and to disclose relevant documents, unless, in the particular circumstances of the case, other factors, including those which may fall short of public interest immunity, may exclude their disclosure…

(9) The duty of candour is largely self-policing (which is why, in the neighbouring jurisdiction, anxious concern is understandably expressed if and when it transpires that public bodies have failed properly to discharge the duty arising)."

177. The only minutes before the court are the version drafted by the applicants. There is nothing in the evidence to suggest that the applicants are in the habit of falsifying minutes, though, without taking from that observation, the minutes must of course be read as the view of events as (honestly) perceived and understood by the applicants.

178. Paragraph 3 of the minutes reads as follows:

"*DOK* [Dr O'Keeffe] *made the MSO position very clear and said that no certificate under SNO has been held in abeyance, as generally the refresher issue doesn't arise until 2017. But they said that they had been upfront with anybody who has come in to them to renew their licence. The MSO have told customers that they do have a concern which they have raised with their UK Colleagues and that there MAY be an issue. She said to be clear, this applies to all course providers who might potentially have a relationship with the MCA and just not SNO."*

179. What the above minute suggests, and this is consistent with the wider slew of correspondence before the court, is that, contrary to the suggestion that is made in the respondents' affidavits and submissions, it is pointedly not the case that the MSO has taken a certain and definite view since 2008 of the European law regime and how it operates in practice. In the above-quoted text Dr O'Keeffe, of the IMA, is minuted as saying that "*that they* [the MSO]…*and that there MAY be an issue*", not that there is an issue.

180. The minutes continue:

"DOK: They have been in touch with their UK colleagues and have sought to have them answer the question that they have put to them which is; 'What is the statutory basis for the UK minister to approving statutory programmes in any course provider in Ireland?' DOK said that they are waiting on an answer to this question. It may have arrived in e-mail during the course of the meeting but had not yet arrived."

181. The minutes continue:

"JOB [of SNO] *asked again about the holding in abeyance of refresher training certificates and was told again by DOK and BH [Mr Hogan] that this is not happening. JOB said he had written correspondence from HM [of the MSO] stating that certificates are being held in abeyance. BH said not in relation to SNO certificates, and was told it was directly in relation to SNO certificates. SNO outlined they have correspondence by e-mail from* [a named seafarer]...*detailing the holding in abeyance of his certificates.*

DOK and BH both stated that is not the case and maybe what HM meant to say is that they would hold them if the issue wasn't resolved, SNO insisted this was the case and the MSO advised that they would check this issue out. JOB offered to send on the particular correspondence. Mr. Hogan said that this is generally not the issue but there may be one or two cases on the margin."

182. It is difficult to reconcile what the MSO had to say in the above regard when one has regard to the correspondence from Seafarer #1 and Seafarer #2 considered previously above.

183. The minutes continue:

"DOS [of SNO] *asked exactly what is the issue with SNO, as the MSO have recognised other training providers in Killybegs, Galway and Dublin until SNO received their accreditation, DOK said that they had become aware last December [that] the SNO had received approval from the MCA for STCW refresher training. They were concerned that the UK Minister for Transport does not have authority or jurisdiction to approve programmes in an Irish College. Their read of the legislation would seem to indicate that those programmes are only approved for the UK and its territories. The MSO said that they could not approve a certification if they are unsure of its validity. The MSO said that this issue initially arose in 2008 as the then Head of the NMCI was at that time trying to bring in the MCA for course accreditation but the MSO never received an answer from the MCA. The question was raised again over the years and was raised again in 2012, at which time the MCA advised that their position was, if approached by the NMCI they would direct the college to the MSO.*

This issue only arose again when the MSO became aware last December that the NMCI had received approval from the MCA to run these courses. On the question of MCA approvals (from Irish providers) being recognized up until last year in Ireland, it was put to BH [of MSO] *on a number of times that they have recognized in the past - he did not deny or confirm but said it didn't matter as there was a new policy in place - this was not referenced further. A copy of this policy was not requested at this time."*

184. What comes across most clearly from the above is that there was no settled view on the part of the respondents as to the position arising at law. At most, they were concerned that there might be some sort of legislative over-reach on the part of the United Kingdom authorities and had 'reached out' to their United Kingdom counterparts to get a better understanding of why the MCA thought it could act as it had, without (it seems) any success.

185. The minutes continue:

> *"BH* [of MSO] *said under international law and under the STCW Convention, the convention has to be transposed into domestic law and there is no meaning if it's not transposed into domestic law and each government then has to give itself its own powers to approve. The MCA certification doesn't specify which piece of law that they are approved under.*
>
> *…*
>
> *DOS* [of SNO] *asked BH have they previous to last December recognised certification from the other MCA approved course providers in Ireland. BH & DOK said that they may have recognised them in the past but said that they are implementing a new policy for not recognising the approvals.*
>
> *CM* [of SNO] asks the MSO have they ever approved a training provider for STCW courses outside of this State. The MSO said no initially, CM asked again, BH then said yes they had, but they were under different circumstances and DOS put it to BH this action was targeted against SNO, he did not reply but was defended by [DOK]…who said it was a serious allegation, DOS admitted it was serious but believed it to be true.
>
> *…*
>
> *CM asked then do the MSO accept MCA certificates of proficiency from people trained outside of Ireland. DOK said if the cert is validly awarded in another country then the MSO observe their international obligations to recognise it.*
>
> *CM asked, for example, if an Irish person was approved in an MCA training facility in France would you accept it? DOK said if the French government confirms that is a validly awarded certificate but would have to have the French stamp on it, they would accept it."*

186. The court cannot but note in passing that this last-minuted contribution appears to sit rather askance with the approach taken by the MSO in relation to an MCA-approved course (at least one done in Ireland).

187. The minutes continue:

> *"CM said that the vast majority of SNO customers are non-Irish and it is standard practice to* [obtain] *multiple flag state approval, the UK colleges and training providers all hold multiple flag states. The question that the MSO are posing to the British is in effect how they can operate outside Britain when they have approved training providers all over the world as asked by their customers. SNO customers have asked them to gain this MCA approval, they have secured it and now what is happening is 400 mariners livelihoods are being called into question.*
>
> *MMMG* [Mr Michael McGrath, TD (listed as having attended with SNO)] *asked for certainty as quickly as possible for the 400 mariners already trained and to have their certificates recognised before January 2017….*
>
> *DOK says that they will have to hold this issue until they get clarification from the UK.*
>
> *MMMG said that what would be helpful would be to take a break and for DOK [to] double check and see if any correspondence has come in from the UK.*
>
> *…*
>
> [There is a break in the meeting which then resumes. (No correspondence had been received).]
>
> *DOK stated that if the letter* [then awaited from the United Kingdom] *is acceptable to the MSO, then the 400 get approved and everything is good. If it's either of the others then she felt that there would be…a difficult situation. 400 was an estimate figure and no date or limit was agreed except said she would not like it '…to be 800'."*

188. Again, it is apparent that the MSO's view as to any over-reach or otherwise on the part of the MCA was by no means settled; in truth, it seems that the IMA was all but hoping that there was an easy and complete answer to such concerns as were presenting in its mind, and contemplated that there might well be such an answer.

189. The minutes continue:

> *If the letter didn't satisfy the MSO DOK said that the…MSO was committed to finding a solution but there had to be a line drawn under the 400 and this number could not increase by another 400…*
>
> *The MSO suggested that SNO make an application to the MSO for approval for the refresher course and this would be dealt with immediately. This was welcomed by SNO…*
>
> *The MSO stated that they would have to look at the difference between the MCA courses and the MSO and if there was a gap between the two that they would need SNO to work with them on a way to fill that gap. SNO stated several times that there would be no gap. The courses were identical and the NMCI course provisionally approved was identical. This issue was returned to several times. It was made clear that both the NMCI & SNO followed IMO model courses and BH agreed to this being acceptable…*
>
> *CM stated that SNO would still retain its MCA approval for its clients but would be happy to be in a position to offer MSO approved courses for Irish CoPs* [certificates of proficiency]."

(11) E-mail exchange of 13th and 15th July, 2016.

190. There appears to have been a certain want of accord on the part of both sides to the meeting of 12th July as to what in fact had been agreed at that meeting. It does not appear to the court that there is anything unusual in the fact that this was so. It is a not uncommon experience in life for two parties, both acting in good faith, to walk away from a meeting with completely different perceptions as to what has been agreed at that meeting. Thus on 13th July, 2016, Dr O'Keeffe e-mailed the SNO outlining what she understood to be the "*next steps*" to be taken following the previous day's meeting, these being:

> "☐ *SNO will make an application for the approval of the relevant programmes to this Department/MSO*
>
> ☐ *MSO will consider this application on an urgency basis with a view to approval*
>
> ☐ *All future courses will be provided on the basis of the MSO approval and all certificates will be approved as Irish certificates by this Department/MSO."*

191. This e-mail met with a, not un-robust, rejoinder by way of e-mail of 15th July, 2016, from SNO to the Department, which e-mail stated, inter alia, as follows:

> *"Thank you again for agreeing to meet with us last Tuesday and for tabling possible solutions to this grave situation, to which we are fully committed to resolving. We have a concern however that your e-mail does not entirely reflect what was agreed between us at that meeting.*
>
> > ☐ *Our position is and always has been that you must recognise certificates issued under the authority of the MCA. Your failure to recognise those certificates is in breach of EU law.*
> >
> > ☐ *We believe you may now have received correspondence from the UK Department of Transport which supports our repeated assertion that you cannot refuse to recognise the certificates issued under the authority of the MCA. We are formally requesting that…*[you] *share that correspondence with us.*
> >
> > ☐ *For the record, we did not agree that we have only provided MCA-approved refresher training to a 'maximum' quota of 400 seafarers. The figure of 400 is an approximate figure.*
> >
> > ☐ *Further, we have since been advised, we cannot disclose to the Department the personal details of over 400 seafarers you have requested. We have obligations under data protection law which prevents such disclosure.*
> >
> > ☐ *At our meeting it was agreed that SNO would apply for approval of the refresher training courses to the MSO and that you would consider those applications on an urgent basis. We made it clear that this is an entirely separate issue from the question of recognising MCA certificates.*
> >
> > ☐ *We made it clear that we agreed to seek this approval to offer seafarers a choice of refresher training. We most certainly did not agree that Irish seafarers would have to undergo MSO-approved training, This would be an unlawful discrimination on the basis of nationality. SNO will offer all seafarers the option of undertaking either the MCA-approved courses or the MSO approved courses. It will be a matter for each seafarer to choose which course he or she wishes to undertake. We fully expect however that Irish seafarers holding Irish CoCs* [certificates of competency] *will choose the MSO course option.*
> >
> > ☐ *We also note from our meeting that the MSO recognised MCA approved certs of proficiency from other Irish training centres up until Dec 2015. It was stated that the MSO changed their policy in this regard when they found out that…*[SNO] *had received MCA approval. We formally request a copy of this policy for our records.*
> >
> > ☐ *We remain available to meet with you to attempt to resolve this matter to protect the livelihoods of seafarers and the continued employment of staff at the NMCI."*

192. The court's reading of the foregoing is that the meeting of the 12th did not achieve a great deal, that SNO was prepared, to use an Irish term, to *'plámás'* the MSO to some extent, but that in no way was it backing down on its view of the law, as outlined, *inter alia*, in its letter of 8th June, 2016, which, as it happens, is the view of the law that it has urged upon the court in the within proceedings, and which also happens to be a correct understanding of the applicable law.

(12) E-mail of 15th July, 2016, from Dr O'Keeffe to SNO.

193. On 15th July, Dr O'Keeffe e-mailed SNO, stating, *inter alia*, as follows:

> *"I can confirm that we received this morning (15 July 2016) a letter from the Maritime and Coastguard Agency in relation to the issues under discussion.*
>
> *The letter provides a legal interpretation of a number of international conventions and directives and we have referred it to our legal advisors.*
>
> *We will be in touch with you again when their advice has been received."*

194. This is not the e-mail of a Department that is convinced of the correctness of any particular legal position.

(13) E-mail of 27th July, 2016 from SNO to Dr O'Keeffe and reply e-mail.

