

# **The Response to the Impact of the COVID-19 Pandemic on Contracts for the Carriage of Passengers by Air and Package Travel in the German and Italian Law Systems**

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## **Abstract**

This article investigates the response to the impact of the COVID-19 pandemic on contracts for the carriage of passengers by air and package travel in the German and Italian law systems, by presenting the relevant rules of positive law and their application by German and Italian courts. In fact, the courts of the two Member States have rendered several decisions on the cancellation of flights by carriers and the withdrawal from package travel due to the COVID-19 pandemic, as well as the issuance of vouchers following the termination of the related contracts. What emerges from this article is that, unlike the German law system, the Italian one has adopted a response to the impact of the COVID-19 pandemic which is not fully consistent with the indications coming from the EU level. In particular, an element of disruption with respect to the relevant EU guidelines is the adoption by the Italian legislature of art 88-bis D-L 18/2020, which addresses (residual) cases of so-called mandatory vouchers.

**Keywords:** contract, COVID-19, flight cancellation, overriding mandatory provision, package travel, passenger rights, voucher

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## I Introduction

This article investigates the response to the impact of the COVID-19 pandemic on contracts for the carriage of passengers by air and on package travel in the German and Italian law systems,<sup>1</sup> by presenting the relevant rules of positive law (see below II) and their application by German and Italian courts (see below III). In fact, the courts of the two Member States have rendered several decisions on the cancellation of flights by carriers and the withdrawal from package travel due to the COVID-19 pandemic, as well as the issuance of vouchers following the termination of the related contracts.<sup>2</sup>

<sup>1</sup> In order to grasp the practical impact of the COVID-19 pandemic on tourism contracts, I have conducted a small survey through Google Modules. The survey consisted of multiple-choice questions which were answered by 50 respondents who had concluded transport, accommodation and package travel contracts to be performed during the period running from February to July 2020 and which were cancelled due to the COVID-19 pandemic. The results of the survey can be summarised as follows. Most respondents (98%) resided in Italy. 60% of the respondents had concluded a contract for the carriage of passengers, 20% an accommodation contract and 20% a package travel. The contracts often (72%) had a significant link with a foreign country (that is to say, the carrier/organiser/hotelier was from a foreign country and/or the place of departure or arrival/the accommodation was abroad). The value of most contracts (56%) was less than 500,00 EUR. In about half (56%) of the cases, the respondents cancelled the travel/accommodation on their own motion. In most cases, the same respondents applied for price reimbursement (94%). In half of the cases (50%), reimbursement was granted. In almost half (52%) of the cases vouchers were offered in place of reimbursement. In a relatively high number of cases (46%), vouchers were accepted. Some of the respondents (26%) remained empty handed: they were not reimbursed nor accepted a voucher. Other respondents (8%; that is to say, 4 respondents) proved to be more combative: They appointed a lawyer in order to seek reimbursement. One respondent (2%) even instituted court proceedings to that aim. In addition to the results of the survey, I have examined the 76 enquiries made by consumers, from March 2020 to March 2021, to the Consumers Desk at the Turin Chamber of Commerce and kindly reported by Avv. Susanna Scapellato, to whom I am grateful. All the enquires concerned the termination of transport, accommodation and package travel contracts due to the COVID-19 pandemic. In particular, in 64 enquires, the consumers informed that their counterparty had withheld (cash) reimbursement of payments made under the relevant transport, accommodation or package travel contract, and had offered a voucher instead. The latter consumers thus enquired to know whether they could refuse the voucher and seek reimbursement instead.

<sup>2</sup> On the cancellation of flights due to the COVID-19 pandemic, see Amtsgericht (District Court) Nürtingen, judgment of 9 June 2020 – 10 C 1810/20, BeckRS 2020, 13376; Giudice di pace di (Justice of the Peace of) Foligno, Avv. Mauro Vergine, judgment of 1 October 2020, filed on 12 October 2020, n 97, RG [Ruolo Generale (General Docket)] n 255/20 <<https://www.edotto.com/articolo/volo-spostato-e-poi-cancellato-per-coronavirus-biglietti-rimborsati>> accessed 23 November 2021; Giudice di pace di Palermo, Dott.ssa [Dottoressa (Doctor)] Donata di Chiara, judgment of 26 October 2020, filed on 23 October 2020, n 1999, RG n 5929/2020; Giudice di pace di Rovereto, judgment of 15 October 2020, filed on 29 October 2020, n 46, RG n 187/2020; Amtsgericht Köln, 159th Division, judgment of 30 October 2020 – 159 C 182/20, NRWE-Datenbank = BeckRS 2020, 3334; Giudice di pace di Busto Arsizio, Avv. Giovanni Masala, decree of 23 November 2020, n 4456, RG n 3342/2020; Giudice di pace di Bologna, Dott. [Dottore (Doctor)] Antonio Pederzoli, judgment of 4 December 2020, filed on 18 January 2021, n 70, RG n 6472/2020; Giudice di Pace di Palermo, 2nd Division, Dott.ssa Daniela Liggio, judgment of 18 February 2021, filed on 22 February 2021, n 460, RG n 9874/2000; Giudice di Pace di Bologna, 1st Division, Dott. Antonio Pederzoli, judgment of 26 February 2021, n 792, RG 7660/2020; Oberlandesgerichtshof (Higher Regional Court) Köln, 6th Civil Chamber, judgment of 26 February 2021 – 6 U 127/20, BeckRS 2021, 2976; Amtsgericht Frankfurt a. M., judgment of 12 March 2021 – 29 C 3204/20, BeckRS 2021, 692; Giudice

## II Positive Law

Cancellation of flights, withdrawal from package travel and vouchers are governed by EU and national law (see below respectively II 1, 2).

### 1 EU Law

Cancellation of flights and withdrawal from package travel are respectively governed by the Air Passenger Rights Regulation<sup>3</sup> and the Package Travel Directive<sup>4</sup> (see below respectively II 1 a, b). As a response to the impact of the COVID-19 pandemic on contracts

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di pace di Palermo, Dott.ssa Raffaella Pira, judgment of 25 March 2021, filed on 31 March 2021, n 858, RG n 11786/2020, Leggi d'Italia; Giudice di Pace di Campobasso, Dott. Luigi Amoroso, judgment of 29 June 2021, n 261, RG n 365/2021, Leggi d'Italia = Smart24 Lex – Il Sole 24 ORE; on withdrawal from package travel due to the COVID-19 pandemic, see Amtsgericht Rostock, judgment of 15 July 2020 – 47 C 59/20, COVID-19 und Recht 2020, 470; Amtsgericht Frankfurt a. M., judgment of 11 August 2020 – 32 C 2136/20 (18), Verbraucher und Recht 2006, 391; Tribunale di (Tribunal of) Trento, Dott. Benedetto Sief, decreto ingiuntivo (ex parte decree) of 11 August 2020, filed on 13 August 2020, n 711, RG n 2106/2020; Landgericht (Regional Court) Rostock, 1st Civil Chamber, judgment of 21 August 2020 – 1 O 211/20, BeckRS 2020, 22398; Amtsgericht Wiesbaden, 92nd Division, judgment of 9 September 2020 – 92 C 1682/20, BeckRS 2020, 27073; Amtsgericht Köln, judgment of 14 September 2020 – 133 C 213/20, BeckRS 2020, 23502; Amtsgericht Hannover, 410th Division, judgment of 25 September 2020 – 410 C 5123/20, BeckRS 2020, 27698; Amtsgericht Frankfurt a. M., final judgment of 15 October 2020 – 32 C 2620/20, BeckRS 2020, 28268; Amtsgericht München, final judgment of 27 October 2020 – 159 C 13380/20, BeckRS 2020, 31180; Amtsgericht Duisburg, 53rd Division, judgment of 1 December 2020 – 53 C 1811/20, BeckRS 2020, 37712; Amtsgericht Duisburg, 51th Division, judgment of 7 December 2020 – 51 C 1394/20, BeckRS 2020, 37776; Amtsgericht München, final judgment of 8 December 2020 – 283 C 4769/20, BeckRS 2020, 36268; Amtsgericht Duisburg, judgment of 14 December 2020 – 506 C 2377/20, BeckRS 2020, 37777; Landgericht Frankfurt a. M., 24th Civil Chamber, judgment of 14 January 2021 – 2-24 O 315/20, BeckRS 2021, 311; Tribunale di Verona, 1st Division, Dott.ssa Eleonora Da Cortà Fumei, order of 18 January, filed on 19 January 2021, Smart24 Lex – Il Sole 24 ORE; Oberlandesgerichtshof Schleswig, 17th Civil Chamber, judgment of 26 March 2021 – 17 U 166/20, BeckRS 2021, 24247; Landgericht Hannover, 5th Civil Chamber, final judgment of 26 March 2021 – 5 O 104/2, BeckRS 2021, 134; Amtsgericht Hannover, 502nd Division, judgment of 9 April 2021 – 502 C 12946/20, BeckRS 2021, 7683; Tribunale di Benevento, 2nd Division, judgment of 5 August 2021, Leggi d'Italia; on withdrawal from package travel due to the SARS-CoV-1 epidemic, see Amtsgericht Augsburg, final judgment of 9 November 2004 – 14 C 4608/03, BeckRS 2004, 16212; Oberlandesgerichtshof [(Austrian) Supreme Court], decision of 14 June 2005 – 4 Ob 103/05h, RIS-Justiz RS0032187; on withdrawal from package travel due to the dengue epidemic, see Corte di Cassazione [(Italian) Court of Cassation], 3rd Division, judgment of 22 March 2007, filed on 24 July 2007, n 16315, RG n 1105/2000, *Atrenum s.a.s. c. Bismanturist 2 s.r.l.*, *Giurisprudenza italiana* 2008, 857.

