

STUDY

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# The Impact of Unfair Commercial Practices on Competition in the EU Passenger Transport Sector, in particular Air Transport



Policy Department for Economic, Scientific and Quality of Life Policies

Directorate-General for Internal Policies

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# The Impact of Unfair Commercial Practices on Competition in the EU Passenger Transport Sector, in particular Air Transport

## **Abstract**

The study aims at identifying and analysing the unfair commercial and trading practices in passenger air transport that not only are detrimental to consumers, but which can also distort competition in the Single Market. The study analyses the main air carrier business models and price patterns, as well as the decisions adopted by the national competent authorities with regard to unfair commercial practices and predatory pricing.

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## LIST OF ABBREVIATIONS

<b>AAC</b>	Average avoidable costs
<b>AGCM</b>	Autorità Garante della Concorrenza e del Mercato (Italian Competition and Consumer Authority)
<b>ASA</b>	Advertising Standards Authority (UK)
<b>ATC</b>	Average total costs
<b>AVC</b>	Average variable costs
<b>BEUC</b>	The European Consumer Organisation
<b>BGB</b>	Bürgerliches Gesetzbuch (German Civil Code)
<b>BKartA</b>	Bundeskartellamt (German Competition Authority)
<b>CAPA</b>	Centre for Aviation
<b>CJEU</b>	Court of Justice of the European Union
<b>CMA</b>	Competition and Markets Authority (UK Competition and Consumer Protection Authority).
<b>CPC</b>	Consumer Protection Cooperation Network
<b>DOT</b>	US Department of Transport
<b>ECAA</b>	European Common Aviation Area
<b>FFP</b>	Frequent Flying Programme
<b>FSC</b>	Full Service Carrier
<b>GDPR</b>	General Data Protection Regulation
<b>HSR</b>	High Speed Rail
<b>IAA</b>	Irish Aviation Authority
<b>LCC</b>	Low Cost Carrier
<b>LGDCU</b>	General Law on the Protection of Consumers and Users (Spain)
<b>LRAIC</b>	Long-run average incremental cost
<b>MCCAA</b>	Malta Competition and Consumer Affairs Authority
<b>OAG</b>	Official Aviation Guide
<b>OCA</b>	Office for Consumer Affairs, Malta
<b>O&amp;D</b>	Origin & Destination
<b>OFT</b>	Office of Fair Trading, UK, the predecessor of the CMA
<b>TFEU</b>	Treaty on the Functioning of the European Union

<b>UCP</b>	Unfair Commercial Practices
<b>UCPD</b>	Unfair Commercial Practices Directive
<b>UTP</b>	Unfair Trading Practices



## LIST OF DEFINITIONS

**Consumer Protection Cooperation (CPC) network:** Network of national authorities responsible for enforcing EU consumer protection laws to protect consumers' interests in EU and EEA countries. The authorities cooperate on consumer rules (e.g. on unfair commercial practices, e-commerce, comparative advertising, package holidays, online selling, and passenger rights), sharing best practices and alerting each other about malpractices with a cross-country dimension. The CPC network also conducts regular EU-wide screenings of websites ('sweeps'<sup>1</sup>) to assess compliance of business operators with consumer rules. It was set up in 2007 by the CPC Regulation<sup>2</sup>, which provided for a cooperation framework so that national authorities could jointly address breaches of EU laws to protect consumers' interests in cases when the trader and the consumer are based in different EU and EEA countries.

**European Single Aviation Market:** Single market in aviation services created the three Council Regulations, known informally as the 'third package'<sup>3</sup>. The third package allows any legal or physical person, irrespective of nationality, to set up an airline anywhere inside the EU market and fly routes within the single market. With the European Common Aviation Area (ECAA) agreement<sup>4</sup>, the EU's internal aviation market – consisting of EU Member States as well as Norway and Iceland – was integrated with the EU's neighbours in South-East Europe<sup>5</sup>. The ECAA agreement, by creating a single aviation market, aims to bring economic benefits to air travellers and industry, as well as introduce uniform and high standards in term of safety and security, and harmonised rules across Europe.

**Full-Service Carriers (FSCs):** Air service operator that focuses on providing a wide range of pre-flight and on-board services, including different service classes, and connecting flights. Since most full-service carriers (FSCs) operate a hub-and-spoke model, this group of airlines are usually also referred to as hub-and-spoke airlines<sup>6</sup>.

**Hub-and-Spoke Service:** Air transportation system in which the plane goes to a central location (hub) where all passengers, except those whose origin or destination is the hub, transfer at the hub to a second flight to reach their destination<sup>7</sup>.

**Low Cost Carriers (LCCs):** Term originated within the airline industry in the middle of the 1990's<sup>8</sup> referring to air service operators with a specific operating model that focuses on cost reduction in order

<sup>1</sup> A sweep is a set of checks carried out simultaneously by national enforcement authorities to identify breaches of EU consumer law in a particular sector. Where breaches of law are identified, the relevant authorities ask the traders to take corrective action. The European Commission coordinates the sweep action.

<sup>2</sup> Regulation (EC) No 2006/2004 of the European Parliament and of the Council of 27 October 2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws, OJ L 364, 9.12.2004. From 17 January 2020 a new regulation will enter into force, i.e. Regulation (EU) 2017/2394 of the European Parliament and of the Council of 12 December 2017 on cooperation between national authorities responsible for the enforcement of consumer protection laws and repealing Regulation (EC) No 2006/2004, OJ L 345, 27.12.2017.

<sup>3</sup> Regulation (EEC) No 2407/92 of 23 July 1992 on licensing of air carriers OJ L240, 24.8.1992; Regulation (EEC) No 2408/92 of 23 July 1992 on access for Community air carriers to intra-Community air routes, OJ L240, 24.8.1992; Regulation (EEC) No 2409/92 of 23 July 1992 on fares and rates for air services, OJ L240, 24.8.1992.

<sup>4</sup> The ECAA Agreement is a multilateral agreement signed on 9 June 2006. It entered into force on 1 December 2017.

<sup>5</sup> Albania, Bosnia and Herzegovina, Kosovo, North Macedonia, Montenegro, Serbia.

<sup>6</sup> Reichmut, J., Ehmer, H., Berster, P., Bischoff, G., Grimme, W., Grunewald, G., Maertens, S., DLR Topical Report: Analyses of the European air transport market, Airline Business Models (2008), [https://ec.europa.eu/transport/sites/transport/files/modes/air/doc/abm\\_report\\_2008.pdf](https://ec.europa.eu/transport/sites/transport/files/modes/air/doc/abm_report_2008.pdf).

<sup>7</sup> Cook, G. N., Goodwin, J. (2008). Airline Networks: A Comparison of Hub-and-Spoke and Point-to-Point Systems, in Journal of Aviation/Aerospace Education & Research, Art. 1.

<sup>8</sup> Reichmut, J., Ehmer, H., Berster, P., Bischoff, G., Grimme, W., Grunewald, G., Maertens, S., DLR Topical Report: Analyses of the European air transport market, Airline Business Models (2008), [https://ec.europa.eu/transport/sites/transport/files/modes/air/doc/abm\\_report\\_2008.pdf](https://ec.europa.eu/transport/sites/transport/files/modes/air/doc/abm_report_2008.pdf).

to implement a price leadership strategy on the markets they serve. The lower ticket prices correspond to the provision of fewer comforts and the exclusion of traditional services and amenities that are normally provided in the fare. These are usually only provided against payment of an extra fee (such as for checked-in luggage, but in some cases also for carry-on luggage), allowing airlines to earn ancillary revenues making up for revenue lost in decreased ticket prices.

**Origin & Destination (O&D):** Approach to delimiting the relevant market from a competition standpoint, where every combination of an airport/city of origin and an airport/city of destination is a distinct relevant market. Defining the market in this way reflects the demand-side perspective, in which passengers consider all the possible alternatives for travelling from a city of origin to a city of destination, but do not consider these substitutable with a different city pair. The effects of a transaction on competition are thus assessed separately for each O&D<sup>9</sup>. O&D data is typically used by airports and airlines alike to calculate existing demand between two airports/markets.

**Point-to-Point Service:** Air transportation system in which the plane travels directly to a destination, rather than going through a central hub. All passengers in a point-to-point system therefore board at the point of origin and deplane at the destination<sup>10</sup>.

**Predatory Pricing:** Pricing strategy usually pursued by a dominant firm in a relevant market which consists of attempting to drive “competitors out of the market by setting prices below some benchmark of cost. If the predator succeeds in driving existing competitors out of the market and in deterring the future entry of new firms, he can subsequently raise prices and earn higher profits. Predatory pricing by dominant firms is prohibited by EU competition law as an abuse of a dominant position. Prices set below average variable costs can be presumed to be predatory, because they have no other economic rationale than to eliminate competitors, since it would otherwise be more rational not to produce and sell a product that cannot be priced above average variable cost. Where prices are set below average total (but above variable) costs, some additional elements proving the predator’s intention need to be established in order to qualify them as predatory, given that other commercial considerations, like a need to clear stocks, may lie at the heart of the pricing policy.”<sup>11</sup>

**Unfair Commercial Practices (UCPs):** Commercial practice that is “contrary to the requirements of professional diligence”, and which “materially distorts or is likely to materially distort the economic behaviour with regard to the product of the average consumer whom it reaches or to whom it is addressed, or of the average member of the group when a commercial practice is directed to a particular group of consumers<sup>12</sup>.”

**Unfair Trading Practices (UTPs):** in a business-to-business relationship, any business practice or act that is deceptive, fraudulent, or causes injury to one of the parties (usually, the weakest contractual party).

<sup>9</sup> Case M.8869, Ryanair/LaudaMotion, C/2018/4731, OJ C 366, 10.10.2018.

<sup>10</sup> Cook, G. N., Goodwin, J. (2008). Airline Networks: A Comparison of Hub-and-Spoke and Point-to-Point Systems, in Journal of Aviation/Aerospace Education & Research.

<sup>11</sup> Directorate-General for Competition, Glossary of terms used in EU competition policy: Antitrust and control of concentrations. Brussels, July 2002.

<sup>12</sup> Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market ('Unfair Commercial Practices Directive') OJ L 149, 11.6.2005.

## EXECUTIVE SUMMARY

### Aim

This study aims to understand the impact on competition in the EU's passenger air transport sector of unfair commercial practices (UCPs) on the part of passenger air transport operators. On the one hand, contractual conditions and pricing strategies by airlines reflect the dynamism of competitive conditions in a market, which has been reshaped both by the entry of low cost carriers (LCCs) and more recently by a surge of technological developments, such as personalised advertising. On the other hand, national consumer protection authorities across Member States have imposed sanctions on air service carriers for some practices considered detrimental to consumers, with particular regard to transparency over the final price to be paid and the essential elements of the transport contract. While price comparison tools have allowed consumers to better compare ticket prices, some contractual conditions may lead to reduced final price transparency. This could in turn negatively impact informed consumer choices.

### Developments in the EU's passenger air transport market and impact on air carriers' business models

The EU passenger air transport market has been steadily growing for a number of years, surpassing 1 billion passengers in 2017. With the rise of LCCs and the development of higher speed rail transport, the market has been reshaped.

The increase in competition between full-service carriers (FSCs) and LCCs has brought various benefits to consumers, in particular lower flight ticket prices. It has also led to an expansion of demand for passenger air transport services. The competitive pressure from LCCs has forced FSCs to adapt their pricing strategies and business models. As a result, FSCs have expanded their networks through mergers and alliances, and have adopted some LCC-specific commercial strategies, such as simpler yield management, unbundling services (e.g. applying a separate fee for luggage), increasing the efficiency of aircraft utilisation, or offering, where possible, point-to-point service. Moreover, some FSCs have gone so far as to create an LCC division. As a result, passenger air transport carriers' business models have changed, with the distinction between LCCs and FSCs being increasingly blurred, and the emergence of hybrid models.

### Price competition among air carriers and possible commercial strategies deleterious to consumers

Air transport prices have been fully liberalised and competition in air transport is mainly price-driven. As noted in the literature<sup>13</sup>, airline ticket prices "*can vary dynamically and significantly for the same flight, even for nearby seats within the same cabin. Customers are seeking to obtain the lowest price while airlines are trying to keep their overall revenue as high as possible and maximise their profit.*" Airlines usually adopt a number of computational techniques aiming at increasing their returns, such as personalised offers and price discrimination. These yield management techniques are not unfair or discriminatory under the Unfair Commercial Practices Directive (UCPD)<sup>14</sup>, as long as price transparency is ensured and discrimination is not based on the passenger's place of residence within the EU.

However, in LCC price patterns, the fares are sometimes opaque and complex, as they are increased by a large number of additional charges, which in some cases may amount to UCPs. Various national consumer authorities across Europe have imposed sanctions for practices that were considered largely detrimental to transparency and passengers' rights. Based on information about enforcement actions,

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<sup>13</sup> Abdella, J., Zaki, N., Shuaib, K. and Khan, F. (2019). Airline ticket price and demand prediction: A survey. Journal of King Saud University - Computer and Information Sciences, <https://doi.org/10.1016/j.jksuci.2019.02.001>.

<sup>14</sup> Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market ('Unfair Commercial Practices Directive') OJ L 149, 11.6.2005.

we have identified decisions by the competition and consumer authorities which have explored not only the impact of aggressive and misleading practices on consumers, but also the possible impact on competition between airlines.

We also analyse predatory prices in the passenger air transport sector. These violate competition laws (Article 102 of the Treaty on the Functioning of the European Union (“TFEU”)), when undertaken by a dominant company in a certain relevant market. At times, it has been claimed that these practices have been undertaken by FSCs not as competition on its merits in response to the entry of LCCs, but with the objective of foreclosing the competitor on a given origin and destination route. One example of a successful claim was the Bundeskartellamt’s (BKartA) prohibition of Lufthansa's predatory pricing conduct in 2002. However, in various other cases, the claims of predatory pricing have been rejected.

To complete the analysis, we illustrate, without purporting to be exhaustive, some precedents in the passenger ferry transport sector at national level, which have led to prohibitions under competition rules by the Italian Competition Authority. We also analyse some national authorities' investigations in the passenger rail transport sector. This analysis provides a reference framework, which, despite the specificities of the air transport sector, could be useful to competition authorities in the future. At the same time, unlike rail, where there is a natural capacity constraint (the infrastructure), for air transport, the liberalisation has brought about increased competition and efficiencies, such as lower prices, but has also diminished regulatory entry barriers. This competition has benefited consumers.

The challenge for competition authorities is how to distinguish legitimate conduct from abusive pricing conduct. It is also how to adapt to new services, such as high-speed rail (HSR) services, given their importance for the environment, and how to update the competition analysis (and in particular the approach to market definition) to account for these developments. We believe that the traditional tools of competition law analysis are sufficient to do so.

However, competition laws are not enough when pricing strategies may be harming consumers, as they will not apply unless the practice is adopted by a dominant undertaking. This is where the law of unfair commercial practices has a role to play.

In the final part of the study, we look at recent, ongoing and future legislative initiatives, including the new Directive on better enforcement and modernisation of EU consumer protection rules<sup>15</sup>, the Representative Actions proposal<sup>16</sup>, put forward by the European Commission with the 2018 New Deal for Consumers, and the planned review of the Air Service Regulation, envisaged in the Commission Work Programme 2020<sup>17</sup>. The study wraps up with conclusions based on the results of the findings discussed.

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<sup>15</sup> Directive (EU) 2019/2161 of the European Parliament and of the Council of 27 November 2019 amending Council Directive 93/13/EEC and Directives 98/6/EC, 2005/29/EC and 2011/83/EU of the European Parliament and of the Council as regards the better enforcement and modernisation of Union consumer protection rules, OJ L 328, 18.12.2019.

<sup>16</sup> Proposal for a Directive of the European Parliament and of the Council on representative actions for the protection of the collective interests of consumers, and repealing Directive 2009/22/EC, COM/2018/0184 final - 2018/089 (COD).

<sup>17</sup> Commission Work Programme 2020, Annex I: New Policy Objectives. Available at [https://ec.europa.eu/info/sites/info/files/cwp\\_2020\\_new\\_policy\\_objectives\\_factsheet\\_en.pdf](https://ec.europa.eu/info/sites/info/files/cwp_2020_new_policy_objectives_factsheet_en.pdf).

## 1. INTRODUCTION

The aim of this study is to provide an overview of the unfair commercial and trading practices currently applied in the passenger air transport sector of the European Union. In particular, the study analyses how such practices reduce price transparency and prevent a genuine price comparison of the final ticket price, thus affecting fair and effective competition in the passenger air transport sector.

Unfair commercial practices (UCPs) are business-to-consumer practices which are “*contrary to the requirements of professional diligence*”, and “*materially distort or are likely to materially distort the economic behaviour with regard to the product of the average consumer whom it reaches or to whom it is addressed, or of the average member of the group when a commercial practice is directed to a particular group of consumers*”<sup>18</sup>.

Unfair trading practices (UTPs) in business-to-business relationships deviate from good commercial conduct and are contrary to good faith and fair dealing.

While both are business practices, they affect different categories of consumer. Consumers are considered weaker contractual parties and they are protected by public enforcement. For UTPs, the remedies for businesses affected are left to private enforcement. They fall under competition rules only when one of the parties abuses its dominant position.

In recent years, there has been a noticeable increase in the number of the decisions adopted by consumer protection authorities against airlines for UCPs, especially with reference to air tickets fares.

It is worth recalling that the EU aviation market has been fully liberalised for over two decades. Although, with the first Directive adopted in 1983, the extent of **liberalisation** was limited to some inter-regional services, the opening of the European market was well underway by 1994. The process was then completed in 1997, with the introduction of full cabotage. The liberalisation of the market meant that airlines registered in the EU and controlled by EU nationals were granted the right of establishment as well as the freedom to operate any route within and between all EU Member States.

As observed in a 2014 OECD discussion paper<sup>19</sup>, “*one of the most noticeable impacts of liberalisation has been the expansion of the European airline industry. Not tied to the bilateral air service agreements anymore, European carriers initiated new services: airlines increased frequencies on existing routes, new routes were opened, and new operators entered the market. The resulting increase in service levels and lower airfares stimulated demand, leading to further output expansion.*” Full access to the EU aviation market gave low cost carriers (LCCs) the opportunity to fully penetrate the European market, including the Member States’ domestic markets.

While the price of the tickets has been liberalised, in order to ensure transparency, Regulation (EC) 1008/2008<sup>20</sup> (so-called “Air Services Regulation”) imposes clear rules on **price transparency** and the obligation to clearly disclose all the additional charges to passengers, in order to make it easier for consumers to understand how the final price is calculated.

Despite these provisions which increase air ticket price transparency, various consumer protection authorities have intervened to impose sanctions and fine airlines, especially LCCs, for UCPs (including misleading advertising) related to air ticket fares. Most of the UCPs identified by the national competent authorities concern the deceptiveness, weak transparency, inadequacy and even the outright lack of

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<sup>18</sup> Article 5 UCPD.

<sup>19</sup> Burghouwt G., Mendes De Leon P., De Wit J., EU Air Transport Liberalisation Process, Impacts and Future Considerations, International Transport Forum, OECD 4/2015.

<sup>20</sup> Regulation (EC) 1008/2008 of the European Parliament and of the Council of 24 September 2008 on common rules for the operation of air services in the Community (Recast), OJ L 293, 31.10.2008.

information about ticket prices, with particular reference to additional charges and fees, which have an impact on the final price of tickets.

Consequently, the European Commission has, on several occasions, highlighted the need to review the Air Services Regulation in order to ensure better consumer protection. In this context, it has identified amongst the most important challenges to be faced by the EU legislators the issue of the changes in air carrier practices and consumers' concerns in relation to price transparency, fare collection and reimbursement. It has highlighted that those are matters which require a better balancing of different interests (i.e. transparency and fairness for consumers that does not create an unnecessary/unjustified burden on airlines, such as, for example, publishing different price elements if the public might not be truly interested in them)<sup>21</sup>.

In particular, price competition between air carriers, based on a combination of price discrimination, a continuous decrease in fares on the most competitive routes, coupled with new on-line distribution models and advertising, have made it difficult for consumers to properly assess the final price and the service included, and to compare the offer with those of other carriers on the same route. Such practices highlight a clear **trend on the part of airlines to fractionalise the costs** of the passenger air transport service in order to apply a separate additional fee to each part of the service that is not strictly inherent to the flight. This approach could affect the capacity of customers to understand how much they will pay to fly from an airport to their destination.

Whilst UCPs are generally covered and subject to sanctions under Directive 2005/29/EC<sup>22</sup> ('UCPD'), as they are contrary to professional diligence and materially distort consumers' behaviours, they may also distort competition between operators, especially when combined with high market shares and aggressive pricing policies.

In this context, we have examined the main characteristics of the EU passenger air transport sector and, in particular, how air carriers set their fares, in line with their different business models and the routes, also taking into account the new digital tools and tracking systems to make personalised offers.

We have further analysed the decisions of the consumer protection authorities concerning UCPs in passenger air transport and those of the antitrust authorities concerning predatory pricing in order to understand whether aggressive price competition may not only materially distort consumers' behaviour but may amount to unfair competition.

In fact, there is a **thin line between aggressive commercial practices**, which often include tickets below the production cost, **and the predatory pricing** aimed at excluding competitors from the market.

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<sup>21</sup> [https://ec.europa.eu/info/law/better-regulation/initiatives/ares-2018-1022254\\_en](https://ec.europa.eu/info/law/better-regulation/initiatives/ares-2018-1022254_en).

<sup>22</sup> Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market ('Unfair Commercial Practices Directive'), OJ L 149, 11.6.2005.