195. On 27th July, 2016, SNO sent a further comprehensive e-mail to the Department stating, *inter alia*, that "*Despite the urgency of this matter, and despite the unacceptable uncertainty that has been created for the 400 seafarers concerned, we are very concerned that we have yet to hear from you…that the Minister will recognise the certificates of proficiency issued to the 400 seafarers concerned". The e-mail further requests that the Department "confirm by return that the Minister will: (1) recognise the* [said] *certificates of proficiency…and…(2) continue to recognise certificates of proficiency issued by* [SNO]*…under the authority of the MCA*". The e-mail also attaches an e-mail received by SNO from an official of the European Commission, and considered later below, that supports the legal position that had been (and still is) adopted by the SNO. Later on 27th July, Dr O'Keeffe sent a short e-mail stating that "*As I said in my email of 15 July 2016, we have referred this issue to our legal advisor. We will be in touch with you again when the advice has been received."*

(14) Letter of 27th July, 2016, from O'Flynn Exhams to Minister of Transport, etc.

196. A letter of 27th July, 2016, from O'Flynn Exhams directly to the Minister of Transport, *etc*., states, *inter alia*, that "*We note from the Dáil Debates on 13 July 2016 that you may be under the impression that the matter has been resolved. Regrettably, that is not the correct position*", rehearses certain of the legal position being adopted by the applicants and raises again the prospect of legal proceedings, though expressing the hope that an answer may yet issue from the Department which obviates the need for such proceedings. "*It cannot be in the interests of the State to allow a breach of European law to continue…and we therefore hope that, as sought by our clients in [an]…e-mail of today to Ms O'Keeffe, confirmation will be provided by return that the certificates issued under the authority of the MAC will be recognised in accordance with European law.*"

(15) E-mail of 28th July, 2016, from SNO to Dr O'Keeffe.

197. On 28th July, 2016, an e-mail issued from the SNO to Dr O'Keeffe, it appears in reply to Dr O'Keeffe's e-mail, the tone of the reply e-mail being rather exasperated, stating, *inter alia*, as follows:

> "*Your response is completely unacceptable in circumstances where 400 seafarers are affected by this uncertainty.*
>
> *We cannot understand how it has not been possible for you to obtain legal advice in the period since we raised this issue with you.*
>
> *In light of the seriousness of the matter and in light of the obligations that we owe to the seafarers who have attended the proficiency courses, you have left us with no alternative but to take steps as we may be advised in order to protect our rights (which may include court proceedings and/or a complaint to the European Commission).*"

198. It was suggested at hearing that this letter involves a clear acknowledgement that the SNO could have commenced court proceedings as of 28th July and elected not to do so. The court does not read the e-mail so. It simply says 'We will take whatever steps we are advised to take' and they may have been advised that it was premature to sue, for all the court knows. But regardless of what they were advised, it seems to the court but to flag that SNO's patience has reached its thinnest level and that a response is required; and the response that issued from the Department the following day suggested that real progress was being made (and to the extent that there was advancement, the need for litigation commensurately receded).

(16) E-mails of 29th July, 2016 from Dr O'Keeffe to SNO.

199. The just-mentioned correspondence came in the form of two e-mails of 29th July from Dr O'Keeffe to SNO, which e-mails stated, *inter alia*, as follows:

> E-mail #1
>
> "*I promised to come back to you when we'd received our legal advice and I can confirm that we have received it.*
>
> *However, it advises, inter alia, further contact with the Department for Transport in London.*
>
> *We have now contacted them and have asked for an urgent response.*
>
> *I will be in touch again when this has been received.*
>
> *In the meantime, I understand that this Department/MSO has approved the relevant suite of STCW programmes for provision by SNO.*
>
> *However, we are still awaiting from SNO details of the programmes provided to approximately 400 seafarers in the first months of 2016 so that, as we agreed on 12 July 2016, we can work with you with a view to approving the issue of replacement Irish certificates to these seafarers. On our side, we will commit to dealing with this issue with all possible speed.*"

200. The court must admit to being somewhat surprised by the emphasis that was being placed in all of this as to what the MCA made of its obligations under English law. The Department was being asked to arrive at a conclusion as to its own position under Irish law and it is a feature of mutual recognition that a recognising member state does not look behind the diploma in respect of which recognition is being extended to the powers of the other member state; it is a system that ultimately reposes on that trust which exists between individual member states as fellow members of a supranational community.

201. In her second e-mail of 29th July, Dr O'Keeffe reiterated that she was awaiting the detail on "*the approximately 400 seafarers….so that, as agreed on 12 July, we can work with you with a view to approving the issue of these certificates to these seafarers".*

(17) E-mail of 2nd August, 2016, from SNO to Dr O'Keeffe.

(i) The Substance of the E-mail.

202. On 2nd August, 2016, a further e-mail issued from SNO complaining about delay and stating that none of the issues raised in the letter of 5th July, 2016, to the Minister. That e-mail states, *inter alia*:

> "*We did not reach any such agreement* [the agreement referred to in the last-quoted text above] *at our meeting in 12th July 2016. We have already addressed the suggestion made by you at that meeting that we disclose to you the personal details of the seafarers who have completed the MCA-approved courses with us so that you could consider issuing 'replacement' MSO approved certificates to those seafarers. We provided you with the reasons why that suggestion was not a solution* **in my e-mail of 15th July 2016***: we cannot disclose those details to you under data protection law; and, there is no legal basis whatsoever for your suggestion that you would issue 'replacement' MSO-approved certificates to those individuals. I cannot understand why you would again seek disclosure of this information and can only presume that your e-mail is designed to further frustrate and delay your recognition of the certificates.*
>
> *…*

You confirmed at our meeting on 12 July 2016 that you recognised MCA-approved certificates of proficiency from Irish training centres up until December 2015, that is, before we received MCA approval. You told us that you had apparently changed your policy in December 2015 when you found out that we had obtained MCA approval. ***You have refused to provide us with a copy of that policy."***

203. There is no denial of the fact that up to December 2015 the State had been accepting certificates of proficiency or certificates generally issued under the authority of the MCA by other training providers in Ireland. There was suggestion at hearing that if this had occurred it was in error, though this is hard to tally with certain of the documentation that was released from the United Kingdom's Department for Transport to the applicants under the United Kingdom's freedom of information legislation, to which the court now turns.

(ii) Certain Documentation from the United Kingdom.

a. Introduction.

204. It is useful for the court to pause at this juncture to consider certain documentation that was obtained by the applicants from the United Kingdom's Department for Transport under that jurisdiction's equivalent of our freedom of information legislation.

b. E-mail of 23rd December, 2015 sent within the United Kingdom's Department

for Transport from Redacted Person to Redacted Persons.

205. The above-mentioned e-mail states, *inter alia*, as follows:

"*It might be helpful for me to give a bit more information on* **Item 4 - STCW courses approvals***, however. Though they were duly diplomatic it, it was evident that the* [Irish Department of Transport, etc. and the Irish Coast Guard]*…does not welcome the fact that the National Maritime College of Ireland proudly advertises that its STCW courses have been approved by the UK's MCA and would like it to stop. Aside from the perceived snub they feel that their only maritime college has 'flagged out', they feel that there is a practical point that they should be able to grant and withdraw (if need be) approval for courses offered in Ireland. We said we understood their concern and would take it away.*

As this was clearly something they felt strongly about, I'd be grateful if MCA could consider this matter and the practicalities of letting IRCG [the Irish Coast Guard] *decide whether to approve the courses going forward instead of the MCA."*

206. It is clear from the above that the decided impression of the United Kingdom's Department for Transport was that the prompt for the interaction with the MCA was the "*perceived snub*" inherent in the fact "*that the National Maritime College of Ireland proudly advertises that its STCW courses have been approved by the UK's MCA*". Though it has no bearing on the outcome of the within judgment, the court must admit that it does not see how this could be perceived as a snub: one would have thought it a matter for pride that the NMCI was considered to be a facility competent to offer MCA-approved courses in a world where MCA standards are something of a 'gold standard' of the maritime industry.

(18) E-mail of 5th August, 2016, from IMA to SNO.

207. A personal data protection concern was considered to present regarding the release by the applicants to the Department/MSO of individual seafarer details. In her e-mail of 5th August, 2016, Dr O'Keeffe, *inter alia*, acknowledged this issue and stated, as follows:

"I can, therefore, confirm that the only information required at this point is the detail of the programmes provided, as set out above. On receipt of this we will, as I said previously, work as quickly as possible, with you and, on application by the individual seafarers, with them, with a view to issuing replacement Irish certificates to the seafarers concerned."

(19) E-mail of 5th August, 2016, from SNO to IMA.

208. The above-mentioned e-mail drew a firm response from SNO, which stated, *inter alia*, as follows in an e-mail sent later on 5th August:

"1. As we agreed at our meeting on the 12th of July, the 'update training' programme we submitted to the MSO and which has been approved, ***is the exact same programme we submitted and had approved by the MCA****.*

2. There is no legal basis for the issuance of 'replacement' Irish certificates, nor is there a requirement.

3. ***This matter will be brought to a swift and simple conclusion for all*** *if the MSO complies with European law and recognises the certificates issued. The European Commission (attached again) has advised you that you must recognise the certificates. The UK Department has advised you that you must recognise the certificates."*

(20) E-mail of 10th August, 2016, from IMA to SNO.

209. Surprisingly, given the tone and substance of the last-quoted e-mail, on 10th August, 2016, the Department issued an e-mail stating that "*The MSO is now proceeding to finalise the process for issuing replacement Irish certificates to the approximately 400 seafarers, as agreed at the meeting on 12 July 2016*". But whatever one makes of this e-mail, it does not affect the fact that it does not really matter what was agreed at the meeting of 12th July so far as the issuance of replacement Irish certificates was concerned. What matters was what the Department was required to do as a matter of Irish law.

(21) Letter of 28th September, 2016, from MSO to O'Flynn Exham, Solicitors.

210. By late-September 2017, the Department seems to have been little closer in arriving at a final view as to its legal obligations (and certainly the notion that it had a longstanding final view is not accepted by the court; it just cannot be accepted as true when one has regard to the substance of the correspondence considered by the court in this part of its judgment). A belated letter of reply to the letter of 5th July sent by O'Flynn Exhams to the Minister of Transport, *etc*., states, *inter alia*, as follows:

"*The matters which are the subject of your letter are also the subject of…ongoing correspondence by both letter and email involving several correspondents. These matters have also been the subject of a meeting with representatives of [SNO]…and others. Given the large volume of correspondence, there have inevitably been some overlaps….[*SNO] *has also been in correspondence with* [the]…*Secretary General of the Department, who responded…most recently on 5th August 2016*….[The] *Managing Director of* [SNO]…*has also been in correspondence with the Department in relation to this matter (and was also present at the meeting referred to above).*

The matter which lies at the heart of this correspondence has to do with the legal basis for the issue of certain statutory certifications, rather than the mutual recognition of same. This involves a number of legal and jurisdictional issues, involving a number of States, which have required consultation with the United Kingdom Department for Transport and United Kingdom Maritime and Coastguard Agency, as well as consultation with and consideration by this Department's legal advisors,

At present the deliberative process in this matter is ongoing [so no final view has been reached], *and a meeting with* [*inter alia*] *the President of the Cork Institute of Technology…(who is also involved in the correspondence) and Mr. Conor Mowlds [of SNO] has been arranged for 17th October 2016. Following that meeting, it is hoped that this correspondence can be concluded."*

211. The above-quoted is a relatively long letter but it gives no answer (none) to the issues raised in the letter of 5th July: they are still the subject of an ongoing "*deliberative process"* and, clearly, no decision has been made as regards the final view of the Department/MSO. There is, it is true, the beginnings in the letter of a distinction which it was sought to make at the hearing of the within application between the "*legal basis for the issue of certain statutory certifications…rather than the mutual recognition of same*". However, in truth all this goes to the one question (which is also the only question in which the applicants have ever truly been interested, *viz*. must Ireland recognise the certificates issuing from a MCA-authorised course done in Ireland or not? SNO has consistently insisted, by reference to comprehensive (and, as it happens, correct) legal reasoning that the State must recognise such certificates. As late as September, 2016, the Department had no considered view in this regard, being still engaged in a "*deliberative process*".