<sup>3</sup> Regulation (EC) No 261/2004 of the European Parliament and of the Council of 11 February 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 (Text with EEA relevance) – Commission Statement [2004] OJ L46/1 (Air Passenger Rights Regulation).

<sup>4</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) 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 (Package Travel Directive).

for the carriage of passengers and package travel, the Commission adopted the Voucher Recommendation (see below II 1 c).<sup>5</sup>

### a) Air passenger rights regulation

In the event of cancellation of a flight by the carrier, pursuant to art 5 para 1 lit a), 7 para 3, 8 para 1 lit a) Air Passenger Rights Regulation, the passenger has the right to reimbursement of the price which, with the signed agreement of the passenger, may also be paid in 'travel vouchers'. Pursuant to art 5 para 1 lit c) Air Passenger Regulation, the passenger may also have the right to compensation. The Commission confirmed the existence of the right to reimbursement in the event of cancellation in the Interpretative Guidelines on EU passenger rights regulations in the context of the developing situation with COVID-19.<sup>6</sup> On the other hand, as concerns the right to compensation, the Interpretative Guidelines specify that, pursuant to art 5 para 3 Air Passenger Rights Regulation, the carrier is exempted from paying compensation where cancellation is due to exceptional circumstances such as the COVID-19 pandemic.<sup>7</sup>

### b) Package travel directive

Withdrawal by the traveller or by the organiser before the beginning of the package travel is governed by art 12 Package Travel Directive, which is transposed in Germany in sec 651h BGB<sup>8</sup> and in Italy in art 41 Cod. tur.<sup>9</sup> Pursuant to the mentioned provisions, in the event of termination of package travel due to 'unavoidable and extraordinary circumstances', travellers have the right to the reimbursement of the price paid for the package.<sup>10</sup>

<sup>5</sup> Commission Recommendation (EU) 2020/648 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 [2020] OJ L151/10 (Voucher Recommendation).

<sup>6</sup> Commission, Interpretative Guidelines on EU passenger rights regulations in the context of the developing situation with Covid-19 [2020] OJ C89I/1 (Interpretative Guidelines).

<sup>7</sup> Compare with Interpretative Guidelines, point 3.4.

<sup>8</sup> Bürgerliches Gesetzbuch in der Fassung der Bekanntmachung vom 2. Januar 2002 (BGBl. I S. 42, 2909; 2003 I S. 738), das zuletzt durch Artikel 10 des Gesetzes vom 30. März 2021 (BGBl. I S. 607) geändert worden ist [Civil code in the version promulgated on 2 January 2002 (Federal Law Gazette I p 42, 2909; 2003 I p 738), last amended by art 10 Law of 30 March 2021 (Federal Law Gazette I p 607)] (BGB).

<sup>9</sup> Decreto Legislativo (Legislative Decree) 23 May 2011, n 79, Codice della normativa statale in tema di ordinamento e mercato del turismo, a norma dell'articolo 14 della legge 28 novembre 2005, n. 246, nonché attuazione della direttiva 2008/122/CE, relativa ai contratti di multiproprietà, contratti relativi ai prodotti per le vacanze di lungo termine, contratti di rivendita e di scambio (Code of State legislation on the regulation and market of tourism, in accordance with art 14 Law 28 November 2005, n 246, and implementation of Directive 2008/122/EC on timeshare, long-term holiday product, resale and exchange contracts), Gazz. Uff. [Gazzetta Ufficiale (Official Gazette)] n 129 of 6 June 2011 – S.O. [Supplemento Ordinario (Ordinary Supplement)] n 139 (Cod. tur.).

<sup>10</sup> See art 12 para 2 Package Travel Directive, sec 651h para 3 BGB, art 41 para 3 Cod. tur.

The Commission confirmed the existence of the latter right, in the Information on the Package Travel Directive in connection with the COVID-19.<sup>11</sup>

### c) Voucher recommendation

As a response to the impact of the COVID-19 pandemic on contracts for the carriage of passengers and package travel, the Commission adopted the Voucher Recommendation. In essence, by that Recommendation, the legislatures of the Member States were authorised to adopt provisions on

vouchers which carriers or organisers may offer to passengers and travellers, subject to their voluntary acceptance, as an alternative to cash reimbursement [...] in the event of cancellation [...] by the carrier or organiser [...] for reasons linked to the COVID-19 pandemic [...] [and] in the event of changes to the contract or terminations [...] for reasons linked to the COVID-19 pandemic [...].<sup>12</sup>

As results from the reference to ‘voluntary acceptance’, the Voucher Recommendation moves from the premise that passengers and travellers may refuse to accept vouchers and seek (cash) reimbursement instead.<sup>13</sup>

## 2 National Law

The German and Italian legislatures have adopted provisions on vouchers (see below respectively II 2 a, b). The Italian provision on vouchers conflicts with EU law (see below II 2 c).

### a) German law: Art 240 para 6 EGBGB

Following the Voucher Recommendation, the German legislature adopted art 240 para 6 EGBGB<sup>14</sup> on vouchers offered by organisers in the event of termination of package travel

<sup>11</sup> Commission, Information on the Package Travel Directive in connection with the COVID-19, 19 March 2020 (revised version, replaces the version of 5 March 2020), <[https://ec.europa.eu/info/sites/info/files/coronavirus\\_info\\_ptd\\_19.3.2020.pdf](https://ec.europa.eu/info/sites/info/files/coronavirus_info_ptd_19.3.2020.pdf)> accessed 23 November 2021.

<sup>12</sup> See Voucher Recommendation, point 1.

<sup>13</sup> See Recitals (11), (12) Voucher Recommendation.

<sup>14</sup> Art 240 para 6 EGBGB {Einführungsgesetz zum Bürgerlichen Gesetzbuche in der Fassung der Bekanntmachung vom 21. September 1994 [BGBl. I S. 2494; 1997 I S. 1061], das zuletzt durch Artikel 2 des Gesetzes vom 10. August 2021 [BGBl. I S. 3515] geändert worden ist [Introductory Act to the Civil Code in the version promulgated on 21 September 1994 (Federal Law Gazette I p 2494), last amended by art 2 Law of 19 March 2020 (Federal Law Gazette I p 540)]} was introduced by the Gesetz zur Abmilderung der Folgen der COVID-19-Pandemie im Pauschalreisevertragsrecht und zur Sicherstellung der Funktionsfähigkeit der Kammern im Bereich der Bundesrechtsanwaltsordnung, der Bundesnotarordnung, der Wirtschaftsprüferordnung und des Steuerberatungsgesetzes während der COVID-19-Pandemie (BGBl. 2020 I 1643) [Law to mitigate the consequences of the COVID-19 pandemic in package travel contract law and to ensure the functioning of

due to the COVID-19 pandemic.<sup>15</sup> As noted by the AG Frankfurt,<sup>16</sup> the German legislature had no choice but to adopt a so-called ‘voluntary voucher solution’,<sup>17</sup> that is to say a solution whereby travellers retain the choice of accepting or refusing the offered voucher.<sup>18</sup> In fact, as also noted by the AG, by the Voucher Recommendation the EU ruled out a so-called ‘mandatory voucher solution’,<sup>19</sup> namely the simple issuance of vouchers releases the carrier or organiser (either permanently or only temporarily) from the reimbursement obligation, irrespective of the traveller’s acceptance of the issued voucher.

## b) Italian law: Art 88-bis D-L 18/2020

Prior to the Voucher Recommendation, the Italian legislature adopted art 28 D-L 9/2020<sup>20</sup> on vouchers issued following the termination of contracts for the transport of passengers and package travel due to the COVID-19 pandemic.<sup>21</sup> Art 28 D-L 9/2020 was replaced by art 88-bis D-L 18/2020.<sup>22</sup> In turn, art 88-bis D-L 18/2020 was amended in order to conform

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the chambers in the area of the Federal Lawyers’ Code, the Federal Notaries’ Code, the Auditors’ Code, and the Tax Consulting Law during the COVID-19 pandemic (Federal Law Gazette 2020 I p 1643)]. On art 240 para 6 EGBGB, see Ansgar Staudinger, Charlotte Achilles-Pujol, ‘Reiserecht’ in Schmidt Hubert (ed), *COVID-19* (2nd edn, CH Beck 2020, München, 181–242) 188–192, para 18a; Ernst Führich, ‘Rücktritt vom Pauschalreisevertrag vor Reisebeginn wegen Covid-19-Pandemie’ (2020) *Neue Juristische Wochenschrift* 2137–2208, 2140–2141, paras 21, 22; Klaus Tonner, ‘COVID 19 und Reisegutscheine’ (2020) *Monatsschrift für Deutsches Recht* 1032–1037; Stefan A. Geib, ‘EGBGB Art. 240 § 6’ in Wolfgang Hau, Roman Poseck (eds), *BeckOK BGB* (57th edn, CH Beck 2021, München); Klaus Tonner, ‘EGBGB Art. 240 § 6’ in Franz Jürgen Säcker, Roland Rixecker, Hartmut Oetker, Bettina Limperg (eds), *MüKoBGB* (Band 13, 8th edn, CH Beck 2021, München).

<sup>15</sup> See Geib (n 14) para 3; Tonner, ‘EGBGB Art. 240 § 6’ (n 14) para 14.

<sup>16</sup> See Amtsgericht Frankfurt a. M., final judgment of 15 October 2020 – 32 C 2620/20 (n 2).

<sup>17</sup> See Amtsgericht Frankfurt a. M., final judgment of 15 October 2020 – 32 C 2620/20 (n 2) para 14.

<sup>18</sup> See also Landgericht Frankfurt a. M., judgment of 14 January 2021 – 2-24 O 315/20 (n 2) para 26; Oberlandesgerichtshof Schleswig, 17th Civil Chamber, judgment of 26 March 2021 – 17 U 166/20 (n 2) para 72.