## 2. THE EU PASSENGER AIR TRANSPORT MARKET

### KEY FINDINGS

- The **liberalisation of the EU passenger air transport market** has resulted in new entrants offering lower fares on the same routes as (or routes parallel to) the traditional FSCs.
- The development of **new business models by LCCs and full-service carriers (FSCs)** has impacted the price management techniques applied by air carriers to maximise their revenues. Price competition is particularly strong to attract price-sensitive passengers on routes where LCCs and FSCs are in direct competition.
- The **LCCs' business model is based on very low fares to which they add several charges** for services that were formerly considered to be included in the ticket (e.g. check-in luggage). This model impacts price transparency since customers may not be able to compare fares and immediately identify the lowest one. Furthermore, airlines fare variations depend on a number of different factors (e.g. past bookings, remaining capacity, average demand and the probability of selling seats later), often more and more linked to profiling of the relevant customer category.
- **Specific on-line sales techniques**, including geo-tracking, profiling and advertising are used to attract passengers, in particular those who are price-sensitive. Based on these on-line techniques, fares may rapidly change. While this may be perceived as unfair by consumers, the literature has concluded that these price management techniques contribute to allocating lower prices to the most price-sensitive passengers whose demand is elastic, increasing competition on the routes.
- An important source of information on price and seat availability comes from price **comparison websites**. They not only provide comparative information but also often sell the air tickets, thus competing directly with air carriers' direct booking channels. A joint survey on comparison websites launched by the European Commission and EU consumer protection authorities in 2016 showed that in various cases advertising on price comparison websites was misleading, and the fare composition and final price were unclear.
- Concerning the benefits for consumers, the results of a 2011 European Flight Index survey are consistent in concluding that, on the same point-to-point route, LCCs' prices are lower than those of FSCs despite the large number of additional charges added to make up the final price.

Following the **full liberalisation of the EU passenger air transport market** in 1997, the volume of passengers and the number of competitors has increased constantly. The liberalisation introduced the possibility for EU air carriers, meeting the requirements of the relevant EU law, to fly freely throughout all the EU territory. It also **removed restrictions on capacity**, as well as **introduced the freedom to set prices in accordance with the market**. Furthermore, the distinction between scheduled and non-

scheduled services<sup>23</sup> was largely removed, enabling all types of air carrier holding EU operating licences to provide services anywhere within the EU internal market, in accordance with demand.

The liberalisation has **increased competition, lowered prices and brought changes in airline business models**. In particular, LCCs have progressively acquired large shares of the market by attracting passengers with fares lower than the traditional FSCs, firstly on lower density routes using secondary airports and progressively on the same routes as FSCs, or on parallel routes. The first two entrants, Ryanair and easyJet, have acquired large market shares and are among the largest EU air carriers in terms of volume of passengers. In 2018, Ryanair was the largest EU air carrier in terms of volume of passengers.

## 2.1. FSC and LCC business models – developments and impact

The competitive pressure which the LCCs have put on the FSCs has reshaped the market. In recent years, FSCs have experienced a significant decrease in their short- and medium-haul intra-European business due to increased competition from LCCs and high-speed rail. Such decrease has in part been offset by long-haul routes, which are these carriers' main revenue sources.

The lower fares resulting from increased competition, in particular from LCCs, can ultimately lead to other airlines cutting labour costs and increasing working hours in order to increase profit margins. In order to compete, some FSCs have formed low-cost subsidiaries to reduce the costs they had to bear, while increasing their competitiveness on short-haul routes. This was achieved by providing point-to-point services in competition with other LCCs. In Europe KLM and Lufthansa have adopted such a strategy, for example. They branded their low-cost subsidiaries Transavia and Eurowings<sup>24</sup> respectively. FSCs and LCCs have essentially different business models, with some blurring at the edges. These are described below.

### 2.1.1. The full-service carrier (FSC) business model

A 'full-service carrier' or a FSC, sometimes also known as a 'legacy' carrier, is *"an airline that focuses on providing a wide range of pre-flight and on-board services including different service classes and connecting flights"*<sup>25</sup>. Since most FSCs operate a **hub-and-spoke model**, this group of airlines are usually also referred to as hub-and-spoke airlines. A hub can be defined as an airport with *"a large percentage of flights operated by an airline as part of a radio network."*<sup>26</sup>

The main strength of this system is that, with a **small number of routes**, it **connects a wide range of origins and destinations** to a large extent. It also creates the possibility of achieving economies of scale, economies of density and economies of scope, thanks to the increase in efficiency which is achieved by centralising at the hub the maintenance services and staff in charge of aircraft operations.

<sup>23</sup> A legal definition of the term 'scheduled air services' at EU level is provided by art. 2, para. 6 of the Air Services Regulation, which reads as follows: *"scheduled air service means a series of flights possessing all the following characteristics: (a) on each flight seats and/or capacity to transport cargo and/or mail are available for individual purchase by the public (either directly from the air carrier or from its authorised agents); (b) it is operated so as to serve traffic between the same two or more airports, either according to a published timetable, or with flights so regular or frequent that they constitute a recognisably systematic series".* A contrario, 'non-scheduled air services' are represented by all those air services which do not meet the requirements set out in the said provision.

<sup>24</sup> Fageda X., Jiménez J.L., Perdiguer, J. (2011). Price rivalry in airline markets: a study of a successful strategy of a network carrier against a low-cost carrier, *Journal of Transport Geography* 19, 658–669.

<sup>25</sup> Reichmut, J., Ehmer, H., Berster, P., Bischoff, G., Grimme, W., Grunewald, G., Maertens, S., DLR Topical Report, *Analyses of the European air transport market: Airline Business Models* (2008). Available at: [https://ec.europa.eu/transport/sites/transport/files/modes/air/doc/abm\\_report\\_2008.pdf](https://ec.europa.eu/transport/sites/transport/files/modes/air/doc/abm_report_2008.pdf).

<sup>26</sup> Button, K. Stough, R. (2000). *Air Transport Networks: Theory and Policy Implications*. Edward Elgar, Cheltenham. ISBN 1 84064 429X.



FSCs usually offer an **integrated passenger product** that includes additional service features, ranging from complimentary luggage carriage to on-board meals, seat allocation, access to airport lounges, frequent flyer programmes, and ticket flexibility. In addition, they may have public service obligations requiring them to serve a minimum number of routes domestically and internationally.

FSCs' pricing is characterised by **complex yield management** and **price discrimination**<sup>27</sup>. Strategies encompassed in yield management include overbooking, price segmentation, which allocates higher prices to customers with more inelastic demand (business travellers), and traffic management to and from hubs to maximise revenues<sup>28</sup>.

FSCs still maintain a dominant role at the main European airports<sup>29</sup>. FSCs provide intercontinental flights and connecting flight services which are not compatible with LCCs' cost management and cost reduction policies. The fact that an airline uses a particular airport as a hub may deter other airlines from operating from that airport<sup>30</sup>.

### 2.1.2. The low-cost carrier (LCC) business model

The definition of an LCC encompasses various types of air carrier<sup>31</sup>: In general, a carrier is considered low cost when it applies a number of **cost minimisation strategies**. However, there is no uniform low-cost strategy, as all these operators implement various methods of cutting costs.

The LCCs' business model is nevertheless essentially based on:

- a single model of aircraft composing the fleet;
- high fleet utilisation;
- internet booking and e-ticketing, with no flexible ticketing and high costs for ticket changes;
- only one class with two kind of tickets, Standard and Flexible;
- no seat allocation (or a charge for choosing a seat);
- the use of secondary airports;
- minimum staff on board;
- quick turnarounds and short breaks between two flights;
- short/medium haul flights, only point-to-point;
- sale of on-board services (food and drink) and charging to carry luggage.

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<sup>27</sup> Reichmut, J., Ehmer, H., Berster, P., Bischoff, G., Grimme, W., Grunewald, G., Maertens, S., DLR Topical Report, Analyses of the European air transport market: Airline Business Models (2008) [online] Available at: [https://ec.europa.eu/transport/sites/transport/files/modes/air/doc/abm\\_report\\_2008.pdf](https://ec.europa.eu/transport/sites/transport/files/modes/air/doc/abm_report_2008.pdf).

<sup>28</sup> Bitzan J., Peoples J. (2016). A Comparative Analysis of Cost Change for Low-Cost, Full-Service, and Other Carriers in the US Airline Industry.

<sup>29</sup> Zhang, S., Derudder, B., Witlox, F. (2013). The impact of hub hierarchy, alliances and concentration on airfare pricing in European hub-to-hub markets. Paper presented at the 17th Air Transport Research Society (ATRS) conference, Bergamo (Italy).

<sup>30</sup> Loriol, O. (2014). Study of the full-service and low-cost carriers network configuration, Journal of Industrial Engineering and Management JIEM, 2014 – 7(5), p. 1112-1123.

<sup>31</sup> As noted in Francis, G., Humphreys, I., Ison, S. and Aicken, M. (2006). Where next for low cost airlines? A spatial and temporal comparative study, in Journal of Transport Geography, vol. 14, p. 83–94: "The American airline Southwest Airlines is seen by most as the first low-cost carrier and stood as an example for the current low-cost model. Southwest originated in the USA after deregulation of the airline industry. At the core of the low-cost model are the cost reductions, which are partly passed on in cheaper tickets for passengers. To obtain these cost reductions, Southwest operates according to two important principles, which separate the low-cost model from other operating models. First, instead of flying according to a hub-and-spoke system, Southwest focuses on short-distance point-to-point flights. Second, they only fly with one class, with reduced services."

This business model allows LCCs to reduce costs. In addition, airlines adopting a **point-to-point** configuration have a lower probability of delays (with a reduced risk of having to compensate the passengers), lower peaks in personnel requirements and a lower turnover of aircraft.

An important element in the LCCs' business strategy is the use of low-density routes and secondary airports to reduce the costs of the slots and air traffic fees. However, not all LCCs are focused on secondary airports. Some large LCCs also operate at primary airports on high-density routes, competing with FSCs<sup>32</sup>. There is, in fact, a convergence of the model of some LCCs, such as Ryanair and easyJet, with the FSCs' business model<sup>33</sup>.

Despite the continuous growth in LCCs' market shares, in 2018 alone, 10 European low-cost airlines collapsed (including Primera Air, VLM Airlines and WOW Air, a long-haul budget airline)<sup>34</sup>. LCCs tend to fail because the business model is particularly sensitive to increases in variable costs. Established LCCs may sustain the losses for a certain period, but the smaller LCCs are forced to leave the market.

## 2.2. Pricing strategies and price transparency

**Passenger air transport competition is essentially price-driven.** Low costs have contributed to the 'commoditization of air travel'<sup>35</sup>. This was also recognised by the Court of Justice of the European Union (CJEU) in the so-called Vueling judgment, where it was held that "(...) *given that airlines' business models have evolved considerably with the increasingly popular use of air transport, it must be observed that certain companies now follow a business model that consists of offering air services at the lowest price*<sup>36</sup>."

LCCs have established themselves in the market with low fares on short-haul point-to-point connections, often from secondary airports. They have traditionally targeted leisure (non-premium, low-yield) passengers, who are price-sensitive but not time-sensitive in terms of the time taken for the journey and are able to book in advance. This business model, when they entered the market, was 'disruptive'.

The European Flight Index survey conducted in 2011 by Kelkoo<sup>37</sup>, one of the largest travel price comparison websites in the EU, gathered information about 5,000 airfares from 20 different airlines at 192 airports. The survey found that LCC fares were, on average, 33 % lower than FSC fares, even after additional charges were taken into account. In the event of there being no additional charges, the LCC fares were, on average, 56 % lower than FSCs. Additionally, the price differential between LCCs' and FSCs' fares varied significantly between fares for domestic and international flights. LCC fares were found to be about 41 % cheaper on international flights compared to 20 % cheaper on domestic flights.

The survey also analysed the charges applied by LCCs and FSCs and their impact on the final price of the ticket. According to the survey, "*on average, additional charges, such as fees for card payments or costs for checking luggage accounted for 37 % of the total price of low-cost airfares, but went as high as 44 %. The highest charges were levied in Italy (45 %) and the UK (38 %), and the lowest in Germany (31 %) and*

<sup>32</sup> Reichmut, J., Ehmer, H., Berster, P., Bischoff, G., Grimme, W., Grunewald, G., Maertens, S., DLR Topical Report, Analyses of the European air transport market: Airline Business Models (2008), [online] Available at: [https://ec.europa.eu/transport/sites/transport/files/modes/air/doc/abm\\_report\\_2008.pdf](https://ec.europa.eu/transport/sites/transport/files/modes/air/doc/abm_report_2008.pdf).

<sup>33</sup> Dobruszkes F., Givoni, M., Vowles, T., (2017). Hello major airports, goodbye regional airports? Recent changes in European and US low-cost airline airport choice, *Journal of Air Transport Management*, No. 59, issue C, p. 50-62.

<sup>34</sup> The failure of the European budget airline, <https://channelsonline.nl/index.php/the-failure-of-the-european-budget-airline/>.

<sup>35</sup> Pearce, B. (2013). Profitability and the Air Transport Value Chain. *IATA Economics Briefing*, Issue Number: 10.

<sup>36</sup> Judgment of 18 September 2014, *Vueling Airlines SA v Instituto Galego de Consumo de la Xunta de Galicia*, C-487/12, ECLI:EU:C:2014:27, para. 38.

<sup>37</sup> See <https://www.breakingtravelnews.com/news/article/low-cost-airlines-add-up-to-44-in-extras-to-price-of-a-ticket/>, summarising the findings of the Kelkoo European Flight Index study.

Spain (32 %). By comparison, the cost of 'added extras' charged by FSCs makes up just 4 % of the average price of a ticket<sup>38</sup>. However, despite charging passengers for a myriad of 'additional services' on top of the standard fare, the fares offered by LCCs were still substantially lower than those available through FSCs on the routes observed in the survey.

As recognised by Advocate-General Bot<sup>39</sup>, the effects of the entry of LCCs in the sector has not only been positive; the LCCs have also engaged in some negative behaviour vis-à-vis consumers, mostly in terms of abusive and misleading practices: *"It is true that the liberalisation of the airline market and the ensuing deregulation of the sector have been accompanied by abusive and misleading practices on the part of the airline companies, particularly the low-cost airlines. Many of them have been found guilty of using clauses held to be unlawful or abusive in their contracts of carriage or conditions of employment of their staff. The low-cost airlines have accordingly received bad publicity, all the more so because they are based on a business model which breaks with the traditional codes in the airline sector. Many passengers have been surprised at having to pay surcharges for services which were hitherto included in the base price of the airline ticket. The arrival of new companies on the airline market has forced traditional operators – who have been criticised in the past for abusing their dominant position or collaborating on fares – to review their pricing policies. The prices of flights have, accordingly, fallen dramatically, thereby enabling consumers who previously did not have the means to travel to enjoy flights. The liberalisation has thus responded to the needs of a customer base previously constrained by limited purchasing power. The low-cost airlines have found their target public."*<sup>40</sup>

In this statement, Advocate-General Bot captured the essence of the LCCs' business model: the model is based on **very low fares combined with adding charges for services that were previously considered to be included in the ticket** (such as check-in luggage) and targeting a specific segment of passengers who could not afford frequent flights. Given this pricing pattern, passengers may not be able immediately to identify the lowest price that reflects their demand elasticity.

To attempt to understand how fares are set by airlines, regardless of which business model they use, it is important to clarify how pricing dynamics work. In particular, there are two elements that make up air fares: **intertemporal price discrimination** (the closer to the date of travel, the higher the price) and **dynamic adjustment to demand** (namely, the more popular the flight, the higher the price)<sup>41</sup>. This is called **"dynamic airline pricing"**.

The price of air travel tickets is a complex and dynamic calculation based on various elements such as past bookings, remaining capacity, average demand and probability of selling seats later. The difference in fares also depends on the tendency of airlines to **segment their passengers** in two categories, namely **leisure and business travellers**<sup>42</sup>. Business travellers (high-yield passengers) typically tend to purchase tickets close to the departure date and are less price-sensitive. In order to enable themselves to price-discriminate towards these 'late-booking' consumers, airlines must successfully save air travel seats up until a time close to those passengers' departure date. Then, these

<sup>38</sup> The fact that the highest charges are levied in Italy may explain the high number of decisions adopted by the national competent authority on unfair commercial practices relating to additional charges, as explained in Section 3.

<sup>39</sup> Opinion of Advocate General Bot, delivered on 23 January 2014, Case C-487/12, Vueling Airlines SA v Instituto Galego de Consumo de la Xunta de Galicia, ECLI:EU:C:2014:27.

<sup>40</sup> Opinion of Advocate General Bot in Case C-487/12, Vueling Airlines SA v Instituto Galego de Consumo de la Xunta de Galicia, ECLI:EU:C:2014:27, para. 27.

<sup>41</sup> Williams, K. (2018). Dynamic airline pricing and seat availability. Cowles Foundation Discussion Paper No. 2103, Available at SSRN: <https://ssrn.com/abstract=3026383>. According to Williams "Airlines tend to charge high prices to passengers who search for tickets close to their date of travel. The conventional view is that these are business travellers and that airlines capture their high willingness to pay through intertemporal price discrimination. Airlines also adjust prices on a day-to-day basis, as capacity is limited and the future demand for any given flight is uncertain. They may adjust fares upward to avoid selling out flights in advance, or fares may actually fall from one day to the next, after a sequence of low demand realizations": p. 1.

<sup>42</sup> Id.

consumers are charged higher prices than if they were to purchase the tickets earlier. At that point, however, the price difference between FSCs and LCCs is narrow, as explained in Section 2.2.1.

Given the entry of LCCs, FSCs have modified their pricing patterns in order to remain competitive with the leisure passenger segment, but they still provide hub-and-spoke services and different classes, targeting passengers who are less price-sensitive and whose demand is inelastic (high-yield passengers), who have traditionally mainly used FSCs because of the 'premium services' provided, including ticket flexibility, frequent flyer programmes, lounge availability and hub-and-spoke service. For a significant portion of passengers, therefore, the role of networks and alliances, to which the specific air travel operator belongs (i.e. the frequent flyer programme of the airline) matters, when it comes to purchasing a flight. This will be further discussed under Section 4.2.1.

Nowadays, however, LCCs compete with FSCs, as the latter seek to retain high-yield passengers with frequency and destination choice. This is a lucrative segment of the demand: the premium seating destined at the high-yield consumer segment is the source of a large part of the airlines' revenue, since *"13% of passengers provide 50% of [these airlines'] revenue"*<sup>43</sup>.

### 2.2.1. Price discrimination in airline fares

As mentioned above, the freedom for the airlines to set fares using price setting as a competition parameter has generated different price management (yield) techniques. The airlines apply such techniques in order to maximise their revenues for a service which is subject to constraints of space (number of seats) and time (flight times and slots), unpredictability of demand over fixed routes, and for which the different prices do not relate to a difference in the cost of the service (same taxes, fuel and airport costs).

Hence, different fares are not only the result of price competition but they are directly related to price discrimination. **Price discrimination means charging different prices to different consumers, where the price difference is not related to a difference in the cost of the service.** Dominance is not an essential element for price discrimination to occur: however, price discrimination may be considered abusive under EU competition laws only if a situation of dominance occurs.

Price discrimination is a way of extracting as much revenue as possible from each group of consumers, separated into different classes of customer. In order to discriminate 'successfully', a firm must possess some market power to be able to charge prices above marginal cost; the population of consumers for the same services must be heterogeneous in terms of different purchasing power and the service requested. In addition, it must be impossible or costly to resell the product in order to prevent arbitrage.

Airlines apply price discrimination depending on when passengers book, separating consumers with different demand patterns into different groups by charging differently at different points in time (generally low before high). This yield technique is typical of the LCCs, where there is one single class of passenger without any segmentation between different categories of passengers (economy, business). While the LCCs' pricing system is characterised by a single class of booking that starts with a minimum fare that generally increases over time in accordance with the 'low-before-high' model (also called *"intertemporal price discrimination"*)<sup>44</sup>, airlines also offer discounts to divert demand from peak periods to off-peak periods in order to maximise profits. When demand is uncertain, discounts help improve profitability by spreading customers evenly across flights before the peak period<sup>45</sup>.

<sup>43</sup> Goldstein, M. (2019), Better Seats for Less Money, Forbes Magazine, 30 April 2019.

<sup>44</sup> Alves, C. F., Barbot, C. (2009). Price discrimination strategies of low-cost carriers, in Journal of Transport Economics and Policy Vol. 43, No. 3.

<sup>45</sup> Piga, C. and Bachis, E. (2006). Pricing strategies by European traditional and low cost airlines. Or, when is it the best time to book on line? Department of Economics, Loughborough University, Discussion Paper Series 2.

The different price discrimination techniques address **different passengers’ price sensitivity**. As already mentioned, LCCs’ main target are price-sensitive passengers. For passengers for whom price is the deciding factor, it is generally most profitable to buy as early as possible because the LCCs practice price discrimination based on when the ticket is purchased. In the case of FSCs, in order to secure a proportion of high-yield (business) passengers, the airlines keep certain seats available and set a higher price as the departure date nears, in order to capture these passengers’ willingness to pay more in exchange for more flexibility<sup>46</sup>.

As the European Commission has set out in various merger cases, (more closely examined under Section 4.2.1), **business and leisure passengers** are **two distinct segments** from a demand perspective and there is no substitutability. For the business passenger segment, on short-haul flights, the competitive pressure on airlines mainly comes from high-speed trains. FSCs are able to retain market power over business passengers, but not leisure passengers. Therefore, on routes with high competition, FSCs are forced to lower their economy fares, but they can maintain high mark-ups on their business fares<sup>47</sup>. For leisure passengers, the FSCs now apply price discrimination based on the ‘low-before-high’ model, with low fares available in months before the departure date increasing as the departure date approaches. It can often be the case that, in the few days before departure LCCs’ and FSCs’ fares on the same route are very similar, and, in some cases, FSCs’ fares may be lower<sup>48</sup>.

Empirical research from the US shows that *“while airlines utilize sophisticated pricing systems that result in significant price discrimination, these systems also more efficiently ration seats.”*<sup>49</sup> Therefore, price discrimination does not necessarily lead to a decrease in consumer welfare. This means that prohibiting price discrimination may not necessarily be in the best interest of consumers.

