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One Day I'll Fly Away…: Voucher Schemes for Cancelled Package Travel Contracts after the Outbreak of the Covid-19 Pandemic

I. Introduction

When the Covid-19 crisis erupted, panic must have hit in the board rooms of tour organisers. With the collapse of giants Thomson Travel Group in 2017 and Thomas Cook in 2019 still in their minds, tour organisers knew that none of them were 'too big to fail'. As states would not necessarily come to their rescue, tour organisers realised that if at that moment they would have to reimburse consumers for the cancelled holidays, they might instantly go into bankruptcy. In order to prevent this scenario, throughout the world tour organisers issued vouchers representing the value of the cancelled holiday to consumers instead of reimbursing them in cash. Tour organisers in the EU did the same. In this paper, I will address the legal aspects of these vouchers and discuss whether vouchers can only serve as stopgaps or whether they can form a serious alternative for reimbursement in the future.

II. Vouchers at the Outbreak of the Covid-19 Outbreak

The outbreak of the corona crisis had a major impact on the travel industry: consumers[1] had to be repatriated from all over the world, trips and flights that had not yet started were cancelled, paid travel prices had to be refunded, and new bookings were virtually non-existent. For tour organisers,[2] this meant that overnight income streams dried up, while operating costs largely continued – even if in some countries governmental economic support measures did bring some relief. In that context, it is not surprising that many tour organisers issued vouchers for cancelled holidays, and refused to refund the tickets in cash. However, for tour organisers located within the EU,[3] this conduct was in clear violation of Article 12 paragraphs 3 and 4 of the 2015 Package Travel Directive,[4] which requires full reimbursement of the paid amounts within 14 days after cancellation. The reason why the reimbursement has to take place at such short notice is, of course, that the consumer often needs the money back swiftly in order to book an alternative holiday. That reason fell away as touristic trips were simply unavailable altogether at that moment. Instead, an alternative risk emerged: given the scale of the corona pandemic there was a substantive risk that many tour organisers would go bankrupt. By issuing vouchers instead of cash as form of repayment, tour organisers could prevent immediate insolvency, and quite possibly also of the parties involved in the national insolvency protection scheme developed for the implementation of Article 17 Package Travel Directive.[5] However, this implied that unless the vouchers would be covered by a (sufficiently robust) insolvency protection scheme, consumers would effectively provide tour organisers with an interest-free loan, which would not be secured against insolvency. That goes against the whole idea of consumer protection, even in a time of crisis.

The European Commission reacted swiftly. Already on 27 March 2020, Commissioner Reynders sent a letter to all Member States, stressing that the consumer's reimbursement right had to be applied to COVID-19 related cancellations. However, to ease liquidity problems, he suggested that tour organisers could offer vouchers under the condition that the consumers (1) would have the choice to accept the voucher and (2) should have the possibility to ask for a full refund if, eventually, they did not make use of it. In addition, he stressed that measures to ensure robust insolvency protection were needed to enhance consumers' confidence to make such choice.[6] Whereas this letter was not made public at the time, its substance is reflected in the Commission's Recommendation of 13 May 2020.[7] In this Recommendation, the European Commission indicated that vouchers could serve as an alternative to reimbursement in money, *provided* that the voucher would be accepted voluntarily by the consumer. In addition, the European Commission indicated that they should be valid for at least 12 months, that the tour organiser should automatically reimburse the amount of the voucher concerned to the consumer at the latest 14 days after the end of its validity period or upon request of the consumer if the voucher was valid for a longer period than 12 months if and to the extent that the voucher had not been redeemed. Moreover, these vouchers should be covered by protection against insolvency of the tour organiser, in the same way as consumers should be protected against insolvency of the tour organiser under Articles 17 and 18 of the Package Travel Directive. This way, consumers would not run the risk of the loss of the value of the voucher due to later financial problems of the tour organiser. Finally, consumers should be allowed to transfer the voucher to another consumer.

The European Commission, thus, was careful to respect the needs of the industry but at the same time to not dilute consumer rights. In a handful of Member States the use of vouchers was stimulated but consumer rights were respected, in particular the right to a full refund.[8] Nevertheless, in most Member States, and in clear violation of the Directive, the legislator did intervene to the detriment

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1 The Package Travel Directive speaks of 'traveller', but in this paper I will use the (slightly more restrictive) notion of consumer, as almost all persons that were victims of the cancelled package travel contracts were consumers.

2 The same applied, for instance, to airlines, railway and bus companies. However, in this paper I will only focus on tour organisers.

3 As well as in Iceland, Norway and the UK, where the same rules apply.

4 Directive (EU) 2015/2302 of the European Parliament and of the Council of 25 November 2015 on package travel and linked travel arrangements [2015] OJ L 326/1.