<sup>19</sup> See Amtsgericht Frankfurt a. M., final judgment of 15 October 2020 – 32 C 2620/20 (n 2) para 14.

<sup>20</sup> Decreto-Legge (Decree-Law) 2 March 2020, n 9, Misure urgenti di sostegno per famiglie, lavoratori e imprese connesse all’emergenza epidemiologica da COVID-19 (Urgent measures on support for families, workers and businesses in relation to the COVID-19 epidemiological emergency), Gazz. Uff. n 53 of 2 March 2020.

<sup>21</sup> On art 28 D-L 9/2020, see Carmine Criscione, ‘Natura giuridica e vicende del voucher introdotto dalla decretazione d’urgenza’ (2020) <<https://www.diritto.it/natura-giuridica-e-vicende-del-voucher-introdotto-dalla-decretazione-d-urgenza/>> accessed 23 November 2021; Renato Santagata, ‘Gli effetti del Coronavirus sui contratti turistici. Primi appunti’ in Giuseppe Conte, Fabrizio Di Marzio (directors), *Giustiziavivile.com, Emergenza COVID-19, Speciale n. 2* (Giuffrè 2020, Milano, 225-234) <[https://giustiziavivile.com/system/files/allegati/covid19-2\\_2020.pdf](https://giustiziavivile.com/system/files/allegati/covid19-2_2020.pdf)> accessed 4 May 2021; Giorgia Vulpiani, ‘Emergenza epidemiologiche e contratti del turismo: il caso del Coronavirus’ (2020) <<http://www.judicium.it/wp-content/uploads/2020/04/G.-Vulpiani.pdf>> accessed 23 November 2021; Susanne Gössl, ‘In- und ausländische Corona-Regelungen im grenzüberschreitenden Handel’ (2021) *Zeitschrift für Vergleichende Rechtswissenschaft*, 23-47, 27-29.

<sup>22</sup> Art 88-bis D-L 18/2020 [Decreto-Legge 17 March 2020, n 18, Misure di potenziamento del Servizio sanitario nazionale e di sostegno economico per famiglie, lavoratori e imprese connesse all’emergenza epidemiologica da COVID-19 (Measures to strengthen the National Health Service and to provide economic support for families, workers and businesses in relation to the COVID-19 epidemiological emergency), Gazz. Uff. n 70 of 17 March

2021] was introduced by L 27/2020 [Legge (Law) 24 April 2020, n 27, Conversione in legge, con modificazioni, del decreto-legge 17 marzo 2020, n. 18, recante misure di potenziamento del Servizio sanitario nazionale e di sostegno economico per famiglie, lavoratori e imprese connesse all'emergenza epidemiologica da COVID-19. Proroga dei termini per l'adozione di decreti legislativi (Conversion into law, with amendments, of Decree-Law 17 March 2020, n 18, containing measures to strengthen the National Health Service and on economic support for families, workers, and businesses in relation to the COVID-19 epidemiological emergency. Extension of deadlines for the adoption of legislative decrees), Gazz. Uff. n 110 of 29 April 2020 – S.O. n 16] and amended by art 182 para 8 lits a)-d) D-L 34/2020 [Decreto-Legge 19 May 2020, n 34, Misure urgenti in materia di salute, sostegno al lavoro e all'economia, nonché di politiche sociali connesse all'emergenza epidemiologica da COVID-19 (Urgent measures on health, support to work and economy, and on social policies in relation to the COVID-19 epidemiological emergency), Gazz. Uff. n 128 of 19 May 2020 – S.O. n 21]. In turn, art 182 para 8 lits a)-d) were introduced by L 77/2020 [Legge 17 July 2020, n 77, Conversione in legge, con modificazioni, del decreto-legge 19 maggio 2020, n. 34, recante misure urgenti in materia di salute, sostegno al lavoro e all'economia, nonché di politiche sociali connesse all'emergenza epidemiologica da COVID-19 (Conversion into law, with amendments, of Decree-Law 19 May 2020, n 34, containing urgent measures on health, support to work and economy, and on social policies in relation to the COVID-19 epidemiological emergency), Gazz. Uff. n 180 of 18 July 2020 – S.O. n 25]. For sake of completeness, art 88-bis D-L 18/2020 was further amended by art 30 para 4-bis D-L 41/2021 [Decreto-Legge 22 March 2021, n 41, Misure urgenti in materia di sostegno alle imprese e agli operatori economici, di lavoro, salute e servizi territoriali, connesse all'emergenza da COVID-19 (Urgent measures in matters of support to companies and economic operators, of work, health and territorial services, connected with the COVID-19 emergency), Gazz. Uff. n 70 of 22 March 2021], converted into law, with amendments by L 69/2021 [Legge 21 Maggio 2021, n 69, Conversione in legge, con modificazioni, del decreto-legge 22 marzo 2021, n. 41, recante misure urgenti in materia di sostegno alle imprese e agli operatori economici, di lavoro, salute e servizi territoriali, connesse all'emergenza da COVID-19 (Conversion into law, with amendments of decree-law 22 March 2021, n 41, on urgent measures in matters of support to companies and economic operators, of work, health and territorial services, connected with the COVID-19 emergency), Gazz. Uff. n 120 of 21 May 2021 – S.O.]. On art 88-bis D-L 18/2020, see, above all, Renato Santagata, 'Crisi sistemica da emergenza sanitaria ed effetti sui contratti turistici e di trasporto' (2020) *Le nuove leggi civili commentate*, 85–105; see also Marco Badagliacca, 'Impedimenti alla partenza nel trasporto aereo di persone e COVID-19' (2020) *Rivista italiana di diritto del turismo* (Special issue), 260–284, 278–284; Luca Guerrini, 'Coronavirus, legislazione emergenziale, e contratto: una fotografia' in Giuseppe Conte, Fabrizio Di Marzio (directors), *Giustiziacivile.com, Emergenza COVID-19, Speciale n. 3* (Giuffrè 2020, Milano, 345–358) <[https://giustiziacivile.com/system/files/allegati/speciale\\_covid19\\_-\\_n.\\_3.pdf](https://giustiziacivile.com/system/files/allegati/speciale_covid19_-_n._3.pdf)> accessed 23 November 2021, 350–352; Alessandro Pepe, 'L'emergenza sanitaria da Coronavirus tra impossibilità sopravvenuta e impossibilità di utilizzazione della prestazione nei contratti di trasporto, di viaggio e del tempo libero (artt. 88 e 88 bis, D.L. 17 marzo 2020, n. 18, conv. con mod. dalla L 24 aprile 2020, n. 27)' (2020) *Le nuove leggi civili commentate*, 596–629; Fabrizio Piraino, 'La normativa emergenziale in materia di obbligazioni e di contratti' (2020) *I Contratti*, 508–513; Monica Pucci, 'Pacchetti turistici e diritti dei viaggiatori nell'ordinamento giuridico italiano ai tempi del Coronavirus' (2020) <<https://idibe.org/tribuna/pacchetti-turistici-e-diritti-dei-viaggiatori-nellordinamento-giuridico-italiano-ai-tempi-del-coronavirus/>> accessed 23 November 2021; Francesco Rossi dal Pozzo, 'Trasporti e turismo in epoca di emergenza sanitaria Covid-19. Il caso dei vouchers in alternativa ai rimborsi in denaro di titoli di viaggio, di soggiorno e di pacchetti turistici' in Eurojus, *L'emergenza sanitaria Covid-19 e il diritto dell'Unione europea. La crisi, la cura, le prospettive*, Numero speciale, (2020) 52–62 <[http://www.eurojus.it/pdf/l-emergenza-sanitaria-Covid-19-e-il%20diritto-dell-Unione-europea-la%20crisi-la-cura-le-prospettive\\_2.pdf](http://www.eurojus.it/pdf/l-emergenza-sanitaria-Covid-19-e-il%20diritto-dell-Unione-europea-la%20crisi-la-cura-le-prospettive_2.pdf)> accessed 23 November 2021; Renato Santagata, 'Gli effetti dell'emergenza sanitaria sui contratti turistici e di trasporto' in Gianmaria Palmieri (ed), *Oltre la pandemia* (Vol. I, Editoriale Scientifica 2020, Napoli, 309–326); Emanuele Tuccari, 'Sopravvenienze e rimedi al tempo del COVID-19' (2020) *Jus Civile*, 465–514 <[http://www.juscivile.it/contributi/2020/2\\_2020/08\\_Tuccari.pdf](http://www.juscivile.it/contributi/2020/2_2020/08_Tuccari.pdf)> accessed 23 November 2021, 490–491, n 71–73; Valeria Villanova, 'I viaggi e gli spostamenti al tempo del Covid-19: qualche riflessione sullo scioglimento del contratto e sulla tutela di passeggeri e viaggiatori' in Emanuele Lucchini

with the Voucher Recommendation.<sup>23</sup> This notwithstanding, the applicable version of art 88-bis D-L 18/2020 still conflicts with EU law, considering that the first sentence of para 12 of that article<sup>24</sup> envisages cases of mandatory vouchers.<sup>25</sup> Indeed these cases are residual: according to art 88-bis para 12 first sentence D-L 18/2020, mandatory vouchers can be issued by carriers and organisers with reference to contracts terminated by 31 July 2020.

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Guastalla (ed), *Emergenza Covid-19 e questioni di diritto civile* (Giappichelli 2020, Torino, 71–89); Salvo Leuzzi, ‘Contratti di trasporto marittimo e forza maggiore al tempo del COVID-19’ (2021) *Il Caso.it*, II, 1370 (citation proposed on the homepage) <<https://blog.ilcaso.it/libreriaFile/1370.pdf>> accessed 23 November 2021, 30ff.