However, this empirical data focuses on monopoly and not on oligopoly market structures. In the EU, taking into account an oligopoly structure, the findings of the empirical literature are as follows: first, *“the rate at which prices increase over time decreases in competition, supporting the idea that competition restrains the ability of airlines to price-discriminate against late-arriving customers. Second, the sensitivity to competition increases in the heterogeneity of the customer base, reflecting that restraints on price discrimination are only relevant when there is initial scope for discrimination.”*<sup>50</sup>

### 2.2.2. Consumer protection in passenger air transport pricing

The **freedom for EU air carriers to set air fares** is enshrined in the Air Services Regulation, in particular Article 22, and has been confirmed by the case law of the CJEU. The Regulation also introduced specific rules for air fare transparency (Article 23), *“which seeks to ensure, in particular, that there is information and transparency with regard to prices for air services (...) and which thereby contributes to safeguarding protection of customers having recourse to those services”*<sup>51</sup>.

As mentioned above, in a fully liberalised market, it may be difficult for the passenger to correctly identify the lowest price or the prices that most suit them, based on their needs and expectations. The

<sup>46</sup> Williams K. (2018) Dynamic airline pricing and seat availability, Cowles Foundation Discussion Paper No. 2103.

<sup>47</sup> Stavins, J. (1996). Price discrimination in the airline market: the effect of market concentration, Federal Reserve Bank of Boston. Henrickson, K. Wilson, W. (2016). The Convergence of low-cost and legacy airline operations, Airline Efficiency (Advances in Airline Economics, Vol. 5), p. 355-375.

<sup>48</sup> Piga, C., Bachis, E. (2006). Pricing strategies by European traditional and low cost airlines. Or, when is it the best time to book on line?, Department of Economics, Loughborough University, Discussion Paper Series 2.

<sup>49</sup> Williams, K. (2018). Dynamic airline pricing and seat availability. Cowles Foundation Discussion Paper, cited, p. 47-48.

<sup>50</sup> Siegert, C., Ulbricht, R. (2019). Dynamic oligopoly pricing: evidence from the airline industry, available at: [http://publications.ut-capitole.fr/15865/1/paper\\_2\\_20.pdf](http://publications.ut-capitole.fr/15865/1/paper_2_20.pdf).

<sup>51</sup> Judgment of 18 September 2014, C-487/12, Vueling Airlines SA v Instituto Galego de Consumo de la Xunta de Galicia, ECLI:EU:C:2014:2232, para. 32, and Judgment of 19 July 2012, Case C-112/11, ebookers.com Deutschland GmbH v Bundesverband der Verbraucherzentralen und Verbraucherverbände — Verbraucherzentrale Bundesverband eV, ECLI:EU:C:2012:487, para. 13.

price for air tickets is mainly broken down across various charges and fees, not only including taxes and airport charges, but also additional services, such as check-in luggage.

Therefore, **price transparency is essential** for customers to be able to compare the effective price for air services and, hence, to ensure fair competition in the sector. Recital 16 of the Regulation emphasises that the *“final price to be paid by the customer for air services originating in the Community should at all times be indicated, inclusive of all taxes, charges and fees.”*. Transparency is applicable also to air services originated in a third country but provided by a Community air carrier.

Under Article 23 of the Regulation, air rates and fares available to the general public must include the conditions applicable to such fares when offered or published in any form, including on the Internet, for air services from an airport located in the territory of a Member State. The **minimum that must be specified is:**

- air fare or air rate;
- taxes;
- airport charges; and
- other charges, surcharges or fees, such as those related to security or fuel.

The presence of **optional price supplements** must also be adequately signalled: this means that such supplements must be communicated in a **clear, transparent and unambiguous way** already from the beginning of the booking process and the consumer must be able to accept them on an ‘opt-in’ basis.

These provisions of the Air Services Regulation must be read in conjunction with the UCPD<sup>52</sup>. That Directive states that: *“failure to provide consumers with clear, appropriate and complete information relating to the price and any other cost associated with the provision of a service may constitute an unfair practice”*. To comply with the UCPD, airlines must provide consumers with the information they need in a timely and clear manner so that they can make an informed choice.

A 2012 study on price transparency in the air transport sector revealed that all the airlines and all the travel agents assessed had, at least, one instance of potential non-compliance with the Air Services Regulation and with the UCPD. The non-compliance with these pieces of EU legislation had a direct impact on consumers<sup>53</sup>. More recently, however, European airlines which have often been categorised as LCCs have changed their business model towards a hybrid strategy, adopting features of FSC network airlines. A recent survey carried out by some economists concludes that *“short-haul airline business models in Europe converge”*<sup>54</sup>, given that carriers have adapted original LCC model based on the low-price, no-frills type of travel and have *“evolved into hybrid carriers which blend low-cost traits with those of full service network carriers”*<sup>55</sup>. The **unbundling of airfares** which has characterised LCCs over the last few years **exacerbates concerns with the price transparency of air fares**.

Furthermore, the Consumer Rights Directive<sup>56</sup> introduced a **ban on excessive surcharges**. Its Article 19 prohibits traders from charging consumers fees in excess of cost to the trader for the use of

<sup>52</sup> Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market (‘Unfair Commercial Practices Directive’) OJ L 149, 11.6.2005.

<sup>53</sup> Price transparency provisions in Regulation (EC) 1008/2008 and other relevant EU legal texts, Report, prepared for the European Commission – DG MOVE, January 2012.

<sup>54</sup> Klophaus, R., Fichert, F. (2019). From low cost carriers to network carriers without legacy? Evolving airline business models in Europe, *Airline Economics in Europe (Advances in Airline Economics, Vol.8)*, p. 57-75.

<sup>55</sup> Id.

<sup>56</sup> Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, OJ L 304, 22.11.2011.

electronic payments. Moreover, the Payment Services Directive<sup>57</sup> went a step further by prohibiting retailers and on-line sellers from imposing surcharges on customers paying with credit and debit cards. These two EU legislative acts have, *de facto*, removed credit card fees from the list of additional fees that LCCs (as well as FSCs) could charge passengers when purchasing a ticket.

### 2.2.3. Additional charges: the CJEU and national court judgments

**Additional fees** charged for services that are not included in the airfare itself are a **significant source of revenue for LCCs**. The number of different service fees and their amount is very great. For example: infant fee, fee for carrying infant/child equipment, sports equipment, musical instruments, flight change fee, and name change fee. Certain of these may, in certain cases, exceed the airfare itself. The fee for large luggage is the most common, as most of the airlines include only carry-on luggage in the base fare. Since most of these services were previously included in the airline's ticket price and were considered an essential part of the service, this has been a source of concern for consumers as it affects their capacity to understand the final price of a flight ticket<sup>58</sup>.

The CJEU has clarified the airlines' freedom to set fares and charges, in particular whether the Air Services Regulation **permits a separate price to be charged for the luggage**<sup>59</sup>. The CJEU made a **distinction between checked-in and non-checked-in luggage**, drawing on the same distinction laid down in the Montreal Convention on airlines' liability for damage caused to luggage<sup>60</sup>.

According to the CJEU, while in the past checked-in luggage was part of airlines' commercial practices, the evolution of the business model towards air services at the lowest price has resulted in greater price significance for such luggage. Therefore, the Court concluded that the airlines "*may accordingly wish to require a price supplement to be paid for that service. Furthermore, it cannot be ruled out that some air passengers prefer to travel without checking in baggage, on the basis that doing so will reduce the price of their plane ticket*"<sup>61</sup>. Consequently, the CJEU concluded that **checked luggage "constitutes an optional price supplement, within the meaning of Article 23(1) of [the Air Services Regulation], given that such a service cannot be considered to be compulsory or necessary for the carriage of [those] passengers"**<sup>62</sup>.

However, according to the Court non-checked-in (carry on) or **hand luggage** must be considered an **essential element** of passenger air transport services. Hence, airlines are obliged to carry it without demanding any additional charge "*on condition that such hand baggage meets reasonable requirements in terms of its weight and dimensions, and complies with applicable security requirements*"<sup>63</sup>. The CJEU recognised that while Member States may regulate the conditions of passenger air transport in order to protect consumers against UCPs, they cannot impose rules that would be contrary to the pricing provisions of the Air Services Regulation. The CJEU concluded that a national law that requires the price for the carriage of checked-in luggage to be included in the base price of the plane ticket is in all circumstances contrary to the Regulation.

This notwithstanding, the CJEU's conclusion with regard to hand luggage has been **interpreted differently by the national courts**. According to the interpretation of the Italian Administrative Court

<sup>57</sup> Directive (EU) 2015/2366 of the European Parliament and of The Council of 25 November 2015 on payment services in the internal market OJ L 337, 23.12.2015, p. 35.

<sup>58</sup> CJEU, Press Release No 127/14, Case C- 487/12, Vueling Airlines SA v Instituto Galego de Consumo de la Xunta de Galicia.

<sup>59</sup> Id.

<sup>60</sup> Convention for the Unification of Certain Rules for international Carriage by Air, done at Montréal on 28 May 1999 (Montreal Convention of 1999), International Civil Aviation Organisation.

<sup>61</sup> Judgment of 18 September 2014, Case C- 487/12, Vueling Airlines SA v Instituto Galego de Consumo de la Xunta de Galicia, para. 38.

<sup>62</sup> Id., Para. 39.

<sup>63</sup> Judgment of 18 September 2014, Case C- 487/12, Vueling Airlines SA v Instituto Galego de Consumo de la Xunta de Galicia, para. 40.

of First Instance<sup>64</sup>, the CJEU has clarified that, while carry-on luggage is an essential element of the transport service, carriers have the discretion to impose restrictions on the dimensions of such carry-on luggage, and to add a fee for carry-on luggage exceeding those dimensions, as long as such restrictions are 'reasonable'.

A Madrid lower court<sup>65</sup>, on the other hand, starting from the above-mentioned CJEU statement about the essential nature of carry-on luggage, stated that the "hold items" are not deemed essential for passenger transport. Hence, airlines are allowed to apply an extra charge for them. Nevertheless, "*hand luggage or unchecked luggage, including bags or backpacks in which passengers are carrying their clothes, personal belongings and other objects [is an] essential element of air transport; therefore, companies are obliged to carry it without demanding any type of extra charge on top of the price of the ticket.*"<sup>66</sup> The Spanish court drew a distinction between luggage destined for the "hold" (or checked-in luggage) and "unchecked-in" hand luggage to establish whether an extra charge applied by airlines is lawful or not. The Spanish court ruled that a clause in Ryanair's luggage policy, which obliges passengers to pay an extra charge to take hand luggage on board is contrary to the CJEU judgment and to the Air Services Regulation, and is "*abusive as it curtails the rights that the passenger has recognized by [article 97 of the Air Navigation Law], generating an imbalance of benefits between the contracting parties to the detriment of the consumer*"<sup>67</sup>. According to the court, this clause was to be declared null and void and removed from the contract.

In another recent judgment, the CJEU clarified that, when a ticket is purchased through an intermediary website, including a price comparison website, additional charges may be applied, such as a commission for the online booking service. However, according to the CJEU, in the event of a flight cancellation, the ticket refund must include the amount paid as commission, unless that commission was added without the knowledge of the airline.<sup>68</sup> In this same judgment, the CJEU recalled that under Article 8(1)(a) of Regulation (EC) 261/2004<sup>69</sup>, in the event of flight cancellation by the airline, passengers are entitled to reimbursement of "*the full cost of the ticket at the price at which it was bought.*"<sup>70</sup>

#### 2.2.4. Profiling and personalised advertising

As mentioned in the previous sections, air carriers use various pricing techniques to attract passengers, especially those who are price-sensitive. The **shift of booking patterns from travel agencies to direct online booking by customers has also allowed the direct storing of data in the airlines' databases**. In this way, air carriers gather an enormous amount of data which is used to **create consumer profiles**. They then use these profiles to display targeted content and to predict consumer behaviour. Consequently, air carriers have **modified their marketing strategies**, focusing on customer preferences using **personalised advertising** and customer profiling.

In particular, airlines use various digital tools in targeted and personalised advertising. This can create **a new type of asymmetry of information between suppliers and consumers**. "*The analytical and predictive techniques that can be applied can create granular pictures of particular consumers and interact*

<sup>64</sup> T.A.R. Roma, judgment no 201912456 of 29 October 2019.

<sup>65</sup> Madrid Commercial Court, judgment n° 13 of 20 November 2019.

<sup>66</sup> Id.

<sup>67</sup> Id.

<sup>68</sup> Judgment of 12 September 2018, Case C-601/17, Harms and Others v Vueling Airlines SA, ECLI:EU:C:2018:702.

<sup>69</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., OJ L 46, 17.2.2004.

<sup>70</sup> Judgment of 12 September 2018, Case C-601/17, Harms and Others v Vueling Airlines SA, ECLI:EU:C:2018:702.



with them to provide the traders with the different, more powerful tools of exerting influence”<sup>71</sup>. For example, airlines are able to change prices at specific hours of the day, providing offers calibrated on the different customers’ purchasing habits.

Some empirical analysis<sup>72</sup> found that booking airline tickets, both from a FSC and from a LCC, tends to be cheaper during the weekend than during the week. Similarly, other scholars argue that “airlines know that some consumers are more likely to buy at different times of the day: high value consumers (business travellers) are more likely to buy during office hours, while low value consumers (leisure travellers) are more likely to buy later in the evening”<sup>73</sup>. The result is that booking online at different times during a week or even one day can result in a significant increase in the ticket price.

This raises the question **of whether these price fluctuations can be directly linked to user profiling**, in particular the use of behavioural tracking (also called customer profiling) enabled through new technologies, such as cookies. In recent years, according to some literature, consumers have seemed to perceive that ticket prices on flights booked online have been adapted by profiling their personal data, including through the recording of WLAN signals<sup>74</sup>.

In addition, current technologies allow companies to distinguish between consumers who regularly visit the website and those who only respond to the advertising and targeted offers. The responses of consumers to these promotions provide companies with further information for profiling and targeting consumers, providing them with offers based on their online behaviour. The prices for services and goods, including airline tickets “in many cases do not represent the real cost for goods but they are the price available at this particular time for the particular visitor with a certain browser history”<sup>75</sup>

In the area of consent requirements for the **use of cookies**, in September 2019, the CJEU issued its judgment in the Planet 49 preliminary ruling<sup>76</sup>. The main question under consideration for the CJEU was whether internet users need to actively consent to the storage of cookies on their device for the purpose of the companies whose websites they access sending them targeted advertising. The second question for the CJEU concerned the information to be provided to website visitors. The CJEU was asked to answer whether it is necessary to include information to the consumers about the duration of the cookies and third parties who have access to those cookies. Even though not all cookies process personal data, the storage of cookies was found in the main proceedings to involve the processing of personal data and, hence, the CJEU found that the General Data Protection Regulation (GDPR) must be applied to all such cases.

In October 2019, the Spanish Data Protection Authority fined Vueling for non-compliance with the GDPR<sup>77</sup> for the cookie policy used on its website on ‘continuing browsing’. In particular, Vueling had

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<sup>71</sup> Jabłonowska, A., Kuziemski, M., Nowak, A. M., Micklitz, W. H., Przemysław, P. and Sartor, G. (2018) Consumer law and artificial intelligence Challenges to the EU consumer law and policy stemming from the business’ use of artificial intelligence. EUI Working Papers.

<sup>72</sup> Puller, S.L., Taylor, L.M. (2012). Price discrimination by day-of-week purchase: Evidence from the US airline industry, *Journal of Economic Behavior & Organisation*, 84, 801-812.

<sup>73</sup> Escobari, D., Rupp, N., Meskey, J. (2018). An Analysis of Dynamic Price Discrimination in Airlines, Online at [https://mpr.ub.uni-muenchen.de/88287/1/MPRA\\_paper\\_88287.pdf](https://mpr.ub.uni-muenchen.de/88287/1/MPRA_paper_88287.pdf).

<sup>74</sup> Lackner G., Teufel, P., Weinberger, R. (2010), User tracking based on behavioral fingerprints, *Lectures Notes in Computer Science*, 6467, 76-95.

<sup>75</sup> Alreck, P.L. and Settle, R.B. (2007). Consumer Reactions to Online Behavioural Tracking and Targeting, *Journal of Database Marketing & Customer Strategy Management*.

<sup>76</sup> Judgment of 1 October 2019, Case C-673/17, *Bundesverband der Verbraucherzentralen und Verbraucherverbände — Verbraucherzentrale Bundesverband eV v Planet49 GmbH*, ECLI:EU:C:2019:801.

<sup>77</sup> Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation), OJ L 119, 4.5.2016, p. 1.

not implemented a tool aimed at offering the user the possibility of objecting to the use of cookies or a system that allows the user to decide which cookies they consent to (granularity).

The **creation of ‘fingerprinting’ through the use of WLAN signals** is perceived as a violation of privacy since it can be used to determine the location of the user<sup>78</sup>. Changing the price of the tickets based on the location of the user can amount to price discrimination based on the residence of the consumer. This is prohibited in the Single Market. **Price discrimination on the basis of the consumer’s nationality or country of residence is prohibited** by the UCPD and by Regulation (EU) 2018/302 on unjustified geo-blocking and discrimination based on nationality, place of residence or place of establishment<sup>79</sup>.

In the past, the Commission received numerous complaints from citizens who felt that they were discriminated against when buying plane tickets online where the price differential seemed to be linked exclusively to the place of residence of the buyer. Those restrictions have been removed and the Commission has not identified further such practices<sup>80</sup>. The recent literature considers that, even if the airlines have the technical ability to apply the purchase history and browser information of their consumer to their dynamic pricing, in many cases they do not.

Moreover, the literature is consistent on the fact that price discrimination increases where there is competition on the same route. Therefore, while price discrimination based on profiling and targeting can be perceived as a violation of privacy, it also contributes to increasing competition on these routes by allocating lower prices to the most price-sensitive passengers whose demand is elastic.

In addition, the challenges of profiling and targeting relate **not only to privacy and data protection** but also to the protection of fairness in contracts, sufficient information and independent consumer choices. The literature has already analysed the challenges associated with profiling and targeting against the background of EU consumer law<sup>81</sup>. Under Article 6 of the Consumer Rights Directive 2011/83/EU, the notion of functionality, which refers to the ways in which digital content can be used, includes the obligation for traders to make consumers aware of the use of tracking techniques and personalised communications. In addition, automated decision-making could be regarded as a form of unfair contract, if the sharing of data regarding consumers’ information is likely to negatively affect the decision-making process, leading to consumer detriment and algorithmic discrimination<sup>82</sup>.

Concerning profiling and behavioural tracking and the need to protect users’ privacy, the forthcoming regulation on protection of privacy in the electronic environment (e-Privacy Regulation), replacing Directive 2002/58/EC, is expected to bring further improvements to the protection of privacy<sup>83</sup>. It will include stricter and more detailed requirements for the processing of personal data. This will include

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<sup>78</sup> Lackner G., Teufl, P., Weinberger, R. (2010), User tracking based on behavioral fingerprints, Lectures Notes in Computer Science, 6467, 76-95.

<sup>79</sup> Regulation (EU) 2018/302 of the European Parliament and of the Council of 28 February 2018 on addressing unjustified geo-blocking and other forms of discrimination based on customers' nationality, place of residence or place of establishment within the internal market, OJ L 601, 2.3.2018, p. 1.

<sup>80</sup> Commission staff working document impact assessment accompanying the document proposal for a regulation of the European Parliament and of the Council on addressing geo-blocking and other forms of discrimination based on place of residence or establishment or nationality within the Single Market.

<sup>81</sup> Helberger, N. (2016) Profiling and Targeting Consumers in the Internet of Things – A New Challenger for Consumer Law. In R. Schulze and D. Staudenmayer, Digital Revolution: Challenges for Contract Law in Practice, Nomos.

<sup>82</sup> Jabłonowska, A., Kuziemski, M., Nowak, A. M., Micklitz, W. H., Przemysław, P., Sartor, G. (2018), Consumer law and artificial intelligence Challenges to the EU consumer law and policy stemming from the business’ use of artificial intelligence. EUI Working Papers.

<sup>83</sup> Proposal for a Regulation of the European Parliament and of the Council concerning the respect for private life and the protection of personal data in electronic communications and repealing Directive 2002/58/EC (Regulation on Privacy and Electronic Communications); <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52017PC0010>.

increasing data subjects' awareness of the use of cookies, which in some cases currently results in the use of cookies even without the informed consent of the subjects.

### 2.2.5. Comparison websites

In recent years, technological developments have transformed the way passenger air transport services are booked, especially through online platforms and computerised reservation systems (CRS) often operated and controlled by air carriers. In this context, Regulation (EC) No 80/2009<sup>84</sup> sets out a regulatory framework for CRS providers, aiming to reinforce competition among them in order for consumers to benefit from an unbiased choice of fares with low distribution costs. That Regulation however, does not reflect the more recent developments in marketing practices, i.e. the increased use of direct bookings via the air carriers' websites, and the rise of comparison websites. A possible review of the Regulation has been envisaged by the Commission, especially focusing on the changes in the business models and the role of metadata aggregators<sup>85</sup>.

When consumers purchase a flight, they have a variety of similar products or services to choose from. In fact, they have access to a number of airlines and platforms from which they can book their journey.

Against this backdrop, a large number of comparison websites have emerged in recent years. Comparison websites are **digital comparison tools that offer searches across airlines, price comparison and booking functionality** (such as Expedia), and **meta-search engines, which also offer price comparison but without booking capability** (such as Kayak).

From a consumer marketing perspective, online research is a fundamental element of the customer journey and it is likely that consumers will engage in extensive searches to find a suitable flight, and, at the same time, to minimise the price.

On the one hand, comparison websites bring with them a number of **benefits**, since they **enhance consumer choice, reduce search costs and increase price transparency** as well as provide information about the different options available. As such, they enable consumers to choose the best deal and are a spur to competition. On the other hand, **concerns** may arise about price comparison sites' **reliability, transparency and accountability**<sup>86</sup>. For example, comparison websites may mislead the consumer by hiding processing fees which are charged only later on in the booking process<sup>87</sup>.

