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THE EFFECTIVENESS OF THE EU PACKAGE TRAVEL DIRECTIVE DURING THE COVID-19 PANDEMIC

Abstract

The aim of this paper is to analyze the effectiveness of the EU Package Travel Directive during the COVID-19 pandemic. First, the paper depicts the legal regime under Council Directive 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours as well as Directive (EU) 2015/2302 of the European Parliament and of the Council of 25 November 2015 on package travel and linked travel arrangements. The comparison of both EU Package Travel Directives shows both some similarities and differences from the perspective of travellers' rights. Furthermore, the paper offers justification of the actions taken by the EU Member States in the face of COVID-19 pandemic, using the EU report on the application of the 2015 Package Travel Directive. Finally, the paper exhibits case law relating to tourism that evolved as a consequence of the COVID-19 pandemic. The reported cases are pending before the Court of Justice of the European Union, which means that all EU Member States are still waiting for the final judgement. The author supports the views presented by Advocate General Laila Medina and strongly believes that the protection of tourists will be continued.

KEYWORDS

package travel, holiday, tourists, EU law

SŁOWA KLUCZOWE

wycieczka zorganizowana, wakacje, turyści, prawo europejskie

1. INTRODUCTION

The COVID-19 pandemic brought uncertainty for many people¹. It has burst upon tourists as one of the main players of the tourism sector. All tour operators also faced the pandemic with little knowledge and no experience. Over this period, many conflicting statements, positions, and behaviours have been spreading. Prior to the coronavirus pandemic, the global tourism sector had seen almost uninterrupted growth for decades. Nowadays, as the world is facing new challenges, such as the war in Ukraine and a stalling recovery in China, tourism is one of the sectors most seriously affected by COVID-19 pandemic. The international arrivals have increased by just 4 per cent in the second year of the pandemic, with 1 billion fewer arrivals compared to the pre-pandemic levels. In many of the world's cities, planned travel went down by 80–90 per cent². Conflicting and unilateral travel restrictions occurred regionally³. The UN World Tourism Organization (UNWTO) reported a 65 per cent drop in international tourist arrivals in the first six months of 2020⁴. The air passenger travel showed a similar decline⁵. The United Nations Conference on Trade and Development released a report in June 2021, stating that the global economy could lose over USD 4 trillion as a result of the pandemic⁶. The majority of experts from the UNWTO believe the sector will not fully recover until 2024⁷. The outbreak of the COVID-19 pandemic forced the

¹ The paper is based on the research conducted for the author's doctoral dissertation, entitled *The legal protection of Polish tourists in the framework of foreign package holidays*.

² L. Jones, D. Brown, D. Palumbo, *Coronavirus: A visual guide to the economic impact*, BBC 20 March 2020, <https://www.bbc.co.uk/news/business-51706225> (accessed 16.10.2022).

³ EU's politics-oriented approach to border reopening is risking recovery, Schengen Visa Info 10 July 2020, <https://www.schengenvisa.info.com/news/eus-politics-oriented-approach-to-border-reopening-is-risking-recovery> (accessed 16.10.2022).

⁴ International tourist numbers down 65% in first half of 2020, UNWTO 15 September 2020, <https://www.unwto.org/news/international-tourist-numbers-down-65-in-first-half-of-2020-unwto-reports> (accessed 16.10.2022).

⁵ M. McCarty Carino, *Airlines may need to retool routes with decline in business travel*, "Marketplace" 26 August 2020, <https://www.marketplace.org/2020/08/26/covid-19-airlines-business-travel> (accessed 16.10.2022).

⁶ United Nations Conference on Trade and Development. COVID-19 and tourism: An update. United Nations, 30 June 2021, https://unctad.org/system/files/official-document/ditcinf2021d3_en_0.pdf (accessed 16.10.2022).

⁷ *This is the impact of COVID-19 on the travel sector*, World Economic Forum 25 January 2022, <https://www.weforum.org/agenda/2022/01/global-travel-tourism-pandemic-covid-19> (accessed 16.10.2022).

EU Member States and thus the EU institutions to undertake a number of actions aimed at protecting the tourism industry. The article examines the effectiveness of the EU Package Travel Directive during the COVID-19 pandemic, taking into account all the relevant factors. These factors are carefully discussed in the following section.

2. HOW WAS IT BEFORE THE 2015 PACKAGE TRAVEL DIRECTIVE?

Directive 90/314/EEC⁸ has contributed to the European travel and tourism since it created – as the first directive ever – important rights for the European travellers purchasing package holidays, typically consisting of passenger transport and accommodation. Firstly, Directive 90/314/EEC ensured that consumers receive essential information before and after signing a package travel contract. Secondly, it provided that the organizers and/or retailers are responsible for the proper performance of the package, even if the services are provided by subcontractors, and regulated what happens if there are changes to the package travel contract. It also ensured that travellers receive a refund of pre-payments and are repatriated in the event of the organiser's and/or retailer's insolvency⁹.

