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Advocate General's Opinions C-396/21 | FTI Touristik (Voyage à forfait aux Îles Canaries) and C-407/21 UFC | Que choisir and CLCV

### **Tourism in times of pandemic : according to Advocate General Medina, if tourist operators are not able to honour the terms of a package travel contract, the pandemic does not exempt them from the obligation to reduce the price and, if it is cancelled, to provide a cash refund unless exceptional difficulties are proven to exist**

*The extraordinary impact of Covid-19 on the tourism sector may justify an exceptional and temporary derogation from the organiser's obligation to provide a full refund to a consumer of any payments made within 14 days if the travel package is cancelled; but any price reduction for lack of conformity of the travel package must be appropriate to all the circumstances of the case*

The Covid-19 pandemic has been one of the most serious health emergencies in living memory, triggering damaging impact on businesses among which the tourism sector was one of the most seriously and immediately affected.

Case **C-396/21** FTI Touristik (Voyage à forfait aux Îles Canaries) concerns a specific aspect of the impact of the pandemic, relating to package travel contracts governed by Directive 2015/2302<sup>1</sup> and travellers' rights. 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% of the pro rata travel price for seven days. The Regional Court of Munich asked the Court of Justice of the European Union whether Article 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 worldwide.

Case **C-407/21** UFC-Que Choisir et CLCV 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 2020-315 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 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 2015/2302. The French Council of State explains that the act adopted was designed to safeguard the cash flow and solvency of the service providers. At the time, more than 7 000 travel and holiday

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<sup>1</sup> 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) N° 2006/2004 and Directive 2011/83/EU of the European Parliament and of the Council and repealing Council Directive 90/314/EEC (OJ 2015, L 326, p. 1).

operators registered in France were in serious difficulty. In those circumstances, an immediate refund for all cancelled services was liable to jeopardise these operators and, therefore, the possibility to refund clients for any payments made.

In her Opinion delivered today in **Case C-396/21 FTI Touristik (Voyage à forfait aux Îles Canaries)**, Advocate General Laila Medina considers that, in view of the structure of Article 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 her, the amount of the price reduction to which a traveller is entitled **must be appropriate taking into account all the circumstances of the case**, which is a matter for the national court to determine.

Advocate General Medina recalls, firstly, that the objective of Directive 2015/2302, which she considers to be applicable in the context of the Covid-19 pandemic, is to ensure a high level of consumer protection. The right to a price reduction is subject to **one condition**, namely the **'lack of conformity,'** and to **one exception**, namely where the lack of conformity is **attributable to the traveller**. Therefore, a lack of conformity that is attributable to any other person or which is due to unavoidable and extraordinary circumstances, **will not exclude the traveller's right to receive a price reduction**.

Secondly, she indicates that the regulatory restrictions imposed in March 2020 in response to the pandemic should be regarded as *force majeure*. The restrictive measures adopted, created a situation beyond the organiser's control, the consequences of which could not have been avoided even if all reasonable measures had been taken. Unavoidable and extraordinary circumstances **do not exempt the organiser from the obligation to grant a price reduction**. The fact that the situation arose from restrictive measures adopted in response to the pandemic, similar to measures imposed at the traveller's place of residence **does not affect the entitlement to a price reduction**.

Advocate General Medina further argues that the organiser may not be held liable for the loss of enjoyment of services that fall outside the scope of the travel contract. The 'appropriate' reduction is to be determined by the national courts, taking into account **all the circumstances of the specific case**. In its assessment, a national court can therefore take into account 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**. She considers that although there is no specific time limit for the payment of the price reduction to which the traveller is entitled, it should be made without undue delay. In that context, the national courts should take into account the liquidity problems of the travel organisers due to the pandemic.

In her Opinion delivered in case **C-407/21 UFC - Que choisir et CLCV**, Advocate General Medina points out 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 Article 12(4) of Directive 2015/2302 as well as by the objective of that directive.

Advocate General Medina therefore argues that, since the provision set out in the directive covers only a **reimbursement in cash**, any alternative imposed by the organiser, in particular in the form of a voucher, has to be excluded. However, that does not prevent the traveller from opting to receive such a voucher after the event giving rise to the right to a refund occurs.

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 overall.

Advocate General Medina states that the principle of force majeure in relation to the objective impossibility of complying with EU may allow for some flexibility in the application of the law, affording travel operators a very limited possibility for temporary relief from compliance with their obligations. However, the offer of a voucher with

the characteristics set out in the contested Order **does not restore the equilibrium between the parties**, because it disadvantages the traveller.

If a Member State temporarily faces insuperable difficulties in applying, in its legal order, a provision transposing secondary EU law, it should also, **exceptionally, be entitled to plead force majeure**. Therefore, Advocate General Medina considers that the pandemic and its extraordinary impact on the tourism sector may justify a **temporary regulatory derogation** from the organiser's obligation to refund the traveller the full amount of any payments made within 14 days of the contract. Such derogation is justified only for the period necessary in order for the Member State to resolve the insuperable difficulties which prevented it from applying the national provision transposing such obligation, subject to the principle of proportionality.

Advocate General Medina argues that it is for the Member State pleading force majeure to **prove that a derogation from Union 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**, particularly in view of 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.

**NOTE:** The Advocate General's Opinion is not binding on the Court of Justice. It is the role of the Advocates General to propose to the Court, in complete independence, a legal solution to the cases for which they are responsible. The Judges of the Court are now beginning their deliberations in this case. Judgment will be given at a later date.

**NOTE:** A reference for a preliminary ruling allows the courts and tribunals of the Member States, in disputes which have been brought before them, to refer questions to the Court of Justice about the interpretation of European Union law or the validity of a European Union act. The Court of Justice does not decide the dispute itself. It is for the national court or tribunal to dispose of the case in accordance with the Court's decision, which is similarly binding on other national courts or tribunals before which a similar issue is raised.

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The full text of the Opinions ([C-396/21](#) and [C-407/21](#)) is published on the CURIA website on the day of delivery.

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