There are also concerns about the way the online platform presents its results, as there is a **risk of skewed rankings**. The rankings presented in air travel comparison websites are usually based on the airfare as well as on charges and taxes<sup>88</sup>. If there is little information upfront on how comparison websites present and order results (typically by price or level of saving), the lack of transparency may harm consumers by causing them to take poorer decisions.

Finally, the way prices are framed and the provision of complete information about the products are important. A lack of transparency about additional charges may result in misleading the consumer on the real fare applicable by the airlines. According to BEUC, The European Consumer Organisation, price

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<sup>84</sup> Regulation (EC) No 80/2009 of the European Parliament and of the Council of 14 January 2009 on a Code of Conduct for computerised reservation systems, OJ L 35, 4.2.2009.

<sup>85</sup> To this end, the Evaluation of the Regulation on Air transport systems: Code of Conduct for computerised reservation systems (SWD(2020)0009) was carried out including a stakeholder consultation.

<sup>86</sup> See CMA, Digital comparison tools market study, Final report of 26 September 2017.

<sup>87</sup> This could constitute infringement of EU consumer law where the consumer has spent considerable time in making a booking before he is informed about the fee, where he may not wish to start the transaction all over again on a different website to avoid paying a relatively small surcharge.

<sup>88</sup> Unfair Commercial Practices, European Commission's questionnaire on the application of Directive 2005/29/EC BEUC's response, 26 October 2011.

comparison sites often display misleading information about the final price of flight tickets, which differ from the price advertised on the airlines' websites.

The **combination of comparison websites and LCCs' business model**, which focuses on the convenience of the service offered based on the low price, **exacerbates the problem**. Given the LCCs' practice of breaking up the ticket price, charging extra for luggage or other supplements, the result may be that the information is only fully disclosed when the flight is booked directly with the specific airline. Thus, according to a joint survey on comparison websites launched by the European Commission and EU consumer protection authorities in 2016<sup>89</sup>, the prices shown first in the comparison tools were not the same as the final price shown in the airline's own online booking engine, and the total price and its components were not clearly explained to the consumer. Furthermore, promotional offers that comparison websites claimed were available did not exist. Such differences often result from the fact that, while the pricing policies of airlines increasingly rely on ancillary service supplements to form the final fare, these supplements are usually not taken into account in the price shown in the comparison sites<sup>90</sup>.

**People who tend to use comparison websites are likely to be more price-sensitive** (where price sensitivity defines a demand which is driven by the price, while the schedule tends to be the element of flexibility.) Likewise, LCCs' market strategy is typically grounded in the offer of competitive prices, primarily addressed to bargain-seeking consumers. From a competition perspective, it can therefore be argued that the growing number of price comparison websites prevents a potential hegemony of LCCs in online booking.

Additionally, very often, the price comparison websites use automated software that visits the e-commerce websites and copies the latter's pricing information in real time. This practice (called '**screen scraping**') is often found in the online travel reservation business. It can happen that the third-party websites, on the one hand, show the comparative prices of airline tickets and, on the other, act as intermediaries for booking travel packages, also offering rental services (such as for cars or hotels) on top of the airline ticket, and applying a fee for that<sup>91</sup>.

In response to such practices, **LCCs have**, on several occasions<sup>92</sup>, **sued comparison websites using screen scraping**. This is not only because they feared losing their additional and revenue-generating services to the benefit of these third-party websites, but also possibly suffering reputational damage if consumers who booked through the third-party websites were not properly informed of flight changes and cancellations.

Given **divergences in national courts' judgments**, in 2015 the CJEU was called on to rule in litigation (between Ryanair and the third-party website owner, PR Aviation BV) on the subject of screen

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<sup>89</sup> Results of the 2016 screening of travel comparison and booking websites in the travel sector. Available at: [http://ec.europa.eu/newsroom/document.cfm?doc\\_id=44016](http://ec.europa.eu/newsroom/document.cfm?doc_id=44016).

<sup>90</sup> Unfair Commercial Practices, European Commission's questionnaire on the application of Directive 2005/29/EC BEUC's response, 26 October 2011.

<sup>91</sup> See Somers, G. (2015). Websites can contractually restrict third party scraping of their data. Timelex. [online] Available at: <https://www.timelex.eu/en/blog/websites-can-contractually-restrict-third-party-scraping-their-data>.

<sup>92</sup> See e.g. Tribunal de Grande Instance de Paris, Case Ryanair v. Vivacances (Opodo) of 9 April 2010; Court of Appeal of Hamburg, Case Ryanair v. Vtours of 28 May 2009; Court of Appeal in Frankfurt, Case CheapTickets v. Ryanair of 5 March 2009; Court of Appeal of Madrid, Case Ryanair v. Rumbo of 1 October 2008; Commercial Court of Barcelona, Case Ryanair v. Atrapalo of 20 January 2009; Court of Barcelona, Case Ryanair v. eDreams of 8 January 2010; Dublin High Court, Case Ryanair v. Billigfluege and Ryanair v. Ticket Point Reisebüro of 26 February 2010.

scraping<sup>93</sup>. The **CJEU ruled in favour of the LCC**, stating that “Directive 96/6<sup>94</sup> on the protection of databases does not preclude the author of a database, which is not protected either by copyright or by the *sui generis* right under that directive, from laying down contractual limitations on its use by third parties, without prejudice to the applicable national law”.

In this case, Ryanair claimed that PR Aviation BV had infringed its rights relating to its data set and that it had acted contrary to the terms of use of its website, by selling its flights and by accessing Ryanair’s price, flight and timetable information without a written licencing agreement for the sole purpose of price comparison.

Subsequently, a French court in 2018 ruled<sup>95</sup> that lastminute.com, a platform run by Lmnext FR, was guilty of a misleading commercial practice by using Ryanair’s database. However, in May 2019, the court in Lugano reached a different conclusion<sup>96</sup> in a similar case involving Ryanair and LM Group websites<sup>97</sup>. It considered screen scraping to be admissible. The court stated that, in performing its online travel agency activities, the comparison website can lawfully continue to offer the possibility of comparing and reserving flight tickets. The court ruled that this does not violate any intellectual property rights or any contractual obligation towards the airline.

Similarly, on 12 November 2019 the Italian Supreme Court<sup>98</sup>, in a case again involving Ryanair and LM Group, rejected a previous ruling of the Court of Appeal of Milan of 2015, which had excluded tout court the dominant position held by Ryanair on the basis of the assessment of the sole general market share of European air flights. The Italian Supreme Court rejected the reasoning of the Court of Appeal on the grounds that the latter had not correctly applied the principles on the definition of the relevant market, which is key and a precondition to assess the existence of a dominant position. In addition, the Supreme Court argued that the Court of Appeal had failed to recognise the undisputed link between the market for air transport and the market for travel agents. This would have allowed it to assess the relevant economic interference from the point of view of competition, considering the access to ancillary tourist services offered by Ryanair, through the possibility of routing from its portal to selected commercial partners from which it receives ancillary revenue and, consequently, the abusive nature of the carrier’s conduct in the specific case (paras 1.4 et seq).

The case was hence referred back to the Court of Appeal, which was called to reconsider its findings on the limitations of the distribution methods that Ryanair had put in the terms of use (preventing the comparison website from displaying and intermediating its flights) in light of the correct market definition. It remains to be seen what position the CJEU might take in the future regarding the airlines’ right to refuse their consent to comparison websites having access to their database and to intermediate booking procedures on behalf of their clients. If such refusal is not allowed, that will create the basis for a disruptive change in the definition of relations between airlines and online travel services.

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<sup>93</sup> Judgment of 15 January 2015, Case C-30/14, Ryanair Ltd v PR Aviation BV, ECLI:EU:C:2015:10.

<sup>94</sup> Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases, OJ L 77, 27.3.1996, p. 20.

<sup>95</sup> Chamber of Commerce of Paris, Judgment of 20 March 2018 (case No 2013031969).

<sup>96</sup> Tribunale di Lugano, Judgment of 9 May 2019.

<sup>97</sup> Websites include lastminute.com, volagratis.com, rumbo.es, weg.de, bravofly.com.

<sup>98</sup> Italian Supreme Court of Cassation, Judgment of 12 November 2019.

### 3. CONSUMER PROTECTION AUTHORITIES' INTERVENTION IN PASSENGER AIRTRANSPORT

#### KEY FINDINGS

- **UCPs** are defined under the UCPD as commercial practices which are both contrary to the requirement of professional diligence and materially distort or are likely to materially distort the economic behaviour of the average consumer with regard to a product or service.
- In **LCCs' price patterns**, fares are usually increased by a large number of additional charges, which **in some cases amount to UCPs**. Consumer protection authorities across Europe have intervened to tackle them, especially focusing on price transparency, with particular reference to charges for hand luggage, no-show rules, debit card surcharges and misleading advertising.
- A number of cases decided by German courts have dealt with the **indication of final costs** excluding additional charges, i.e. a kerosene surcharge, charges for each checked luggage item, service charges displayed at the very last moment of the booking process. Such airline practices have been considered as UCPs under German law implementing the UCPD, as well as violations of specific provisions of a bespoke regulation governing price indication. In the light of the latter, the advertiser must display easily recognisable and clearly legible price information in order to allow consumers to make informed decisions on the purchase of the advertised product.
- A controversial additional **charge** applied by LCCs is that for **hand luggage**. The CJEU ruled that hand luggage is an inevitable component of a passenger transport service. However, the question of the size of the hand luggage remains open. A recent decision by the Italian Administrative Court found that a charge for large hand luggage was justified and compliant with the CJEU ruling (see Section 2.2.3).
- According to the Italian Consumer Protection Authority and the Administrative Court, airline policies on the **correction of passengers' name** amount to UCPs when *de facto* the airline obliges the passenger to pay again for a travel service he/she had already purchased, in order to purchase a second ticket, which often costs more than the first one.
- The information provided on an LCC's website and in communications addressed to consumers informing the passengers of **flight cancellations** has been considered a misleading omission, in so far as it did not provide adequate explanation of the existence of a right to financial compensation pursuant to Regulation (EC) 261/2004 and of the way to exercise it.
- National Consumer Protection Authorities in Italy, Malta and Spain have ruled on the '**no-show clause**' adopted by some airlines. While the Italian and Maltese Authority claimed that any such clause is legitimate as long as it is adequately advertised on any booking channels to consumers when purchasing tickets with a sequence of travel, the Spanish Court ruled that airlines cannot prevent the passenger, who books a return flight and misses the outbound flight, from taking the already paid for return flight.
- Pursuant to the UK Consumer Protection Authority, **additional fees** charged by airlines when the flight ticket is purchased **using a debit card** are only allowed when they are included in the headline price and/or are presented in a clear and transparent manner. Otherwise, debit card surcharges are deemed UCPs as they make it difficult for consumers to compare prices easily and make informed market choices.

The **general rules on UCPs provide effective tools** for and rights to customers, and allow the competent authorities **to tackle and limit the consequences of unfair pricing practices** in the passenger air transport sector.

However, **unfair commercial conduct relating to pricing is still very frequent** in this sector. As a result, in recent years, the increasingly competitive environment of the passenger air transport market has been characterised by several cases of UCPs and misleading practices against which national competition authorities have imposed sanctions.

### 3.1. Definition of unfair and misleading practices in passenger air transport

As noted above, unfair and misleading commercial practices are covered under UCPD. Namely, Article 5 UCPD prohibits the use of commercial practices, which are *“both contrary to the requirement of professional diligence and materially distort or are likely to materially distort the economic behaviour of the average consumer with regard to a product or service”*. Under Article 2(e) UCPD, the notion of material distortion is defined as *“the impairment of the ability to make an informed decision, thereby causing the average consumer to take a transactional decision that they would not have taken otherwise”*. Practices, which are either **misleading or aggressive are deemed to be unfair** under the UCPD.

Under Article 6 UCPD, misleading practices consist of **misleading actions** and **misleading omissions**. A misleading action consists in giving false, untruthful or deceptive information. According to Article 7 UCPD, *“an omission is misleading if it omits or discloses, in an unclear unintelligible, ambiguous or untimely manner, material information that the average consumer needs, according to the context, to take an informed transactional decision.”* The omission of material information is likely to cause the average consumer to take a transactional decision they would not have taken otherwise<sup>99</sup>.

In its report on Airlines' Taxes, Fees, Charges, and Surcharges<sup>100</sup> the Consumer Protection Cooperation (CPC) Network examined the level of transparency of taxes, fees and charges levied by airlines in order to identify any practices that could potentially mislead or determine potential damage to European consumers. The report, in line with Articles 6 and 7 UCPD, has clarified that **the following actions and omissions can be regarded as misleading in passenger air transport:**

- calculation of fees and taxes in the price of the flight ticket;
- presenting costs which are contributing to the air carriers' general income as taxes and fees imposed by other bodies;
- the final price of the flight ticket not including all the unavoidable taxes, charges and fees which are to be paid by the consumer (e.g. booking fee or fuel surcharge);
- the absence of clear and easily accessible information on the size of the refund for unused tickets.

### 3.2. Most commonly detected UCPs in the passenger air transport sector

As mentioned in the previous Section, air carriers' price management techniques are based on price discrimination, both allocating costs between high- and low-yield passengers and depending on the time when the ticket is purchased. These **yield management techniques are not unfair or**

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<sup>99</sup> Van Boom, W.H. (2016). Unfair Commercial Practices, in Twigg-Flesner, C., Research Handbook on EU Consumer and Contract Law, (Research handbook in European Law series), Cheltenham: Edward Elgar., p 388-405.

<sup>100</sup> Link to the Report: <https://docplayer.net/17263490-Cpc-report-on-airlines-taxes-fees-charges-and-surcharges.html>.

**discriminatory** under the UCPD, **as long as transparency is ensured and discrimination is not based on the passenger's place of residence within the EU**. However, in LCCs' price patterns, the fares are sometimes opaque and complex, as they are increased by a large number of additional charges, which in some cases may amount to UCPs.

Various national consumer authorities across Europe have imposed sanctions for practices that were considered largely detrimental to transparency and passengers' rights. Based on information about enforcement actions, we have identified decisions by the competition and consumer authorities which have explored not only the impact of UCPs on consumers, but have also explored the possible impact on competition between airlines (see Chapter 4).

While the same national authority is usually (with a few exceptions) responsible for enforcing both consumer protection and competition laws, this Section examines the **practices**, which have been **challenged by the competent authorities only under consumer protection law** and not under competition law. This is because none of the pillars of competition law, i.e. the prohibition of anti-competitive agreements and abuses of dominance or merger control, applied.

The conduct penalised under consumer protection law concerns misleading advertising, application of the no-show rule, overcharged one-way tickets, payment card surcharges, lack of transparency on insurance policies, an overcharged call centre facility, flight cancellation policies, misleading information on monetary compensation, hand luggage policies, and penalty fees for the correction of passenger's name.

The following paragraphs explore some decisions on UCPs of the consumer protection authorities in Germany, Italy, Malta, Spain and the UK, while an overview of all the relevant investigations and outcomes is provided in the Annex.

### 3.2.1. Germany

#### a) *Brief overview of consumer protection in Germany*

In Germany, trade practices are covered by the Act against unfair competition (UWG – Gesetz gegen den unlauteren Wettbewerb)<sup>101</sup>. This piece of legislation is designed to implement the UCPD and is characterised by a three-fold purpose of protection (competitors, consumers, and the public interest in undistorted competition)<sup>102</sup>. It contains both general and enforcement rules. Competition law violations, by contrast, are primarily governed by the Act against Restraints of Competition (GWB - Gesetz gegen Wettbewerbsbeschränkungen)<sup>103</sup>.

The German competition authority, the Bundeskartellamt (BKartA), does not have powers for the enforcement of consumer law. In fact, there is **no public enforcement of consumer protection law** as such. Consumer protection law enforcement is largely based on civil law provisions codified in the German Civil Code (BGB). A relevant role is played by trade associations, consumer organisations<sup>104</sup> and the chambers of commerce, which have broad *locus standi* (i.e. legal standing) in claims before civil

<sup>101</sup> [https://www.gesetze-im-internet.de/uwg\\_2004/](https://www.gesetze-im-internet.de/uwg_2004/).

<sup>102</sup> Bekanntmachung der Neufassung des Gesetzes gegen den unlauteren Wettbewerb, BGBl. I 2008, p. 2949.

<sup>103</sup> <https://www.gesetze-im-internet.de/qwb/>.

<sup>104</sup> The most active organisations combating UCPs in Germany are the Centre for Protection against Unfair Competition (Wettbewerbszentrale, an independent institution of German industry that supports self-regulation by companies in the interests of fair and functioning markets) and consumer organisations (Verbraucherzentrale Bundesverband).



courts. However, the UWG grants specific powers of intervention and enforcement to certain federal authorities<sup>105</sup>.

The BKartA can conduct sector inquiries into consumer law issues and act as *amicus curiae*<sup>106</sup> in civil consumer protection actions. Nevertheless, the authority has as yet not been granted wider powers to intervene in consumer matters, e.g. by cease-and-desist or reimbursement orders. Its main task consists in analysis and advice. Currently, a discussion is underway on conferring additional decision-making competences on the BKartA as well as powers to impose punitive measures with the aim of enhancing public enforcement of consumer protection law<sup>107</sup>.

*b) The German Regional Courts' judgments on misleading advertising on ticket fares*

Issues relating to the indication of final costs to the consumer have resulted in considerable litigation in Germany. In addition to the legislation mentioned in the previous Section, a special legal act, namely the Price Indication Regulation (PAngV, Preisangabenverordnung) may apply to such cases<sup>108</sup>. For instance, in 2007, the Higher Regional Court of Düsseldorf applied this regulation<sup>109</sup>, under which **an advertiser has to make the price information easily recognisable and clearly legible**. In the case at stake, the airline company had not clearly indicated in its internet advertisement the final costs, including the kerosene surcharge, which was indicated with a '(\*)' in smaller, white letters against a light background<sup>110</sup>. For this violation, a consumer organisation won the action for an injunction under the UWG.

In another case brought against an airline before the Higher Regional Court of Hamburg<sup>111</sup>, the **advertising** of air travel by quoting prices **without an express indication of an extra fee to be charged for each checked luggage item**, has been regarded as a misleading commercial practice and, therefore a violation of Arts. 3 and 5 of the UWG. In its reasoning, the Court carried out a market analysis of the practices put in place by the defendant's competitors, while relying on the 'conventional' understanding of airline travellers, in order to judge whether the practice would qualify as unfair.

Similarly, the Regional Court of Leipzig dealt with a case of misleading advertising brought by a consumer protection association. The court considered the practice of **advertising a certain price while excluding the service charge until the very last moment of the booking processes** as a violation of article 23(1) the Air Services Regulation and the Price Indication Regulation. The price indication was also deemed as misleading under § 5(1)(2) UWG<sup>112</sup>.

Finally, in a 2016 case, the Regional Court of Aschaffenburg deemed imposition of credit card payment fees that are higher than the actual costs incurred by the vendor company to be an unfair practice in breach of Article 3(a) UWG in conjunction with § 312a (4) BGB<sup>113</sup>.

<sup>105</sup> Federal Network Agency, Federal Financial Supervisory Authority, Federal Railway Authority and the Federal Aviation Office.

<sup>106</sup> From Latin "friend of the court" – an organisation or a person, who is not a party to the specific litigation at hand, but is permitted to advise the court on a point of law or fact directly concerning the lawsuit.

<sup>107</sup> [https://www.bundeskartellamt.de/EN/Consumer\\_Protection/Consumer\\_Protection\\_node.html](https://www.bundeskartellamt.de/EN/Consumer_Protection/Consumer_Protection_node.html).

<sup>108</sup> <https://www.gesetze-im-internet.de/pangv/BJNR105800985.html>.

<sup>109</sup> Section 1 (6), sentence 2 thereof.

<sup>110</sup> OLG Düsseldorf, judgment of 30.10.2007 - I-20 U 86/07.

<sup>111</sup> OLG Hamburg, judgment of 26.08.2010 - 3 U 118/08.

<sup>112</sup> LG Leipzig, judgment of 21.05.2010 - 5 O 2485/09.

<sup>113</sup> LG Aschaffenburg, judgment of 13.07.2016 – 1 HKO 66/15. The case concerned a platform selling flights and not an airline, but would be equally applicable to airline online payments.

### 3.2.2. Italy

#### a) *Brief overview of consumer protection in Italy*

The Italian Consumer Protection Authority is the Autorità Garante della Concorrenza e del Mercato (AGCM). The AGCM is an independent administrative authority with investigative and enforcement powers and the **power to impose sanctions** (including fines) **both under national competition law and under consumer protection law**. Although the investigating and enforcement powers under both branches of law are the same, decisions on anti-competitive behaviours and UCPs are based on different legal bases. In both cases, the authority can accept commitments by the undertakings to halt the infringements.

The AGCM has started several proceedings against various airlines and other transport operators under its consumer protection powers<sup>114</sup>, in particular under Articles 20, 21(1)(b) and (d) and 22 of the Codice del Consumo (Consumer Code)<sup>115</sup>, which correspond to Articles 5, 6 and 7 UCPD.

#### b) *AGCM interventions on hand luggage policy*

The AGCM has launched investigations into LCCs for infringements of consumer protection rules on a number of occasions, most recently in relation to hand luggage policy.

With twin rulings against Ryanair and Wizz Air, the AGCM condemned the LCCs' most recent amendments to their hand-luggage policies, which introduced an **extra charge for a large hand luggage** (i.e. a trolley). In its rulings, the Italian authority relied on the CJEU judgment in *Vueling Airlines*<sup>116</sup>, in which the court stated that hand luggage is an inevitable component of a passenger transport service. On these grounds, the AGCM argued that excluding an essential element of the service from the price of the ticket and making it subject to additional payment constitutes an incomplete and false representation of the total cost of the ticket, which is liable to mislead consumers. The AGCM also argued that, through the introduction of the new hand-luggage policy, the airlines had *de facto* increased their standard price. While noting that a price increase is legitimate in itself, the authority ruled that this had been achieved by **deceiving consumers by excluding a service that is essential, predictable and inevitable** for almost every passenger, and typically included in the standard ticket price. The new policy was therefore deemed to be inconsistent with the requirements of professional diligence and to skew the economic behaviour of consumers.