<sup>23</sup> The tormented legislative history of art 88-bis D-L 18/2020 was summarised by the GdP Palermo as follows: ‘[I]n the event of cancellation of [travel or accommodation] due to [...] the sanitary emergency, [L 27/2020] has authorised the reimbursement of the sums paid [...] by means of vouchers. [L 27/2020] then clarified in [art 88-bis D-L 18/2020] that “the issue of vouchers [...] releases the issuer from the related reimbursement obligation and does not require any form of acceptance by the addressee” (para 12). Finally, it also expressly provided for the overriding mandatory character of the provision (para 13). Following the entry into force of [L 27/2020], the EU Commissioners sent a letter of complaint, asking for the law to be amended and allow travellers to choose between full reimbursement and [...] a voucher, threatening to open [...] an infringement procedure. The [Italian] Competition Authority also intervened on the issue [...]. [L 77/2020], converting [D-L 34/2020], was thus published. During approval, the Parliament also amended [art 88-bis D-L 18/2020]. The decision to amend the [...] [provision] stemmed from the infringement procedure opened by the European Commission against Italy [see Commission, July infringements package: key decisions, Press corner (2020), <[https://ec.europa.eu/commission/presscorner/detail/en/inf\\_20\\_1212](https://ec.europa.eu/commission/presscorner/detail/en/inf_20_1212)> accessed 23 November 2021]. The provisions in question in fact derogate (to the detriment of the consumer, according to the Commission) from those established in the relevant Community Regulations and Directives. Consequently, [...] to avoid the continuation of the infringement procedure, the Parliament decided to amend the provisions in a more favourable way for consumers [...]. This resulted in [L 77/2020] which, as already mentioned, has introduced some amendments to [art 88-bis D-L 18/2020] [...] [An] important innovation is the possibility of issuing vouchers without acceptance by the addressee only in the event of withdrawal exercised by 31 July 2020. On this point, it should be said that [art 88-bis D-L 18/2020] provided that the issue of the voucher did not require any form of acceptance by the addressee. This provision was confirmed but limited (by the “new” para 12) only to the case of withdrawal (by the traveller, the travel organiser or the carrier) exercised by 31 July 2020’ (Author’s translation). Giudice di pace di Palermo, judgment of 23 October 2020, n 1999 (n 2); see also Giudice di Pace di Campobasso, judgment of 29 June 2021, n 261 (n 2).

<sup>24</sup> Art 88-bis paras 12, 12-bis D-L 18/2020 read: ‘12. The issuance of vouchers following withdrawal by 31 July 2020 does not require any form of acceptance by the addressee. The voucher may be issued and also used for services provided by another organiser belonging to the same corporate group. It may be used also for the use of services beyond the term of expiry, insofar as the respective bookings are made within the term provided for in the first sentence. 12-bis. The period of validity of the 24 months-vouchers provided for by this article shall also apply to the vouchers already issued at the date of entry into force of this provision. In any event, once 24 months have elapsed since their issuance, vouchers that are neither used nor used to book the services referred to in this art shall be reimbursed, within 14 days from their expiry, for the amount paid. Limited to vouchers issued, in implementation of this article, in relation to air, rail, sea, inland waterway or land transport contracts, the reimbursement referred to in the second sentence may be requested after 12 months from issuance and shall be paid within 14 days from the request’ (Author’s translation).

<sup>25</sup> See Santagata, ‘Crisi sistemica da emergenza sanitaria ed effetti sui contratti turistici e di trasporto’ (n 22) 97–98; see also Villanova (n 22) 87–88.

That said, in what appears to be an attempt to make art 88-*bis* para 12 first sentence D-L 18/2020 prevail over EU law,<sup>26</sup> the Italian legislature even qualified the provisions of that article as overriding mandatory provisions within the meaning of art 17 L 218/1995,<sup>27</sup> 9 para 1 Rome I Regulation.<sup>28,29</sup>

<sup>26</sup> Compare with Tuccari (n 22) 495.

<sup>27</sup> Art 17 L 218/1995 [Legge 31 May 1995, n 218, Riforma del Sistema italiano di diritto internazionale privato (Reform of the Italian System of private international law), Gazz. Uff. n 128 of 3 June 1995 – S.O. n 68] is the Italian autonomous provision on overriding mandatory provisions. The article in question is headed 'Norms of necessary application' and reads: 'Italian norms which, considering their object and purpose, must be applied notwithstanding the reference to foreign law, prevail over the following provisions' (Author's translation). On art 17 L 218/1995, see, among others, Giorgio Conetti, Sara Tonolo, Fabrizio Vismara, *Manuale di diritto internazionale privato* (4th edn, Giappichelli 2020, Torino) 63ff; Franco Mosconi, Cristina Campiglio, *Diritto internazionale privato e processuale* (Vol. I, 9th edn, UTET 2020, Milano) 307ff; Marco Torsello (ed), 'Legge di riforma del Sistema italiano di diritto internazionale privato' in Massimo Franzosi, Rita Riotti (eds), *Codice civile commentato con dottrina e giurisprudenza* (1st edn, Giappichelli 2018, Torino) 27ff; Giorgio Conetti, Sara Tonolo, Fabrizio Vismara, *Commento alla riforma del diritto internazionale privato italiano* (2nd edn, Giappichelli 2009, Torino) 53ff; Nerina Boschiero, 'Art. 17' in Stefania Bariatti (ed), *Legge 31 maggio 199, n. 218, Riforma del Sistema italiano di diritto internazionale privato* (Le nuove leggi civili commentate, CEDAM 2006, Padova) 1062ff; see also Tamás Szabados, 'Overriding Mandatory Provisions in the Autonomous Private International Law of the EU Member States – General Report' (2021) 1 ELTE LJ, 9–35.

<sup>28</sup> Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I) [2008] OJ L177/6 (Rome I Regulation).

<sup>29</sup> See art 88-*bis* para 13 L 27/2020, 28 para 8 D-L 9/2020; Zeno Crespi Reghizzi, 'Effetti sui contratti delle misure normative di contenimento dell'epidemia di COVID-19: profili di diritto internazionale privato' (2020) *Diritto del commercio internazionale* 923–939, 936ff; Pedro Alberto de Miguel Asensio, 'Medidas de emergencia y contratos internacionales' (2020) 81 *La Ley Unión Europea*, 1–14, 11–12; Gössl (n 21) 36–37; Fabrizio Marongiu Buonaiuti, 'Le disposizioni adottate per fronteggiare l'emergenza coronavirus come norme di applicazione necessaria', in Ermanno Calzolaio, Massimo Meccarelli, Stefano Pollastrelli (eds), *Il diritto nella pandemia* (eum 2020, Macerata) 235–256; Dieter Martiny, 'Rom I-VO Art. 9', in Jan v. Hein (director), *MüKoBGB* [Band 13, 8th edn, CH Beck Franz Jürgen Sack, Roland Rixecker, Hartmut Oetker, Bettina Limperg (eds), *MüKoBGB*, vol 13, 8. Aufl. 2021, München] para 58c; Mosconi, Campiglio (n 27), 308; Ennio Piovesani, 'Italian Self-Proclaimed Overriding Mandatory Provisions to Fight Coronavirus' (2020) <<https://conflictflaws.net/2020/italian-self-proclaimed-overriding-mandatory-provisions-to-fight-coronavirus/>> accessed 23 November 2021; Ennio Piovesani, 'Overriding Mandatory Provisions in the Context of the COVID-19 Pandemic', in *Il Caso.it*, II, 1013 (citation proposed on the homepage) <[https://blog.ilcaso.it/news\\_1013/18-11-20/Overriding\\_mandatory\\_provisions\\_in\\_the\\_context\\_of\\_the\\_COVID-19\\_pandemic](https://blog.ilcaso.it/news_1013/18-11-20/Overriding_mandatory_provisions_in_the_context_of_the_COVID-19_pandemic)> accessed 23 November 2021; Francesco Rossi dal Pozzo (n 22) 60ff; Santagata, 'Gli effetti dell'emergenza sanitaria sui contratti turistici e di trasporto' (n 22) 219; Tuccari (n 22) 498 n 82; Giovanni Zarra, 'Alla riscoperta delle norme di applicazione necessaria brevi note sull'art. 28 co. 8 del DL 9/2020 in tema di emergenza COVID-19' (2020) <<http://www.sidiblog.org/2020/03/30/alla-riscoperta-delle-norme-di-applicazione-necessaria-brevi-note-sullart-28-co-8-del-dl-92020-in-tema-di-emergenza-covid-19/>> accessed 23 November 2021; Pietro Franzina, *Introduzione al diritto internazionale privato* (1st edn, Giappichelli 2021, Torino) 188–189; Ennio Piovesani, 'Ex Lege Qualified Overriding Mandatory Provisions as a Response to the "COVID-19 Epidemiological Emergency"' (2021) *Praxis des Internationalen Privat- und Verfahrensrechts*, 401ff; Elena Rodríguez Pineau, 'Leyes de policía: el impacto de la pandemia en el derecho internacional privado' in Beatriz Gregoraci Fernandez, Francisco Velasco Caballero (eds), *Derecho y política ante la pandemia: reacciones y transformaciones* (Tomo II, UAM – BOE 2021, Madrid, 253–270) 259ff; Santagata, 'Crisi sistemica da emergenza sanitaria ed effetti sui contratti turistici e di trasporto' (n 22) 97ff.