(22) Letter of 13th October, 2016, from O'Flynn Exhams to the MSO.

212. On 13th October, 2016, O'Flynn Exhams issued a further letter to the MSO which stated, *inter alia*, as follows:

"*Unfortunately our clients have not yet, despite the 'large volume' of correspondence, received any substantive response from the Minister or the* [Department]…*to any of the issues in our letters to the Minister*.

As it is now over three months since we first wrote to the Minister and in light of the fact that there are 400 seafarers adversely affected by the policy adopted by the…[Department] *to date, we await a response to the issues raised in our letters as a matter of urgency."*

(23) Letter of 27th October, 2016, from Cork Institute of Technology to IMA.

213. On 17th October, there was a meeting between the President of Cork Institute of Technology and Dr O'Keeffe. That yielded a letter of 27th October, 2016, from the President of the Institute which reads, *inter alia*, as follows:

"I now set out below a revision of the draft minute [of the meeting of the 17th] for your consideration. We have labelled the bullet points A, B and C for ease of reference.

Draft agreed minute

A. Persons who took the relevant programmes in the period up to and including 17 July 2016.

These persons, on application to the Department of Transport, Tourism and Sport, are subject to satisfactory assessment of all documentation, will be eligible for award of the appropriate Irish certification.

B. Persons who took the relevant programmes in the period 18 July 2016 to 23 October 2016 in education institutions in which the relevant programmes have been approved by the Department of Transport, Tourism and Sport.

These persons, on application to their own education institution, and subject to satisfactory assessment of all documentation, will be eligible for award of the appropriate Irish certification, award of which has been delegated to the relevant education institution.

C. With effect from 24 October 2016

☐ [Department]…*position: All the relevant statutory STCW programmes will be provided on the basis of the Department['s]… approval and all certificates will be approved as Irish certificates by the Department….*

☐ *CIT position: NMCI will promote* [Department]…*approved STCW courses to Irish- based seafarers. NMCI will continue to offer STCW cases under arrangements with multiple flag states.*

Obviously we still have a gap in position under item C.

CIT recognises that NMCI will primarily train officers to certificates of competency under the authority of DTTAS/MSO and no change is foreseen in this regard.

However, it is the case that there is significant market demand for NMCI and its joint venture company to deliver STCW training under arrangements with the Maritime and Coastguard Agency and with third countries. It is part of NMCI's mandate to satisfy this market demand.

I note your advice in relation to the potential risk posed….[H]owever CIT has clear legal advice from…Senior Counsel… that:

1. *The entry into and performance of such arrangements between the Maritime and Coastguard Agency and NMCI is protected by Article 56 of the* [TFEU]…(*freedom to provide services across the EU*),

2. There is no legal impediment to NMCI seeking approval from the competent authorities of EU Member States to deliver STCW training in Ireland, and

3. The Minister…has no legal function and no legal powers in relation to the arrangements between NMCI and the MCA.

This advice is consistent with the stated position of the European Commission in their communication dated 27 July 2016 which has been copied to you….

This being the case, NMCI and its joint venture company may continue to offer STCW training courses under arrangements With multiple flag states. NMCI is happy to promote…[Department-]*approved STCW courses to Irish based seafarers. Ultimately, the choice of course is a matter for the individual seafarer.*

I think it would be useful if we arranged another meeting and you might let me know when would be convenient for you.

If the Department has an alternative legal analysis to offer, perhaps you would communicate this in advance of our next meeting."

214. So just under four months on from the letter of 5th July, the applicants are seeking any "alternative legal analysis" of which the Department stands possessed.

(24) Letter of 28th November, 2016 from MSO to Cork Institute of Technology

215. A one-paragraph letter of reply to the just-quoted letter issued from the Department in on 28th November, 2016, stating:

"I refer to your letter of the 27 October, the contents of which have been noted. In the circumstances, the Department is seeking further, more formal legal advice, inter alia, about the next steps to be taken. I will revert to you when that advise has been received and considered."

216. So still no decided view on the part of the Department.

(25) E-mail of 5th December, 2016, from Department to SNO.

217. Matters took a somewhat surprising turn with the issuance of an e-mail of 5th December, 2016, from the Department to SNO. It is perhaps best to consider this e-mail by reference to the affidavit evidence of Mr Mowlds, whom, it will be recalled, is the managing director of SNO. He avers, *inter alia*, as follows:

"214. On 5 December 2016, [an officer]…*of the Department wrote to me, noting that:*

'*the following has been agreed* [sic] *between the Department and SNO…*

(A) Candidates presenting certificates of updated proficiency to this Department, in support of applications for certification/examination by this Department, where the certification was achieved in Ireland on or after the 18th July 2016, must present a Certificate of Updated Proficiency issued under the authority of the Department of Transport…

(B) Candidates presenting Certificates of Updated Proficiency carried out at SNO…in accordance with the Certificate of Approval of Training/Educational Programme issued by the Maritime and Coastguard Agency of the United Kingdom…from the date of issue of that approval on 21st January 2016 until 17th July 2016, to this Department in support of an application for certification/examination by this Department, will have those certificates recognised by this Department.'

215. While SNO did not regard this email as necessarily representing the Department's final position on approval of its certificates, given that it was aware that the Department was still taking legal advice, SNO and the NMCI were very reassured by this development and regarded it as being extremely positive. In particular, it appeared that SNO had resolved with the Department a mechanism to ensure that the certificates it had issued would be recognised and SNO and the NMCI reasonably expected that the difficulties they had experienced in this regard had now been resolved."

(26) Undated letter issued under accompanying e-mail of 19th December, 2016,

from Department of Transport, etc., to O'Flynn Exhams.

218. On 19th December, 2016, an e-mail issued from the Department, to which an undated letter to O'Flynn Exhams was attached and which referred back to the letter of 5th July. Again, the affidavit evidence of Mr Mowlds is of interest in this regard:

"[continuing from para. 215 (quoted above)]

215… In particular, it appeared that SNO had resolved with the Department a mechanism to ensure that the certificates it had issued would be recognised and SNO and the NMCI reasonably expected that the difficulties they had experienced in this regard had now been resolved.

216. This reasonable expectation was then reinforced when, on 19 December 2016, the Applicants' Solicitors received an

updated letter from the Department which purported to be a response to their correspondence months earlier, dated 5 July 2016. It merely referred to the 2014 Regulations and it stated that the Minister 'will and does authorise and issue certificates of competency to those persons who completed a course in a designated institution and passed the required exams.

217. The letter continued:

> *'Equally, the Minister recognises certificates issued in another Member State by that competent authority in accordance with the terms of the Directive or as required by European Union law. You have correctly pointed out that from 01 January 2017, seafarers who hold an appropriate* [certificate]*…will need to produce documentary evidence of having completed refresher training in certain competencies in order to hold a certificate of competency'.*

218. Again, this letter provided reassurance and SNO welcomed it.

219. Moreover, significantly, the letter did not signal or explain that a Marine Notice was proposed to be issued. On the contrary, the letter clearly suggested that recognition would be given to certificates issued under the terms of the Mutual Recognition Directive [i.e. the 2005 Directive] *and as required by EU law. In addition, no dispute was taken in the letter with SNO's understanding of EU law as set out in some detail in the letter from the Applicants' Solicitors to the Minister of 5 July 2016.*

220. In addition, during this time, SNO was aware that the Department had been accepting certificates because staff members and clients of SNO had been reporting back to SBO that their certificates of competency were being revalidated on the basis of their MCA-approved certificates of proficiency."

219. There is no indication in the undated letter sent under cover of the e-mail of 19th December of any decision on the part of the Minister that was subsequently signalled by way of the issuance of the now-impugned Marine Notice, and no raising of the substantive legal arguments that the respondents have made in the within proceedings; in fact the first time that the applicants saw any substantive legal response to the issues that they had raised consistently and persistently with the Department, was when they received the written legal submissions that preceded the hearing of the within application. (There had been a statement of opposition before then but, as with all statements of opposition, it tends to deny much, concede little and not give the best sense of the substantive argument to come). Indeed, as will be seen later below, one of the conclusions that the court reaches in the within judgment is that the approach adopted by the Department vis-à-vis the applicants (who just wanted mutual recognition of their certificates and wanted an informed response as to why such mutual recognition could not, in the Department's view, be extended) represents a breach of the duties of good administration and transparency that present under European Union law.

XVI.

The Marine Notice

(i) Surprising Certainty.

220. The text of the Marine Notice has been recited previously above. Notable in that Notice is the sentence stating as follows:

> *"IMO STCW courses, including short courses, carried out in Ireland may only be approved by the Minister….Candidates for seafarer and fisher certification should be aware that the Department will only accept certificates issued by training providers approved by the competent authority for training carried out in Ireland".*

221. The just-quoted assertion was not made in the letter of 19th December or previously. Indeed, this assertion in the Marine Notice was the first communication to the world of what by the time of the Marine Notice had clearly, and at last, become a decided point within and on the part of the Department. Notably, the Department did not make previous contact with the applicants to engage with them concerning what by the time of the Marine Notice had clearly become a decided point. In fact, as mentioned above, no good explanation of the basis for the decision was forthcoming until the written submissions in the within proceedings were exchanged. That makes the date of the Marine Notice (13th February, 2017) the relevant date for the purposes of commencement of the within judicial review proceedings (in the same way as a letter setting out a public authority's position on a question presenting would be the relevant date for the purpose of associated judicial review proceedings).

222. In passing, the court, again, does not accept the submission made at hearing that the issuance of the Marine Notice was but a communication by the Department to the world at large of a longstanding Department position that was long and well understood by the applicants. Any fair-minded assessment of the substance and thrust of the correspondence now considered at some length in the preceding pages makes clear that there was no concluded position within or on the part of the Department/MSO as late as 19th December, 2016, regarding the issuance in Ireland of MCA certificates by an MCA-approved trainer in Ireland. The most that could be said is that the Department (i) had concerns about the position being taken by the MCA, (ii) had some sort of sense as to its own legal obligations, (iii) for reasons unknown, was unable, over a period of months and despite legal advice being sought and obtained, to arrive at any concluded view as to what its obligations were at law, (iv) was unable or unwilling to volunteer, in a meaningful manner, any interpretation of the relevant law that was contrary to that repeatedly advanced by SNO (in order that SNO and others might properly understand that interpretation of the law and engage with same), (v) seemed satisfied to leave SNO adrift as to what the position of the Department was until the surprise issuance in February 2016 of a Marine Notice that was now clearly informed by a (belatedly formed) concluded view as to the legal issues presenting.

(ii) Further Letter to Minister.

223. On 7th April, 2017, O'Flynn Exhams issued a further letter directly to the Minister of Transport, *etc*. That letter recites the history of the engagement between the parties and rehearses the legal position adopted by the applicants in the within proceedings. It states, *inter alia*, as follows:

"This Notice (which, despite what we set out below, was published without any warning to our clients) has very serious consequences for our clients.

…

[*The letter references the letter of 19th December, 2016, and then continues as follows*.]