However, the decision was **annulled by the competent administrative court**. In particular, the court challenged the AGCM's interpretation of the *Vueling* case, and stressed that while the CJEU decision considered hand luggage to be an essential element of the transport service, it did so without specifying any specific dimensions and weight. Therefore, the carriers have discretion to impose limitations on hand luggage dimensions and weight as long as these are 'reasonable'. In the cases at issue, the court found that there is no reason to believe that the dimensions proposed by the airlines are unreasonable. The court considered that **large hand luggage is not deemed an essential element** of the passenger air transport service, since the consumer can avoid carrying it on board, choosing smaller luggage (as shown by the behaviour of a number of passengers even under the previous policy). Finally, the court argued that Ryanair and Wizz Air's offers were not misleading, being

<sup>114</sup> PS11237 - Ryanair, AGCM Decision, 31 October 2018, PS11272 - Wizz Air, AGCM Decision, 20 February 2018; [https://www.agcm.it/dotcmsdoc/allegati-news/PS11237\\_scorr-sanz\\_omi.pdf](https://www.agcm.it/dotcmsdoc/allegati-news/PS11237_scorr-sanz_omi.pdf) and [https://www.agcm.it/dotcmsdoc/allegati-news/ps11272\\_scorr-sanz\\_omi.pdf](https://www.agcm.it/dotcmsdoc/allegati-news/ps11272_scorr-sanz_omi.pdf).

<sup>115</sup> Legislative Decree 206/2005, transposing the UCPD into national law.

<sup>116</sup> Judgment of 18 September 2014, C-487/12, *Vueling Airlines*, EU:C:2014:2232.

instead clear and straightforward, as the airlines pointed out from the outset the difference in price depending on the hand luggage dimensions.

*c) The AGCM intervention on name correction policy*

Another UCP investigated by the AGCM involved changing or correcting the passenger's name on the reservation. The company concerned, Blue Panorama, applied a fee of EUR 50 to correct mistakes due to spelling being wrong or to a second name having to be added to match the name in the passport. The AGCM decision was upheld by the administrative court. The court confirmed that, **de facto**, the company was obliging the passengers **to pay again for a travel service they had already purchased**, in order to acquire a second ticket, with a price often higher than the first one<sup>117</sup>.

*d) The AGCM intervention on information transparency*

In late 2017, the AGCM ruled on the duty of information on the right to compensation following the **cancellations of flights**<sup>118</sup>. The judgment was delivered in the context of Ryanair's mass cancellation of flights due to crew and air traffic strikes. According to the AGCM, Ryanair acted in a 'misleading manner' when informing the passengers of the cancellations, without providing adequate information on additional compensation pursuant to EU Regulation (EC) 261/2004. In particular, in the view of the Authority, the information provided on the company's website and in communications addressed to consumers was incomplete and non-transparent. As such, the company's conduct appeared likely to cause serious and irreparable damage to consumers, hindering the exercise of their rights. For these reasons, the Authority asked Ryanair to inform consumers of the rights arising from the cancellation of flights in order to allow them to acquire full and adequate awareness of:

- all the rights due to the consumer following cancellations;
- the complete list of dates, routes and number of each cancelled flight in relation to which not only the right to reimbursement and / or to modify the flight free of charge had arisen but also to compensation;
- the procedure to be followed to request reimbursement, free modification of the flight and the amount of the financial compensation due.

The decision was upheld by the Italian administrative court<sup>119</sup>.

*e) UCPs in other passenger transport sectors*

With specific regard to the Italian market, the AGCM has levied sanctions on **UCPs in passenger maritime and rail transport** as well. Although they concern other transport modes, the commercial practices investigated are very common in passenger air transport. It seems therefore useful to briefly consider the position of the Italian authority also in respect of these cases. This makes it possible to present a more complete picture of the relevant state of play in the country, providing some examples of the reasoning of the AGCM, which might possibly be applied in the future to similar cases in the sector of passenger air transport.

Costa Crociere, a shipping company, was fined for UCPs in violation of Articles 21, 22, 24 and 25 of the Consumer Code in relation to the **cancellation** of two cruises to Madagascar because of a health emergency on the island. The AGCM found that the company did not provide consumers with correct

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<sup>117</sup> T.A.R. Roma, Ordinance no 201905878 of 12 September 2019.

<sup>118</sup> AGCM, Ryanair, Decision PS10972 of 29 May 2018. The AGCM fined Ryanair EUR 1.85 million for UCPs.

<sup>119</sup> T.A.R. Roma, Decision no 201910192 of 1 August 2017.

and timely information on the cancellation and reimbursement, when selling and organising the two cruises as required by Directive 90/314/EEC on package travel, package holidays and package tours<sup>120</sup>. This limited consumers' ability to exercise their rights in relation to changes in the travel programme<sup>121</sup>.

Trenitalia, the main Italian train operator, was fined by the AGCM for the **lack of transparency of its booking website**. The search option 'all trains' did not include some of the travel solutions which included use of or a combination with regional trains if the departure time coincided with a more expensive solution, such as high-speed trains (i.e. Freccce and Intercity).

### 3.2.3. Malta

#### a) *Brief overview of consumer protection in Malta*

The Malta Competition and Consumer Affairs Authority (MCCAA) is **in charge of both promoting and enhancing competition and safeguarding consumers' interests** and welfare. These two functions are carried out by two separate offices within the authority. The Office for Consumer Affairs (OCA) deals specifically with the protection of consumer rights. It provides assistance to consumers in their disputes with traders, mainly favouring a conciliation process that is carried out with the aim of reaching an amicable settlement.

The Office also ensures price transparency and effective enforcement of consumer protection legislation. This is mainly achieved through investigation of UCPs, unfair contract terms and breaches to the Consumer Rights Regulations, and by taking the necessary measures for the cease and prevention of such practices. Over the years, the MCCAA has identified a number of UCPs in Malta, especially on the subject of sufficient transparency towards consumers.

#### b) *The MCCAA intervention on the 'no show rule'*

In 2018, the OCA assessed the use of 'no-show' clauses within the conditions of airlines operating to and from Malta, pursuant to complaints by consumer protection organisations<sup>122</sup>, that such clauses were unfair. The Consumers' Association especially blamed the relevant no-show clause for Air Malta<sup>123</sup>, which **prohibits a passenger, who books a return flight and misses the outbound flight, from taking the already paid inbound flight**. In the exchange of views between the airline and the Consumers' Association, CA Malta, it was argued, on the one hand, that:

- the no-show policy is an accepted IATA standard policy;
- where passengers purchase a return ticket rather than one-way tickets, the airline reservations system considers the booking as a single ticket for the whole journey;
- one-way tickets and return tickets are different products, having a different price which results from market conditions;
- passengers, who inform the airline before the actual flight that they will not be using one of the ticket segments, will have the other segment protected.

On the other hand, the consumer association contended that:

<sup>120</sup> Council Directive 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours. OJ L 158, 23.6.1990, p. 59–64.

<sup>121</sup> AGCM, Costa Crociere, Decision PS11336 of 12 June 2019.

<sup>122</sup> The MCCAA was contacted in December 2018 and again in January 2019 by the Consumers' Association CA Malta. In addition, other consumer groups such as Consumentenbond, EKPIZO, Which?, KEPKA, dTest and Forbrugerrådet Tænk were associated.

<sup>123</sup> Clause 3.3.6. of Air Malta's General Conditions of Carriage. The clause reads: "3.3.6 Please be advised that in the event you do not show up for any flight without advising us in advance, we may cancel your return or onward reservations. However, if you do advise us in advance, we will not cancel your subsequent flight reservations."

- IATA is a trade organisation therefore it cannot set the standards of consumer rights which are embodied both within EU and Maltese legislation;
- the fact remains that the passenger paid for both outbound and inbound flights and should, therefore, be able to use both journeys;
- most consumers are not aware of this procedure and assume that the fair practices used in other industries also apply.

In its reply<sup>124</sup>, the MCCAAs refers to the Commission proposal for the revision of the Air Passenger Rights Regulation<sup>125</sup>, and the reasoning for proposing only a partial ban of the no-show policy, namely that a full ban “would impair airlines from offering indirect flights at lower prices than direct flights and therefore hurt competition.” Regarding the relevant Air Malta clause, the Authority considered that it is “in line with the recent decision of the Italian Authority (AGCM)” who, ruled on a similar, albeit not identical, clause.

As recalled by the Maltese Authority, the AGCM has established that:

- “to comply with the Unfair Commercial Practices Directive (...) airlines must allow passengers not using the first segment of the trip (...) to confirm they will use the second leg of the flight ticket”;
- a “confirmation should be sent to the airline within 24 hours after the scheduled departure of the first flight and no fee of any amount must be charged to passengers for that”;
- airlines were requested to “change their Terms and Conditions accordingly and provide information on this procedure in a clear manner to passengers.”

Embracing the reasoning of the Italian Authority, the MCCAAs agreed that consumers are not always aware of the existence of the no-show clause and that this information should be made clear to consumers purchasing travel tickets intended to be used in sequence. It also noted that Air Malta’s website is a good example, since in the online booking procedure there is clear information of the no-show policy immediately beneath the total price of the ticket. Nonetheless, as this information should also be visible on other booking channels, the Authority pledged to contact Air Malta about this.

### 3.2.4. Spain

#### a) Brief overview of consumer protection in Spain

Consumer protection regulations in Spain essentially stem from private law, administrative law, and self-regulation. The basic framework for consumer protection in Spain is established by Section 51 of the Spanish Constitution of 1978, which stipulates that public authorities must, *inter alia*, guarantee the defence of consumers, protect their economic interests and promote information to consumers. This obligation is enshrined in the General Law on the Protection of Consumers and Users (LGDCU).

#### b) The Spanish Supreme Court ‘no-show rule’ judgment

On November 2018, the Spanish Supreme Court issued a judgment<sup>126</sup> under consumer protection rules dealing with unfair terms in passenger air transport contracts, which related to Iberia’s policy of cancelling a ticket covered by a ‘no-show’ clause.

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<sup>124</sup> The MCCAAs reply was delivered in a letter of February 2019. See <http://camalta.org.mt/wp-content/uploads/2019/04/no-show-mccaa.pdf>.

<sup>125</sup> COM (2013)0130 final.

<sup>126</sup> Spanish Supreme Court, judgment of 13 November 2018, n. 631/2018.

By virtue of this clause, Iberia did not allow a passenger who, for any reason (i.e. missing the flight, sickness) had not used one leg of the ticket, to use the second leg. The airline justified its position on the grounds that the fares of the return tickets are lower than those applied for separate bookings of each of the flights.

Unlike the Italian and Maltese authorities, the **Spanish Court** considered the **'no-show' clause to be abusive** and, thus, unlawful. The Court's reasoning was that any such clause implies an imbalance in the rights and obligations of the consumer.

The Spanish judge observed, in particular, that the two elements of the contracts between the consumer and the airline are (i) the payment by the traveller of the stipulated price and (ii) the facilitation by the airline of the transport contracted on a certain date, on certain routes and of a certain quality that the passenger has the right to demand and enjoy. When the passenger fulfils his obligation, which is solely the payment of the price, he cannot be deprived of the enjoyment of the service contracted and should be able to use any or all parts of a ticket for which he has paid. Accordingly, the right of the passenger to use the service contracted with the airline under the agreed conditions does not imply that there is an obligation to use each and every one of the segments: the existence of such a requirement would convert a right granted to the passenger into an obligation.

The reasoning of the Supreme Court was grounded on Article 1.169 of the Spanish Civil Code under which creditors are allowed to use even partially the services they are entitled to receive, provided that this does not cause damage to the debtor. As a consequence, the Court ruled that the fact that a passenger did not use part of what had been paid for cannot lead to the loss of the entire ticket.

### 3.2.5. UK

#### *a) Brief overview of consumer protection in the UK*

In the UK, UCPS fall within the jurisdiction of the Competition and Markets Authority (CMA) that has taken over from the former Office of Fair Trading (OFT) and is entrusted with **both consumer and competition protection**. Under the Consumer Protection from Unfair Trading Regulations of 2008 and the Consumer Rights Act of 2015, the CMA has investigative and decisional powers, including the power to seek injunctions and launch criminal prosecutions. The CMA can accept commitments from the undertakings to improve their practices. However, it cannot impose fines on the undertakings.

In investigations by the former OFT (now CMA), several airlines were found to be in breach of a number of legislative instruments, such as the Enterprise Act 2002, the Consumer Protection from Unfair Trading Regulations 2008 and the Regulation (EC) 1008/2008.

#### *b) The CMA and Advertising Standards Authority (ASA) interventions on debit card surcharges and misleading advertising*

In 2012, the OFT investigated airlines which were charging consumers an additional fee for making a payment by debit card. Such card charges were not included in the headline price and/or were not presented in a clear and transparent manner. In the opinion of the OFT these practices made it difficult for consumers to compare prices easily, thus damaging consumer confidence and impeding effective competition.

The OFT was concerned that airlines' **payment surcharges were a 'price partitioning' device** which concealed the true or genuine price of their services. In its view, although some payment cards were presented by airlines as a free payment mechanism, consumers were often not in a position to use such cards. The OFT further underlined that *"there was no reasonable or legitimate reason for the airlines'*

*failure to provide headline prices which included all unavoidable charges, such as any cost for paying by debit card.”<sup>127</sup>*

In addition, the UK's advertising regulator, the Advertising Standards Authority (ASA), has taken several decisions on **misleading advertising** by airlines. In particular, the ASA has analysed the dynamic pricing schemes used by airlines in order to push consumers to book their flights in advance to avoid future price increases, and the misleading effects of certain price discount sales advertising. The authority observed that, while the area of dynamic pricing is an evolving one, *“where marketers use dynamic pricing, it is still their own responsibility to ensure that price statements are accurate and to hold evidence to demonstrate that a pre-discount price was genuine.”* Hence, when passenger air transport companies advertise prices that are subject to change and have limited availability, *“marketing communications should make clear what consumers need to do to find the most up to date price”* and *“ensure to take publication lead times into account”* as, if the relevant price is very difficult to achieve for the consumer very soon after publication, *“the marketing communication is likely to be considered misleading.”<sup>128</sup>*

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<sup>127</sup> Investigation CRE-E/27017 closed on July 2012, into Aer Arann, Aer Lingus Limited, BMI Baby Limited, Eastern Airways Limited, easyJet, Flybe Group, German Wings GmbH, Jet2.com, Deutsche Lufthansa AG, Ryanair, Thomas Cook Airlines, Thomson (TUI UK Limited), Vueling Airlines, Wizz Air.

<sup>128</sup> <https://www.asa.org.uk/advice-online/travel-marketing-working-with-third-parties.html>.

## 4. POSSIBLE IMPACT OF UCPS ON PASSENGER AIR TRANSPORT COMPETITION

### KEY FINDINGS

- **Predatory pricing** in the passenger air transport sector has sometimes been alleged, but has seldom been upheld by the competent competition authorities. Under EU competition law only predatory pricing strategies of dominant firms are relevant from an antitrust enforcement perspective. This means that some UCPS, including predatory pricing practices, are **not caught by the scope of EU competition law** when the undertaking implementing them is not dominant in a relevant market.
- Predatory pricing is **difficult to prove** and requires a **comparison between pricing** on the side of the dominant undertaking **and costs**. EU courts use the average variable cost benchmark, while the Commission also refers to long run average incremental costs. Pursuant to CJEU Akzo (Judgment of 3 July 1991, AKZO Chemie BV v Commission of the European Communities, Case C-62/86, ECLI:EU:C:1991:286) case law, the average variable ('AVC') is the cost benchmark used to assess abuse in the form of predatory pricing. When fares are set above the AVC but below average total costs, an **'intent to eliminate a competitor'** on the side of the dominant firm must be shown by the authority alleging the abuse. **Evidence** to establish such intent may be **difficult to find**.
- The difficulty of proving predatory pricing is **even more marked in the passenger air transport sector**, due to the complexities of the pricing policies adopted by air service carriers. In that sector, fares are often a consequence of the business model of the air transport company, and are set based on complex calculations and customer segmentation. The simplified benchmarks for costs used in competition law analysis fail to fully capture such complexity.
- These considerations explain why predatory pricing claims have seldom been upheld by national competition authorities, and never, thus far, by the European Commission.

There is an **overlap between the two separate fields of law: the law regulating unfair practices, on the one hand, and competition law, on the other**. While the distinction between the two fields of law may seem easy in theory, in practice it is not. Indeed, *"in the European Union the relationship between anti-trust law and the law against unfair practices in competition raises not only issues of how to properly delimit the scope of application of the rules of both bodies of law, but also of how to divide the exercise of legislative authority over these matters between the EU and its Member States, and of how to deal with divergences existing between the various national laws in both areas"*<sup>129</sup>.

Against this background, **some pricing strategies can be unfair, some can be anti-competitive but not unfair, or some can be both**. Predatory pricing strategies, when adopted by a dominant firm, are likely to drive a competitor out of the market and allow the firm adopting them subsequently to raise prices to the detriment of consumers in the long run. This said, under EU competition law, and in particular, **Article 102 TFEU, only the predatory pricing strategies of dominant firms** are looked at

<sup>129</sup> Ullrich, H. (2005), Anti-Unfair Competition Law and Anti-Trust Law: A Continental Conundrum? EUI Law Working Paper No. 2005/01.



closely<sup>130</sup>. This ultimately means that several **pricing strategies which may be unfair fall outside the scope of EU competition law**<sup>131</sup>.

Furthermore, although “*predatory pricing is one of the most commonly alleged violations of competition laws with respect to airlines’ unilateral conduct, case law shows that investigating and policing predatory pricing is a difficult task*”<sup>132</sup>. Across EU Member States, the Lufthansa BKartA decision is the landmark case on predatory pricing in the passenger air transport sector<sup>133</sup>. At EU level, predatory pricing has been alleged, yet there has been no precedent of a case finding predatory pricing in this sector. For example, some years ago, a complaint was filed with the European Commission by Virgin on Iberia’s pricing practices on certain routes from Brussels to Barcelona and Madrid and vice versa<sup>134</sup>. The complaint did not lead to a finding of infringement.

In this Chapter, we briefly analyse the interaction between price competition and the notion of predatory pricing under competition law. We will also explore different theories of harm. Finally, in the absence of a precedent finding abuse in the air transport sector at EU level, we will look at pricing practices which have either been alleged to violate EU competition laws, or been found as abusive under such laws by a national competition authority.

#### 4.1. Interactions between UCPs and predatory pricing

Unfair practices in competition cases may violate competition laws, but also laws on consumer protection. In this Section, we focus on the commercial behaviour of air service carriers which may violate EU competition laws.

At the outset, it is worth clarifying that **some pricing practices** are the **result of increased competition** among carriers after the market entry of LCCs. Over the last few years, LCCs’ market shares have increased in most of the world’s short-haul markets, including in Europe. LCCs have grown and now not only serve secondary airports but have also recently entered the FSCs’ markets by offering their services in primary airports as well<sup>135</sup>. According to the economic literature, LCCs’ market entry has not only triggered a reduction in fares on a given route<sup>136</sup>, but also capacity increases as well as the emergence of new consumer demand.

This development has prompted FSCs to adapt their business models by means of different strategies, including pricing strategies. Economists have diverging views on how quickly FSCs react to increased competition by LCCs<sup>137</sup>. At times, they adapt their pricing strategies quickly. At other times, their reply to such competition pressure is slower. While some of these pricing strategies could be considered competition on their merits, **other pricing strategies may be abusive**, particularly when they are adopted by a dominant firm in a given market. Such may be the case when the incumbent takes

<sup>130</sup> Ullrich, H. (2005). Anti-Unfair Competition Law and Anti-Trust Law: A Continental Conundrum? EUI Law Working Paper No. 2005/01.

<sup>131</sup> Renda, A., Cafaggi, F., Pelkmans, J. *et al*, (2014), Study on the legal framework covering business-to-business unfair trading practices in the retail supply chain, p. 7.

<sup>132</sup> OECD, 2014, Airline competition, Background paper from the Secretariat. Also see United States of America vs. AMR Corporation, *et al*, at 73.

<sup>133</sup> *Id*.

<sup>134</sup> Lall, A. (2005). “Predatory Pricing: Still a rare occurrence?”, Chapter 2, p. 37-56 in Forsyth, P., Gillen, D.W., Mayer, O. G. and Niemeier, H.-M. (2018) eds., *Competition versus Predation in Aviation Markets: A Survey of Experience in North America, Europe and Australia*, Ashgate Publishing.

<sup>135</sup> Malighetti, P., Stefano, P., Redondi, R. (2013), The Low-cost fare response to new entry, *European Transport. Research. Review*, 5, p. 185-194.

<sup>136</sup> Windle, R., Dresner, M. (1999). Competitive responses to low cost carrier entry. *Transport Res E* 35:59–75. Windle, R., Dresner, M. (1995), The short and long run effects of entry on US domestic air routes. *Transp J* 35(2):14–25.

<sup>137</sup> Malighetti, P., Stefano, P., Redondi, R. (2013), The Low-cost fare response to new entry, *European Transport. Research. Review*, 5, p. 185-194.

advantage of its market position to try to force the new entrant out of the relevant market using predatory pricing.

On the other hand, LCCs also adapt their pricing strategies to keep up with competition from the FSCs: empirical studies show that they use price discrimination as a strategy to react to FSCs. As a result of the LCCs' entry, some FSCs have adopted hybrid business models, and business strategies mimicking the pricing practices of LCCs<sup>138</sup>. For their part, LCCs resort to applying different prices to the customer (with fares depending on the flexibility offered on the ticket), and, the closer to the timeline of the trip, the higher the fares applied<sup>139</sup>. This dynamic pricing strategy is not anticompetitive as such. However, certain types of price discrimination can amount to competition law violations. This is the case of selective price cuts above a certain measure of cost.