The Member States, governed by this Directive, had a huge margin of discretion in terms of providing tourists with adequate level of protection. According to its Art. 8, “Member States may adopt or return more stringent provisions in the field covered by this Directive to protect the consumer”. This nature of the Directive has led to the approximation of implementation regulations in the individual Member States, allowing for the existing differences, sometimes quite significant, regarding some of the regulated issues. It means that the Directive allowed for derogations from it as part of the implementation process as long as the minimum standard of protection stipulated therein was maintained. It also defined the terms which are essential to the tourism industry. According to Art. 2 of Directive 90/314/EEC, the term “package” means the pre-arranged combination of not fewer than two of the items listed below, when sold or offered for sale at an inclusive price and when the service covers a period of more than twenty-four hours or includes overnight accommodation: 1. transport, 2. accommodation, 3. other

⁸ Council Directive 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours [1990] OJ L158/59.

⁹ Proposal for a Directive of the European Parliament and of the Council on package travel and assisted travel arrangements, amending Regulation (EC) No. 2006/2004, Directive 2011/83/EU and repealing Council Directive 90/314/EEC, COM(2013) 512 final.

tourist services not ancillary to transport or accommodation and accounting for a significant proportion of the package¹⁰.

There is no doubt that the customer of the travel agency is the consumer. This fact seemed to be confirmed by the Directive 90/314/EEC. Pursuant to Art. 2(4), “consumer means the person, who takes or agrees to take the package (‘the principal contractor’), or any person on whose behalf the principal contractor agrees to purchase the package (‘the other beneficiaries’) or any person to whom the principal contractor or any of the other beneficiaries transfers the package (the transferee)”.

Directive 90/314/EEC also referred to the protection of customers in the event of the price change by the tour operator. Pursuant to its Art. 4(5), the possibility of withdrawing from the contract existed if the price of the package increased “to a significant degree”. The Directive did not specify this concept in detail, leaving the matter to national legislators. Moreover, there were no provisions that would refer more broadly to the consequences of the consumer’s withdrawal from participation in a package before its commencement¹¹.

Under Directive 90/314/EEC, the concept of *force majeure* appeared in two provisions. First, *force majeure* was one of the two circumstances which resulted in the exclusion of the consumer right to compensation in a situation where the tour operator cancelled the package before the agreed date of departure¹². In this provision, the legislator defined *force majeure* as extraordinary and unforeseen circumstances beyond the control of the party and having the consequences which could not be avoided even if due diligence was exercised, except for selling more than the available number of seats. Secondly, *force majeure* was one of the conditions allowing the “organiser and/or retailer or the supplier of services” to avoid responsibility for the non-performance or improper performance of the contract¹³. Under this provision, liability was excluded if the non-performance or improper performance of the contract was for “reasons of *force majeure*”, as defined in point (ii) of Art. 4(6), or an event which the organiser and/or retailer or the supplier of services, even with all due care, could not foresee or forestall. In the latter case, the directive envisaged two grounds for excluding the tour operator’s liability (*force majeure* and the event indicated).

One of the most important problems discussed for years in the case of a package travel contract is the responsibility of tour operators for the so-called third

¹⁰ P. Cybula, *Umowa o imprezę turystyczną*, Warszawa 2005, p. 66.

¹¹ D. Ambrożuk, *Funkcja ochronna przepisów ustawy o imprezach turystycznych dotyczących umowy o udział w takiej imprezie*, (in:) B. Gneta, E. Sługocka-Ktupa, M. Szaraniec, A. Vighianisi Ferraro (eds.), *Prawo konsumenckie w Polsce oraz innych państwach UE. Zagadnienia wybrane*, Warszawa 2019.

¹² Council Directive 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours [1990] OJ L158/59, Art. 4(6).

¹³ Council Directive 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours [1990] OJ L158/59, Art. 5(2).

parties (subcontractors). Directive 90/314/EEC allowed in this respect to limit the liability of the tour operator in two ways to a large extent¹⁴: firstly, on the basis of international conventions relating to the services constituting a package, and secondly¹⁵, permitting the Member States to limit a contractual level of the amount of compensation. However, it didn't include damages related to personal injury¹⁶.

Pursuant to Directive 90/314/EEC, the package travel contract should contain, *inter alia*, deadlines by which complaints could be submitted by a consumer with reference to the non-performance or improper performance of the contract¹⁷. Interestingly, no provision of the Directive in question specified when consumer claims for the non-performance or improper performance of a package travel contract are time-barred. The lack of such a provision under the Directive meant that it could be freely defined by the Member States, assuming that the general requirements of correct implementation, related in particular to the need to ensure effective legal protection, were met.

However, the main problem of Directive 90/314/EEC was that in 1990 the structure of the travel market was much simpler than today and the Internet didn't exist. It remains unclear to what extent modern ways of combining travel services are covered by the Directive. Moreover, Directive 90/314/EEC, adopting the principle of minimum harmonisation, has led to different legal protection offered to consumers under different national laws. The Member States were allowed to offer consumers more protection than stipulated by the Directive. As a result, it contributed to the emergence of inequalities leading to limitations in cross-border trade, which was particularly affecting entrepreneurs.