The letter [of the 19th] *did not signal or explain that a Marine Notice in the terms outlined above was proposed to be taken. On the contrary, the letter clearly suggested that recognition would be given to certificates issued under the terms of the Directive and as required by European Union law. No dispute was taken in the letter with our understanding of European law as set out in some detail in our letter of the 5th July. Furthermore, it is the case that in fact, up to the time of the issue of the Marine Notice described above, your Department recognised certificates issued by SNO under the authority of the MCA from August 2016 up until the publication of the Marine Notice. It is also the case that prior to 2016, the Department accepted, without hesitation, MCA approved certificates from other training providers in Ireland including, without limitation, from the Seamanship Centre and the Effective Offshore Training Ireland. It was not until SNO obtained MCA approval that the acceptance became an issue for the Department.*

In light of the correspondence outlined above, we believe that it was incumbent on you as Minister, before authorising the issue of the Marine Notice, to give some advance warning to our clients of the approach which you proposed to take, and to allow our clients to make appropriate submissions. We are very surprised that at no stage did you or the Department see fit to address the detail of our letter of 5 July, 2016.

Quite apart from the failure to give our clients any advance warning, and quite apart from the complete lack of courtesy and fairness in failing to address the detail of our letter of 5 July 2016, we have advised our clients that the Marine Notice is contrary to EU law. In this context, as we explained at some length. In our letter of 5 July, 2016, there is nothing in the EU regime established by the 2008 Directive which prohibits the competent authorities of one Member State to approve training courses in another Member State. As we explained, the MCA has approved not only the courses undertaken by SNO in Ireland, but it has also approved courses undertaken in a number of other Member States. Our client's view in this regard is supported by the view taken by the EU Commission in an e-mail dated 27 July, 2016 (copy attached) from Ms Marietta Asik (Directorate-General for Mobility & Transport, Maritime Safety) [the court considers this e-mail later below]*…in which she stated:-*

> 'Regarding the location of the training institutions, we have not identified any requirement in Directive 2005/45/EC or Directive 2008/106/EC which requires the training institution to be located within the territory of the Member State that approves it.
>
> The above has been brought to the attention of the Member States.'

No basis in European law has been identified for the approach taken in the Marine Notice. We have advised our clients that the Marine Notice clearly constitutes an infringement of Article 3 of the 2005 Directive under which every Member State is required to recognise appropriate certificates issued by another Member State. There is no requirement in the Directive that the relevant training course should take place in the territory of the Member State in question.

In the circumstances, we must call upon you to take immediate steps to vacate and annul the above Marine Notice and to confirm that you will recognise certificates issued by SNO under the authority of the MCA. If we do not hear from you within seven (7) days to that effect, our clients will have no alternative but to take appropriate action, to include an application for leave to judicially review the Marine Notice….

We should make clear that the approach taken in the Marine Notice has very serious consequences for our clients as follows:-

Graduates of NMCI holding MCA approved certificates for training completed at the NMCI cannot sail on Irish flagged vessels or call to Irish ports on foreign flagged vessels which will immediately limit their employment prospects and consequently their decision to use the NMCI/SNO in the future for education and training purposes. We are instructed that the Department is also refusing to recognise UK certificates of competency where such certificates were issued by the competent authority In the UK in reliance on MCA approved certificates of proficiency for training carried out at the NMCI. This means that the Marine Notice affects not only NMCI graduate mariners holding Irish certificates of competency but also graduate mariners holding UK certificates of competency. Ship operators employing those graduates will be exposed to Port State Control Inspections at Irish Ports and may be subject to enforcement action for non-compliance.

The NMCI's largest customer use SNO to deliver bespoke programmes to their officers and MCA approved training courses are an integral part of certain programmes. Further, 80% of the companies offering cadetships at the NMCI are UK based, no Irish company supporting the NMCI currently offer fully paid cadetships. Our client's largest customer and companies offering cadetships, all of whom operate in an international arena, will be forced to go another training provider to deliver their requirements if the NMCI does not hold international approvals to support its customer's fleet requirements.

Our client has built up a significant international reputation in the provision of these courses. Its academic and business model is to develop an international maritime centre of excellence for education and training by developing its services to the maritime industry including through its joint venture companies. The Marine Notice wholly undermines our client's academic and business model and all of the work which our client has undertaken to date in providing these courses and building up its reputation which in turn reflected well on Ireland's reputation in the maritime industry. The reputation and business of our client, including with graduates and with existing and potential customers, will be irreparably damaged by the Marine Notice. This will result not only in financial and immense reputational loss but also, we regret to say, in job losses at the NMCI".

(iii) Terse Response.

224. O Flynn Exhams' letter did not meet with any meaningful response from the Department. Instead, on 19th April, 2017, a three-line letter issued from the Chief State Solicitor's Office, which office was undoubtedly acting under instructions, referencing the letter of 7th April to the Minister and stating simply "*We are authorised to accept service of proceedings on behalf of the Minister"*. This was a surprisingly abrupt end to the interaction between SNO and the Department which had commenced the previous June with the letter of 8th June from Cork Institute of Technology to the Department of Transport, *etc*.

XVII

European Maritime Safety Agency

225. The role of EMSA was something of a side-issue in the proceedings but is nonetheless worth touching upon.

226. In his affidavit evidence, Mr Hogan, whom, it will be recalled, is the Chief Surveyor in the MSO avers, *inter alia*, as follows:

> *"The European Commission has an EU level of enforcement based on Directive 2008/106.* [In fact it is also based on the 2005 Directive]. *This takes the form of assessment of EU member states by EMSA. EMSA is a statutory body established under Regulation 1406/2002*[*i.e.* Regulation (EC) No. 1406/2002 of the European Parliament and of the Council of 27 June 2002 establishing a European Maritime Safety Agency (O.J. L208, 5.8.2002, 1), as amended (the 'EMSA Regulation')] *and is vested with powers to carry out enforcement activities as set out in the Regulation. EMSA can only carry out an assessment visit to each member state individually. It cannot carry out an assessment visit to the United Kingdom and in the course of same also carry out an assessment visit to Applicants in Ireland."*

227. Could this possibly be so? Does European Union legislation take the (unusual) step of preventing EMSA from adopting a policy that would allow it to review maritime training carried out anywhere in the European Union? The short answer to this question is 'no'. Thus, for example, recitals (5) and (6) of the EMSA Regulation provide as follows:

> *"(5) The Agency should favour the establishment of better cooperation between the Member States and should develop and disseminate best practices in the Community. This in turn should contribute to enhancing the overall maritime safety system in the Community as well as reducing the risk of maritime accidents, marine pollution and the loss of human lives at sea.*
>
> *(6) In order properly to carry out the tasks entrusted to the Agency, it is appropriate that its officials carry out visits to the Member States in order to monitor the overall functioning of the Community maritime safety and ship pollution prevention system. The visits should be carried out in accordance with a policy to be established by the Agency's Administrative Board and should be facilitated by the authorities of the Member States."*

228. There is nothing in the just-quoted text, or indeed elsewhere in the EMSA Regulation, that would prevent EMSA from adopting a policy allowing it to visit more than one member state in the course of carrying out an audit. So there is, in truth, no reason why EMSA would not be in a position to review thoroughly the training (and the MCA's verification of the training) carried on by SNO, and to ensure that the appropriate requirements of, *inter alia*, Arts. 10 ("*Quality standards*"), 13 ("*Use of simulators*") and 17 ("*Responsibilities of Member States with regard to training and assessment*") of the 2008 Directive have been met.

XVIII

European Commission Correspondence

229. Mentioned in passing previously above, but worth touching upon in greater detail, is an e-mail of 27th July, 2016, sent to SNO (in response to a query made by SNO on 25th and 26th July, 2016) by Ms Asik, a Policy Officer with the European Commission's Directorate-General for Mobility and Transport (Maritime Safety). That e-mail was thereafter forwarded by SNO to the Department, though the e-mail indicates that its substance had in any event been brought to the attention of all European Union member states. The main body of that e-mail reads as follows:

> "*Directive 2005/45/EU on the mutual recognition of seafarers' certificates within the EU requires Member States to recognise certificates issued by or under the authority of a Member State in accordance with the requirements of* [the 2008 Directive]…
>
> *In this context, Certificates of Proficiency issued by a training institution recognised by a Member State under Article 17* [of the 2008 Directive]…*fall also within the scope of* [the 2005 Directive]…and have to be recognised by other Member States.
>
> *Regarding the location of the training institutions, we have not identified any requirement in* [the 2005 Directive]…*or* [the 2008 Directive]…*which requires the training institution to be located within the territory of the Member States that approves it.*
>
> *The above have been brought to the attention of the Member States".*

230. The above is not a formal decision of the European Commission. However, it is not a 'nothing'. It is a serious communication that addresses in an informed manner the issue of the location of training institutions and the approval of same. And it is a sufficiently considered document that the European Commission was satisfied to communicate the substance of the message it contained to all European Union member states, a step that does not seem likely to be taken lightly. Moreover, and this ought not to be ignored, the above-quoted message is entirely correct as a matter of law.

XIX

Article 56 TFEU

231. Article 56 TFEU provides, *inter alia*, as follows:

> *"Within the framework of the provisions set out below, restrictions on freedom to provide services within the Union shall be prohibited in respect of nationals of Member States who are established in a Member State other than that of the*

person for whom the services are intended…"

232. When it comes to Art. 56 TFEU, the respondents submit, *inter alia*, as follows in their written submissions:

> *"61. There are several peculiarities attending the Applicants' reliance on Article 56…*
>
> *62. The first is that Article 56 is not even applicable to the Applicants' situation for the simple reason that they are established in Ireland. If a person or undertaking maintains a permanent economic base in a Member State it cannot avail of the right to provide services in that State. The Treaty Chapter on services does not apply to wholly internal situations where the relevant elements of an activity are confined within one Member State…*
>
> *63. Secondly, while it is correct that the freedom to provide services implies the converse freedom to receive services, the Respondents would dispute the standing of the Applicants to advance any plea on this basis since they are not the recipient of services in this case".*

233. Both of these propositions contain error.

234. As the Court of Justice observed in *Liga Portuguesa de Futebol Profissional v. Departamento de Jogos da Santa Casa da Misericórdia de Lisboa* (Case C-42/07), para.51, "[T]*he freedom to provide services is for the benefit of both providers and recipients of services".*

235. Like references can be found, *e.g.*, in

> (i) *Luisi v. Minsitero del Tesoro and Carbone v. Ministero del Tesoro* (Joined Cases 286/82 and 26/83), para. 16, where the Court of Justice observes that "[T]*he freedom to provide services includes the freedom, for the recipients of services, to go to another Member State in order to receive a service there, without being obstructed by restriction";*
>
> (ii) (a) *Ladbrokes Betting & Gaming Ltd v. Stichting de Nationale Sporttotalisator* (Case C-258/08), para.15, and
>
> (b) *Sporting Exchange Ltd ('Betfair') v. Minister van Justitie* (Case C-203/08), para.23,
>
> where the Court of Justice in each of (a) and (b) reiterates re. providers and recipients of services that "*The freedom to provide services is for the benefit of both providers and recipients of services*",
>
> and
>
> (iii) *Sjöberg v. Gerdin* (Joined Cases C-447/08 and C-448/08), para.32, where the Court of Justice observes that "[T]*he freedom to provide services covers both providers and recipients of services").*

236. It follows from the foregoing that the services which a provider carries out, without moving from the member state in which that provider is established, for recipients who are established in other member states, constitutes the provision of cross-border services for the purposes of Art.56 TFEU.