Predatory pricing is prohibited by EU competition law as an abuse of a dominant position under Article 102 TFEU. However, Article 102 TFEU is insufficient to tackle some unfair pricing practices because its application requires that *"one of the parties involved in the commercial relationship holds a dominant position in the relevant product and geographic market."*<sup>140</sup> In addition, *"even in that case, dominance per se is not prohibited by EU competition law"*. Only its abuse is. In practice, UTPs *"emerge as a result of imbalances in contractual power, which go beyond the concept of dominance in antitrust."*<sup>141</sup> Although some price-related UCPs harm consumers, as seen in Chapter 3, these do not necessarily constitute a competition law violation, in particular when adopted by a company whose market power is still not significant enough to confer on it a dominant position. Therefore, not all price-related UCPs and UTPs would be caught by EU competition law.

The European Commission's approach to predatory pricing, alongside other Article 102 TFEU abuses, is spelled out in the 'Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings' ('the Guidance')<sup>142</sup>. According to the Guidance, the European Commission will generally intervene *"where there is evidence showing that a dominant undertaking engages in predatory conduct by deliberately incurring losses or foregoing profits in the short term (referred to hereafter as 'sacrifice'), so as to foreclose or be likely to foreclose one or more of its actual or potential competitors with a view to strengthening or maintaining its market power, thereby causing consumer harm"*<sup>143</sup>. When the pricing strategy is adopted 'with objective justification', such conduct, otherwise abusive, is legal. It is up to the dominant firm to present such objective justification.

## 4.2. Market definition and dominance

The first step in the analysis of whether certain pricing practices amount to an abuse of dominance under Article 102 TFEU is to define the relevant market, **both from a geographical and from a product/service viewpoint**, because a dominant position can only exist on a particular market.

<sup>138</sup> Malighetti, P., Stefano, P., Redondi, R. (2013), The Low-cost fare response to new entry, European Transport Research. Review. 5, p. 185-194.

<sup>139</sup> Alves C. F. and Barbot C. (2009). Price Discrimination Strategies of Low-cost Carriers, Journal of Transport Economics and Policy, Vol. 43, No. 3, p. 345-363.

<sup>140</sup> Renda, A., Cafaggi, F., Pelkmans, J., et al, (2014) Study on the legal framework covering business-to-business unfair trading practices in the retail supply chain, p. 7.

<sup>141</sup> Id., p. 7.

<sup>142</sup> Commission Communication of 24 February 2009, Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, Articles 63 and following, OJ C 45, 24.2.2009.

<sup>143</sup> Id.

Second, it is necessary to analyse whether the undertaking has a **dominant position** on the relevant market. Since only a company that is dominant in a certain relevant market can abuse its position, a finding of dominance is a prerequisite for a possible finding of abuse.

#### 4.2.1. Defining the relevant market

The relevant product/service market is “made of all products/services which the consumer considers to be a substitute for each other due to their characteristics, their prices and their intended use<sup>144</sup>.” The relevant geographic market is “an area in which the conditions of competition for a given product are homogenous”<sup>145</sup>.

In order to determine the relevant product/service and geographic market, the competition authority uses the **substitutability criterion: both demand-side substitutability and supply-side substitutability matter**. As the European Competition Authorities have clarified, “it is not useful to identify the distinction between the service dimension and the geographical dimension when defining the relevant market in the air transport sector, since the service has an inherent geographical dimension in it.”<sup>146</sup>

Prior to analysing both dimensions, it is necessary to clarify the starting point for market definition analysis in accordance with the European Commission’s 1997 Notice. Typically, the ‘**small but significant non-transitory increase in price**’ (so-called SSNIP) **test** is used as a starting point to define the relevant market: the test seeks to identify the smallest market within which a hypothetical monopolist could profitably raise prices. In practice, a small but significant non-transitory increase in price of 5-10 % above the competitive level is applied to the narrowest possible bundle of services and the smallest geographical area as a starting point. If such an increase is unprofitable, the market is further expanded to encompass additional services and a broader geographic scope. When the increase above competitive level pricing could be profitably sustained by the hypothetical monopolist, the services and geographic area at stake constitute a separate relevant market.

Traditionally, in its merger decision practice, the European Commission has defined the relevant market for scheduled passenger air transport services on the basis of the ‘point of origin/point of destination’ (**O&D**) **city-pair approach**<sup>147</sup>. Indeed, “passengers purchase scheduled air transport services between a point of origin and a point of destination (O&D) as the basic product”<sup>148</sup>. This means that

<sup>144</sup> Commission Notice on the definition of relevant market for the purposes of Community competition law (97/C 372 /03) (hereinafter, 1997 Notice).

<sup>145</sup> Id.

<sup>146</sup> Benacchio, M. (2008), cited, p. 99, quoting European Competition Authorities (ECA), Mergers and alliances in civil aviation, (2004).

<sup>147</sup> Commission's Decision C(2012) 2320 in Case No COMP/M.6447 – IAG/bmi, OJ C161, 07.06.2012, p.2, recitals 31-34; Commission's Decision of 26 January 2011 in Case No COMP/M.5830 – Olympic/Aegean Airlines, recitals 41-44; Commission's Decision C(2010) 5346 in Case No COMP/M.5889 – United Air Lines/Continental Airlines, OJ C225, 20.08.2010, p. 1, recitals 9-12; Commission's Decision C(2010) 5008 in Case No COMP/M.5747 – Iberia/British Airways, OJ C241, 08.09.2010, p. 1, recitals 9-10; Commission's Decision of 28 August 2009 in Case No COMP/M.5440 – Lufthansa/Austrian Airlines, recitals 11-14; Commission's Decision C(2009) 4004 in Case No COMP/M.5403 – Lufthansa/bmi, OJ C158, 11.07.2009, p. 1, recitals 8-10; Commission's Decision of 22 June 2009 in Case No COMP/M.5335 – Lufthansa/SN Airholding, recitals 12-14; Commission's Decision C(2009) 103 in Case No COMP/M.5364 – Iberia/Vueling/Clickair, OJ C72, 26.03.2009, p.23, recitals 30-31; Commission's Decision C(2008) 4359 in Case No COMP/M.5181 – Delta/Northwest, OJ C281, 05.11.2008, p.3, recitals 8-11; Commission's Decision of 27 June 2007 in Case No COMP/M.4439 – Ryanair/Aer Lingus, recitals 54-66; Commission's Decision (2005) D/207690 in Case No COMP/M.3940 – Lufthansa/Eurowings, OJ C18, 25.01.2006, p.22, recitals 10-11; Commission's Decision (2005) D/202898 in Case No COMP/M.3770 – Lufthansa/Swiss, OJ C204, 20.08.2005, p.3, recitals 12-14; Commission's Decision (2004) D/200549 in Case No COMP/M.3280 – Air France/KLM, OJ C60, 09.03.2004, p.5, recital 9; Commission's Decision (2002) D/228776 in Case No COMP/M.2672 – SAS/Spainair, OJ C93, 18.04.2002, p.7, recital 10; Commission's Decision of 12 January 2001 in Case No COMP/M.2041 – United/US Airways, recital 9; Commission Decision 2000/C 96/04, Commission's Decision in Case No IV./M.0019 – KLM/Alitalia, OJ C96, 05.04.2000, p.5, recital 22. The O&D approach was confirmed by the General Court: see Case T-342/07, Ryanair Holdings plc v Commission [2010] ECR II-3457, paragraph 53; Case T-177/04, easyJet v Commission [2006] ECR II-1931, paragraph 56; Case T-2/93, Air France v Commission [1994] ECR II-323 paragraph 84.

<sup>148</sup> Benacchio, M. (2008), cited, p. 99, quoting European Competition Authorities (ECA), Mergers and alliances in civil aviation, (2004).

air transport product markets would usually be defined as city pairs or airport pairs. Thus, every combination of a point of origin and a point of destination is considered a separate relevant market<sup>149</sup>.

Network effects in the air transport sector are also taken into account in the market definition: network alliances may mean that an O&D approach is not the most appropriate and, in this case, the relevant product market may be larger.

First, **demand-side substitutability** is a key criterion in defining the relevant market. From the service standpoint, the market expands to all those alternatives (services) which are considered substitutable on the side of the customers (passengers). Passengers take into account all possible alternatives for travelling from a city of origin to a city of destination. They do not consider these substitutable for a different city-pair. The competition authorities' assessment of demand-side substitution "*relies on a number of factors, including the number of potential passengers attracted by the overlapping catchment area, the frequency and schedules of the service at different airports, the difference in the total duration of the journey – including transfer time to terminals – the difference in the total travel costs and the difference in the quality of service at airports.*"<sup>150</sup>

From the demand-side standpoint, it may be necessary to make a **distinction between different groups of passengers**, since different services may be substitutable for different kinds of customers: the first distinction is between time-sensitive and non-time sensitive passengers, while the second distinction is between connecting passengers and point-to-point passengers. Indeed, on the basis of the "*established practice of EU Commission and competition authorities, the distinction between time-sensitive and not time-sensitive passengers, as well as between point-to-point passengers and connecting ones*" is relevant in terms of such sub-segmentation<sup>151</sup>.

On this basis, the relevant service market can be **sub-segmented** into various segments depending on time and price sensitivity. There are passengers who are price-sensitive and book in advance (so-called '**leisure segment**'), and there are less price-sensitive passengers, typically with a higher ability to pay and/or travelling for business, who are less price-sensitive and whose demand is inelastic (so-called '**business segment**')<sup>152</sup>.

Business passengers are, typically, more time-sensitive than price-sensitive. Factors that matter to them are faster connections, more flight frequencies, a higher level of punctuality, and the possibility of changing the time of travel at short notice. By contrast, leisure passengers are more flexible in terms of duration of flight, but also expect lower fares. Another factor to consider is the length of routes, i.e. short-haul versus long-haul flights: in this case, airport substitutability comes into play. As discussed previously, it is not appropriate to distinguish this dimension from the relevant geographic market and "*catchment areas for short haul routes tend to be narrower than those for long haul routes*", while "*airports are less dependent on their main catchment areas for non-time sensitive travellers compared to time-sensitive ones.*"<sup>153</sup>

In addition, from the demand standpoint, the characteristics of **connecting passengers** (those who fly to a final destination and for whom a given hub is a stopover) differ from the **point-to-point passengers**: for the former, flight punctuality as well as additional services, such as luggage transfer,

<sup>149</sup> Commission Decision of 27 February 2013, Ryanair/ Aer Lingus III, Case No COMP/M.6663, recitals 49-50.

<sup>150</sup> Benacchio, M. (2008). Consolidation in the air transport sector and antitrust enforcement in Europe, EJTIR, 8, no. 2, p. 91-116.

<sup>151</sup> Id.

<sup>152</sup> They are also called "premium passengers" insofar as long-haul flights are concerned. Among others, Benacchio M. (2008). Consolidation in the air transport sector and antitrust enforcement in Europe, EJTIR, 8, no. 2.

<sup>153</sup> Benacchio, M. (2008). Consolidation in the air transport sector and antitrust enforcement in Europe, EJTIR, 8, no. 2, p. 91-116.

are essential. The two categories (point-to-point and connecting passengers) are normally considered to belong to different relevant markets.

Price- and time-sensitivity are but some of the aspects in the demand-side substitutability analysis. Although ticket fares impact the degree of substitutability between low-cost flights and 'traditional' services, so do other non-price factors such as *"the destination to the airports and the aircrafts used, as well as the type of tickets and pricing policies (restrictions vs. flexibility in changing flight time)"*<sup>154</sup>.

To conclude: (a) a pair of origin/destination routes is considered a separate relevant service market; (b) a distinction and further sub-segmentation can be made between business and non-business passengers, as well as point-to-point passengers and connecting flight passengers.

To conclude, another important development which has impacted the approach to market definition in the context of demand-side substitutability and possible ways to sub-segment the demand between various categories of customers has been the emergence and expansion of LCCs. The capacity increase and lower fares brought about by the emergence of LCCs has brought about the emergence of additional demand. In particular, this has led to increased demand for air transport services from price-sensitive passengers, given the lower fares applied by LCCs. LCCs and FSCs have subsequently started to compete to capture the less time-sensitive, more price-sensitive part of the demand.

There may also be destination-insensitive customers who choose the destination on the basis of price only. It would be necessary to examine whether a separate sub-segment of such passengers could be identified in the broader leisure passenger category. Furthermore, some traditional assumptions on sub-segmentation may no longer be valid. For example, the emergence of LCCs has challenged the assumption that business customers are time-sensitive but not price-sensitive. Indeed, *"market investigations reported that the price-sensitivity of business customers has increased over time due to new possibilities to book cheaper flights."*<sup>155</sup> There is a group of corporate customers who attach particular importance to the geographic coverage or air transport service networks, who may also engage in route-specific negotiations for discounts.

From the viewpoint of **supply-side substitutability**, the role of network air carriers ("**network effects**") comes into play. The O&D approach to market definition may need to be adapted to take this factor into account since, when the role of networks and alliances is considered, the **market may be broader** than a strict demand-side approach in terms of city-pair routes may suggest. In this respect, the *"competition between hubs and between alliances as well as the bundle of routes offered by the merging airlines from an airport and the attractiveness of the frequent flying programmes (FFP) could"*<sup>156</sup> matter to determine how specific categories of client (e.g. corporate clients) consider a given route/fare attractive. Such competitive constraints from the supply-side affect the actual and potential competition. Competition between hubs and between alliances renders the approach to market definition analysis more complex<sup>157</sup>, since hub-and-spoke carriers compete on the size and coverage of their respective networks<sup>158</sup>. For example, the US Department of Transport (DOT) also looks at network factors<sup>159</sup>. The European Commission has also taken the effect of alliances and networks on

<sup>154</sup> Reichmut, J., Ehmer, H., Berster, P., Bischoff, G., Grimme, W., Grunewald, G., Maertens, S., DLR Topical Report, Analyses of the European air transport market: Airline Business Models (2008), [online] Available at: [https://ec.europa.eu/transport/sites/transport/files/modes/air/doc/abm\\_report\\_2008.pdf](https://ec.europa.eu/transport/sites/transport/files/modes/air/doc/abm_report_2008.pdf).

<sup>155</sup> Benacchio, M. (2008). Consolidation in the air transport sector and antitrust enforcement in Europe, EJTIR, 8, no. 2, p. 91-116.

<sup>156</sup> Id.

<sup>157</sup> Dziedzic, M., Warnock-Smith, D. (2016). The Role of Secondary Airports for Today's low-cost Carrier Business models: the European case, in Research in Transportation Business and Management.

<sup>158</sup> OECD, supra, 2014.

<sup>159</sup> Id.

market definition into account in merger decisions such as Lufthansa/Austrian Airlines<sup>160</sup>. In that case, the Commission found that *“networks have some importance for corporate customers whose demand is driven both by network effects and O&D considerations, individual customers are mainly concerned with finding the cheapest and most convenient connection between two cities.”*<sup>161</sup>

For the purposes of the definition of the relevant market, **market and technological developments** in the relevant industry sector need also need to be taken into account. Technical developments and ecological concerns entail analysing **whether alternative modes of transport** to air transport (e.g. high-speed rail) **belong to the same relevant product market for a given route**. For example, in several EU merger cases, *“high-speed rail connections have been considered as a possible intermodal alternative to air travel also when time-sensitive passengers are concerned.”*<sup>162</sup> For example, alternative means of transport, such as ferries, were taken into account in the European Commission’s Olympic/Aegean Airlines merger decision<sup>163</sup>. In addition, in 2012, the Italian Competition Authority investigated the air transport and high-speed rail substitutability between Alitalia and Trenitalia for the Rome Fiumicino airport-Milan Linate airport route<sup>164</sup>. The development of high-speed rail services throughout the last decades has gradually blurred the concept of competition and cooperation between such services and air transport services. A case study below analyses this further.

The rise of the LCCs has also had repercussions on the supply-side substitutability analysis in terms of **airport substitution**. The evolution of the LCC model is now increasingly seeing LCC airlines compete alongside network rivals at primary airports. Airport managers are looking at LCCs in order to boost numbers at the airports, putting pressure on FSCs<sup>165</sup>, which thus have to keep up with increased competition from the LCCs. Indeed, from a geographic standpoint, LCCs, which were initially mainly focused on point-to-point connections to/from regional airports, have recently started expanding into major hub airports, thereby directly competing with traditional FSCs on certain routes. This has led to the freeing up of capacity constraints<sup>166</sup>: on the supply-side, taking into account LCCs, air transport services at one airport constrain the provision of similar services at another adjacent airport. In those instances, the airports in a multiple-airport metropolitan area can be grouped into a single destination, so that relevant markets are taken to be **“airport pairs” rather than “city pairs”**.

#### 4.2.2. Market power amounting to dominance

Having a dominant position in a relevant market means *“a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition ... on the relevant market by giving it the power to behave to an appreciable extent independently of its competitors, customers and ultimately of its consumers”*<sup>167</sup>. Under EU competition law, it is not in itself illegal for an undertaking to be in a dominant position and such a dominant undertaking is entitled to compete on its merits, including engaging in price competition. However, when competing in a given market, a dominant company must observe certain constraints. The undertaking concerned has *“a special responsibility not to allow its conduct to*

<sup>160</sup> Commission Decision of 28.8.2009, Lufthansa/ Austrian Airlines, Case No. COMP M.5440.

<sup>161</sup> Id.

<sup>162</sup> Macario R., Van De Voorde, E. (2011), Critical Issues in Air Transport Economics and Business. Routledge, p. 349.

<sup>163</sup> In the Athens/Mykonos route. European Commission decision Aegean/Olympic Air I (2011).

<sup>164</sup> Valeri, E., Competition between air and high speed rail: the case of the Rome-Milan corridor, FSR Transport, Vol. 1, 2014, p. 8–9.

<sup>165</sup> Dziedzic, M., Warnock-Smith, D. (2016). The role of secondary airports for today’s low-cost carrier business models: the European case, in Research in Transportation Business and Management.

<sup>166</sup> Id.

<sup>167</sup> Judgment of 13 February 1979, Hoffmann-La Roche & Co. AG v Commission of the European Communities, Case 85/76, ECLI:EU:C:1979:36.

*impair genuine undistorted competition on the common market.*"<sup>168</sup> According to the well-established case law of the CJEU, *"the scope of the 'special responsibility' of a dominant firm must be considered in the light of the specific circumstances of each case."*<sup>169</sup>

The CJEU has held that **very large shares** are in themselves, and save in exceptional circumstances, evidence of the existence of a dominant position<sup>170</sup>. Beyond market shares, other factors, matter in establishing dominance, such as **barriers to entry**. As the possibility of market entry increases, the possibility of the dominant firm exercising market power decreases, with the result that a dominant position in a given market may be harder to establish.

Barriers to entry may be **structural, behavioural or regulatory**<sup>171</sup>. Network effects, such as alliances and networks, as well as frequent flyer programmes, constitute a separate type of entry barrier. The liberalisation that also led to the rise of LCCs' entailed lowering regulatory barriers to entry compared to the 1980s. Nowadays, access to airport slots and competing high-speed rail (HSR) links are perceived as effective entry barriers. For example, in the Lufthansa/KLM merger, slot shortages were considered as entry barriers. The hub structure of the airport is also a type of structural barrier. In the Lufthansa/Austrian Airlines case, Lufthansa's dominance at the Frankfurt hub was also considered an entry barrier.

In addition, some barriers to entry can be behavioural. They relate to the potential for predatory conduct such as strategic pricing. As seen above, LCCs target and capture a particular part of the customer segment with a lower willingness to pay. The upper threshold of that willingness was considerably below the lowest tariff of the network carriers. In the absence of low-cost airlines, such customers would be economically excluded from air travel<sup>172</sup>. Therefore, demand expanded with the entry of LCCs and competition emerged for this demand between FSCs and LCCs. With regard to incumbents, which enjoyed some market power on a given route prior to LCCs' entry, the competition brought by LCCs gave rise to some pricing practices, which may be legitimate price competition, but some of which may also be likely to foreclose competitors. As such, these examples of pricing strategies on the side of the dominant firm, when adopted not as legitimate price competition, i.e. competition on its merits, are types of behavioural entry barriers.

### 4.3. Predatory pricing: theory of harm

**Predatory pricing strategies usually involve below-cost pricing.** Predatory pricing is defined as a **(deliberate) commercial strategy, undertaken by a dominant firm, of attempting to drive competitors out of the market by setting prices below production costs.** Lower prices in the short run are not always in the best interest of consumers. The theory of harm is as follows: in the event that a dominant firm engaging in predation succeeds in driving existing competitors out of the market and in deterring the future entry of new firms, **it can subsequently raise prices and earn higher profits** than would be the case should competitive conditions prevail in the relevant market.

<sup>168</sup> Communication from the Commission — Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, para 1. Judgment of 9 November 1983, NV Nederlandsche Banden Industrie Michelin v Commission of the European Communities, Case 322/81, ECLI:EU:C:1983:313.

<sup>169</sup> Judgment of 14 February 1978, United Brands Company and United Brands Continentaal BV v Commission of the European Communities, Case 27/76, ECLI:EU:C:1978:22.

<sup>170</sup> Judgment of 13 February 1979, Hoffmann-La Roche & Co. AG v Commission of the European Communities, Case 85/76, ECLI:EU:C:1979:36,461, p. 41.

<sup>171</sup> This part draws on the Report by the European Competition Authorities (ECA) Air Traffic Working Group, Mergers and alliances in the civil aviation, 2004, available at <https://ec.europa.eu/competition/publications/eca/report.pdf>.

<sup>172</sup> Macário, R., Reis, V., Viegas, J., Meersman, H., Monteiro, F., Van de Voorde, E., Vanelslander, T., Mackenzie-Williams, P., Schmidt, H., The Consequences of the Growing European Low-cost Airline Sector Transport and Tourism, Study Policy Department Structural and Cohesion Policies, European Parliament, Brussels, 2007.

The relevant CJEU case law sets out a **two-tiered test for predatory pricing**: 1) **prices below the average variable costs (AVC)** by a dominant firm will be **presumed predatory**, and it is up to the dominant firm to rebut the presumption (“predatory prices”); and 2) **prices below the average total costs (ATC) but above the AVC** will be regarded as **abusive, if they are part of a strategy to eliminate competitors** (“predatory pricing strategies”).