3. THE 2015 PACKAGE TRAVEL DIRECTIVE AS A CURE FOR HEALING THE EXISTING PROBLEMS

On 25 November 2015 the European Parliament and the Council of the EU adopted a new Directive on Package Travel and Linked Travel Arrangements, i.e.

¹⁴ P. Cybula, *W sprawie oceny dopuszczalności powoływania się przez organizatora turystyki na przepisy szczególnie ograniczające zakres albo warunki na jakich odszkodowanie lub zadośćuczynienie jest wypłacane przez dostawcę usług turystycznych (czyli o potrzebie zmiany art. 50 ust. 5 ustawy o imprezach turystycznych i powiązanych usługach turystycznych)*, „Kwartalnik Antymonopolowy i Regulacyjny” 2018, Vol. 38.

¹⁵ Council Directive 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours [1990] OJ L158/59, Art. 5(2).

¹⁶ *Ibidem*.

¹⁷ Council Directive 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours [1990] OJ L158/59, Art. 4 (2) (1) and Annex to the Directive.

Directive 2015/2302¹⁸. The main objective of the Directive in question was to eliminate gaps and ambiguities arising from Directive 90/314/EEC and to adapt the legal regulations of the Member States to the challenges related to electronic commerce, in the most uniform manner in the area of operation of the EU market. For this reason, the Member States will not be able either to maintain or introduce into national law provisions diverging from those laid down in the Directive, including more or less stringent provisions that would lead to a different level of protection for travellers¹⁹.

Compared to the previous legal regime, Directive 2015/2302 is based on the principle of maximum harmonisation. It follows from this assumption that the matter covered by this Directive has been exhaustively regulated by the EU legislator. It is also unacceptable to fail to implement any part of the Directive²⁰. According to recital 21 of the Directive, “Member States should remain competent, in accordance with Union law to apply the provisions of this Directive to areas not falling within its scope. Member States may therefore maintain or introduce national legislation corresponding to the provisions of this Directive, or certain of its provisions, in relation to contracts that fall outside the scope of this Directive. For instance, Member States may maintain or introduce corresponding provisions for certain stand-alone contracts regarding single travel services (such as the rental of holiday homes) or for packages and linked travel arrangements that are offered or facilitated, on a not-for-profit basis to a limited group of travellers and only occasionally, or to packages and linked travel arrangements covering a period of less than 24 hours and which do not include accommodation”.

As far as the personal scope of application of Directive 2015/2302 is concerned, the EU legislator deliberately deviates from the term “consumer” and replaces it with the word “traveller” in order to avoid misunderstandings related to the interpretation of the former term in the light of other consumer protection directives. According to Art. 3(6) of the Directive, the term “traveller” refers to any person who is seeking to conclude a contract or is entitled to travel on the basis of a contract concluded, within the scope of this Directive. In this definition of “traveller”, the EU legislator does not specify that it is a natural or legal person or that it is only a natural person, but merely states it is a “person”. The

¹⁸ Directive (EU) 2015/2302 of the European Parliament and of the Council of 25 November 2015 on package travel and linked travel arrangements, amending Regulation (EC) No. 2006/2004 and Directive 2011/83/EU of the European Parliament and of the Council and repealing Council Directive 90/314/EEC [2015] OJ L326/1.

¹⁹ Art. 4: “Unless otherwise provided for in this Directive, Member States shall not maintain or introduce, in their national law, provisions diverging from those laid down in this Directive, including more or less stringent provisions which would ensure a different level of traveller protection”.

²⁰ F. Radoniewicz, *Techniki implementacji do polskiego porządku postanowień decyzji ramowych Rady Unii Europejskiej dotyczących prawa karnego materialnego*, “Przegląd Prawa Konstytucyjnego” 2015, Vol. 193.

purpose of a trip is not mentioned, either. Therefore, the Directive shall also apply to a business traveller. This follows from recital 7 of the Preamble, which requires the Directive to apply to business travellers, including members of liberal professions, or self-employed or other natural persons, where they do not make travel arrangements on the basis of a general agreement. It can be concluded that in contracts falling within the scope of Directive 2015/2302, the majority of travellers “purchasing” packages or linked travel arrangements are consumers within the meaning of EU law. A “traveller” is then a person protected under the Package Travel Directive, and not only a consumer within the meaning of EU law or only a natural person. However, only a natural person, including one who has the status of an entrepreneur, may be the beneficiary of the package travel contract²¹.

The adoption of Directive 2015/2302 led to certain changes within the scope of the protection of tourists. First of all, the concept of “package” started to be defined differently, and the concept of “linked travel arrangements” was introduced. According to Art. 3(2) of Directive 2015/2302, a package means a combination of at least two different types of travel services for the purpose of the same trip or holiday. The new Directive also clarifies the individual elements of the package. Therefore, the concept of “package” will also include contracts in which the package is prepared by the entrepreneur at the traveller’s request or of his choice, made before the package travel contract is concluded²². Moreover, it will not matter for the design of the package whether the trader has separate contracts with individual travel service providers or whether it only allows the selection and purchase of these services at one point of sale before a traveller agrees to pay. The most important thing is that tourism services are either offered or sold at an exclusive or total price, as well as where such services are advertised or sold under the term “package” or under a similar term indicating a close connection between the tourism services concerned. Such similar terms could be “combined deal” or “all-inclusive”²³. Moreover, individual services may also be combined after the conclusion of a contract under which the trader entitles a traveller to choose some types of tourism services. This regulation will apply in a situation where the package is a gift for a traveller²⁴.