237. The court also recalls in this regard the decision of the Court of Justice in *Alpine Investments BV v. Minister van Financiën* (Case C-384/93). At issue in that case was the ability of a Dutch provider of financial services to engage in so-called 'cold calling' of persons in another member state. In the course of its judgment, the Court of Justice made various useful observations concerning Art.56 TFEU. The Court of Justice commences its judgment as follows, at paras 2-3 and 5:

> "2 *Those questions* [the questions referred to the Court of Justice] *were raised in proceedings brought by Alpine Investments BV challenging the restriction imposed on it by the Netherlands Ministry of Finance prohibiting it from contacting individuals by telephone without their prior consent in writing in order to offer them various financial services (a practice known as 'cold calling').*
>
> *3 Alpine Investments BV, the applicant in the main proceedings (hereinafter 'Alpine Investments'), is a company incorporated under Netherlands law and established in the Netherlands which specializes in commodities futures.*
>
> *`…*
>
> *5 Alpine Investments offers three types of service in relation to commodities futures contracts: portfolio management, investment advice and the transmission of clients' orders to brokers operating on commodities futures markets both within and outside the Community. It has clients not only in the Netherlands but also in Belgium, France and the United Kingdom. It is not however established anywhere outside the Netherlands."*

238. The last two sentences in the just-quoted text indicate in effect that there is a direct parallel between the facts in *Alpine Investments* and those which underpin the within application. SNO's clients are not only in Ireland. Thus Mr Mowlds avers, *inter alia*, in his evidence as follows: "*SNO…continues to provide MCA-approved refresher training to Irish, British, other European and non-European seafarers at the NMCI. Indeed, 30% of the mariners trained at the NMCI are from overseas*". SNO too is not established outside Ireland: it is based in Ireland, but its clients are from elsewhere in the European Union, as well as further afield. Thus Mr Mowlds goes on to aver, *inter alia*, as follows:

> *"SNO provides training to a global market, mariners from all corners of the globe, serving on vessel*[s] *registered in many different countries. For the NMCI and SNO to remain viable as a training institution the NMCI and SNO need to provide training to both Irish and non-Irish seafarers serving on both Irish and non-Irish vessels and those living in Ireland or indeed domiciled abroad. SNO actively targets a global client base in this way and seafarers of many different nationalities travel to Ireland specifically to undertake training at the NMCI*".

239. Returning to Alpine Investments, the Court of Justice, under the heading "The first question" observes as follows, at paras. 17-22 (incl.):

> "*17 There are two aspects to the national court's first question.*

18 First, it asks whether the fact that the services in question are just offers without, as yet, an identifiable recipient of the service precludes application of Article 59 of the Treaty.

19 T*he freedom to provide services would become illusory if national rules were at liberty to restrict offers of services.* [This is essentially why the Department is wrong in its submissions concerning Art.56 TFEU]. *The prior existence of an identifiable recipient cannot therefore be a condition for application of the provisions on the freedom to provide services.*

20 The second aspect of the question is whether Article 59 covers services which the provider offers by telephone to persons established in another Member State and which he provides without moving from the Member State in which he is established.

21 *In this case, the offers of services are made by a provider established in one Member State to a potential recipient established in another Member State*. [Again, that is a direct parallel with the situation presenting in the within proceedings.] *It follows from the express terms of Article 59 that there is therefore a provision of services within the meaning of that provision.*

22 The answer to the first question is therefore that, on a proper construction, Article 59 of the EEC Treaty covers services which the provider offers by telephone to potential recipients established in other Member States and provides without moving from the Member State in which he is established."

240. The Court later observes as follows, at paras. 30-31 (incl.):

`"30 The first paragraph of Article 59 of the Treaty [the then applicable Treaty provision] *prohibits restrictions on freedom to provide services within the Community in general. Consequently, that provision covers not only restrictions laid down by the State of destination but also those laid down by the State of origin. As the Court has frequently held, the right freely to provide services may be relied on by an undertaking as against the State in which it is established if the services are provided for persons established in another Member State (see Case C-18/93 Corsica Ferries Italia v Corpo dei Piloti del Porto di Genova* [1994] *ECR 1-1783, paragraph 30; Peralta* [[1994] ECR I-3453]… *paragraph 40, and Case C-381/93 Commission v France* [1994] *ECR 1-5145, paragraph 14).* [Again, the situation contemplated by the Court of Justice in this paragraph is the situation that presents here.]

31 It follows that the prohibition of cold calling does not fall outside the scope of Article 59 of the Treaty simply because it is imposed by the State in which the provider of services is established."

241. It is clear from the foregoing that Art.56 TFEU is something that SNO can invoke as against the Irish State authorities, notwithstanding that it is an Irish entity based solely in Ireland. Perhaps unsurprisingly, the Court of Justice went on to find in *Alpine Investments* that the interference with the freedom to provide services in the context of that case was justified, observing, *inter alia*, as follows, at paras 43-44 (incl.) and 46:

"43 Although the protection of consumers in the other Member States is not, as such, a matter for the Netherlands authorities, the nature and extent of that protection does none the less have a direct effect on the good reputation of Netherlands financial services.

44 Maintaining the good reputation of the national financial sector may therefore constitute an imperative reason of public interest capable of justifying restrictions on the freedom to provide financial services.

`…

46 As the Netherlands Government has justifiably submitted, in the case of cold calling the individual, generally caught unawares, is in a position neither to ascertain the risks inherent in the type of transactions offered to him nor to compare the quality and price of the caller's services with competitors' offers. Since the commodities futures market is highly speculative and barely comprehensible for non-expert investors, it was necessary to protect them from the most aggressive selling techniques."

242. *Alpine Investments* is not some 'one-off' decision of the Court of Justice. Thus in *Ciola v. Land Vorarlberg* (Case C-224/97) the Court of Justice held that an Austrian company which provided moorings for boats on Lake Constance to boat-owners resident in another member state could rely on Art.56 TFEU against the Austrian authorities when the latter sought to limit the number of moorings available for boat-owners resident abroad, observing as follows, at paras. 11-12 (incl.):

"11 It should be observed at the outset that, as the national court has pointed out, first, the right freely to provide services may be relied on by an undertaking as against the State in which it is established if the services are provided for persons established in another Member State (Case C-70/95 Sodëmare and Others v Regione Lombardia [1997] ECR 1-3395, paragraph 37) and, second, in accordance with Joined Cases 286/82 and 26/83 Luisi and Carbone v Ministero del Tesoro [1984] ECR 377, paragraph 16, and Case 186/87 Cowan v Trésor Public [1989] ECR 195, paragraph 15, that right includes the freedom for recipients of services to go to another Member State in order to receive a service there, without being obstructed by restrictions.

12 Consequently, Articles 59 to 66 of the Treaty apply to a service such as that which the company of which Mr Ciola is manager provides, by means of a contract for the rental of a mooring, to a boat-owner resident in another Member State who receives and enjoys the service in a Member State other than that in which he resides."

243. In *Konsumentombudsmannen v. Gourmet International Products AB* (Case C-405/98) the Court of Justice went further and held that a national rule preventing undertakings established in State A from offering advertising space in their publications to potential advertisers established in another member state could be challenged in State A as contrary to Article 56 TFEU, observing, *inter alia*, at paras.37-38 (incl.):

"37 …[A]*s the Court has frequently held, the right to provide services may be relied on by an undertaking as against the Member State in which it is established if the services are provided to persons established in another Member State (see, in particular, Case C-18/93 Corsica Ferries Italia v Corpo dei Piloti del Porto di Genova [1994] ECR I-1783, paragraph 30, and Case C-384/93 Alpine Investments [1995] ECR I-1141, paragraph 30).*

38 That is particularly so where, as in the case before the referring court, the legislation of a Member State restricts

the right of press undertakings established in the territory of that Member State to offer advertising space in their publications to potential advertisers established in other Member States."

244. Likewise in *Gambelli & ors*. (Case C-243/01), services provided by internet from the United Kingdom to recipients in another member state were held to be protected by Art. 56 TFEU.

245. In *Corsica Ferries Italia srl v. Corpo dei Piloti del Porto di Genova* (Case C-18/93), in the context of tariffs imposed for ferry services, the Court of Justice observed, *inter alia*, as follows, at para. 30:

> "[T]*he freedom to provide maritime transport services between Member States, and in particular the prohibition of discrimination on grounds of nationality, may be relied on by an undertaking as against the State in which it is established, if the services are provided for persons established in another Member State. In a case such as that in point in the main proceedings, an undertaking established in one Member State and operating a liner service, covered by* [Council] *Regulation* [EEC] *No 4055/86* [of 22 December 1986 applying the principle of freedom to provide services to maritime transport between Member States and between Member States and third countries (O.J. L378, 31.12.1986, 1)], *to another State, provides those services, by reason of their very nature, inter alia for persons established in the latter State."*

246. A similar observation was made in Commission v. France (Case C-154/89), where the Court of Justice stated, *inter alia*, as follows, at para. 9:

> *"Although Article 59 of the Treaty expressly contemplates only the situation of a person providing services who is established in a Member State other than that in which the recipient of the service is established, the purpose of that Article is nevertheless to abolish restrictions on the freedom to provide services by persons who are not established in the State in which the service is to be provided (see judgment in Case 76/81* Transporoute v Minister of Public Works [*1982] ECR 417, at paragraph 14). It is only when all the relevant elements of the activity in question are confined within a single Member State that the provisions of the Treaty on freedom to provide services cannot apply (judgment in Case 52/79*, Procureur du Roi v Debauve *[1980] ECR 833, at paragraph 9)."*

247. How could the restriction at play in the within proceedings (that identified in the Marine Notice) be said to be justified legally when the same level of training is carried on both under MSO approval and MCA approval, with the governing standard in each instance being the STCW standard? Ireland cannot properly seek, in some echo, for example, of *Alpine Investments*, to justify the restriction identified in the Marine Notice by reference to concerns about training. In this regard, the court respectfully adopts the following observations from the written submissions of the applicants (all of which in the original submissions are cross-referenced into the supporting evidence), *viz*:

> *"78. It is suggested that the Minister is concerned about auditing standards. However:*
>
> *(1) The MCA has a very strong and esteemed international reputation and training courses accredited by it are regarded internationally as being of a very high standard…*
>
> *(2) The MCA's procedures for approving courses are actually more rigorous than those applied by the Minister…*
>
> (*3*)…[T]*he MCA conducted a very detailed, rigorous and thorough audit. The MCA audit checklist was furnished prior to the audit and adhered to during the audit. The MCA's guidance, MSN 1865 – entitled 'Seafarer Training and Certification Guidance: UK Requirements for Emergency, Occupational Safety, Security, Medical Care and Survival Functions' – was also furnished in advance to ensure compliance with the MCA's pre-requisites for delegates, while a detailed report was made available at the end of the audit with findings and close-out dates of the findings made clear. Subsequent to the findings, any issues were resolved and proof of the resolution was provided to the MCA prior to their specified due date…*
>
> *(4) By contrast, in the course of assessing the applicants' courses for approval, 2 MSO surveyors attended an audit for less than 2 hours. Both surveyors were unaware that 5 elements of Update Training were required, and they were under the impression that only 3 elements were required. Clarification was offered to them verbally and in writing explaining the requirements of the STCW code. Further, the MSO does not have any prerequisites for entry to the courses. Following numerous emails, SNO offered suggestions to the Department for approval which in general were accepted. No further audit of the relevant courses has subsequently been conducted by the MSO…*
>
> (5) *The MCA has a strong and esteemed international reputation, and* [has]…*approved training courses delivered in a number of other Member States including France, Spain, Italy, the Netherlands and Croatia…*
>
> 79. Quite apart from the issues outlined above, it is clear that the Marine Notice cannot be justified by any concern as to auditing. In particular:
>
> *"(1) An Irish seafarer who takes an MCA-approved course in the UK will have that course recognised by the MSO.*
>
> *(2) An Irish seafarer who takes a course in an MCA-approved centre in a third country (other than the UK) will have his course recognised by the MSO…*
>
> *(3) There is no reason to treat an Irish seafarer with a certificate issued pursuant to an MCA-approved course delivered in the UK or in a third country more favourably than an Irish seafarer with a certificate issued pursuant to an MCA-approved course delivered by SNO.*
>
> *(4) Moreover, while Mr Hogan raises auditing concerns, he does not explain why such concerns do not arise in respect of MCA-approved courses delivered in third countries…*
>
> *(5) It is wholly anomalous that the Minister recognises certificates issued pursuant to MCA-approved courses provided by institutions outside Ireland, but is refusing to recognise the certificates. Had the Minister any concerns about MCA approved courses, it would surely follow that no MCA courses could be recognised".*

XX

The Charter, the Constitution and the Convention

(i) Introduction.