### c) Conflict with EU law

To the extent that it provides for mandatory vouchers, art 88-*bis* para 12 first sentence D-L 18/2020 conflicts with EU law, namely with art 5 para 1 lit a), 7 para 3, 8 para 1 lit a) Air Passenger Rights Regulation, art 12 para 2 Package Travel Directive and the Voucher Recommendation. It is submitted that the conflict in question cannot be settled through consistent interpretation.<sup>30</sup> That said, the Air Passenger Rights Regulation (as well as the other Regulations protecting passenger rights)<sup>31</sup> can be enforced horizontally in claims between private parties.<sup>32</sup> As such, Italian courts must set aside art 88-*bis* para 12 first sentence D-L 18/2020 in favour of art 5 para 1 lit a), 7 para 3, 8 para 1 lit a) Air Passenger Rights Regulation.<sup>33</sup> On the contrary, the Package Travel Directive lacks direct horizontal effects.<sup>34</sup> Accordingly, Italian courts are not conferred with the power to set aside art 88-*bis* para 12 first sentence D-L 18/2020 in favour of art 12 para 2 Package Travel Directive.<sup>35</sup> Instead, in the latter case, Italian courts have the power and the duty to refer a question on the constitutional legitimacy of art 88-*bis* para 12 first sentence D-L 18/2020 to the Italian Constitutional Court. The Constitutional Court could thus ascertain the conflict between art 88-*bis* para 12 first sentence D-L 18/2020 and art 12 para 2 Package Travel Directive, declare that the Italian provision is contrary to the Constitution and consequently abrogated.<sup>36</sup> In any case, in the event of doubt as to the compatibility of art 88-*bis* para 12 first sentence D-L 18/2020 with EU law, Italian courts may – or even must, if the latter are courts of last resort – seek guidance from the ECJ, by submitting a preliminary

<sup>30</sup> Compare with Rossi dal Pozzo (n 22) 60; but see, with reference to the Package Travel Directive, Pepe (n 22) 620.

<sup>31</sup> Regulation (EC) No 261/2004 of the European Parliament and of the Council of 11 February 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 (Text with EEA relevance) – Commission Statement [2004] OJ L46/1; Regulation (EC) No 1371/2007 of the European Parliament and of the Council of 23 October 2007 on rail passengers' rights and obligations [2007] OJ L315/14; Regulation (EU) No 1177/2010 of the European Parliament and of the Council of 24 November 2010 concerning the rights of passengers when travelling by sea and inland waterway and amending Regulation (EC) No 2006/2004 Text with EEA relevance [2010] OJ L 334/1; Regulation (EU) No 181/2011 of the European Parliament and of the Council of 16 February 2011 concerning the rights of passengers in bus and coach transport and amending Regulation (EC) No 2006/2004 Text with EEA relevance [2011] OJ L55/1.

<sup>32</sup> Compare with C-509/11 *ÖBB-Personenverkehr AG*, Opinion of AG Jääskinen, ECLI:EU:C:2013:167, para 65.

<sup>33</sup> See Rossi dal Pozzo (n 22) 60; Pepe (n 22) 616.

<sup>34</sup> Instead, the Package Travel Directive may unfold direct vertical effects. Compare with joined cases C-178/94, C-179/94, C-189/94 and C-190/94 *Dillenkofer et al. v Bundesrepublik Deutschland*, ECLI:EU:C:1996:375, para 42.

<sup>35</sup> See Corte costituzionale [(Italian) Constitutional Court], judgment of 24 June 2010, n 227, *Giurisprudenza italiana* 2011, 531; compare with Liesbet Van Acker, Hannes Claes 'Covid-19 and Consumer Law – The Belgian Response' (2021) *Journal of European Consumer and Market Law* 215–218, 216.

<sup>36</sup> Compare with Corte costituzionale, judgment of 22 February 2012, n 75, *Foro italiano* 2013, 3397.

reference under art 267 TFEU.<sup>37</sup> The findings reached above should not be affected by the legislative qualification of the provisions contained in art 88-*bis* D-L 18/2020 as overriding mandatory.<sup>38</sup>

### III Case Law

German and Italian courts have rendered several decisions on the application of the rules of positive law examined above. In particular, those decisions concern the cancellation of flights by carriers and the withdrawal from package travel due to the COVID-19 pandemic, as well as vouchers issued following the termination of the related contracts (see below respectively III 1, 2, 3).

<sup>37</sup> See Pucci (n 22); Santagata, 'Gli effetti del Coronavirus sui contratti turistici. Primi appunti' (n 21) 231; Santagata, 'Gli effetti dell'emergenza sanitaria sui contratti turistici e di trasporto' (n 22) 319–320; Santagata, 'Crisi sistemica da emergenza sanitaria ed effetti sui contratti turistici e di trasporto' (n 22) 97–98.

<sup>38</sup> The fact that domestic provisions qualify as overriding mandatory provisions under art 17 L 218/1995, 9 para 1 Rome I Regulation does not exclude that the same provisions must be compatible with EU law; if this were not the case, the principles of primacy and of uniform application of EU law would be undermined [compare with Case C-184/12 *United Antwerp Maritime Agencies (Unamar) NV v Navigation Maritime Bulgare*, ECLI:EU:C:2013:663, para 46]. In particular, as concerns compatibility with secondary EU law, it is submitted that domestic overriding mandatory provisions cannot be applied if they derogate from or adversely affect Regulations (e.g. the Air Passenger Rights Regulation), the latter being directly applicable instruments of EU law [see Ulrich Magnus, in Julius von Staudinger, *Internationales Vertragsrecht 1* (De Gruyter 2016, Berlin), Art 9 Rom I-VO para 35]. Instead, in the case of Directives, a distinction should be drawn depending on whether the latter establish minimum or full harmonisation (see Case C-184/12 *United Antwerp Maritime Agencies (Unamar) NV v Navigation Maritime Bulgare*, Opinion of AG Wahl, ECLI:EU:C:2013:301, para 41). Domestic overriding mandatory provisions can be applied where Directives establish minimum harmonisation, insofar as the former strengthen the level of protection granted by the latter [see Case C-184/12 *United Antwerp Maritime Agencies (Unamar) NV v Navigation Maritime Bulgare*, ECLI:EU:C:2013:663, para 46; Case C-184/12 *United Antwerp Maritime Agencies (Unamar) NV v Navigation Maritime Bulgare*, Opinion of AG Wahl, ECLI:EU:C:2013:301, para 41]. Instead, it is argued that domestic overriding mandatory provisions should not be applied in areas governed by full harmonisation Directives [see Case C-184/12 *United Antwerp Maritime Agencies (Unamar) NV v Navigation Maritime Bulgare*, Opinion of AG Wahl, ECLI:EU:C:2013:301, para 42; see also Jan D. Lüttringhaus, 'Eingriffsnormen im internationalen Unionsprivat- und Prozessrecht: Von Ingmar zu Unamar' (2014) *Praxis des Internationalen Privat- und Verfahrensrechts*, 146–152, 150 and n 62 therein, citing Heinz-Peter Mansel/Karsten Thorn/Rolf Wagner, 'Europäisches Kollisionsrecht 2013: Atempause im status quo' (2014) *Praxis des Internationalen Privat- und Verfahrensrechts*, 1–27, 25], such as the Package Travel Directive. In fact, in the case of maximum harmonisation Directives, the Member States cannot deviate from, not even strengthen, the level of protection set by the EU. Indeed, in the areas covered by said Directives it is no longer for the Member States, but exclusively for the EU, the task of determining how and which interests should be safeguarded [compare with Case C-184/12 *United Antwerp Maritime Agencies (Unamar) NV v Navigation Maritime Bulgare*, Opinion of AG Wahl, ECLI:EU:C:2013:301, para 42]. Arguably, in those areas, the Member States are not entitled to unilaterally determine which public interests must be safeguarded within the meaning of art 9 para 1 Rome I Regulation, [Lüttringhaus (n 38) 150 n 63] and thus should not be allowed to maintain or establish domestic overriding mandatory provisions in the same areas.

## 1 Flight Cancellation by the Carrier

The decisions on the cancellation of flights by carriers concern, more specifically, the right to reimbursement and to compensation under the Air Passenger Rights Regulation (see below respectively III 1 a, b).

### a) Right to reimbursement

In a case concerning the cancellation of a flight (likely) due to the COVID-19,<sup>39</sup> the AG Nürtingen<sup>40</sup> held that the passenger has the right to reimbursement under art 5 para 1 lit a), 8 para 1, lit a) Air Passenger Rights Regulation and to interest for late payment.<sup>41</sup> Similar conclusions were drawn in a decision by the GdP Rovereto,<sup>42</sup> where, however, the Air Passenger Rights Regulation was not expressly referred to. The GdP further concluded that, in the case of late payment of the reimbursement after several requests and the commencement of legal proceedings by the passenger, the carrier must pay compensation for delay and reimburse legal costs (including out-of-court costs).<sup>43</sup> However, the Italian court added that compensation must be limited where cancellation is due to exceptional circumstances such as the COVID-19 pandemic.<sup>44</sup> On the other hand, rather than applying the Air Passenger Rights Regulation, the GdP Foligno<sup>45</sup> applied art 28 D-L 9/2020 (today art 88-*bis* D-L 18/2020) and held that the subtraction of travel days which result from the cancellation (and subsequent postponement) of a flight due to the COVID-19 pandemic may objectively frustrate or seriously undermine the purpose of the trip, giving rise to the passenger's right to reimbursement pursuant to the combined reading of art 28 D-L 9/2020 and art 1463 C.c.<sup>46</sup>

### b) Right to compensation

The AG Köln held that generic reference to the pandemic is not sufficient to establish a causal link between the cancellation and the extraordinary circumstances referred to in

<sup>39</sup> The cancelled flight was flight EW2784 of 6 April 2020, from Stuttgart to Budapest.

<sup>40</sup> See Amtsgericht Nürtingen, judgment of 24 June 2020 – 10 C 1810/20 (n 2).