As regards price changes before the start of the package, Directive 2015/2302 introduced two significant changes compared to Directive 90/314/EEC. Firstly,

²¹ P. Cybula, *The implementation of Directive 2015/2302 on package travel and linked travel arrangements in Poland*, (in:) *Collective commentary about the New Package Travel Directive*, ESHTE 2020, 55.

²² Case C-400/00 *Club-Tour, Viagens e Turismo SA v Alberto Carlos Lobo Gonçalves Garrido*, with the participation of Club Med Viagens Lda. [2002] ECLI:EU:C:2002:272, I,04051.

²³ Directive (EU) 2015/2302 of the European Parliament and of the Council of 25 November 2015 on package travel and linked travel arrangements, amending Regulation (EC) No. 2006/2004 and Directive 2011/83/EU of the European Parliament and of the Council and repealing Council Directive 90/314/EEC [2015] OJ L326/1, Recital 10 of the Preamble.

²⁴ *Ibidem*, Recital 11 of the Preamble.

Art. 10(1) of Directive 2015/2302 expressly states that introducing provisions relating to the possibility of increasing the price is permissible as long as the contract also provides that a traveller is entitled to a price reduction in the same situations. Secondly, if the price increase within the scope strictly defined in Art. 10(1) of Directive 2015/2302 does not exceed 8 per cent of the price, a traveller is obliged to pay the surcharge. The price is changed unilaterally by the tour operator and a traveller cannot withdraw from the contract.

The EU legislator also introduced the concept of “unavoidable and extraordinary circumstances”, defined in Art. 3(12) of Directive 2015//2302 as “a situation beyond the control of the party who invokes such a situation, and the consequences of which could not have been avoided even if all reasonable measures had been taken”. This is a reduction in the protection of a traveller because the concept of “unavoidable and extraordinary circumstances” is understood more broadly than the current concept of *force majeure*²⁵, which leads to wider circumstances excluding the tour operator’s liability²⁶.

On the one hand, Directive 2015/2302 does not contain a general rule allowing the exclusion or limitation of the tour operator’s liability due to “special provisions”²⁷, but on the other hand it specifies when consumer’s claims for the non-performance or improper performance of a package travel contract are timebarred. In accordance with Art. 14(6), “the limitation period for introducing claims under this Article shall not be less than two years”. Art. 14 of Directive 2015/2302 deals with a traveller’s entitlement to a price reduction for non-compliance and compensation for any damage suffered by a traveller as a result of any non-compliance.

4. EU REPORT ON THE APPLICATION OF THE PACKAGE TRAVEL DIRECTIVE

As mentioned above, the COVID-19 pandemic has had a dramatic and unprecedented impact on the tourism sector throughout the world, reducing sharply the tourism flows and thus the revenues of the tourism businesses. In the first three quarters of 2020, international arrivals in the EU were 67.5 per cent lower than in

²⁵ M. Nesterowicz, *Dyrektywa Unii Europejskiej o imprezach turystycznych i powiązanych usługach turystycznych, jej implementacja do prawa polskiego i odpowiedzialność biur podróży*, “Przegląd Sądowy” 2018, Vol. 51.

²⁶ D. Ambrożuk, *op.cit.*

²⁷ Directive (EU) 2015/2302 of the European Parliament and of the Council of 25 November 2015 on package travel and linked travel arrangements, amending Regulation (EC) No. 2006/2004 and Directive 2011/83/EU of the European Parliament and of the Council and repealing Council Directive 90/314/EEC [2015] OJ L326/1, Art. 14 (4) and (5).

the same period in 2019. The drop ranged from 46 per cent to 84 per cent, depending on the Member State concerned. Most of the tourism stakeholders we interviewed doubted that the tourism demand would return to pre-crisis levels before 2024²⁸. For this reason, the European Commission decided to publish a report on the application of Directive 2015/2302 on Package Travel and Linked Travel Arrangements²⁹. The document in question summarizes the actions taken by EU Member States in the face of the COVID-19 pandemic.

First of all, the application of the Directive was reflected in the number of inquiries and complaints that appeared in relation to the legal solutions it introduced. According to the information from European Consumer Centres (ECCs)³⁰ 2399 queries and 261 complaints were submitted in 2019. Queries cover all requests for information and assistance received by ECCs, whereas complaints cover cases where ECCs contact the trader to find a solution. The COVID-19 pandemic did not stop the growth of these indicators. In 2020, the numbers increased by 368 per cent (11,226 queries) and 250 per cent (914 complaints). Furthermore, the proportion of the total ECC caseload that related to the Directive increased significantly from 2 per cent in 2019 to 7 per cent of the total caseload in 2020. Nevertheless, the subject of queries and complaints has changed. In 2019, 39 per cent of them concerned the non-conformity of the performance or misleading acts or omissions. In 2020, cancellation and non-performance was the topic number one (62 per cent). On the other hand, the thing that remained unchanged was the average case-handling time. In order to avoid confusion, the ECCs published a brochure on the interpretation of the PTD³¹ and shared FAQs on their national websites and social media channels to assist consumers in view of the spike of complaints in the travel sector, including packages.