5 See on the possible insolvency problems for travel guarantee funds: European Commission, 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 (26 February 2021) COM(2021) 90 final, 20. The report is referred to hereinafter as: Commission Report 2021.

6 See Commission Report 2021 (fn 6), 16.

7 Commission Recommendation of 13 May 2020 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, C(2020) 3125 final (hereinafter: the Recommendation).

8 This was the case in Austria, Denmark, Estonia, Finland, Ireland, Latvia, The Netherlands, Romania, and Sweden.

of consumers.[9] In Belgium, for instance, already on 19 March 2020, a special decree allowed tour organisers to issue a voucher for any package travel contract that was cancelled due to the coronavirus before 19 June 2020, provided that the voucher covered the total value of the amount already paid, was valid for at least one year, specified that it was linked to the coronavirus crisis and that the consumer did not incur any costs for the supply of the voucher. If these conditions were met, the consumer could not demand an immediate refund. The voucher, however, would automatically be governed by the same insolvency instrument that applied to the package travel contract.[10] If the voucher had not been used within 12 months, the consumer could demand a cash refund at the end of this period, but the tour organiser then still had 6 months to repay the credit.

Similar schemes operated in other Member States, with consumers being forced to accept vouchers instead of cash in Bulgaria, the Czech Republic, France, Greece, Italy, Portugal, and Slovakia. In these countries, the consumer could not demand repayment of the original price until the voucher expired – which, for instance, in France and Italy was the case only 18 months after the vouchers had been issued.[11] In Portugal and Slovakia, there were some exceptions for vulnerable consumers who could be expected not to be able to afford such late repayment; they would be allowed to claim immediate repayment. In other Member States, the consumer was not required to accept a voucher, but the tour organiser's obligation to refund the consumer in cash was suspended until 90 days (Lithuania and Luxembourg), 180 days (Poland) or 6 months after the cancellation of the holiday (Malta), or even 180 days (Croatia) or 12 months after the end of the pandemic would be announced (Bulgaria and Slovenia). In Spain, the tour organiser would only be required to repay the price for the cancelled holiday if and to the extent that the tour organiser's suppliers have in turn proceeded to return the amounts they received to the tour organiser – which date of course is impossible for the consumer to know. In some countries, the specific legislation was adopted even after the publication of the European Commission's Recommendation.

In July 2020, the European Commission launched infringement procedures against 10 Member States.[12] On 30 October 2020, the European Commission sent reasoned opinions to Croatia, Lithuania and Slovakia, and launched an infringement procedure against Bulgaria. At that date, Croatia, Lithuania and Slovakia had not corrected their legislation, and Bulgaria had just *introduced* national rules infringing the Directive, allowing tour organisers to suspend the reimbursement of any payments made by consumers until 12 months after the (still to come) announcement of the end of the corona crisis in Bulgaria.[13] These infringement procedures were still pending at the time the European Commission published its Report on the application of the Package Travel Directive.[14]

It should be mentioned that several Member States adopted specific State aid measures to support tour organisers and, in particular, to set up guarantee schemes for vouchers to ensure that, in the event of insolvency of the tour organiser, consumers would nevertheless be reimbursed for the value of the vouchers issued to them. The European Commission approved such state aid measures in accordance with the Temporary Framework for State aid measures[15] or under the Treaty for the Functioning of the European Union.[16] Additional State aid measures are still being taken. For instance, in late-February 2021, the Dutch government notified its intention to create a 'voucher fund' of € 400,000,000 where tour organisers could take out credit in order to redeem vouchers that expired.[17]

III. A Future for Vouchers?

Where vouchers are secured by insolvency protection schemes – as suggested in the Commission's Recommendation but still not implemented in all Member States, consumers do not run much financial risks in accepting them. But why would they decide to accept them in the first place? Of course, consumers may be (or may have been) sympathetic to tour organisers' needs or the risk that in case of insolvency they would not have received much compensation anyway. But it seems unlikely that such feelings would resurface if holidays planned from 2021 on would be cancelled – because of a new outbreak of Covid-19, or because of another disaster preventing the proper performance of the contracts. Moreover, it seem equally unlikely that Member States would again intervene by allowing infringements of European law (at the potential cost of a fine by the Court of Justice of the EU) or by again providing state aid.