248. The applicants correctly claim that the Marine Notice breaches their rights under the Charter of Fundamental Rights of the European Union ('CFREU'), the Constitution and the European Convention on Human Rights ('ECHR').

(ii) Some General Comments.

a. Application of the Charter, Constitution and Convention.

249. By way of preliminary comment, the court observes that there can be no doubt but that the Charter is applicable to the dispute now arising between the parties. This is clear from Art.51 of the Charter ("*The provisions of this Charter are addressed to…Member States…when they are implementing Union law*") and the decision of the Court of Justice in *Åklagaren v. Hans Åkerberg Fransson* (Case C-617/10) in which the Court of Justice observed, *inter alia*, at para. 19, that "*The Court's settled case-law…states, in essence, that the fundamental rights guaranteed in the legal order of the European Union are applicable in all situations governed by European Union law*". The within application is clearly focused on the proper implementation of European Union law, as evident from the consideration of the 2005 Directive, the 2008 Directive, the 2012 Directive, and, indeed, Art. 56 TFEU.

b. Sequencing of Consideration.

250. In *Carmody v. Minister for Justice and ors* [2010] 1 I.R. 635, 650, Murray C.J. observed, *inter alia*, at para. 50 that "[W]*hen a party makes a claim that an Act or any of its provisions is invalid for being repugnant to the Constitution and at the same time makes an application for a declaration of incompatibility of such Act or some of its provisions with the State's obligations under the Convention, the issue of constitutionality must first be decided.*" The position of European Union law in our legal order would suggest that in a case where, as here, the CFREU is in play, the various human rights schemes should be considered in the following order: (1) CFREU, (2) Constitution, (3) ECHR. However, at least in the within case, apart from the need for the court to follow what the Supreme Court has ordained, not a lot seems to turn on the sequencing as the substance of the rights in issue is broadly similar under each of the said human rights schemes established and/or recognised by each of the three esteemed schemes aforesaid.

> ***[51]*** *If a court concludes that the statutory provisions in issue are incompatible with the Constitution and such a finding will resolve the issues between the parties as regards all the statutory provisions impugned, then that is the remedy which the Constitution envisages the party should have. Any such declaration means that the provisions in question are invalid and do not have the force of law. The question of a declaration pursuant to s. 5 concerning such provisions cannot then arise. If, in such a case, a court decides that the statutory provisions impugned are not inconsistent with the Constitution then it is open to the court to consider the application for a declaration pursuant to s. 5 if the provisions of the section including the absence of any other legal remedy, are otherwise met."*

c. Proportionality.

251. Human rights are not absolute. Each of the CFREU, Constitution and ECHR contemplate that there may be a proportionate restriction of the rights recognised thereby. Thus:

CFREU

– Art. 52(1) CFREU provides as follows:

> *"Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others."*

Constitution

– in *Heaney v. Ireland* [1994] 3 I.R. 593, 607, in an observation that, so far as the court is aware, has been followed in all subsequent constitutional law cases, Costello J. observed as follows:

> *"The objective of the impugned provision must be of sufficient importance to warrant overriding a constitutionally protected right. It must relate to concerns pressing and substantial in a free and democratic society. The means chosen must pass a proportionality test. They must:—*
>
> *(a) be rationally connected to the objective and not be arbitrary, unfair or based on irrational considerations;*
>
> *(b) impair the right as little as possible, and*
>
> *(c) be such that their effects on rights are proportional to the objective: Chaulk v. R. [1990] 3 S.C.R. 1303 at pages 1335 and 1336."*

(These observations were adopted, for example, by Denham J. in her judgment in the Supreme Court decision in *Meadows v. Minister for Justice Equality and Law Reform* [2010] 2 I.R. 701, 743).

ECHR

– the decision of Hogan J. in *Efe v. Minister for Justice* [2011] 2 I.R. 798 is also suffused with the notion that a like

principle of proportionality falls to be brought to bear when considering rights recognised under the ECHR and any interferences with same.

(iii) Freedom to Conduct Business and Right to Property.

252. The applicants enjoy the freedom to conduct business and a right to property under Arts. 16 and 17 CFREU [Article 16 CFREU provides that "*The freedom to conduct a business in accordance with Union law and national laws and practices is recognised*". Article 17(1) CFREU provides that "*Everyone has the right to own, use, dispose of and bequeath his or her lawfully acquired possessions. No one may be deprived of his or her possessions, except in the public interest and in the cases and under the conditions provided for by law, subject to fair compensation being paid in good time for their loss. The use of property may be regulated by law in so far as is necessary for the general interest*."] Arts. 40 and 43 of the Constitution [Article 40.3 provides that "*1 The State guarantees in its laws to respect and, as far as practicable, by its laws to defend and vindicate the personal rights of the citizen*" and "*2 The State shall, in particular by its laws protect as best it may from unjust attack and, in the case of injustice done, vindicate the life, person, good name, and property rights of every citizen*." Article 43 expressly protects, *inter alia*, per. Art. 43.1.1 "*the natural right, antecedent to positive law, to the private ownership of external goods*", though the exercise of property rights extant under Art.43.1 falls, per Art.43.2.1 "*to be regulated by the principles of social justice*" and, per Art.43.2.2 may be delimited by law "*with a view to reconciling their exercise with the exigencies of the common good.*"], and Art.1, Protocol 1 ECHR [Art. 1, Protocol 1, ECHR provides that "*Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties*."].

253. As regards the freedom to conduct business, perhaps four points might usefully be noted:

(1) as was noted by the Court of Human Rights in its decision in *Rees v. United Kingdom* (Case 2/1985/88/135), para.50, admittedly in the context of Art.12 ECHR (right to marry), though the point applies generally by analogy:

> *"Article 12…lays down that the exercise of this right shall be subject to the national laws of the Contracting States. The limitations thereby introduced must not restrict or reduce the right in such a way or to such an extent that the very essence of the right is impaired";*

(2) freedom of contract is an important dimension of the freedom to conduct a business. As AG Kokott observed in her Opinion in C*ommission v. Alrosa Company Ltd* (Case C-441/07 P), para.225:

> *"Contractual freedom is one of the general principles of Community law. It stems from the freedom to act for persons. It is also inseparably linked to the freedom to conduct a business….In a Community which must observe the principle of an open market economy with free competition…contractual freedom must be guaranteed. The case-law of the Court of Justice also recognises that economic operators must enjoy contractual freedom";*

(3) the Supreme Court has accepted in *The Employment Equality Bill 1996* [1997] 2 IR 321, 366 that there is a constitutionally protected property right to carry on a business and earn a livelihood, Hamilton C.J. observing as follows:

> "*The Court is satisfied that the provisions under consideration constitute a delimitation of the exercise by employers of a right protected by…Article* [40.3.3], *i.e. the right to carry on a business and earn a livelihood"*; and

(4) the term "*possessions*" in Art 1, Protocol 1 ECHR is wide-ranging, the Court of Human Rights observing as follows in *Kopecký v. Slovakia* (App. No. 44912/98), para.35(c):

> "'*Possessions' can be either 'existing possessions' or assets, including claims, in respect of which the applicant can argue that he or she has at least a "legitimate expectation" of obtaining effective enjoyment of a property right",*

the result of the foregoing being that a wide range of economic interests are protected under that provision; assets protected by Art. 1, Protocol 1 ECHR include the goodwill or economic interests connected with the running of a business (see, *e.g., Tre Traktorer Aktiebolag v. Sweden* (App. No. 10873/84) and *Benthem v. Netherlands* (App. No. 8848/80)).

254. As regards the right to property, perhaps four points might usefully be noted:

(1) according to the Court of Justice in *Sky Österreich GmbH v. Österreichischer Rundfunk* (Case C-283/11), para. 34:

> "*The protection granted by*…[Art. 17 CFREU]…*does not apply to mere commercial interests or opportunities, the uncertainties of which are part of the very essence of economic activity…but applies to rights with an asset value creating an established legal position under the legal system, enabling the holder to exercise those rights autonomously and for his benefit",*

and also, per the Court of Justice para. 35, to claims having an economic value. Shortly put, therefore, it seems that Art. 17 CFREU extends to all pecuniary rights;

(2) like principles underpin the Constitution. Thus in *Hempenstall v. Minister for the Environment* [1994] 2 I.R. 20, a case in which the applicant taxi-owners, challenged the validity of certain taxi-licensing legislation, on the grounds, *inter alia*, that the unrestricted granting of hackney licences constituted an unjust attack on their constitutionally protected rights to private property in their taxi licences, Costello J. recognised that property rights may arise in licences (though he found that the applicants had failed to establish on the balance of probabilities that the respondent's actions resulted in a diminution in the value of their taxi licences and thus had failed to establish that an attack on their property rights had occurred);

(3) commercial goodwill, i.e. "*the benefit and advantage of the good name, reputation and connection of a business…the attractive force that brings in the customer*" (*Commissioners for Inland Revenue v. Muller and Co.'s Margarine Ltd* [1901] A.C. 217, 223, per Lord Macnaghten) falls within the scope of the protection of property. (And, of course, the

applicants also enjoy a right to a good name and a professional reputation under Art. 7 CFREU [Article 7 CFREU provides that "*Everyone has the right to respect for his or her private and family life, home and communications*." Article 40.3 of the Constitution provides that "*1 The State guarantees in its laws to respect and, as far as practicable, by its laws to defend and vindicate the personal rights of the citizen*" and "*2 The State shall, in particular by its laws protect as best it may from unjust attack and, in the case of injustice done, vindicate the life, person, good name, and property rights of every citizen."*], Art. 40 of the Constitution, and Art. 8 ECHR [Article 8(1) ECHR provides that "*Everyone has the right to respect for his private and family life, his home and his correspondence."*]); and

(4) it appears from the Court of Human Rights' consideration of Art 1, First Protocol ECHR, that a reviewing court must, to borrow from the judgment of the Court in *Sporrong and Lönnroth v. Sweden* (App. No. 7151/75; 7152/75), para 63,"[i]*n the absence of a formal expropriation…look behind the appearances and investigate the realities of the situation complained of".*

(iv) Level of Interference.

255. The Marine Notice interferes with the applicants' freedom to conduct business and their property rights. The applicants have a substantial business, they enjoy goodwill in that business, they have been approached by employers who have urged SNO to seek MCA approval, and it is clear from the evidence before the court that they will suffer continuing reputational and commercial damage if the position as declared in the Marine Notice persists. Yet, in direct interference with their freedom of contract (as referenced, i*nter alia*, in *Alrosa*), and despite the fact that as a matter of European Union law the applicants are fully entitled to enter into the arrangements with the MCA that have so troubled the respondents, the Marine Notice obstructs those arrangements.