The analysis of the data included in the report proves that the insolvency protection systems appear to have functioned well in spite of being put under great strain. Travellers could choose between the repatriation and termination of their holidays in the case of those who had already arrived at their destinations. According to the information available to the Commission, travellers who had

²⁸ European Court of Auditors. EU Support to tourism. Need for a fresh strategic orientation and a better funding approach. Publications Office of the European Union 2021, https://www.eca.europa.eu/Lists/ECADocuments/SR21_27/SR_EU-invest-tourism_EN.pdf (accessed 16.10.2022).

²⁹ Report from the Commission to the European Parliament and the Council on the application of Directive (EU) 2015/2302 of the European Parliament and of the Council on package travel and linked travel arrangements (COM2021) 90 final 2.

³⁰ ECC Net is a network of independently managed offices cofunded by the European Commission. It provides free information and advice to consumers who purchase products and services within the EU and assists with the outofcourt settlement of disputes arising between traders and consumers from different EU Member States.

³¹ Report from the Commission to the European Parliament and the Council on the application of Directive (EU) 2015/2302 of the European Parliament and of the Council on package travel and linked travel arrangements (COM2021) 90 final 9.

not yet started their package have received, or should receive, a refund of their prepayments³². However, there were situations where tourists had to wait a long time to receive a refund or did not receive a full refund even though Art. 17(5) of the PTD requires that refunds be provided without undue delay after a traveller's request.

The report also included the issue of the so-called risk insurance. There were voices that banks were no longer providing security for tour operators and that also some of the relatively few insurance companies offering insolvency protection are pulling out of the market in Austria³³ and Belgium³⁴. This, in turn, gave rise to anxiety whether appropriate insolvency protection providers can be found to cover the risks related to the bankruptcy of a major tour operator, especially, during peak season. Therefore, it was proposed to provide a multiple security providers for one tour operator or the setting up of a pan-EU guarantee fund as a kind of re-insurance for the first line guarantors.

The limitation of prepayments was also examined. This system is known in Member States such as Germany. According to its national case law on unfair contract terms, prepayments for package travel are, in principle, limited to 20 per cent down payment at the time of booking unless the tour operator duly justifies a higher prepayment due to expenditures arising at the time of contract conclusion. The rest is due no more than 30 days before the beginning of the trip³⁵. In some Member States, there are also restrictions on prepayment(s). This is the case, for example, in Austria, where these restrictions do not apply as long as unlimited insolvency protection is available³⁶. In order to improve the system and protect tourists, a proposal for a limitation in the amount of prepayments has emerged. This idea would require travellers to pay as long as they receive the service, which, in turn, would ensure the certainty of trading in the tourism services market. Another advantage of this solution is that travellers would be better protected in the case of cancellations³⁷.

³² *Ibidem*, final 11.

³³ Recital 7 of the Commission Decision of 4 February 2021 in State aid case SA.60521, https://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_60521 (accessed 30.11.2021).

³⁴ Explanatory Memorandum to COM(2021)90 – Application of Directive 2015/2302 on package travel and linked travel arrangements, https://www.eumonitor.eu/9353000/1/j4nvhd-fd-k3hyd-zq_j9vvik7mlc3gyxp/vlgnkr-gb2qr7 (accessed 30.11.2021).

³⁵ Judgment of the Bundesgerichtshof of 9 December 2014, X ZR 13/14; Judgment of the Bundesgerichtshof of 25 July 2017, X ZR 71/16.

³⁶ Para 4(4) of the Package Travel Order (*Pauschalreiseverordnung*). Prepayments may only be accepted 11 months before the agreed end of the trip; prepayments of more than 20 per cent may only be requested 20 days before the start of the trip, unless unlimited insolvency protection is available.

³⁷ Position paper of the Verband Deutsches Reisemanagement e.V. of May 2020, https://www.vdr.service.de/fileadmin/der,verband/politische,arbeit/vdr,positionen/2020,05_VDR,Position_Payment,Practice,Airline,Tickets_Pay,As,You,Check,In.pdf (accessed 30.11.2021).

With reference to the bankruptcy of Thomas Cook³⁸, the European Parliament called for extending insolvency protection to seat-only flights in the framework of the revision of the Air Passenger Rights Regulation 261/2004. There is no doubt that the airline insolvency can affect travellers, tour operators, and intermediaries³⁹. In the case of a flight cancellation, the tour operator may have to refund a traveller the full price irrespective of whether it still holds the money or will be able to recover it from the airline. The COVID-19 crisis clearly shows that mandatory insolvency protection provided by airlines should be introduced.