<sup>41</sup> See Amtsgericht Nürtingen, judgment of 24 June 2020 – 10 C 1810/20 (n 2).

<sup>42</sup> See Giudice di pace di Rovereto, judgment of 29 October 2020, n 46 (n 2).

<sup>43</sup> See Giudice di pace di Rovereto, judgment of 29 October 2020, n 46 (n 2).

<sup>44</sup> See Giudice di pace di Rovereto, judgment of 15 October 2020, n 46 (n 2).

<sup>45</sup> See Giudice di pace di Foligno, judgment of 12 October 2020, n 97 (n 2).

<sup>46</sup> Regio Decreto (Royal Decree) 16 March 1942, n 262, Approvazione del Codice civile (Approval of the Civil code), Gazz. Uff. n 79 of 4 April 1942 (C.c.). Art 1463 C.c., headed 'Total impossibility', reads: 'In contracts for consideration, the party released due to the supervening impossibility of the performance owed cannot ask for the counter-performance, and must return that which it has already received, according to the rules relating to the recovery of undue payment' (Author's translation).

art 5 para 3 Air Passenger Rights Regulation, and therefore to exempt the carrier from the obligation to pay compensation under art 7 of that Regulation. In particular, the AG cited the ECJ and confirmed that:

The carrier must establish that, even if it had deployed all its resources in terms of staff and the financial means at his disposal, it would clearly not have been able, unless it had made intolerable sacrifices in the light of its undertaking at the relevant time, to prevent the extraordinary circumstances with which it was confronted from leading to the cancellation of the flight or its delay equal to or in excess of three hours in arrival.<sup>47</sup>

In that case, the German court held that the existence of the causal link mentioned had not been proved by the carrier and the latter was thus ordered to pay compensation.<sup>48</sup> Similar findings were reached in a case brought before the AG Frankfurt.<sup>49</sup>

## 2 Withdrawal before the Beginning of the Package

German courts have rendered several decisions on the impact of the COVID-19 pandemic on package travel contracts.<sup>50</sup> Instead, at the time of writing, there are few known Italian decisions on the point.<sup>51</sup>

<sup>47</sup> Case C-315/15 *Marcela Pešková and Jiří Peška v Travel Service a.s.*, ECLI:EU:C:2017:342, ECLI:EU:C:2017:342, paras 29, 34.

<sup>48</sup> The court's decision was later upheld by the Oberlandesgerichtshof Köln [6th Civil Chamber, judgment of 26 February 2021 – 6 U 127/20 (n 2)].

<sup>49</sup> See Amtsgericht Frankfurt a. M., judgment of 12 March 2021 – 29 C 3204/20 (n 2) para 13.

<sup>50</sup> For a summary of German court decisions on the impact of the COVID-19 pandemic on package travel contracts, see Stefanie Bergmann, 'Rechtsprechungsübersicht zum Pauschalreiserecht 2019 bis 2020' (2020) *Verbraucher und Recht*, 443–448, 446–447.

<sup>51</sup> The first known Italian decision on the impact of the COVID-19 pandemic on package travel is a judgment rendered by the Tribunale di Torino [judgment of 29 December 2020, n 4786 (n 2)]. In the case underlying that judgment, two travellers had concluded by phone a package travel scheduled for 16 August 2020. On 16 March 2020, due to the worsening COVID-19 epidemiological emergency, the travellers withdrew from the package. Thereafter, the travellers sued the organiser before the Tribunale, seeking reimbursement of the advance payment they had made. Considering that the contract had been concluded off-premises and that withdrawal had been made after only 3 days from the contract's conclusion, the Italian court upheld the travellers' claim under art 41 para 7 Cod. tur. (compare with art 12 para 5 Package Travel Directive). The second known decision is an ex parte decree rendered by the Tribunale di Trento [decreto ingiuntivo of 13 August 2020, n 711 (n 2)] and kindly reported by Avv. Andrea Antolini of the Trento Bar to whom I am grateful. In the case underlying that decree, according to the claimants, the latter had concluded (in the name and behalf of their daughter) a package travel contract with destination the United States and scheduled departure on 1 July 2020. On 13 August 2020, the organiser withdrew from the package and issued a voucher. Thereafter, the claimants asked the Tribunale to issue an ex parte decree ordering the organiser to reimburse the price. The claimants relied on EU law and also on an exception to the issuance of mandatory vouchers envisaged in the same art 88-bis D-L 18/2020, namely in para 8 thereof. The Italian court ultimately issued the requested ex parte decree [on art 88-bis para 8 D-L 18/2020, see also Tribunale di Benevento, judgment of 5 August 2021 (n 2)]. The third

## a) Conditions: ‘unavoidable and extraordinary circumstances’

German courts held that the COVID-19 pandemic may qualify as an ‘unavoidable and extraordinary’ circumstance within the meaning of sec 651h paras 3, 4 n 2 BGB,<sup>52</sup> and may thus justify withdrawal (by the traveller or by the organiser) before the beginning of the package travel,<sup>53</sup> insofar as the following ‘space-time’ conditions be fulfilled: 1) at the time of conclusion of the package travel, the spread of the pandemic in the place of destination or in its immediate vicinity must not have been foreseeable;<sup>54</sup> 2) at the time of withdrawal, that spread must have been foreseeable.<sup>55</sup> With respect to the latter condition, the lack of travel notices does not exclude that the spread of the COVID-pandemic in the relevant areas was foreseeable.<sup>56</sup> Rather, foreseeability of the spread at the time of withdrawal may be assessed

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decision is an order rendered by the Tribunale di Verona [order of 19 January 2021 (n 2)]. In the case underlying that order, the package travel concerned a trip to Bhutan scheduled for April 2020. The package travel was terminated before the beginning, due to the COVID-19 pandemic. The travellers asked price reimbursement, but the travel agency (on 3 March 2020) only issued a voucher. The travellers thus claimed reimbursement under art 41 Cod. tur. before the Tribunale. The travel agency challenged that claim, arguing that it had issued an art 88-bis D-L 18/2020-mandatory voucher. The Italian court ultimately dismissed the travellers’ claim, stating that the choice between reimbursement and the issuance of a voucher ‘both under D-L 9/2020 and under the following D-L 18/2020 converted into L 27/2020 is up to the organiser, without the need of acceptance by the addressee. [Art 88-bis para 13 D-L 18/2020] provides that the [...] provisions [of that article] are overriding mandatory provisions and thus [...] derogate from community legislation and international law. [...] The issuance of the voucher in place of the reimbursement [...] must thus be deemed correct’ (Author’s translation). Finally, it is worth mentioning a fourth decision, even though the latter does not concern the COVID-19 pandemic: a judgment rendered by the Giudice di pace di Avellino (judgment of 7 January 2021, filed on 15 January 2021, n 124, RG n 2713/2020). The case underlying the decision by the GdP concerned a package travel contract concluded on January 2020, with scheduled departure to Amsterdam on 29 February 2020. In that case, the travellers were both diagnosed with a flu on 27 February 2020 and thus withdrew from the package. The Italian court thus ordered the organiser to reimburse the travellers under art 1463 C.c. (n 46).

<sup>52</sup> Compare with art 12 para 2, 3 lit b) Package Travel Directive.

<sup>53</sup> See Amtsgericht Rostock, judgment of 15 July 2020 – 47 C 59/20 (n 2) para 15; Landgericht Rostock, judgment of 21 August 2020 – 1 O 211/20 (n 2) paras 10, 11; Amtsgericht München, final judgment of 27 October 2020 – 159 C 13380/20 (n 2) para 17; Amtsgericht München, final judgment of 8 December 2020 – 283 C 4769/20 (n 2) para 10.

<sup>54</sup> See Amtsgericht Augsburg, final judgment of 9 November 2004 – 14 C 4608/03 (n 2) para 16; see also Oberlandesgerichtshof, decision of 14 June 2005 – 4 Ob 103/05h (n 2).

<sup>55</sup> See Amtsgericht Rostock, judgment of 15 July 2020 – 47 C 59/20 (n 2); Amtsgericht Frankfurt a. M., judgment of 11 August 2020 – 32 C 2136/20 (18) (n 2); Amtsgericht Köln, judgment of 14 September 2020 – 133 C 213/20 (n 2) para 13; Amtsgericht München, final judgment of 27 October 2020 – 159 C 13380/20 (n 2) para 19; Amtsgericht Duisburg, judgment of 1 December 2020 – 53 C 1811/20 (n 2) para 17; Amtsgericht Duisburg, judgment of 7 December 2020 – 51 C 1394/20 (n 2) para 17; Amtsgericht Duisburg, judgment of 14 December 2020 – 506 C 2377/20 (n 2); Amtsgericht Hannover, judgment of 9 April 2021 – 502 C 12946/20 (n 2) paras 13, 14; see also Amtsgericht Augsburg, final judgment of 9 November 2004 – 14 C 4608/03 (n 2) para 17.