XXI

Manifest Error

256. Given that the Marine Notice involves a disproportionate and unjustifiable encroachment on multiple rights enjoyed by the applicants, as well as involving a violation of national and European Union law for the reasons set out in this judgment, the court considers that the Marine Notice is also manifestly erroneous. In reaching this conclusion, the court has been mindful that:

(1) given that the issues arising fall so clearly within the scope of European Union law, the rationality of the Marine Notice falls to be tested by the applicable European Union law test, *viz*. manifest error;

(2) as indicated by Morgan J. in *Lion Apparel Systems Ltd v. Firebuy Ltd* [2007] EWHC Ch. 2179, para.38, "*When referring to 'manifest' error, the word "manifest" does not require any exaggerated description of obviousness. A case of "manifest error" is a case where an error has clearly been made*" (which is the case here);

(3) the word 'manifest' "*should not*", per Fennelly J. in *SIAC Construction Ltd v. Mayo County Council* [2002] 3 IR. 148, 176, "*be equated with any exaggerated description of obviousness. A study of the case law will show that the community courts are prepared to annul decisions, at least in certain contexts, when they think an error has clearly been made"*;

(4) where there is an apparent breach of European Union law, the courts will require a decision-maker to justify the breach, engaging in more intensive scrutiny and closer investigation of the facts than the *Wednesbury* approach would require; and

(5) as McCloskey J. observed in *Easycoach Ltd v. Department for Regional Development* [2012] NIQB 10, para.88:

> "[T]*he doctrine of manifest error…properly analysed by reference to the overarching principles, is not concerned with whether the relevant act or omission on the part of a contracting authority has some benign or innocent explanation. Thus the existence of a manifest error is not dependent on the authority's state of knowledge or any blameworthiness in its behaviour. Rather, I consider liability to be of the no fault variety. Accordingly, where an authority asserts – or demonstrates – that the relevant error has occurred without any fault on its part, I consider this legally irrelevant. The exercise conducted by the court is of a clinical, detached and objective nature. The only question for the court is whether a manifest error has been established"*.

XXII

Legitimate Expectation

(i) Overview.

257. Legitimate expectation as an administrative and European law concept has been the subject of extensive commentary in case law and academic literature. The following observations can perhaps safely be made:

(1) in *Lett & Co. Ltd v. Wexford Borough Council* [2012] 2 I.R. 198, 212 Clarke J., as he then was, held in the High Court that there were certain positive factors that must be present, and certain negative factors absent, for a party successfully to invoke the doctrine of legitimate expectation, observing as follows:

> [I]*t seems to me that, on the current state of the development of the doctrine of legitimate expectation…there are both positive and negative factors which must be found to be present or absent, as the case may be, in order that a party can rely upon the doctrine. The positive elements are to be found in the three tests set out by Fennelly J. in the passage from Glencar Exploration p.l.c. v. Mayo County Council (No. 2) [2002] 1 I.R. 84, [162, as referenced hereafter]….The negative factors are issues which may either prevent those three tests from being met…or may exclude the existence of a legitimate expectation by virtue of the need to preserve the entitlement of a decision maker to exercise a statutory discretion within the parameters provided for in the statute concerned or, alternatively, may be necessary to enable…legitimate changes in executive policy to take place."*

None of the negative factors identified by Clarke J. present in the context of the within proceedings;

(2) as to the requisite positive factors, Clarke J. found them to be as set out by Fennelly J. in his judgment in *Glencar Exploration Ltd v. Mayo County Council* [2002] 1 I.R. 84, 162, *viz*:

> *"Firstly, the public authority must have made a statement or adopted a position amounting to a promise or representation, express or implied as to how it will act in respect of an identifiable area of its activity. I will call this the representation*. [These criteria, it seems to the court, are satisfied in the within case by the Department's undated letter sent under cover e-mail of 19th December, 2016. It seemed from that letter, when read in conjunction with the letter of 5th July, 2016, that the Minister was accepting the applicants' proposition that certificates issued by the MCA or issued on behalf of the MCA were ones which would be recognised by the Minister.] *Secondly, the representation must be addressed or conveyed either directly or indirectly to an identifiable person or group of persons, affected actually or potentially, in such a way that it forms part of a transaction definitively entered into or a relationship between that person or group and the public authority or that the person or group has acted on the faith of the representation.* [Again, this criterion seems clearly met in the within case. The Department's undated letter sent under the cover e-mail of 19th December was addressed to the applicants and, as is clear from the lengthy correspondence and dealings considered previously above, there was, it is clear, a significant relationship between the Department (IMA and MSO) and the applicants; and that is also relevant, it seems to the court, to the third point.] *Thirdly, it must be such as to create an expectation reasonably entertained by the person or group that the public authority will abide by the representation to the extent that it would be unjust to permit the public authority to resile from it."* [In the within case, it seems to the court, the expectation of the applicants was reasonably entertained in circumstances where they had been told repeatedly that the Department was taking legal advice; then the letter of the 19th issued, and was written after legal advice had been provided.]

(3) once established, a legitimate expectation will not lightly be overridden (see, *e.g.*, (1) the judgment of O'Donnell J., for the Supreme Court, in *Lett*, para. 25, where he observes that

> "[I]*t seems to me in principle at least, and indeed by analogy with the position in estoppel in private law, that the issue for the court is that once a legitimate expectation or estoppel has been identified, it is necessary to make good the equity so found, and that in such circumstances again in principle, the court can make an order, whether characterised as damages or restitution, in order to make good the breach identified",*

and also (2) the decision of the High Court in *Power v. Minister for Social and Family Affairs* [2007] 1 I.R. 543, para.32, where MacMenamin J. looks to see if there is a sufficient overriding public interest to justify departure from what has previously been promised);

(4) the criteria for legitimate expectation are similar under European Union law (see, further *Embassy Limousines & Services v. European Parliament* (Case T-203/96), though the European version perhaps "*provides stronger protection for the individual than does its domestic Irish law cousin*" (Barrett, G., "*Protecting Legitimate Expectations in European Community Law and in Domestic Irish Law*" (2001) 20(1) *Yearbook of European* Law 191, 242).

(ii) Application of Principle.

258. It appears to the court that the Marine Notice did breach the applicants' legitimate expectations. In reaching this conclusion, the court has had regard, of course, to the law as outlined above, but also to the following features of the facts presenting. First, the Minister has previously, repeatedly and lawfully recognised MCA-approved certificates from training providers in Ireland. Second, on 5th December, 2015, an e-mail was sent to the applicants in which it was stated, *inter alia*, that "*Candidates presenting Certificates of Updated Proficiency carried out at SNO…in accordance with the Certificate of Approval of Training/Educational Programme issued by the* [MCA]*…from the date of issue of that approval on 21st January 2016 until 17th July 2016, to this Department in support of an application for certification/examination by this Department, will have those certificates recognised by this Department."* Third, in the undated letter from the Department (sent under cover of an e-mail dated 19th December, 2016), the Department in a letter which purported to be a response to the O'Flynn Exhams letter of 5th July 2016, stated, *inter alia*, that "[T]*he Minister will and does authorise and issues certificates of competency to those persons who complete a course in a designated institution and who pass the required exams*" and that "*Equally the Minister recognises certificates issued in another Member State by that competent authority in accordance with the terms of the Directive or as required by European law."* Fourth, the Marine Notice, it seems to the court, is inconsistent with the representations made by the Minister to the applicants (in particular in the just-referenced correspondence of 5th and 19th December, 2016). Fifth, the Minister, it seems to the court has sought, prior to and in the course of these proceedings, to resile from representations made, in a manner that is unjustified and disproportionate.

259. In passing, the court notes the suggestion by counsel for the respondent that when it comes to legitimate expectation the applicants cannot rely on the fact that approvals to other third-party centres were granted. However, the facts in *Lett* indicate that this is not so. In that case the reference to payment of compensation to the mussel farmers was in a document that was not issued to them at all; instead it appeared in a foreshore licence issued by the Minister to Wexford Borough Council. Yet those circumstances were found to be sufficient to yield a legitimate expectation. In the present case, there is a very small group of STCW-related training-providers and if there was (and there was) a practice (which was a lawful practice) in respect of some of those providers it is entirely reasonable to assume that the State would not discriminate arbitrarily against any other provider, thus yielding a legitimate expectation in this regard.

XXIII

General Principles

(i) Equal Treatment and Legal Certainty

a. Equal Treatment.

260. In its decision in Albert *Ruckdeschel & Co and Hansa-Lagerhaus Ströh & Co* (Joined Cases 117/76 and 16/77), para. 7, the Court of Justice observed, *inter alia*, that

> "*The…Treaty* [of Rome] *provides that the common organization of agricultural markets 'shall exclude any discrimination between producers or consumers within the Community'. Whilst this wording undoubtedly prohibits any discrimination between producers of the same product it does not refer in such clear terms to the relationship between different industrial or trade sectors in the sphere of processed agricultural products. This does not alter the fact that the prohibition of discrimination laid down in the aforesaid provision is merely a specific enunciation of the general principle of equality which is one of the fundamental principles of Community law. This principle requires that similar situations shall not be treated differently unless differentiation is objectively justified."*

261. The general principle of equality aforesaid is now such an established feature of European Union law that in *Fabricom SA v. Belgium* (Joined Cases C-21/03, C-34/03) the Court of Justice was able to state as follows, at para. 27:

> "[I]*t is settled case-law that the principle of equal treatment requires that comparable situations must not be treated differently and that different situations must not be treated in the same way unless such treatment is objectively justified".*

262. Bringing that settled case-law to bear in the context of the within proceedings, the court must conclude that the Department has failed to treat the applicants equally with other equally-placed institutions; as per the affidavit evidence of Mr Mowlds, the managing director of SNO, prior to 2016, the Department accepted MCA-approved certificates from other training-providers in Ireland. These averments seem buttressed by the above-quoted observations from the e-mail of 23rd December, 2015 sent within the United Kingdom's Department for Transport from Redacted Person to Redacted Persons that the decided impression of the author of that e-mail, following a meeting with Irish officials, was that "*the* [Irish Department of Transport, etc. and the Irish Coast Guard]*…does not welcome the fact that the National Maritime College of Ireland proudly advertises that its STCW courses have been approved by the UK's MCA and would like it to stop. Aside from the perceived snub they feel that their only maritime college has 'flagged out', they feel that there is a practical point that they should be able to grant and withdraw (if need be) approval for courses offered in Ireland*". Thus there does seem, to have been on the part of the respondents, an especial focus upon, and improper differentiation of the NMCI, as opposed to other course providers.

b. Legal Certainty.

263. It seems to the court to follow almost as a matter of course from the foregoing, *i.e.* from the inconsistent positions that the Department has adopted *vis-à-vis* the NMCI and other training-providers, that there has been a breach of the principle of legal certainty. In reaching this conclusion, the court is mindful of the observations of the Court of Justice in *Matra v. Commission* (Case C-225/91), paras. 40-42 (incl.), a State aid case, that

> *"40 Matra further criticizes the Commission for deciding not to object to the aid in question, without awaiting the outcome of the procedure under Regulation No 17, cited above, with respect to the agreement between Ford and VW, thereby disregarding the link between Articles 85 and 92 of the Treaty.*
>
> *41 It must be noted in this respect that while the procedure provided for in Articles 92 and 93 leaves a wide discretion to the Commission, and under certain conditions to the Council, in coming to a decision on the compatibility of a system of State aid with the requirements of the common market,* ***it is clear from the general scheme of the Treaty that that procedure must never produce a result which is contrary to the specific provisions of the Treaty*** *(judgment in Case 73/79 Commission v Italy [1980] ECR 1533, paragraph 11). The Court has also held that those aspects of aid which contravene specific provisions of the Treaty other than Articles 92 and 93 may be so indissolubly linked to the object of the aid that it is impossible to evaluate them separately (judgment in Case 74/76 Iannelli v Meroni [1977] ECR 557).*
>
> *42* ***That obligation on the part of the Commission to ensure that Articles 92 and 93 are applied consistently with other provisions of the Treaty is all the more necessary where those other provisions also pursue, as in the present case, the objective of undistorted competition in the common market."***
>
> [Emphases added],

and of the related observation by the Court of First Instance in *RJB Mining v. Commission* (Case T-156/98), para. 112, another State aid case, that:

> *"112 As regards the alleged failure to take adequate account of the State aid, in particular in so far as concerns the financial consequences of the merger, it is settled case-law of the Court of Justice that the Commission must, as a matter of principle, avoid inconsistencies that might arise in the implementation of the various provisions of Community law (see Matra…paragraph 41, and Case C-164/98 P DIR International Film and Others v Commission [2000] ECR 1-447…). That obligation on the Commission to maintain consistency between the provisions of the Treaty relating to State aid and other provisions of the Treaty is all the more necessary when the other provisions also have undistorted competition in the common market as their aim (Matra…paragraph 42, and SIDE v Commission [[1995] ECR 11-2501]...".*

(ii) Good Administration and Transparency.

a. Good Administration.