Predatory prices are prices set at a level, for which the only explanation is the purpose of eliminating the competitor or deterring entry. Such is the case for below-AVC pricing.

Predatory pricing strategies include other below-cost pricing strategies, which are not in themselves unequivocally predatory, but could have the same effect, when they are part of an illegitimate strategy to drive a competitor out of the relevant market or keep out new entrants. These prices are typically above AVC, but below ATC, and are considered predatory when intent to predate is proven. The CJEU has clarified that **in such cases additional elements are to be taken into account which provide proof of the predator’s intention to exclude the competitor**, given that other commercial considerations may lie at the heart of the pricing policy. In addition, pricing conduct such as margin squeeze<sup>173</sup>, or selective price cuts<sup>174</sup> may be abusive although the pricing is above average total costs<sup>175</sup>.

There is an inherent difficulty in identifying predatory pricing conduct, as the multiple forms of tests and evaluation criteria are not sophisticated enough to capture the complexities of the pricing policies adopted by air service carriers. In addition, the tests applied by national competition authorities, in particular on the cost benchmarks, diverge or overlap at times. This generates uncertainty for market players, could give rise to inconsistencies in application of EU competition law and risks rendering some predatory conduct not easily detectable by national competition authorities.

#### 4.3.1. Presumption of predatory pricing: below-AVC pricing conduct

The CJEU first developed the presumption that certain prices are abusive of a dominant position in the Akzo test<sup>176</sup>: this is the case **when prices are set below AVC**. This is because elimination of competitors would be the only economic rationale of such prices<sup>177</sup>, since **it would otherwise be more rational not to produce and sell that product**. Similarly in *Tetra Pak II v Commission* (hereinafter, ‘*Tetra Pak*’), the CJEU found that prices were considerably lower than AVC and, therefore, considered that it was not necessary to prove intention to eliminate competitors<sup>178</sup>. In these circumstances, a presumption of an eliminatory intent exists and it is **for the presumed predator to rebut this presumption**.

The CJEU also considered that in such cases it is not even necessary to demonstrate specifically that the undertaking in question had a reasonable prospect of recouping the losses incurred<sup>179</sup>. This means that in the EU, a predatory intent does not need to be successful for an abuse of dominant position to occur. This is instead the case in the USA, where the courts require a reasonable possibility of

<sup>173</sup> Judgment of 10 July 2014, Telefónica SA and Telefónica de España SAU v European Commission, Case C-295/12P, ECLI:EU:C:2014:2062. This is the seminal case.

<sup>174</sup> Judgment of 16 March, Compagnie maritime belge SA (C-395/96 P) and Dafa-Lines A/S (C-396/96 P) v Commission of the European Communities, Joined cases C-395/96 P and C-396/96 P, ECLI:EU:C:2000:132.

<sup>175</sup> Such practices or other exclusionary pricing abuses, as well as other types of competition-related exploitative abuses (such as excessive pricing) will not be analysed in depth for the purposes of this study, though they may also entail violation of Article 102 TFEU.

<sup>176</sup> Judgment of 3 July 1991, C-62/86, Akzo Chemie BV v Commission of the European Communities, ECLI:EU:C:1991:286.

<sup>177</sup> *Id.*, para 71.

<sup>178</sup> Judgment of 6 October 1994, T-83/91, Tetra Pak International SA v Commission of the European Communities, ECLI:EU:T:1994:246, para 148.

<sup>179</sup> Judgment of 6 October 1994, T-83/91, Tetra Pak International SA v Commission of the European Communities, ECLI:EU:T:1994:246, para 150. According to the CJEU, “it is not necessary to demonstrate specifically that the undertaking in question had a reasonable prospect of recouping losses so incurred.”



recoupment of losses for such pricing to amount to a competition law violation. However, the competition authorities applying EU law take into account the possibility of recoupment of losses as an element in their competition analysis of the conduct. Although it is not necessary, it could be a useful element in the analysis of whether certain conduct is or not legitimate price competition, i.e. competition on its merits.

#### 4.3.2. Additional elements when below-cost pricing is above AVC

According to standing CJEU practice, prices above AVC but below ATC would be abusive of a dominant position when they are part of an overall commercial strategy to exclude a competitor<sup>180</sup>. Hence, a mere cost-price analysis does not suffice to establish abuse, as would be the case when fares are below AVC. In such situations, it is also necessary to assess and find the likely **exclusionary effect** as well as subjective **intent of the firm to exclude competitors** (or intent to predate) (hereinafter '**eliminator intent**'). Looking at whether there is **likelihood to exclude ('foreclose') a competitor** is part of the test in all exclusionary abuses. It is the standard of proof. Intent to eliminate is something specific to predatory pricing and only in the case of pricing above AVC. Intent has a subjective element, while the likely foreclosure effect does not.

The **burden of proof in establishing intent to eliminate falls upon the authority** investigating the abuse (the national competition authority or the European Commission). This is not easy to establish and often entails investigating the company's internal documents to look for such an exclusionary commercial strategy. In such cases, *indicia* may be used to understand whether there is an eliminator intent on the side of the dominant firm. In particular, both in *Akzo*<sup>181</sup> and *Tetra Pak II*, evidence of the existence of such intent was found in the company's internal documents.

While they are sometimes separate elements, even in the case law of the Courts, such elements appear to be conflated. For example, in *Post Danmark*, the CJEU concluded that if a dominant undertaking applied prices which are below ATC but above average incremental cost (AIC)<sup>182</sup>, this could be abusive if the practice produces "*an actual or likely exclusionary effect, to the detriment of competition and, thereby of consumers' interests.*"<sup>183</sup>

When it comes to whose costs should be looked at, they are the dominant firm's own costs. In addition, not every likely foreclosure effect matters: the 2009 Commission Guidance highlights how competition on prices may amount to an abuse when the behaviour of a dominant undertaking has already been or is capable of excluding competitors "*which are considered to be as efficient as the dominant undertaking*" (the so called '**as efficient competitor test**')<sup>184</sup>. The effect on competition of pricing strategies of a dominant undertaking needs to be assessed assuming that the competitor is as efficient as the dominant firm. When less efficient competitors are likely to be driven out of the relevant market, such an effect is not demonstrated.

Moreover, based on CJEU case law, the 2009 Guidance endorses **two indicators as the cost benchmark**, allowing the Commission to assess whether a dominant undertaking is applying predatory prices which may foreclose a hypothetical competitor that is as efficient as the dominant undertaking itself:

<sup>180</sup> Judgment of 6 October 1994, T-83/91, *Tetra Pak International SA v Commission of the European Communities*, ECLI: EU:T:1994:246., para. 149 and 151.

<sup>181</sup> Judgment of 3 July 1991, C-62/86, *Akzo Chemie BV v Commission of the European Communities*, ECLI:EU:C:1991:286.

<sup>182</sup> This is the average of additional costs of supplying additional input. Long run implies that all inputs are considered variable. This measure is typically used in telecommunications, or, as the case was in *Post Danmark*, where a multi service company is at stake.

<sup>183</sup> Judgment of 27 March 2012, C-209/10, *Post Danmark A/S v Konkurrencerådet*, ECLI: EU:C:2012:172 ,para. 37, 44.

<sup>184</sup> Commission Guidance on its enforcement priorities on Article 102 TFEU, para. 23.

- long-run average incremental cost (LRAIC) (i.e. the average of all the (variable and fixed) costs that a company incurs to produce a particular product), and
- average avoidable costs (AAC) (i.e. average costs that could have been avoided if the service had not been provided).

Through these indicators it is possible to assess whether the competitor, who is as efficient as the dominant firm, would be able to withstand competition despite the pricing strategy applied by the dominant undertaking. The Guidance establishes a form of safe harbour (i.e. presumption of legality) when the “prices of the dominant undertaking cover its long-run average incremental costs (LRAIC)”. In addition, according to the Guidance, when the dominant undertaking’s prices do not cover LRAIC, the European Commission will still look at other factors before determining whether there is likely anticompetitive foreclosure. These factors are “the conditions on the relevant market (for example the existence of economies of scale and/or scope), the duration of the conduct of the dominant undertaking and the part of the market affected by it, any direct evidence of an exclusionary strategy or of actual foreclosure, and also the situation of the dominant undertaking’s competitors, customers and input suppliers.”<sup>185</sup> Therefore, in this Guidance the Commission itself clarifies that the “evidence of an exclusionary strategy” (i.e. intent to eliminate, the outcome of which, as seen above, need not be successful) is but one small part of the elements in establishing whether there is a likely foreclosure effect.

According to the CJEU, “a pricing policy ... cannot be considered to amount to an exclusionary abuse simply because the price charged to a single customer by a dominant undertaking is lower than the average total costs attributed to the activity concerned, but higher than the average incremental costs pertaining to the latter.”<sup>186</sup> In other words, pricing above AIC but below ATC is not in itself abusive. A *quid pluris* is needed to substantiate predatory pricing abuse in this case.

Against this background, the **price-cost benchmarks** applied by the EU courts and the Commission (i.e. AVC, but also depending on the circumstances, AAC and LRAIC), have been **contested in the economic literature**. Some scholars have opined that ‘marginal cost’ is the appropriate cost benchmark, suggesting that pricing above marginal cost should be presumed legal<sup>187</sup>. Their analysis influenced the CJEU in the *Akzo* case and it had a significant influence on US courts. Other scholars have suggested the AAC as the benchmark to establish whether prices are predatory<sup>188</sup>. Such a benchmark has been used by the UK’s CMA (formerly, OFT). Other scholars have suggested that price-cost tests are imperfect to detect predation<sup>189</sup>. To date, there is therefore as yet no consensus among economists as to which cost benchmark is more appropriate.

Beyond the cost-price benchmark aspects, **market structure is another important element** to consider in the analysis on whether intent to eliminate characterises the dominant firm’s strategy, as it can provide circumstantial evidence of intent to predate rather than conscious and benign adaptation to changed market conditions. This aspect will be looked at in more detail in Section 5.1.3.

Moreover, a reference to the **barriers to entry** in the specific market could be relevant for the competitive analysis, i.e. whether, in the presence of such barriers, predatory pricing strategies are more likely to occur. According to the so-called theory of contestable markets<sup>190</sup>, predatory pricing will

<sup>185</sup> Guidance, para. 20.

<sup>186</sup> Judgment of 27 March 2012, *C-209/10, Post Danmark A/S v Konkurrencerådet*, ECLI:EU:C:2012:172, para. 37.

<sup>187</sup> Areeda, P., Turner D. F. (1975). Predatory Pricing and Related Practices under Section 2 of the Sherman Act, Harvard Law Review, Vol. 88, No. 4 pp. 697-733.

<sup>188</sup> Baumol, W.J. (1979). Quasi-Performance of Price Reductions: A Policy for Prevention of Predatory Pricing, Yale Law Journal, 89: 1-26.

<sup>189</sup> Rey, P., Tirole, J. (1997). Analyse Économique de la Notion de Prix de Prédation », Revue Française d’Économie, vol. 12, p. 3-32.

<sup>190</sup> Baumol, W. J., Panzar, J. C. Willig, R. D. (1982). Contestable Markets and the Theory of Industry Structure.

rarely ever be rational in contestable markets (e.g. when barriers to entry are low, for example, or sunk costs are low or zero). The reasoning for this is that, even if competitors may be driven out of the market when barriers to entry are low, a new entrant may come in 'contesting' the dominant firm's profits. By contrast, in a market with high entry barriers the rationale for predatory pricing is higher. The air transport liberalisation policy in the 1990s and the ensuing market entry of LCCs afterwards is a living example of contestability in the air transport sector<sup>191</sup>. Despite that, and although the air transport sector is more contestable than the rail transport sector, there is a significant degree of brand loyalty, and there are high fixed costs involved with buying or renting planes (i.e. inherently making market entry more complex). In addition, abiding by sector-specific regulation is a specific cost for the undertaking. Indeed, as seen above, incumbents may at times use pricing strategies as a way to raise entry barriers.

In this context, another piece of circumstantial evidence of intent to eliminate is the expected reaction of competitors. When the competitors react swiftly to predatory pricing behaviour, the possibility for the incumbent to profit from such strategy is questionable. Then, another alternative explanation for the conduct must be sought. Some empirical economic literature questions whether, in the air transport sector, the reaction of the incumbents to entry and their behaviour matters as an entry barrier, as only three percent of airline companies consider incumbents' pricing discounts "*an 'absolutely effective' barrier*"<sup>192</sup>.

Instead, factors such as capacity increases on the part of the incumbent must be examined in concomitance with predatory pricing to understand the overall exclusionary strategy: "*Claims of predation are more credible when they involve not only price cuts, but also significant capacity increases or other changes in network operations by Incumbent. Entry by Incumbent into a route it was not currently serving would seldom be a normal competitive response to a rival*"<sup>193</sup>. These are all examples of circumstantial evidence to establish the eliminatory intent.

#### 4.3.3. Case law on predatory pricing in the air transport sector

Predatory pricing claims in passenger air transport have seldom been upheld<sup>194</sup>. For example, in 2004, Virgin filed a complaint with the European Commission alleging that Alitalia had engaged in 'predatory pricing' on certain routes. Similar allegations were made by Virgin against Spain's Iberia, claiming that Iberia had engaged in predatory pricing conduct on the routes to and from Brussels and Barcelona and Madrid. None of them led to a finding of abuse.

The **imperfection of price cost benchmarks** and the **difficulty of proving intent to eliminate competitors** (as outlined above) explain, in our opinion, why predatory pricing claims have not often been upheld. First, the dominance on a given route of the undertaking applying the pricing practice must be proven. In addition, air service fares are calculated dynamically and are driven by many factors. Hence, applying the price-cost benchmarks may lead to oversimplification<sup>195</sup>. In addition, proving an exclusionary strategy (i.e. the intent to foreclose the competitor) and distinguishing it from legitimate price competition is also a daunting task for a competition authority. Finally, competitors can retaliate,

<sup>191</sup> OECD, 2004, Roundtable discussion on predatory foreclosure, Note by Germany.

<sup>192</sup> Pinto, G.M., Competition and Predation in the Airline Industry, Journal of Air Law and Commerce, 2009, Volume 73, Issue 4.

<sup>193</sup> Fones, R.W., Predation in the airline industry, Remarks, American Bar Association, June 12, 1997.

<sup>194</sup> Currently, there are some ongoing cases outside the EU, for example in Canada. "*In December-2018, the Canadian Competition Bureau launched a predatory pricing investigation into passenger air transport company WestJet relating to its supposed "ULCC" Swoop*". Air fares priced below avoidable cost are illegal in Canada.

<sup>195</sup> OECD, 2014, Airline competition, Background paper from the Secretariat. Also see United States of America vs. AMR Corporation, et al., at 73.

i.e. by applying lower prices, thus leading to a price war, thwarting the plausibility of predatory pricing as a successful strategy to exclude a competitor, since the anticipated actions by competitors may render such a strategy unprofitable. Indeed, LCCs do not follow generic strategies and select their markets carefully: therefore, predicting how competitors will react is a complex task<sup>196</sup>. An LCC applies lower prices as part of its business model, i.e. to compete to capture the leisure part of the demand, and it is unlikely to do so aggressively to exclude a competitor for a given route. The evidence establishing intent to eliminate a competitor may be hard to build. This, in turn, explains why it is complex for a national competition authority to prove such abuse.

#### 4.4. National competition authorities' interventions against airlines

As mentioned above, predatory pricing has been alleged in several instances, but it has rarely been proven. So far, at EU level, there are no precedents for finding predatory pricing in the passenger air transport sector. Therefore, we examine a selection of national precedents<sup>197</sup>.

##### 4.4.1. Germany: BKartA's decision in the Lufthansa case

Two cases, both involving Lufthansa, are relevant for this study. In a 2002 landmark case, the BKartA considered that Lufthansa's conduct amounted to predatory pricing. In the second case, the BKartA considered whether to initiate proceedings against Lufthansa for abusive pricing on German domestic routes, but eventually decided not to do so. We briefly mention this second allegation for the purposes of completeness, as an example of other pricing abuses beyond predatory conduct.

###### a) Prohibition of conduct amounting to predatory pricing

In 2002, the BKartA found<sup>198</sup> Lufthansa liable for having abused its dominant position on the relevant market, the Frankfurt-Berlin route, by means of predatory pricing.

The BKartA established that by *"adopting a combination of lowered ticket prices and new features included in the same tickets, Lufthansa deliberately incurred in losses in order to squeeze out<sup>199</sup> from the Frankfurt-Berlin route its main competitor, Germania Fluggesellschaft"* and thus abused its dominant position, infringing Article 102 of the TFEU. First, the BKartA took into account various elements related to that specific route, such as its ticket price history

##### Lufthansa – Germania case The facts of the case

Until 2001, only Lufthansa served the Frankfurt-Berlin route. At that time, tickets cost EUR 240 one way. This was a one-way flexible economy ticket without substantial restrictions. In 2001, Germania started operating flights between Frankfurt and Berlin at a price of EUR 99 one way. In order to respond to this entry, Lufthansa introduced a price for the round-trip ticket of EUR 200. Germania responded by bringing its one-way ticket price down to EUR 55 and then putting it up again to EUR 99. To respond, Lufthansa raised (lowered? You do not actually say what the price of a one-way ticket was previously.) its price for a one-way ticket to EUR 105.

<sup>196</sup> Lall, A. (2005). Predatory Pricing: Still a rare occurrence?, Chapter 2, p. 37-56 in Forsyth P., Gillen D.W., Mayer O. G., and Niemeier H. M. eds, Competition versus Predation in Aviation Markets: A Survey of Experience in North America, Europe and Australia, Ashgate Publishing.

<sup>197</sup> Milligan, J. (2017), European Union Competition Law in the Airline Industry, London, Sec. 7.4.3.2.

<sup>198</sup> Bundeskartellamt, 9. Beschlussabteilung, B 9 – 144/01, BESCHLUSS in dem Verwaltungsverfahren gegen Deutsche Lufthansa AG, Köln wegen Missbrauchs einer marktbeherrschenden Stellung nach § 19 GWB, 18 February 2002, available at: [https://www.bundeskartellamt.de/SharedDocs/Entscheidungen/DE/Entscheidungen/Missbrauchsaufsicht/2002/B9-144-01.pdf?\\_\\_blob=publicationFile&v=4](https://www.bundeskartellamt.de/SharedDocs/Entscheidungen/DE/Entscheidungen/Missbrauchsaufsicht/2002/B9-144-01.pdf?__blob=publicationFile&v=4).

<sup>199</sup> Despite using the wording "squeeze out", the abusive conduct was predatory pricing and not margin squeeze.

or the entry barriers for airlines on the Frankfurt-Berlin route<sup>200</sup>. The BKartA carried out a price-cost test. The fare was above average variable cost, but below average total cost. Hence, in alignment with the Akzo test (which was referred to in the decision) the BKartA analysed whether there was intent to eliminate a competitor on the part of Lufthansa. To this end, circumstantial evidence was taken into account to conclude that the price was part of Lufthansa's overall strategy to foreclose/eliminate the competitor. Furthermore, Lufthansa's ability to recoup losses was also considered by the BKartA as a factor to conclude that this was an exclusionary strategy. As seen above<sup>201</sup>, this is not a requirement to substantiate the finding of predatory pricing as such, but it can be taken into account by the national competition authority when it comes to inferring intent to eliminate a competitor.

More specifically, Lufthansa's overall strategy to exclude the competitor was inferred by the BKartA from the following circumstances: i) Lufthansa only introduced new prices on this route, but not on others; ii) it deviated from its standard ticket conditions to mirror those offered by Germania; and iii) it had already used a similar strategy in the past. In BKartA's view, the strategy had no explanation other than that of seeking to eliminate its competitor Germania, since it both "*restricted Germania's opportunity to compete on the market and deterred entry by other potential competitors, therefore substantially affecting competition in the market.*" Hence, Lufthansa was ordered to cease the abuse and was banned from imposing a one-way route fare, which was not at least EUR 35 higher than its competitor's (Germania's) fare for the same one-way route<sup>202</sup>.

This is evidence that competition authorities are often prepared to intervene even when prices are lower in the short run, as the dominant firm can raise prices above the competitive level once it has driven the competitor out of the market. This would be detrimental to the interest of consumers in the long run. As a result, the BKartA also indirectly protected consumers with this prohibition decision.

*b) Decision not to initiate proceedings for abusive pricing<sup>203</sup>*

After Lufthansa had become the only operator on some domestic flight routes due to the bankruptcy of Air Berlin in August 2017, concerns arose that the prices applied by Lufthansa on those routes had become excessive. Indeed, BKartA found that in November and December 2017 the average prices on such routes increased by approximately 25-30% compared to the level of the previous year. However, the BKartA decided not to initiate proceedings against Lufthansa, as the price increases did not last for long. UK airline EasyJet entered the market after buying some of Air Berlin's assets, thus re-introducing competition in the routes on which Air Berlin operated previously. In its decision not to initiate proceedings, the BKartA also took into account the fact that the price rises could also have been attributed to a certain extent to the significant decline in capacity due to Air Berlin's insolvency, which would have led to price increases even under competitive circumstances.

This case shows that there is potential for competition authorities to intervene against exploitative behaviour and protect consumers directly, i.e. by prohibiting excessive prices. However, intervention

<sup>200</sup> Bundeskartellamt, 9. Beschlussabteilung, B 9 – 144/01, BESCHLUSS in dem Verwaltungsverfahren gegen Deutsche Lufthansa AG, Köln wegen Missbrauchs einer marktbeherrschenden Stellung nach § 19 GWB, 18 February 2002, available at [https://www.bundeskartellamt.de/SharedDocs/Entscheidung/DE/Entscheidungen/Missbrauchsaufsicht/2002/B9-144-01.pdf?\\_\\_blob=publicationFile&v=4](https://www.bundeskartellamt.de/SharedDocs/Entscheidung/DE/Entscheidungen/Missbrauchsaufsicht/2002/B9-144-01.pdf?__blob=publicationFile&v=4).