The report also refers to the situation of the tourism industry and tourists in connection with the COVID-19 pandemic, announced on 11 March 2020 by the World Health Organization. As the research shows, the COVID-19 pandemic has resulted in unprecedented worldwide travel restrictions causing almost a standstill of travel in Europe and many other parts of the world. This is having a serious impact on the whole tourism ecosystem⁴⁰, reflected in relevant data. Between January and October 2020 tourism was reduced to 72 per cent in comparison with 2019⁴¹. The tour operators themselves were also at a disadvantage as travellers started demanding refunds. It was realized that these customer's demands significantly exceed the level of income generated by new bookings. The Commission's Joint Research Centre estimated in a "second wave" scenario that 11.7 million jobs could be at risk in the EU economy as a result of a drop in tourist arrivals in 2020⁴². Refund requests due to cancellations turned out not to be fulfilled, as shown by data from consumer organisations. It can be concluded that, by December 2020, thousands of consumers had not yet received a refund in money for cancelled holidays⁴³.

The coronavirus pandemic, affecting the international environment, has forced the EU institutions to adopt specific measures. The first step was to publish informal guidelines on the application of the Package Travel Directive in connection with COVID-19⁴⁴ on the Commission's website on 5 March 2020,

³⁸ European Parliament Resolution of 24 October 2019 on the negative impact of the bankruptcy of Thomas Cook on EU tourism (2019/2854(RSP)), https://www.europarl.europa.eu/doceo/document/B_9_2019_0120_EN.pdf (accessed 30.11.2021).

³⁹ Report from the Commission to the European Parliament and the Council on the application of Directive (EU) 2015/2302 of the European Parliament and of the Council on package travel and linked travel arrangements (COM2021) 90 final 13.

⁴⁰ *Ibidem*, final 13.

⁴¹ Behavioural changes in tourism in times of COVID-19, https://publications.jrc.ec.europa.eu/repository/bitstream/JRC121262/report_covid_tour_emp_final.pdf (accessed 30.11.2021).

⁴² *Ibidem*.

⁴³ BEUC's evaluation of the Member States implementation of the EU Commission Recommendation on 'vouchers' of 14 December 2020, <https://www.beuc.eu/publications/travel,voucher,chaos,continues,several,eucountries,and,travel,industry,still,flouting/html> (accessed 30.11.2021).

⁴⁴ Information on the Package Travel Directive in connection with the COVID-19, https://ec.europa.eu/info/sites/info/files/coronavirus_info_ptd_19.3.2020.pdf (accessed 30.11.2021).

and to update them on 19 March 2020. A traveller's right to get a full refund was confirmed as long as the conditions of Art. 12(2) or (3) of the PTD were met⁴⁵. Simultaneously, the European Commission asked tourists to accept any changes in the dates of packages, and thus their postponement due to the spreading pandemic. This is of particular importance in a situation where tour operators found themselves in the context of cash flow. Several Member States requested the Commission to suspend the 14 days refund right and/or replace it with a temporary voucher solution⁴⁶.

On 1 May 2020, the Commission adopted Recommendation (EU) 2020/648 on vouchers offered to passengers and travellers as an alternative to reimbursement for cancelled package travel and transport services in the context of the COVID-19 pandemic⁴⁷. The right to reimbursement under the applicable EU legislation was recalled again. Simultaneously, the Recommendation recognises the unsustainable cash-flow and revenue situation for the transport and travel sectors, due to the numerous cancellations caused by the coronavirus pandemic⁴⁸. The recommendation also introduces solutions aimed at rendering the voucher system more attractive. One of them is treating vouchers as an alternative to cash reimbursement, in order to increase their acceptance by passengers and travellers. What is more, the European Commission called on the Member States to apply the PTD and EU passenger rights regulations correctly and to ensure that any shortcomings related to it are detected on time and properly sanctioned⁴⁹.

15 Member States have introduced a legal obligation for tour operators to provide vouchers instead of cash reimbursement for cancelled trips, or to postpone reimbursement beyond the 14-day period. It was treated as inconsistent with Art. 12(2), 12(3)(b) and 12(4) read in conjunction with Art. 4 of the PTD⁵⁰.

Member States have also taken measures to improve the situation of tour operators responsible for organising package tours. For this purpose, specific

⁴⁵ Report from the Commission to the European Parliament and the Council on the application of Directive (EU) 2015/2302 of the European Parliament and of the Council on package travel and linked travel arrangements (COM2021) 90 final 14.

⁴⁶ The decision of the German Government of 2 April 2020 to request the Commission to submit at EU level proposals on package travel and passenger rights that should temporarily replace cash refunds by vouchers in the case of COVID-19 related cancellations, <https://www.bundesregierung.de/bregde/aktuelles/im,sogenannten,corona,kabinett,der,bundesregierung,wurde,heute,-folgender,beschluss,fuereine,gutscheinloesung,bei,pauschalreisen,flugtickets,und,freizeitveranstaltungen,gefasst,,1738744> (accessed 30.11.2021).

⁴⁷ Recommendation (EU) 2020/648 on vouchers offered to passengers and travellers as an alternative to reimbursement for cancelled package travel and transport services in the context of the COVID-19 pandemic [2020] OJ L 151, 10–16.

