

CORONAVIRUS OVERCOMING THE DIFFICULTIES

CORONAVIRUS. CANCELLATION OF TRAVEL PACKAGES AND THE BALANCING OF REMEDIES TO KEEP THE TOURISM INDUSTRY ALIVE IN ITALY AND FRANCE

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The coronavirus pandemic has had significant legal consequences in all areas of commerce and services, including tourism. In order to protect tourism professionals from the increased risk of bankruptcies and judicial liquidations, several Member States, including France and Italy, have adopted measures to face the consequences of the termination of package travel contracts, in the respect of the rights of the customers.

These measures are contained in Italy in Law Decree no. 9 of March 2, 2020 ("**DL 9/2020**") and in France in Order 2020-315 of March 25, 2020 ("**Order 2020-315**").

The purpose of such measures is to protect tourism professionals who are forced to cancel travel packages, or are forced to do so by their customers, due to the general restrictions on travel implemented worldwide and who are therefore exposed to massive refund claims as well as reductions the bookings. Yet, this should not mean neglecting customers rights, who are offered alternative solutions to full reimbursement, which is the ordinary legal remedy.

To achieve this goal, the measures adopted in both countries derogate from ordinary law, thereby establishing an exceptional regime.

Before looking at the overriding special remedies, and the main differences between the Italian and French measures, it is worth briefly recalling the ordinary regime applicable to package travels and related services.

The core regime for package travels and related travel arrangements is established at EU level by Directive (EU) 2015/2302 of the European Parliament and of the Council of November 25, 2015¹.

In Italy, the Directive was implemented by Legislative Decree n. 62 of May 21, 2018 - in force since July 1st, 2018 - which amended Chapter I of Title VI of Annex 1 to Legislative Decree n. 79 of May 23, 2011 ("**D. lgs n. 79 of May 23, 2011**").

¹ Directive (EU) 2015/2302 of the European parliament and of the Council of November 25, 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

France, for its part, introduced the provisions of the Directive by Order n. 2017-1717 of December 20, 2017 which amended articles L211-1 et seq. of the Tourism Code, established by Law of April 14, 2006 (“**Code du Tourisme**”).

This legislation, which transposed paragraphs 2 and 3 of Article 12 of the Directive relating to the termination of contracts, provides that the customer shall have the right to terminate the package travel contract before start without paying any termination fee in the event of unavoidable and extraordinary circumstances² occurring at the place of destination or its immediate proximity and significantly affecting the performance of the package, or which significantly affect the carriage of passengers to the destination. In the event of termination of the contract under this paragraph, the customer shall be entitled to full refund of any payments made for the package, but shall not be entitled to additional compensation³.

The professional may terminate the contract and provide the customer with the full refund of any payments made, but shall not be liable for additional compensation, if he is prevented from performing the contract because of unavoidable and extraordinary circumstances and notifies the customer of the termination of the contract without undue delay before the start of the package⁴.

Such refunds or reimbursements shall be made to the customer without undue delay and in any event no later than 14 days after the package travel contract is terminated⁵.

Services relating to the transport of passengers are excluded from the scope of these provisions, and are governed by international treaties and European Union legislation on passenger rights⁶.

In order to cope with the Covid-19 crisis and strike a balance between protection of tourism professionals and respect of consumer rights, DL 9/2020 in Italy and Order 2020-315 in France introduce alternative mechanisms for the reimbursement of package travels which customers could claim following the termination of the contract, in derogation to ordinary contractual tourism law⁷.

In Italy, Article 28, §5 of DL 9/2020 provides the following alternatives for the professional:

1. to fully refund the consideration received within fourteen days of the withdrawal notification sent by the traveler;
2. to issue of a voucher of the same amount as the amount of the terminated package travel to be used within one year, or
3. to offer to the customer a replacement package of equivalent or higher quality.

The wording of this provision suggests that these are alternatives at the choice of the professional, and the offer of a voucher does not necessarily entail the obligation to provide a replacement package⁸.

²“Unavoidable and extraordinary circumstances” meaning “*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*” (Article L. 211-2, Section V, 2° Code du Tourisme, Article 33 D.lgs. n. 79 of May 23, 2011).