So what role, if any, can there be for vouchers in a legal regime that starts from the idea that consumers must be reimbursed in cash, but allows for voluntary schemes? In my view, vouchers only serve a purpose next to reimbursement in cash if they benefit tour organisers and consumers alike. That is not the case with mandatory vouchers – and in that sense the European Commission was completely right in not accepting such voucher schemes even in the midst of the emerging pandemic. But it is also not the case with most voluntary vouchers schemes. Of course they bring the tour organiser the benefit of not losing out on a contract and thus of retaining the expected profit from this consumer contract. But there is no reciprocal advantage for the consumer to

9 These measures are published on the website of the European Consumer Centre in Luxembourg <https://cecluxembourg.lu/wp-content/uploads/2020/08/Copie-de-Table-Countries-measures-Corona_package-travels.pdf> accessed 17 March 2021 and mentioned more extensively in a report by BEUC: 'Covid-19 and EU travellers' rights. Evaluation of the Member States Implementation of the EU Commission Recommendation on 'vouchers'' <https://www.beuc.eu/publications/beuc-x-2020-119_covid-19_and_eu_travellers_rights.pdf> accessed 16 March 2021. Unless indicated otherwise, the information on the national measures in this paper is largely based on these two sources.

10 See <http://www.ejustice.just.fgov.be/eli/arrete/2020/03/19/2020040676/moniteur> accessed 16 March 2021.

11 See also Josep M Bech Serrat, 'Covid-19 Contractual Measures in Hospitality: Lessons from Problematic Regulation in Europe', EuCML 2/2021, 49-50.

12 These Member States are the Czech Republic, Cyprus, Greece, France, Italy, Croatia, Lithuania, Poland, Portugal and Slovakia, see <https://ec.europa.eu/commission/presscorner/detail/en/INF_20_1212> accessed 17 March 2021.

13 The infringement procedures against the Czech Republic, Greece, France, Italy, Poland, and Portugal were terminated as these countries had either corrected their legislation, or the legislation they introduced had expired; the infringement procedure against Cyprus was closed as there was no evidence that the Cypriot legislation was not in conformity with the Directive. See <https://ec.europa.eu/commission/presscorner/detail/en/inf_20_1687> accessed 16 March 2021.

14 Commission Report 2021 (fn 6), 16.

15 Communication from the Commission of 19 March 2020 – Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak (20 March 2020) OJ C 91I, 1.

16 Commission Report 2021 (fn 6), 17.

17 The Dutch government was criticized for waiting far too long as the first vouchers expired already in March 2021. Indeed, one of the larger tour organisers already announced it would not redeem the vouchers because it lacked the money to do so, see H Stil, 'Gelukkig hebben we de reisvoucher nog – of toch niet?' (15 March 2021) Het Parool <https://www.parool.nl/nederland/gelukkig-hebben-we-de-reisvoucher-nog-of-toch-niet~ba087f30/> accessed 17 March 2021.

accept such voluntary voucher schemes. To the contrary – the consumer still does not receive back their money in cash, but may only (at a later stage) receive the value of the voucher in kind. Even if such vouchers are secured against the tour organiser's insolvency, the consumer is still locked-in to the contract with the tour organiser instead of being free to shop elsewhere.

This is different only if tour organisers and consumers mutually benefit from a voucher scheme. That would be the case if tour organisers offer consumers something *on top of* what they are legally entitled. That would mean, for instance, that the value of the voucher is higher than what the consumer has paid for or that extra benefits are being awarded (e. g. extra luggage that can be taken without additional costs, a free dinner, entrance to a party, beachside view, etc.).[18] And it should be easy for the consumer to transfer the voucher to another consumer or to use the voucher not with the tour organiser itself but with a tour organiser from the same group of companies. Such advantages do not cost the tour organiser much, and reward a loyal consumer for not reclaiming their money. Moreover, the tour organiser need not find a new customer in order to make its profit, as this particular consumer has a keen interest in booking their next holiday with this particular tour organiser.

IV. Concluding Remarks

Vouchers are not the solution to the financial problems of tour organisers, but they can contribute to such a solution. The European Commission's Recommendation set out the minimum requirements for voucher schemes – the vouchers need to be voluntary and secured against insolvency, they should be valid for at least 12 months, and the tour organiser should automatically reimburse the (remaining) amount of the voucher within 14 days after the expiration of the voucher. But they need to provide something extra to the consumer, in exchange for the consumer not immediately demanding back their money. And that is no rocket science: the European Commission already indicated in its Recommendation that '*(i)n order to make vouchers more attractive, organisers (…) could consider issuing vouchers with a higher value than the amount of any payments made for the package travel or transport service originally booked, for example through an additional lump sum or additional service elements.*'[19] So what are tour organisers waiting for? ■

18 See also Rachel R Chen, Eitan Gerstner, Daniel Halbheer & Paolo Roma, Service Shutdowns and Compensation: Cash Refunds or Vouchers?', <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3801132> accessed 16 April 2021.

19 See the Recommendation (fn 8), no (11), 6.