<sup>56</sup> See Amtsgericht Rostock, judgment of 15 July 2020 – 47 C 59/20 (n 2) para 23; Amtsgericht Rostock, judgment of 15 July 2020 – 47 C 59/20 (n 2) paras 4ff; Amtsgericht Frankfurt a. M., judgment of 11 August 2020 – 32 C 2136/20 (18) (n 2); Amtsgericht Wiesbaden, judgment of 9 September 2020 – 92 C 1682/20 (n 2) para 9; Amtsgericht Köln, judgment of 14 September 2020 – 133 C 213/20 (n 2) paras 17, 18; Amtsgericht Duisburg,

by taking journal articles, communications by the WHO and travel notices by German or foreign authorities into account.<sup>57</sup>

In all the cases settled by the known German decisions, the COVID-19 pandemic qualified as an extraordinary and unavoidable circumstance within the meaning of sec 651h BGB.<sup>58</sup> There is only one known exception: a decision rendered by the AG München,<sup>59</sup> where the court held that, at the time of the traveller's withdrawal on 1 April 2020<sup>60</sup> from a cruise package planned to begin on 28 June 2020 and with scheduled stops in Stockholm, Tallin, St. Petersburg and Copenhagen,<sup>61</sup> the spread of the pandemic in those areas was not foreseeable. In particular, the AG's decision reads:

The plaintiff withdrew from the trip nearly 3 months before the start of the trip. On 1 April 2020 there was a worldwide travel warning. However, this was initially limited until the end of April 2020. The entry restrictions from Denmark were also initially limited to 13 April 2020 [...]. The same applies to the entry restrictions for Russia, which were initially valid until 1 May 2020. Thus, at the time of the withdrawal, there was no travel warning for the travel period from 28 June 2020 to 5 July 2020 [...]. Europe was still at the start of the pandemic at the beginning of April 2020 [...]. Therefore, in the opinion of this court, it was in no way foreseeable at that time [that is to say, that of withdrawal] how the pandemic would develop further in Europe. However, reports on COVID-19 outbreaks on cruise ships were already available at that time. Nevertheless, in the opinion of this court, it could not have been ruled out at the beginning of April 2020 that the cruise could have been carried out three months later with hygiene measures and testing of passengers [...]. Taking these aspects into account, this court assumes that, when viewed *ex ante*, on 1 April 2020 it could not be assumed with the necessary certainty that circumstances would arise during the travel period that would significantly impair the trip. Finally, it is also

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judgment of 1 December 2020 – 53 C 1811/20 (n 2) para 18; Amtsgericht Duisburg, judgment of 7 December 2020 – 51 C 1394/20 (n 2) para 18; Amtsgericht München, final judgment of 8 December 2020 – 283 C 4769/20 (n 2) para 11; Amtsgericht Duisburg, judgment of 14 December 2020 – 506 C 2377/20 (n 2) para 6.

<sup>57</sup> Compare with Amtsgericht Frankfurt a. M., judgment of 11 August 2020 – 32 C 2136/20 (18) (n 2). Information on the spread may even constitute common knowledge with the court under sec 291 ZPO {Zivilprozessordnung in der Fassung der Bekanntmachung vom 5. Dezember 2005 [BGBl. I S. 3202; 2006 I S. 431; 2007 I S. 1781], die zuletzt durch Artikel 3 des Gesetzes vom 5. Oktober 2021 [BGBl. I S. 4607] geändert worden ist [Code of Civil Procedure as promulgated on 5 December 2005 (Federal Law Gazette I p 3202; 2006 I p 431; 2007 I p 1781), last amended by art 1 Law of 10 October 2013 (Federal Law Gazette I p 3786)]} and thus need not to be substantiated by evidence. See Amtsgericht Rostock, judgment of 15 July 2020 – 47 C 59/20 (n 2) paras 17–18; Amtsgericht München, final judgment of 8 December 2020 – 283 C 4769/20 (n 2) para 13; Amtsgericht Frankfurt a. M., judgment of 11 August 2020 – 32 C 2136/20 (18) (n 2).

<sup>58</sup> This notwithstanding, according to the AG Hannover: 'A large number of actions are pending before the courts concerning the question of whether the requirements of sec 651h para 3 BGB are met in the event of a withdrawal in connection with the pandemic. The case law is inconsistent' (Author's translation). See Amtsgericht Hannover, judgment of 9 April 2021 – 502 C 12946/20 (n 2) para 21.

<sup>59</sup> See Amtsgericht München, final judgment of 27 October 2020 – 159 C 13380/20 (n 2).

<sup>60</sup> See Amtsgericht München, final judgment of 27 October 2020 – 159 C 13380/20 (n 2) para 4.

<sup>61</sup> See Amtsgericht München, final judgment of 27 October 2020 – 159 C 13380/20 (n 2) para 2.

not apparent why the plaintiff withdrew from the contract on its own initiative and did not wait for the situation to develop [...].<sup>62</sup>

### **b) Withdrawal by the traveller**

German courts specified that, in the case of withdrawal by the traveller due to the COVID-19 pandemic pursuant to sec 651h paras 1, 3 BGB,<sup>63</sup> the same traveller has the right to reimbursement of the price,<sup>64</sup> whereas the organiser does not have the right to a lump sum pursuant to sec 651 para 2 BGB (that is to say, termination fees).<sup>65,66</sup>

### **c) Withdrawal by the organiser**

German courts also specified that, in the case of withdrawal by the organiser due to the COVID-19 pandemic pursuant to sec 651h para 4 n 2 BGB,<sup>67</sup> the traveller has the right to reimbursement of the price but not to compensation pursuant to sec 651n para 2 BGB (that is to say, compensation for damages for a ruined holiday).<sup>68</sup> In particular, the AG Frankfurt held that the period of 14 days for reimbursement under sec 651h para 5 BGB,<sup>69</sup> which starts from the date of withdrawal, also applies in the event of withdrawal by the organiser.<sup>70</sup> The AG also held that, where the organiser does not fulfil the reimbursement obligation in a timely manner, the traveller has the right to compensation for the damage caused by the delay,<sup>71</sup> as well as the right to reimbursement of the out-of-court costs for requesting that reimbursement.<sup>72</sup> Furthermore, the German court held that the delay in making the reimbursement cannot be justified by the difficulty in obtaining liquidity (in view of the large number of reimbursement requests received), nor by organisational difficulties.<sup>73</sup>

<sup>62</sup> See Amtsgericht München, final judgment of 27 October 2020 – 159 C 13380/20 (n 2) paras 24–29 (Author's translation).

<sup>63</sup> Compare with art 12 paras 1, 2 Package Travel Directive.

<sup>64</sup> See Amtsgericht Frankfurt a. M., judgment of 11 August 2020 – 32 C 2136/20 (n 2); Landgericht Rostock, judgment of 21 August 2020 – 1 O 211/20 (n 2); Amtsgericht Köln, judgment of 14 September 2020 – 133 C 213/20 (n 2).

<sup>65</sup> Compare with art 12 para 1 Package Travel Directive.

<sup>66</sup> See Landgericht Rostock, judgment of 21 August 2020 – 1 O 211/20 (n 2).

<sup>67</sup> Compare with art 12 para 3 lit b) Package Travel Directive.

<sup>68</sup> See Amtsgericht Rostock, judgment of 15 July 2020 – 47 C 59/20 (n 2); Amtsgericht Wiesebad, judgment of 9 September 2020 – 92 C 1682/20 (n 2).

<sup>69</sup> Compare with art 12 para 5 Package Travel Directive.

<sup>70</sup> See Amtsgericht Frankfurt a. M., final judgment of 15 October 2020 – 32 C 2620/20 (n 2) para 13.

<sup>71</sup> See Amtsgericht Frankfurt a. M., final judgment of 15 October 2020 – 32 C 2620/20 (n 2) para 15.

<sup>72</sup> See Amtsgericht Frankfurt a. M., final judgment of 15 October 2020 – 32 C 2620/20 (n 2) para 16.

<sup>73</sup> See Amtsgericht Frankfurt a. M., final judgment of 15 October 2020 – 32 C 2620/20 (n 2) para 15.

### 3 Vouchers

Attempts by carriers and organisers to impose mandatory vouchers on passengers and travellers are at the heart of the German and Italian decisions summarised below.

#### a) German case law

As mentioned above (II 2 a), the AG Frankfurt a. M. correctly noted that ‘mandatory vouchers’ were ruled out by the EU.<sup>74</sup> Accordingly, the AG held that, pursuant to the Voucher Recommendation and art 240 para 6 EGBGB, the organiser cannot limit himself to offering a voucher where the latter is refused by the traveller.<sup>75</sup> Similar conclusions were drawn in a reported decision by the AG Berlin-Wedding, in a case concerning the cancellation of a flight by a Portuguese carrier.<sup>76</sup> In that case, the carrier had issued a voucher and had withheld (cash) reimbursement relying on Portuguese law, which (apparently) envisaged mandatory vouchers in cases of cancellation of flights due to the COVID-19 pandemic.<sup>77</sup>

#### b) Italian case law

Italian courts have taken three conflicting positions on the issue of art 88-*bis* D-L 18/2020-mandatory vouchers: 1) the first position is that taken by the GdP Busto Arsizio and the Tribunale di Verona, whereby art 88-*bis* para 12 first sentence D-L 18/2020 prevails over EU law (see below III 3 b aa); 2) the second position is that taken by the GdP Foligno, Palermo and Rovereto, which simply acknowledged the possibility of issuing mandatory vouchers under the Italian provision (see below III 3 b bb); 3) the third position is that taken by the GdP Bologna, whereby that provision must be set aside in favour of EU law (see below III 3 b cc).

##### ba) First position

In the case brought before the GdP Busto Arsizio, the carrier had cancelled a flight due to the COVID-19 pandemic.<sup>78</sup> In that case, the carrier had offered an art 88-*bis* D-L 18/2020-mandatory voucher, which, however, was not accepted by the Italian passenger.

<sup>74</sup> See Amtsgericht Frankfurt a.M., final judgment of 15 October 2020 – 32 C 2620/20 (n 2) para 14.

<sup>75</sup> See Amtsgericht Frankfurt a.M., final judgment of 15 October 2020 – 32 C 2620/20 (n 2) paras 13, 14; see also Landgericht Frankfurt a. M., judgment of 14 January 2021 – 2-24 O 315/20 (n 2) para 26; Oberlandesgerichtshof Schleswig, 17th Civil Chamber, judgment of 26 March 2021 – 17 U 166/20 (n 2) para 72.