³ Article L-211-14, Section II Code du Tourisme, Article 41 §4 of D. lgs n. 79 of May 23, 2011

⁴ Article L-211-14 Section III, 2° Code du Tourisme and Article 41 §5 letter b) D.lgs. n. 79 of May 23, 2011

⁵ Article R. 211-10, §1 Code du Tourisme and Article 41 §6 D.lgs. n. 79 of May 23, 2011

⁶ Regulation (EC) No 261/2004 of the European Parliament and of the Council of February 11, 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, and repealing Regulation (EEC) No 295/91

⁷French Order 2020-315 specifies that the option offered to the tour operator constitutes a “*derogation from the provisions of the last sentence of II of article L. 211-14 of the tourism code and the first sentence of III*” both providing the remedy for full reimbursement of payments made.

⁸Article 28 §5 DL 9/2020: “*In caso di recesso, l'organizzatore può offrire al viaggiatore un pacchetto sostitutivo di qualità equivalente o superiore, può procedere al rimborso nei termini previsti dai commi 4 e 6 dell'articolo 41 del citato*

The wording of French Order 2020-315 is slightly different. Regardless of the subject who determines the termination of the contract (professional or customer), its Article 1 Section II) provides that the professional may offer a voucher instead of the reimbursement of payments received, but specifies in Section III) that, in this case, he must propose, at the latest within three months from the notification of the termination, a new package, identical or equivalent to the package provided for by the terminated contract, with a price “*not higher than that of the package provided by the terminated contract*” so that the customer can use in practice the voucher⁹.”

In other words, French Order 2020-315 provides the offer of a substitute package on the part of the professional as an obligation as soon as the voucher solution is chosen instead of the reimbursement, whereas the Italian mirror-provision foresees the substitute package as a third option for the professional, instead of reimbursement or voucher¹⁰.

The requirements to be met by the substitute package also differ somewhat.

Article 1 Section IV) of French Order 2020-315 provides that the substitute package offered must be “*identical or equivalent*” to that provided for by the terminated contract and that its price must not be higher than that of the package provided by the terminated contract. Italian DL 9/2020 stipulates that the offered substitute package must be “*of equivalent or higher quality*” than the package provided by the terminated contract¹¹.

In addition, Article 1 Section V) of French Order 2020-315 specifies that the offer for the substitute package must be made at the latest within three months of notification of the termination of the package travel contract and that it is valid for a period of eighteen months, whereas Italian DL 9/2020 provides for a validity period of one year.

Lastly, French Order 2020-315 Section VII) makes the exceptional inapplicable if the customer has not accepted the proposal for a new package within eighteen months, which is likely not to be a merely theoretical hypothesis given the overall health context. In that case, the professional must refund all payments received under the terminated contract, including, where applicable, the refund of an amount equal to the balance of the voucher which was not used by the customer.

To sum up, both legislations tend to encourage the remedy in kind (the substitute package) as opposed to the monetary remedy (cash reimbursement) in the context of a crisis which is expected to last in time. The ultimate purpose is to protect the industry in two countries, Italy and France, whose GNPs are heavily dependent on inbound tourism, and try in that way to avert the massive insolvencies and consequent occupational repercussions that would be triggered by the ordinary regime, where most consumers would otherwise probably choose the refund, especially in times of upcoming depression and unemployment among low- to middle-income holidaymakers. Conversely, neither country foresees publicly-funded indemnification mechanisms to support the

decreto legislativo 23 maggio 2011, n. 79, oppure può emettere un voucher, da utilizzare entro un anno dalla sua emissione, di importo pari al rimborso spettante.” In English: “*In case of withdrawal, the organizer can offer the traveler a replacement package of equivalent or higher quality, can proceed with the reimbursement in the terms provided for in paragraphs 4 and 6 of article 41 of the aforementioned legislative decree 23 May 2011, n. 79, or can issue a voucher, to be used within one year of its issue, for an amount equal to the refund due*”.

⁹ “[...] *l'organisateur ou le détaillant peut proposer, à la place du remboursement de l'intégralité des paiements effectués, un avoir que le client pourra utiliser dans les conditions prévues par les dispositions des III à VI du présent article. [...] Les personnes qui ont conclu les contrats mentionnés au I du présent article doivent proposer, afin que leur client puisse utiliser l'avoir mentionné au II de cet article, une nouvelle prestation qui fait l'objet d'un contrat répondant aux conditions suivantes;*

1° La prestation est identique ou équivalente à la prestation prévue par le contrat résolu;
2° Son prix n'est pas supérieur à celui de la prestation prévue par ce contrat résolu.”

¹⁰ Cf. note 8 above.

¹¹ Cf note 8 above

ability of tourism operators to make money refunds. A balance is, therefore, indeed stricken, albeit arguably more at the cost of consumer rights.

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