264. In *Intel Corp v. European Commission* (Case T-286/09), paras.358-9, the General Court observed as follows:

> *"358 The question which arises in the present case is in fact whether the Commission complied with its obligation to investigate the case carefully and impartially.*
>
> 359 *In that regard, it should be noted that the guarantees afforded by the European Union legal order in administrative proceedings include, in particular, the principle of sound administration, enshrined in Article 41 of the Charter of Fundamental Rights, which entails the duty of the competent institution to examine carefully and impartially all the relevant aspects of the individual case (Joined Cases T 191/98, T 212/98 to T 214/98* Atlantic Container Line and Others v Commission *[2003] ECR II 3275, paragraph 404* [a decision of the Court of Justice] *and the case-law cited)."*

265. In *Kingdom of the Netherlands and ING Groep v. European Commission* (Cases T-29/10 and T-33/10), the General Court, at para.107, observed, *inter alia*, as follows:

> "107 [W]*ith regard to the appraisal of the arguments concerning the lawfulness of the contested decision on procedural grounds, it should be noted that the Kingdom of the Netherlands and ING refer, in a general manner, to a number of guarantees conferred by the European Union legal order in administrative proceedings, in particular when they may lead to a decision having mandatory legal effects such as to affect the interests of the parties covered by the decision. Those guarantees include the requirement that the Commission examine, carefully and impartially, everything relevant to the particular case, and the rights of the person concerned to put forward his point of view before the decision is taken and to have sufficient reasons given for the decision."*

b. Transparency.

266. There is a battery of European case-law dealing with the principle of transparency as a necessary facet of verifying compliance with the principle of non-discrimination. So, for example, in

> – *Commission v. Italy* (Case C-260/04), para.24, the Court of Justice observed, *inter alia*, as follows:
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> "[T]*he principles of equal treatment and non-discrimination on grounds of nationality imply, in particular, a duty of transparency which enables the concession-granting public authority to ensure that those principles are complied with."*
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> – *Sporting Exchange Ltd ('Betfair') v. Minister van Justitie* (Case C-203/08), the Court of Justice observed as follows, at para.50:
>
> > *"It has consistently been held that if a prior administrative authorisation scheme is to be justified, even though it derogates from a fundamental freedom, it must be based on objective, non-discriminatory criteria known in advance, in such a way as to circumscribe the exercise of the authorities' discretion so that it is not used arbitrarily (Case C 389/05 Commission v France [2008] ECR I 5397, paragraph 94, and Case C 169/07 Hartlauer [2009] ECR I 1721, paragraph 64). Furthermore, any person affected by a restrictive measure based on such a derogation must have a judicial remedy available to them (see, to that effect, Case C 205/99 Analir and Others [2001] ECR I 1271, paragraph 38)."*
>
> – *Carmen Media Group v. Land Schleswig-Holstein* (Case C-46/08), the Court of Justice observes, *inter alia*, as follows, at paras. 86-87 (incl.) and 90:
>
> > *"86 According to consistent case-law, where a system of authorisation pursuing legitimate objectives recognised by the case-law is established in a Member State, such a system cannot render legitimate discretionary conduct on the part of the national authorities which is liable to negate the effectiveness of provisions of EU law, in particular those relating to a fundamental freedom such as that at issue in the main proceedings (see, in particular, Case C 203/08* Sporting Exchange *[2010] ECR I-0000, paragraph 49).*
> >
> > *87 Also, if a prior administrative authorisation scheme is to be justified, even though it derogates from a fundamental freedom, it must be based on objective, non discriminatory criteria known in advance, in such a way as to circumscribe the exercise of the authorities' discretion so that it is not used arbitrarily. Furthermore, any person affected by a restrictive measure based on such a derogation must have an effective judicial remedy available to them (see* Sporting Exchange, *paragraph 50 and case-law cited).*
> >
> > *…*
> >
> > *90 Having regard to the above, the answer to the third question is that, on a proper interpretation of Article 49 EC, where a system of prior administrative authorisation is established in a Member State as regards the supply of certain types of gambling, such a system, which derogates from the freedom to provide services guaranteed by Article 49 EC, is capable of satisfying the requirements of that latter provision only if it is based on criteria which are objective, non-discriminatory and known in advance, in such a way as to circumscribe the exercise of the national authorities' discretion so that it is not used arbitrarily. Furthermore, any person affected by a restrictive measure based on such a derogation must have an effective judicial remedy available to them."*

267. Further applications of the principle of transparency can be seen, *inter alia*, in *Altmark Trans GmbH v. Nahverkehrsgesellschaft Altmark GmbH* (Case C-280/00*), R. (Alliance for Natural Health* and *Nutri-Link Ltd) v. Secretary of State for Health* (Joined Cases C-154 and 155/04) and *Melli Bank plc v. Council* (Joined Cases T-246/08 and T-332/08).

c. Conclusion.

268. As is apparent from the correspondence between the parties, as considered at some length previously above, there has been a notable failure on the part of the respondents to address fully by reply the case that was put forward to them carefully and comprehensively in the letter from O'Flynn Exhams of 5th July 2016; no meaningful reply by e-mail or letter has ever issued to that correspondence despite, *inter alia*, request being made to the Department that it advise SNO of its perspective of the applicable law; no reasons were offered as to why a different approach was being taken; and there is no evidence before the court (none) which suggests that the contentions of the applicants were ever comprehensively considered in such a manner as might have enabled a suitably informed and informative reply. In truth, the evidence points in the opposite direction. It was not until court proceedings were commenced, court proceedings that the applicants have repeatedly stated that they would prefer not to have felt themselves compelled to bring, that there has been any explanation of the legal position being adopted by the respondents. The court is driven by the facts and evidence to conclude that (i) notwithstanding such correspondence and meetings as did occur, there has in truth been a failure on the part of the respondents (a) constructively to engage with the applicants, and (b) carefully and impartially to examine all the relevant evidence in the case; and (ii) there has been delay and failure in communicating with the applicants (for example, rather than communicating transparently with the applicants, the MSO simply put recognition of certificates in abeyance without notifying the applicants).

Natural and Constitutional Justice

269. The applicants contend that they were entitled, in the circumstances presenting, to be consulted with by the respondents prior to the issuing of the Marine Notice. They rely in this regard on the decision of the Supreme Court in *Dellway Investments Limited v NAMA* [2011] 4 I.R. 1. In that case, *Dellway* and a number of associated companies were developers, all controlled by a Mr McKillen. The developers had relationships with a number of banks. Under the National Asset Management Agency Act 2009, the National Asset Management Agency (NAMA) was conferred with the right to acquire 'bank assets', including bank loans and all of the contractual rights and security associated with such loans. Banks could object only if they were of the opinion that the bank asset was not an eligible bank asset. A borrowing party to such loans, the person who was in an existing relationship with a bank from which acquisition was made, had no entitlement to make any representation concerning such proposed acquisition. (There were other issues in the case but they need not be considered here).

270. By way of aside, if one 'parks' the issue of whether or not the plaintiffs in *Dellway* enjoyed a legal right in the bank's interests in their loans, *Dellway* presented, in reality, as strong an attack on the property rights and right to earn a livelihood of Mr McKillen and his associated companies, as one could possibly imagine, short of direct expropriation of the property itself. Although the interference with the property interests of the applicants in the within proceedings is not quite as draconian as occurred in *Dellway*, it is nonetheless substantial and serious. However, the attack in *Dellway* occurred in a context in which Mr McKillen did not enjoy a right to make submissions, and it is in that context that the Supreme Court's considerations in *Dellway* must be viewed. In this last regard, the court cannot but note that the position of the applicants in the within proceedings is different to Mr McKillen's position in *Dellway*. This is because, by virtue of their ongoing liaison with Department officials, from June to December 2016, the applicants in the within proceedings had an opportunity to make extensive submissions in relation to the central issue that is now at issue in the within proceedings.

271. The overall result of the decision of the Supreme Court in *Dellway*, insofar as the issue of fair procedures is concerned, has, if the court might respectfully observe, been encapsulated succinctly by Hogan J. in the following observation in *Callaghan v. An Bord Pleanála* [2016] IECA 398, para. 37:

> "*The Supreme Court*…[*in Dellway*] *held that fair procedures meant that the applicant was entitled to be heard prior to any decision by NAMA to receive*…[a particular] *tranche of loans…because such a transfer of those loans quite obviously had material reputational and practical implication for the borrowers*."

272. In essence, the core judgments in *Dellway*, particularly those of Murray C.J. and Fennelly and Macken JJ., can, so far as relevant to the within proceedings, perhaps be synthesised as follows:

> (1) the criteria for assessing whether fair procedures require a person to be heard before a decision is made include (a) the nature of the decision, (b) the nature of the statutory scheme, (c) the importance of the decision to the person invoking the right and (d) the choice of the procedure adopted by the decision-maker. There can be other relevant criteria such as any legitimate expectation presenting;
>
> (2) a person whose interests are capable of being directly affected in a material way by a decision, should be allowed to put forward reasons as to why the decision should not be made or not take a particular form, even if that decision is justifiable in the interests of the common good. However, the mere diminution of property values would not normally suffice to establish the right to be heard; and
>
> (3) the right to be heard before a contemplated decision is made is not dependent on establishing interference with a specific and identifiable right. The courts have never laid down rigid rules for determining when the need to observe fair procedures applies: it depends on the circumstances and the subject matter. The fundamental underlying principle is fairness.

273. It does not seem to the court that, in the circumstances presenting in the within case, the applicants were entitled, as a matter of law, to be consulted prior to the issuing of the Marine Notice. By virtue of their ongoing liaison with Department officials the applicants in effect had an opportunity to make submissions in relation to the matters of concern to them. The issuance of the Marine Notice precipitated the within proceedings. If advance notice of its potential issuance had been given, ancillary arguments such as *e.g.*, legitimate expectation would likely have come more to the fore. However, even the fact that the Marine Notice has now issued has not altered the kernel of the dispute arising between the parties or the principal submission arising, being that the applicants believe that they have a right to proceed in one manner under European and Irish law and the respondents believe a contrary view to be correct. When it comes to this substantive dispute the views of the applicants were well-known and understood by the respondents, and counsel for the applicants in the within case stated more than once at hearing that the mutual recognition dimension of his arguments was very much his key argument, occupying the great bulk of his time at hearing. It follows from the foregoing that the court does not see that any injustice or unfairness, let alone a breach of natural or constitutional justice, arises from the fact that the applicants were not consulted prior to the issuing of the Marine Notice.

XXV

Futility

274. The respondents contend that for the court to strike down the Marine Notice is a futile exercise because the Department will still carry on with its policy. That is, to put matters mildly, a curious submission to make. The court were it to strike down the notice (and it will) would be and is doing so on the basis, *inter alia*, that the policy reflected in the Marine Notice is contrary to law. Can it seriously be suggested that the State would or will ignore the impact of that finding? It could, of course, appeal the finding. But absent such an appeal, the court would expect that the State would seek immediately to comply with any declaration of the court both (a) as part of that respect which one great organ of state owes to another, and (b) because that is appropriate in a system of government based on the rule of law.

XXVI

Conclusion

275. For the various reasons aforesaid, the court will grant the following reliefs sought in the notice of motion: reliefs (1), (2), (3), 4(a), and 4(g). Though the court does not grant relief (5), it would respectfully draw the attention of the respondents to the concern touched upon by the court previously above that reg.12 of the 2014 Regulations does not properly transpose the applicable

requirements of the 2008 Directive, as amended. Relief (6) is declined as the court, having concluded previously above that the within application was brought well within time, does not consider any extension of time to be required. The court understands that reliefs (7) and (8) are no longer being sought. No further or other relief appears to the court to be required. The court will hear the parties as to the issue of costs.