<sup>76</sup> See Ernst Führich, ‘TAP muss auszahlen – trotz Gutscheinschutzes’ (2020) <<https://reiserecht.fuehrich.com/2020/07/15/urteil-zu-corona-flugabsagen-tap-muss-auszahlen-trotz-gutscheinschutzes/>> accessed 23 November 2021.

<sup>77</sup> See Führich (n 76).

<sup>78</sup> See Giudice di pace di Busto Arsizio, decreto ingiuntivo of 23 November 2020, n 4456 (n 2). The decision in question was kindly reported by the claimant-passenger himself, Avv. Andrea Ponte from the Turin Bar Association, to whom I am grateful.

The passenger asked the GdP to set aside art 88-*bis* para 2 first sentence D-L 18/2020 and order the carrier to provide (cash) reimbursement under art 7 para 3 Air Passenger Rights Regulation. The Italian court refused to do this, arguing that: ‘[...] the domestic norm [that is to say, art 88-*bis* D-L 18/2020], may well be included among those that prevail over any law under art 9 [Rome I Regulation]’<sup>79</sup>. In a similar vein, in a case concerning a package travel, the Tribunale di Verona<sup>80</sup> held:

[Art 88-*bis* para 13 D-L 18/2020] provides that the [...] provisions [of that article] are overriding mandatory provisions and thus derogate from community legislation and international law. Overriding mandatory provisions are envisaged in art 17 L 218/1995 whereby, Italian norms which, in the light of their object and purpose, must be applied regardless of the reference to foreign law, prevail over private international law rules.<sup>81</sup>

These are extraordinary provisions, adopted in situations of emergency, which prevail over other norms applicable in normal situations. What follows is that the same prevail both over national legislation and foreign laws, since their application is deemed necessary to safeguard the country. ‘The issuance of the voucher in place of the reimbursement of the purchased package [travel] must thus be deemed correct’. The two courts thus erred in concluding that, in the light of the legislative qualification of the provisions contained in art 88-*bis* D-L 18/2020 as overriding mandatory provisions, the former article may prevail over ‘any law’, including art 5 para 1 lit a), 7 para 3, 8 para 1 lit a) Air Passenger Rights Regulation and art 41 para 3 Cod. tur. (transposing art 12 para 2 Package Travel Directive). This erroneous conclusion confirms that the autonomous-legislative qualification of overriding mandatory provisions is indeed a ‘controversial’<sup>82</sup> legislative practice, insofar as it ‘might have the practical effect of misleading national courts into considering themselves bound by that qualification’<sup>83</sup> and it might even prejudice a proper reconstruction by those courts of the relationship between national and EU (uniform substantive) law.

### **bb) Second position**

In a case brought before the GdP Foligno,<sup>84</sup> the court acknowledged the possibility of issuing mandatory vouchers under art 28 D-L 9/2020 (today art 88-*bis* D-L 18/2020). However, in that case, the GdP noted that the carrier had failed to appear in court and had not notified its willingness to issue such mandatory vouchers. The, Italian court therefore ordered

<sup>79</sup> Author’s translation.

<sup>80</sup> See Tribunale di Verona, order of 19 January 2021 (n 2); see above n 51.

<sup>81</sup> See above n 27.

<sup>82</sup> See Ennio Piovesani, ‘Italian Self-Proclaimed Overriding Mandatory Provisions to Fight Coronavirus’ (n 29).

<sup>83</sup> See Ennio Piovesani, ‘Ex Lege Qualified Overriding Mandatory Provisions as a Response to the “COVID-19 Empidemiological Emergency”’ (n 29) 401, 405.

<sup>84</sup> See Giudice di pace di Foligno, judgment of 12 October 2020, n 97 (n 2).

the carrier to reimburse the price. In another case brought before the GdP Palermo,<sup>85</sup> the carrier had appeared but had only ‘offered, timidly, the voucher instead of reimbursement’<sup>86</sup> without issuing the offered voucher. The GdP thus ordered the carrier to reimburse the price. In an earlier case, the same GdP Palermo<sup>87</sup> noted that the carrier had issued an art 88-*bis* D-L 18/2020-mandatory voucher. However, in that case, the GdP further noted that, after the commencement of court proceedings by the passenger, the carrier had offered reimbursement. In the light of that offer, the Italian court ordered the carrier to reimburse the price. The same conclusions were reached, in a similar case, by the GdP Rovereto.<sup>88</sup>

### bc) Third position

In a case brought before the GdP Bologna,<sup>89</sup> notwithstanding an art 88-*bis* D-L 18/2020-mandatory voucher having been issued, the carrier was ordered to reimburse the price, considering that the latter had not proved that the issued voucher had been accepted by the passenger. Therefore, in so doing, the GdP correctly, yet impliedly, set aside art 88-*bis* para 2 first sentence D-L 18/2020 in order to uphold the passenger’s claim for (cash) reimbursement under art 5 para 1 lit a), 7 para 3, 8 para 1 lit a) Air Passenger Rights Regulation.

## V Summary

1. Cancellation of flights and withdrawal from package travel are respectively governed by the Air Passenger Rights Regulation and by the Package Travel Directive. As a response to the impact of the COVID-19 pandemic on contracts for the carriage of passengers and package travel, the Commission adopted the Voucher Recommendation. The mentioned Recommendation envisages ‘voluntary’ vouchers offered following the termination of the mentioned contracts due to the COVID-19 pandemic as an alternative to (cash) reimbursements. On the other hand, the Recommendation rules out the possibility of issuing ‘mandatory’ vouchers. Accordingly, the German legislature adopted art 240 para 6 EGBGB on voluntary vouchers offered by organisers in the case of termination of package travel due to the COVID-19 pandemic. On the contrary, the Italian legislature adopted art 88-*bis* D-L 18/2020, which provides for residual cases of mandatory vouchers in para 12 first sentence thereof. Art 88-*bis* para 12 first sentence D-L 18/2020 thus conflicts, in particular, with art 5 para 1 lit a), 7 para 3, 8 para 1 lit a) Air Passenger Rights Regulation, art 12 para 2 Package Travel Directive and the Voucher Recommendation. In the case of conflicts between art 88-*bis* para 12 first sentence D-L 18/2020 and the Air Passenger Rights Regulation, Italian

<sup>85</sup> See Giudice di pace di Palermo, judgment of 31 March 2021, n 858 (n 2).

<sup>86</sup> Author’s translation.

<sup>87</sup> See Giudice di pace di Palermo, judgment of 23 October 2020, n 1999 (n 2).

<sup>88</sup> See Giudice di pace di Rovereto, judgment of 29 October 2020, n 46 (n 2).

<sup>89</sup> See Giudice di pace di Bologna, judgment of 18 January 2020, n 70 (n 2).

courts must set aside the Italian provision. Instead, in the case of conflict between the provision in question and the Package Travel Directive, Italian courts must refer a question on the constitutional legitimacy of that provision to the Italian Constitutional Court. The Constitutional Court could thus ascertain the conflict between art 88-*bis* para 12 first sentence D-L 18/2020 and the Package Travel Directive, declare that the Italian provision is contrary to the Constitution and consequently abrogated. In any case, in the event of doubt as to the compatibility of the provision in question with EU law, Italian courts may – or even must, if the latter are courts of last resort – seek guidance from the ECJ, by submitting a preliminary reference under art 267 TFEU.

2. German and Italian courts concluded that, where a flight is cancelled by the carrier due to the COVID-19 pandemic, the passenger has the right to reimbursement under art 5 para 1 lit a), 8 para 1 lit a) Air Passenger Rights Regulation. In truth, in most cases, Italian courts have come to this conclusion without expressly referring to the Air Passenger Regulation. German courts further concluded that the COVID-19 pandemic qualifies as an ‘extraordinary’ circumstance and may thus exempt the carrier from its obligation to pay compensation in the event of cancellation under art 5 para 3 Air Passenger Rights Regulation, insofar as the existence of a causal link between the cancellation and the pandemic is established.

3. With respect to the withdrawal before the beginning of package travel, German courts concluded that the COVID-19 pandemic qualifies as an ‘unavoidable and extraordinary’ circumstance within the meaning of sec 651h paras 3, 4 n 2 BGB, insofar as: 1) at the time of conclusion of the package travel, the spread of the pandemic in the place of destination or in its immediate vicinity was not foreseeable; 2) at the time of withdrawal, that spread was foreseeable. In the case of withdrawal by the traveller due to pandemic, pursuant to sec 651h paras 1, 3 BGB, the same traveller has the right to reimbursement, whereas the organiser does not have the right to termination fees pursuant to sec 651 para 2 BGB. On the other hand, in the case of withdrawal by the organiser due to the COVID-19 pandemic pursuant to sec 651h para 4 n 2 BGB, the traveller has the right to price reimbursement but not to compensation for damages for a ruined holiday pursuant to sec 651n para 2 BGB.

4. In the light of the Voucher Recommendation and of sec 640 para 6 BGB, the AG Frankfurt correctly ruled out the possibility of issuing mandatory vouchers. On the contrary, Italian courts have taken conflicting positions on the (residual) cases of mandatory vouchers envisaged in art 88-*bis* para 12 first sentence D-L 18/2020. In fact, in the cases brought before the GdP Busto Arsizio and the Tribunale di Verona, the legislative qualification of the provisions contained in art 88-*bis* D-L 18/2020 as overriding mandatory provisions has led to an incorrect reconstruction of the relationship between the Italian provision, on the one side, and the Air Passenger Rights Regulation and Package Travel Directive, on the other side. On the contrary, that relationship was correctly reconstructed by the GdP Bologna, which (impliedly) set aside art 88-*bis* para 12 first sentence D-L 18/2020 in order to uphold the passenger’s claim for (cash) reimbursement under art 5 para 1 lit a), 7 para 3, 8 para 1 lit a) Air Passenger Rights Regulation.