⁴⁸ Report from the Commission to the European Parliament and the Council on the application of Directive (EU) 2015/2302 of the European Parliament and of the Council on package travel and linked travel arrangements (COM2021) 90 final 15.

⁴⁹ *Ibidem*.

⁵⁰ *Ibidem*, final 16.

state aid measures were adopted in order to support tour operators and establish guarantee schemes for vouchers to ensure that, in the event of insolvency of the tour operator, travellers are reimbursed, as recommended by the Commission in its Recommendation 2020/648. Those measures were adopted by the Commission in accordance with the Temporary Framework for State Aid Measures⁵¹ or under the Treaty⁵².

The report also summarizes the implementation of travellers' right to reimbursement. According to the report, they did not receive reimbursements within 14 days as provided for under Art. 12(4) PTD, covering situations of a trip having been cancelled because of COVID-19. They were either refused a refund, imposed a voucher against their wish, unable to contact the tour operator, received a refund after an excessively long period of time or only partially, or were otherwise hindered in claiming their rights⁵³. Doubts regarding the implementation of travelers rights under the PTD have also been deepened by the number of queries and complaints received by ADR bodies, ECCs, and consumer organisations.

The report ends by stating that the COVID-19 crisis and its consequences should still be monitored and further evaluated depending on the future course of events. Nevertheless, it is already known what the European Commission is planning to do before long. As announced in its New Consumer Agenda, by 2022 a "deeper analysis into whether the current regulatory framework for package travel, including as regards insolvency protection, is still fully up to the task of ensuring robust and comprehensive consumer protection at all times, taking under consideration also developments in the field of passenger rights"⁵⁴ will be conducted. It is also planned to increase the current protection of consumers, including tourists. The Commission will assess the highest possible level of consumer protection provided by the PTD, effective enforcement of the rights of consumers at all times and the method of a fairer sharing of the burden among economic operators along the value chain to contribute to this objective⁵⁵.

⁵¹ Communication of the Commission of 19 March 2020. Temporary Framework for State Aid Measures to support the economy in the current COVID-19 outbreak, OJ C 91I, 1.

⁵² Consolidated version of the Treaty on the Functioning of the European Union [2012] OJ C 326, Art. 107(3)(b).

⁵³ BEUC's evaluation, *op.cit.*, and its survey among their members regarding complaints in the package travel sector (not published).

⁵⁴ Communication from the Commission to the European Parliament and the Council. New Consumer Agenda – Strengthening consumer resilience for sustainable recovery, COM(2020) 696 final.

⁵⁵ Report from the Commission to the European Parliament and the Council on the application of Directive (EU) 2015/2302 of the European Parliament and of the Council on package travel and linked travel arrangements (COM2021) 90 final 21.

5. CASE LAW ANALYSIS

Apart from a negative impact on the tourism sector, the COVID-19 pandemic also contributed to the evolution of two cases pending before the Court of Justice of the European Union, namely the *FTI Touristik* case⁵⁶ and the *UFC – Que choisir and CLCV* case⁵⁷. For research purposes, it seems justified to present the facts of both cases.

The *FTI Touristik* case deals primarily with the impact of the pandemic on package travel contracts and travellers' rights, which are governed by Directive 2015/2302. The applicants in the main proceedings booked a 14-day holiday from Germany to the Canary Islands from 13 to 27 March 2020. Due to the pandemic, their trip ended after seven days and they returned to Germany claiming a price reduction of 70 per cent of the *pro rata* travel price for seven days. The Regional Court of Munich asked the Court of Justice of the European Union whether Art. 14(1) of Directive 2015/2302 entitles the traveller to a price reduction for lack of conformity with the package travel contract in circumstances where this is due to restrictions imposed to prevent the spread of an infectious disease worldwide⁵⁸.

The *UFC – Que Choisir and CLCV* case concerns, more specifically, the legality of the adoption of national measures granting temporary derogations from consumer legislation on package travel contracts. The applicants, French associations defending consumer interests, contested, among others, the legality of Order No. 2020315 of 25 March 2020 governing the conditions for termination of holiday contracts in the event of unavoidable and extraordinary circumstances or *force majeure*. Under those conditions, the Order allowed the travel organisers to issue a voucher instead of a refund of the full amount of any payments made by travellers thus deviating from the requirements of the Directive 2015/2302⁵⁹.

The Court of Justice of the European Union has not yet decided how to resolve the issues raised by the questions referred for a preliminary ruling by the Member States involved. On 15 September 2022 Advocate General Laila Medina issued an opinion on both cases.

As far as the *FTI Touristik* case is concerned, in view of the structure of Art. 14 of the Directive, the organiser is not exempt from his obligation to provide for an appropriate reduction in the price of the package. According to Advocate General, the amount of the price reduction to which a traveller is entitled must be

⁵⁶ Case C-396/21 *FC v FTI Touristik GmbH* [2021] ECLI:EU:C:2021:523.

⁵⁷ Case C-407/21 *UFC – Que choisir and CLCV* [2022] ECLI:EU:C:2022:690.

⁵⁸ Tourism in times of pandemic: Advocate General's Opinions (C-396/21, C-407/21) | FTI Touristik and UFC' (*Insight EU Monitoring*, 15 September 2022, <https://portal.ieu-monitoring.com/editorial/tourism-in-times-of-pandemic-advocate-generals-opinions-c-396-21-c-407-21-fti-touristik-and-ufc/387021> (accessed 16.10.2022)).

⁵⁹ *Ibidem*.

appropriate, taking into account all the circumstances of the case, which is a matter for the national court to determine⁶⁰. In consequence, a lack of conformity that is attributable to any other person than a traveller or which is due to unavoidable and extraordinary circumstances, will not exclude the travellers's right to receive a price reduction.

Advocate General also points out that the regulatory restrictions imposed in March 2020 in response to the pandemic should be regarded as *force majeure*. For this reason, unavoidable and extraordinary circumstances do not exempt the organiser from the obligation to grant a price reduction. She added that the "appropriate" reduction is to be determined by the national courts, taking into account all the circumstances of the specific case such as the reason for the lack of conformity, whether there was fault on the part of the organiser and whether the organiser could recover further up the business chain or from the State monies paid to the traveller.

In her Opinion delivered in the *UFC – Que Choisir and CLCV* case Advocate General indicates that the term "refund" generally refers to an amount of money that is paid back to someone. Therefore, the "refund" of any payments made cannot be understood as entitling the organiser to provide a deferred form of payment, such as a voucher. That interpretation is supported by the context and the origins of Art. 12(4) of Directive 2015/2302 as well as by the objective of that directive⁶¹. Moreover, a reimbursement should be paid in cash, which means that any other form, including a voucher, has to be excluded.

Advocate General Medina takes the view that any derogations from EU law on the freedom of movement cannot justify derogations from a specific provision of secondary EU law and, more specifically, from the traveller's right to receive a refund. Her reading of Directive 2015/2302 is that the pandemic is neither excluded from the scope of the concept of "unavoidable and extraordinary circumstances" nor from the scope of that directive overall⁶².

If a Member State pleads *force majeure*, it needs to prove that a derogation from EU law is necessary to resolve such difficulties owing to the pandemic, and it is necessary to verify that there is no alternative. In her view, the Order adopted by the French government appears to exceed what is necessary and proportionate to address the difficulties encountered by travel operators. Advocate General Medina draws particular attention to the retroactive effect of the contested measure, the duration of the suspension of the right to receive a refund and the lack of any advantage offered to the traveller to counterbalance the impact on his or her rights under the package travel contract.

Sometimes the opinions of Advocates General are helpful as they constitute proposals for legal solutions in cases considered by the CJEU. What is crucial

⁶⁰ *Ibidem*.

⁶¹ *Ibidem*.

⁶² *Ibidem*.

is that the Advocate General's opinion is not binding on the Court of Justice⁶³. However, this does not change the fact that the remarks delivered by Advocate General Medina are valuable in the cases at issue. It is highly likely that they will be taken into account while deciding the dispute before the Court of Justice of the European Union.

6. CONCLUSION

To sum up, even though the EU's specific competence on tourism is relatively limited, the EU has significant influence on tourism law through its role in promoting consumer protection. The fact that Directive 90/314, which originally treated a tourist as a consumer, is no longer in force does not mean that tourists were deprived of such a status. As the 2015 Package Travel Directive states, a tourist is still a consumer under EU law. Moreover, the level of protection resulting from consumer law has been increased, since a tourist defined by the new directive as a traveller is in many cases also a consumer within the meaning of EU law. The next stage of the analysis was to compare the previous legal regime with EU law shaped by Directive 2015/2302. Its main objective was to bring the law up to date to reflect changes in the way that holidays are booked following the development of on-line booking, as well as to adjust the level of the protection of tourists to a changing market of tourism services. Under Directive 90/314, these solutions were completely unknown, which was also an impulse to work on the new directive. It should be noted that the adoption of the Package Travel Directive has led to the strengthening of the scope of protection in some areas. Nevertheless, there are still some areas where little has changed or deteriorated slightly. The EU legislator decided to develop a certain protection system for tourists by means of a directive instead of using a more far-reaching measure such as a regulation. In consequence, Directive 2015/2302 is a maximum harmonisation Directive and Member States do not have any flexibility on how they implement most of its provisions. Art. 4 states that unless otherwise provided for, Member States shall not maintain or introduce, in their national law, provisions diverging from those laid down in the Directive, including more or less stringent provisions which would ensure a different level of traveller protection. On the contrary, the previous Package Travel Directive provided a minimum level of harmonisation. It means that Member States could sometimes provide customers of travel agencies with a higher level of protection than required by the Directive. Hence, the current standard of protection should be unified in each Member State which limits its ability to adapt the Directive to suit

⁶³ L.C. Wilz, *The Advocate General: A key actor of the Court of Justice of the European Union*, ResearchGate 2011, 588.

the national market should it wish to do so. However, there are a number of areas where there are choices. Despite some shortcomings, it is safe to say that Directive 2015/2302 has achieved its goal, which was to increase the transparency and legal certainty for both travellers and entrepreneurs.

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