<sup>201</sup> In the CJEU *Tetra Pak II* case, to which the BKartA itself referred. More about this above in Section 4.3.1.

<sup>202</sup> Bundeskartellamt, 9. Beschlussabteilung, B 9 – 144/01, BESCHLUSS in dem Verwaltungsverfahren gegen Deutsche Lufthansa AG, Köln wegen Missbrauchs einer marktbeherrschenden Stellung nach § 19 GWB, 18 February 2002, available at [https://www.bundeskartellamt.de/SharedDocs/Entscheidung/DE/Entscheidungen/Missbrauchsaufsicht/2002/B9-144-01.pdf?\\_\\_blob=publicationFile&v=4](https://www.bundeskartellamt.de/SharedDocs/Entscheidung/DE/Entscheidungen/Missbrauchsaufsicht/2002/B9-144-01.pdf?__blob=publicationFile&v=4). Also cited in OECD, *Airline competition*, Background paper from the Secretariat, 2014.

<sup>203</sup> Bundeskartellamt, Case Summary 29.5.2018, No proceeding against Lufthansa for abusive pricing, Ref:B9-175/17, Date of Decision: May 2018, available at [https://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Fallberichte/Missbrauchsaufsicht/2018/B9-175-17.pdf?\\_\\_blob=publicationFile&v=2](https://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Fallberichte/Missbrauchsaufsicht/2018/B9-175-17.pdf?__blob=publicationFile&v=2).

against excessive prices remains highly exceptional to avoid competition authorities becoming a price regulator. It is predominantly the role of specific regulatory frameworks to set the conditions for trading in regulated network industries' markets, including, when applicable, prices<sup>204</sup>. In addition, intervening on prices may risk doing more harm than what it is purported to solve. National competition authorities have not been shy to adopt such interventions in markets where barriers to entry are high, such as pharma. However, this case also shows that sometimes the intervention of competition authorities, although possible, becomes unnecessary, as market forces bring about the necessary corrections faster.

#### 4.4.2. Lithuania: FlyLAL versus Air Baltic

Another case involving predatory practices in the passenger air transport sector was argued before the Lithuanian courts, when Lithuanian airline flyLAL sued Latvian airline Air Baltic and Riga airport. FlyLAL claimed alleged abuse of a dominant position by Air Baltic and Riga Airport in the relevant market of flight routes to and from Vilnius and sought compensation for the damage resulting from such conduct, as well as from an alleged anti-competitive agreement between the co-defendants, Air Baltic and Riga Airport<sup>205</sup>.

In 2016, the Regional Court of Vilnius endorsed FlyLAL's claims and found that Air Baltic should be liable to compensate flyLAL for the damage suffered. The procedure was the object of a preliminary ruling before the CJEU<sup>206</sup>.

#### 4.4.3. UK: Air Southwest versus Flybe

In 2010, Air Southwest lodged a complaint with the UK competition authority OFT (currently, Competition and Markets Authority) claiming that Flybe's pricing conduct on a route in competition with Air Southwest constituted an abuse of a dominant position by means of predatory pricing<sup>207</sup>. Flybe had applied below AVC prices out of and to some London airports. The complaint alleged that Flybe's aim was to squeeze Air Southwest out of the Plymouth to Newquay to London Gatwick routes or at eliminating Air Southwest as a competitor at Plymouth Airport. In defining the relevant markets, the OFT used the O&D approach. It then considered both Flybe's services on the Newquay to London Gatwick route as well as on a number of routes from Exeter Airport as focal products.

No significant barriers to entry deriving from slot availability or excessive sunk costs of entry were identified on any of the focal routes. Flybe was found to be dominant on the Exeter to Jersey and Exeter to Guernsey routes, but not on the Newquay to London Gatwick route, where Flybe faced sufficient competitive constraints from Air Southwest. During the period under investigation, on that route Air

#### FlyLAL vs Air Baltic The facts of the case

The Lithuanian airline flyLAL was the main carrier operating flights to and from Vilnius airport until 2004, when the Latvian Air Baltic began flying routes out of the airport, including some to the same destinations as flyLAL. As the Latvian airline developed a larger market share in the country, flyLAL's position declined and it was put into liquidation in 2009. The Lithuanian airline claimed that its collapse was caused by a predatory pricing strategy, based on Riga airport having granted Air Baltic discounts on its services so as to allow the airline to expand into Vilnius, undercut flyLAL on costs and drive it out of the market.

<sup>204</sup> See for example the discussion in Motta, M. and de Stree, A. (2007) 'Excessive Pricing in Competition Law: Never say Never?', in Konkurrensverket – Swedish Competition Authority (ed.), *The Pros and Cons of High Prices*.

<sup>205</sup> P. Whelan, *The Consistent Application of EU Competition Law - Substantive and Procedural Challenges*, Leeds, 2016, p. 174.

<sup>206</sup> Judgment of 5 July 2018, C-27/17, AB flyLAL-Lithuanian Airlines, in liquidation v Starptautiskā lidosta Rīga VAS Air Baltic Corporation.

<sup>207</sup> MPINF-PSWA001, Flybe Ltd, Office of Fair Trading (OFT) Decision, 5 November 2010.

Southwest held a market share that was greater than, or around the same as, that of the alleged predator.

The theory of harm was that Flybe might have attempted to eliminate Air Southwest from all routes, thus benefiting Flybe's other routes operating from a nearby regional airport. After a 17-month investigation, the OFT concluded that Flybe had not breached competition law.

The documentary evidence that the competition authority analysed did not provide sufficient evidence that Flybe's principal intention was to eliminate Air Southwest. This was important since, according to the OFT, there might have been a rationale that justified Flybe's behaviour, i.e. adaptation by Flybe to the competitive conditions in the relevant markets rather than intent to eliminate the competitor.

This case is an important example that demonstrates how difficult is to prove intent to eliminate a competitor when predatory pricing in the air transport sector is at issue.

#### **4.5. Predatory pricing in the rail and maritime transport sectors**

In this Section of the study, we provide a few illustrative examples of predatory pricing cases in rail and maritime passenger transport, both at EU level and at national level. Albeit in a different branch of the transport sector, such examples are relevant for the study because potentially abusive pricing strategies display similar features and the elements included in the analysis leading to finding predatory behaviour are similar.

##### **4.5.1. The Italian market for maritime passenger transport: the *Diano* case**

In accordance with EU legislation, predatory pricing is prohibited in Italy under Article 3 of Law No. 287/90. We have found no evidence in Italian proceedings of predatory pricing cases in the market for airline services. However, we have evidence of a major antitrust case involving predatory infringement in the market by maritime transport that the AGCM ruled on in 2002.

The market for maritime passenger transport is different from the passenger air transport sector, both in terms of regulation and of competition. However, the conduct described in this case could also be of interest to the passenger air transport market.

On 25 November 1998, the AGCM received a complaint from Diano S.p.A. ('Diano'), denouncing the anti-competitive behaviour of Caronte S.p.A. ('Caronte') and Tourist Ferry Boat S.p.A. ('Tourist') as part of their maritime transport activities in the Strait of Messina. Namely, in August 1998 Diano started offering a ferry service across the Strait of Messina, operating on the 'Reggio Calabria-Messina' route, a route not served at that time. This service was intended as an alternative to transport across the Strait, especially for commercial vehicles and commuters from Reggio Calabria. In October 1998, Tourist and Caronte started operating on the same route through their subsidiary Navigazione Generale Italiana S.p.A. ('NGI'). According to Diano, NGI's entry on to the 'Reggio Calabria-Messina' route was intended to force Diano to leave the market. Diano alleged that NGI set "*artificially low prices [...] even below cost*" for the 'Reggio Calabria-Messina' route with the exclusive aim of excluding Diano, the new entrant, from the market. Moreover, it claimed that NGI fixed its departure and arrival times so that they overlapped with those of Diano.

On 7 December 2000, the AGCM started proceedings against Tourist, Caronte and NGI for alleged infringement of Article 3 of Law No 287/90. The Authority concluded that the alleged abuse consisted in the adoption of an exclusionary strategy, aimed at confining the competitor Diano to a marginal position in the market for the vehicle ferry service across the Strait of Messina.

First, the AGCM noted that Tourist and Caronte, although legally distinct companies, could be considered as a single economic entity, following a process of so-called 'economic fusion' through the progressive pooling, from 1969, of the resources necessary for the development of their activity. The AGCM found that Tourist and Caronte, with their subsidiary NGI, held a dominant position in the reference market, with an aggregate market share around 80 %. The aggregate share of the dominant companies, besides being very high, was significantly higher than that of the other two players on the market: Ferrovie dello Stato (the state railways) and Diano, the new entrant.

In order to verify if the conduct adopted by Caronte and Tourist was aimed at squeezing Diano out of the market, the AGCM applied the theoretical principles in the CJEU Akzo case law. However, in assessing whether the fares were predatory the AGCM used a cost benchmark based on the concept of average incremental cost (short- and long-term).

According to the economic theory of incremental costs, to consider a pricing policy as predatory, the conditions of the following test must be met: (a) if the price is lower than the average incremental cost in the short term, it shall be considered predatory; (b) if the price is higher than the average long-term incremental cost, it cannot be regarded as predatory in itself; (c) if the price is between the two benchmarks, the finding of any predatory behaviour requires additional elements and an examination of the competitive environment in which it occurs.

The AGCM's analysis on the fares applied by Caronte and Tourist showed that the revenues from the ferry service on the 'Reggio Calabria-Messina' route were not sufficient, for the years 1999 and 2000, to cover both long and short-term incremental costs. Therefore, from the AGCM's perspective, the conditions were met for the companies' pricing strategy to be considered predatory.

As a result, in the final decision of 17 April 2002, the AGCM concluded that the abusive pricing strategy implemented by Caronte and Tourist on the 'Reggio Calabria-Messina' route had been carried out through a particularly aggressive pricing policy. It therefore concluded that it was aimed at preserving their dominant position in the ferry market on the Strait of Messina by hindering the activity of the new entrant. The strategy also allowed the dominant operator to create a reputation as an aggressive incumbent, which discouraged other potential competitors from entering the market. Finally, the preservation of this dominant position thus preserved put the companies in a position to recover in future the costs incurred in implementing the predatory strategy. Indeed, once the new entrant had been eliminated or marginalised, and by virtue of its established reputation as an aggressive incumbent, the dominant operator would be able to raise its fares, thereby recovering the losses incurred on the 'Reggio Calabria-Messina' route.

With the final decision of 2002, the AGCM established that the conduct of Tourist and Caronte constituted a breach of Article 3 of Law No 287/90 and ordered the two companies to stop the anti-competitive conduct<sup>208</sup>.

#### 4.5.2. The Czech passenger rail transport sector

In recent years, national competition authorities have been active in the railway sector<sup>209</sup>. In addition, in 2016, the European Commission started an investigation of an alleged abuse by means of predatory pricing involving the Czech railway incumbent České dráhy, a.s. (ČD). The investigation examined

<sup>208</sup> AGCM, decision of 17 April 2002, A267 - Diano/Tourist Ferry Boat-Caronte Shipping-Navigazione Generale Italiana. The AGCM also imposed a fine of 1,146,102 euros on Tourist, a fine of 1,096,034 euros on Caronte and a fine of 73,616 euros on NGI. The TAR Lazio upheld the AGCM's decision. In second instance, the Consiglio di Stato, reunited the proceedings and confirmed the position of TAR Lazio with the judgment of October 2, 2007, No. 5068.

<sup>209</sup> For example, in May and in June 2017 the Spanish National Commission on Markets and Competition fined RENFE and Deutsche Bahn *et al* for anti-competitive agreements, and RENFE for abuse of dominant position which limited international companies from accessing the Spanish market (price discrimination).



whether the rail transport company charged prices below costs with the aim of eliminating competition in rail passenger transport services in violation of Article 102 TFEU.

ČD is the main railway operator in the Czech Republic. Until 2011, it was the only rail company active on the Prague to Ostrava route. After the entry of competing passenger rail companies RegioJet in 2011 and LEO Express in 2012 on to this route, ČD significantly decreased the prices it charged to passengers on the route. To our knowledge, the Commission investigation is still ongoing.

In the meantime, at national level, in December 2017, the Czech Competition Office imposed a fine of CZK 367,805,000 (approximately EUR 14 million) on ČD for abuse of a dominant position on the Czech market for rail passenger transport in violation of Article 102 TFEU and the corresponding provision of national competition law. The Czech Competition Office considered that the company had abused its dominant position by engaging in below-cost pricing as it submitted excessively low bids in the tender procedures announced by the Ministry of Transport to win passenger rail transport contracts on certain regional routes. This investigation is interesting as it also shows that predatory conduct can sometimes occur in the context of public procurement procedures.

## 5. CASE STUDIES

### KEY FINDINGS

- **The predatory pricing case study** examines how technological developments (i.e. the uptake of HSR services) can impact the definition of the relevant market as a dynamic exercise. We also analyse the impact of market structure on the incentives for a dominant undertaking to implement predatory strategies. The analysis demonstrates the difficulties for competition authorities of differentiating between legitimate price competition and abusive predatory pricing conduct, which in turn explains the limited number of precedents in this area.
- **The Malta case study** examines the air passenger transport sector in Malta, which is mainly shared between an LCC, Ryanair, and the state-owned Air Malta, and recent developments, exploring the possible outcomes in terms of consumer protection and competition.

### 5.1. The predatory pricing case study

Due to technological developments in the transport sector, new high-speed rail lines can have an enormous influence on the provision of air passenger transport services<sup>210</sup>. Growing environmental concerns have led the EU to seek to speed up the delivery of high-speed rail lines<sup>211</sup>. In the light of these developments, train operators' commercial strategies have followed suit. One example could be the emergence of cross-border train operators. In September 2019, Eurostar and Thalys announced their intention to merge to form a high-speed train network in Europe. The aim is to increase the capacity of passengers per year on the combined Eurostar and Thalys networks to 30 million by 2030. In addition, starting in the summer of 2020, the Italian train services company Trenitalia, which operates high-speed rail services in Italy, will connect Milan and Paris in six hours. All these developments could impact customers' decisions in long-haul and short-haul transport modes of travel across the EU, including passenger air transport. In turn, when it comes to applying EU competition law, technological and commercial developments like these mean that high-speed rail services and passenger air transport services compete with one another on certain routes. This has an impact on the definition of the relevant market.

Against this background, this case study aims to analyse the extent to which technological and commercial developments such as these will impact the competition authorities' well-established approach to market definition in the air transport passenger sector.

This case study is developed as follows. First, we provide an overview of the current economic literature analysing intermodal competition and complementarity between rail and passenger air transport services. Second, we look at a concrete example, the Paris to Milan route and vice-versa, analysing what is material in terms of demand-side substitutability when it comes to relevant market definition. We

<sup>210</sup> Albalade, D., Bel, G., Fageda, X. (2015), Competition and cooperation between high-speed rail and air transportation services in Europe *Journal of Transport Geography* 42, 166-174.

<sup>211</sup> (former) European Commissioner for Transport, Violeta Bulc, 2018, press release, European Aviation: environmental report points to action to address sustainability and health challenges. This speech was presented to discuss the findings of the Commission's Second European Aviation Environmental Report.

will attempt to build our case by referring both to economic literature and some potentially relevant national competition authority precedents.

In line with this economic literature we conclude that predatory pricing findings cannot be made while ignoring how competition occurs on given routes (be it competition from high-speed rail, or competition among passenger air transport operators). We also conclude that traditional competition authority analysis in these markets, with its focus on the price-cost tests, may not be well suited to capturing all instances where a predatory strategy rather than benign price competition may be at work, something which the OECD pointed to already in 2014<sup>212</sup>. Further research may be needed to understand whether, and, in the affirmative, how the approach to predatory pricing in passenger air transport markets should or could be adapted to take this into account.

### 5.1.1. Air and rail transport: intermodal competition or complementarity?

The gradual development of HSR services in recent years has blurred the concept of competition versus complementarity between these services and air transport services. The success of the Thalys and the TGV in France, the ICE in Germany, Trenitalia's Frecciarossa, and privately-owned Italo in Italy are examples of such development.

A rich body of economic literature has developed over the years on the intermodal interaction of high-speed rail and passenger air transport services<sup>213</sup>. In particular, the competitive constraints posed by high-speed rail on passenger air transport services have been investigated by several scholars<sup>214</sup>. Economic literature has also looked at their complementarity<sup>215</sup>.

The presence of a hub matters when it comes to assessing to what extent other travel modalities, such as HSR, constrain the provision of air transport services. Some empirical research has examined "*the distinction between routes with and without a hub airport as an endpoint as well as the influence of the location of the high-speed rail station on competition between passenger air transport services and high-speed rail services*"<sup>216</sup>. It has done so by looking at various routes in various EU countries, such as France, Germany and Spain. This research indicates that:

- (i) in France and Spain, high-speed rail constrains airlines operating out of Paris-Orly and Madrid, which "*are clearly affected by high-speed train services, where the losses from point-to-point traffic can be added to the lower profitability of connecting routes. It might be the case that these hub airports are losing flight frequencies in their connecting traffic due to competition from high-speed rail services.*"<sup>217</sup> By contrast, "*airlines operating out of Paris-CDG and Frankfurt are not affected by high-speed rail services.*"<sup>218</sup> In Spain, all routes point to competition between the high-speed rail and air services, and "*Iberia's Madrid hub appears to have been hit hardest by intermodal competition*"<sup>219</sup>.

<sup>212</sup> OECD, cited, DAF/COMP (2014)14, p. 40-41.

<sup>213</sup> Well summarised in Finger, M., Bert, N., Kupfer, D. (2014). High Speed Rail vs. Low Cost Rail: competing or complementary modes?, Florence School of Regulation, European Transport Regulation Observer.

<sup>214</sup> González-Savignat, M., (2004). Competition in air transport. The high speed train. J. Transp. Econ. Policy 38 (1), p. 77–108. Dobruszkes, F., (2011). High-speed rail and air transport competition in Western Europe: a supply-oriented perspective. Transp. Policy 18, p. 870–879.

<sup>215</sup> Albalade, D., Bel, G., Fageda, X. (2014), Competition and cooperation between high-speed rail and air transportation services in Europe Journal of Transport Geography 42, 166-174. Finger, M., Bert, N., Kupfer, D. (2014). High Speed Rail vs. Low Cost Rail: competing or complementary modes?, Florence School of Regulation, European Transport Regulation Observer.

<sup>216</sup> Id., 166-174.

<sup>217</sup> Id., 166-174.

<sup>218</sup> Id., 166-174.

<sup>219</sup> Id., 166-174.

- (ii) Germany is a particular example since *“its hub airports are not showing a net decrease in air service supply.”* Hubs to which Lufthansa flies *“have not been notably affected by intermodal competition”*<sup>220</sup>. The research explains this with the fact that *“Germany’s high-speed rail network is less centralized on one city with a hub airport as is the case in France and Spain.”*<sup>221</sup>.

It is worth bearing in mind, however, the limitations of this literature, since the empirical data is from 2012. In the meanwhile, market conditions may well have changed. However, for the purposes of our study this literature is relevant insofar as it shows that, while on certain routes high-speed rail and passenger air transport services may compete, on other routes they are complementary. From a geographical standpoint, this may depend on which Member State is being considered and the competition conditions in the relevant geographical markets.

### 5.1.2. Air and rail transport competition: market definition

The technical and commercial developments discussed above have an impact on the market definition for passenger air transport services, and on the specific routes, in relation to which pricing strategies of a potentially dominant firm may occur. When high-speed rail services and air transport services are considered as being part of the same relevant market, markets can be larger and thus dominance of the air carrier harder to prove.

One example is the Paris to Milan route and vice versa. Starting from 2020, the high-speed rail link between Paris and Milan operated by Trenitalia will allow it not only to compete directly with the French TGV on this route, but possibly also to capture the portion of business traveller demand which typically flies from Milan to Paris and vice versa, a fairly short haul flight. Supply features such as travel times, access to city centres, cost and frequencies, matter in choosing modes of transport<sup>222</sup>. Paris CDG’s distance from the city and airport waiting times matter for business customers in choosing whether to fly or to take the high-speed train.

It is thus worth deliberating whether high-speed rail services and air transport services on this route are a part of the same product market. Since this impacts the finding of dominance by a competition authority, it is worth understanding how changed market conditions may imply a limited usefulness of precedents in this area. To this end, some merger precedents could be helpful. For example, in 2012 the Italian AGCM investigated<sup>223</sup> the passenger air transport and high-speed rail substitutability for the Rome Fiumicino airport-Milan Linate airport route and considered whether on this route Alitalia and Trenitalia were in competition with one another. The Authority found that Alitalia was dominant on the Milan Linate-Rome Fiumicino route: indeed, HSR was not considered to sufficiently constrain the behaviour of Alitalia as a monopoly on that route. While there was demand-side substitutability for time-sensitive travellers (mostly business travellers) between the two modes of transport, air and rail, this was the case only at certain times of day hours, and it had only a minor impact in disciplining Alitalia’s behaviour. As such, the two modalities were not considered substitutes by the AGCM. It would be interesting to see whether this analysis would be different now that Trenitalia operates the Frecciarossa on the Rome-Milan route and whether for business passengers the Rome-Milan flight and

<sup>220</sup> Albalade, D., Bel, G., Fageda, X. (2015), Competition and cooperation between high-speed rail and air transportation services in Europe *Journal of Transport Geography* 42, 166-174.

<sup>221</sup> Id., 166-174.

<sup>222</sup> González-Savignat, M., (2004). Competition in air transport. The high speed train. *J. Transp. Econ. Policy* 38 (1), 77–108. Dobruszkes, F., (2011) High-speed rail and air transport competition in Western Europe: a supply-oriented perspective. *Transp. Policy* 18, 870–879. Albalade, D., Bel, G., 2012. *The Economics and Politics of High-speed Rail. Lessons from Experiences Abroad*. Rowman and Littlefield Publishers (Lexington Books), Lanham, MA.

<sup>223</sup> This investigation was launched in the context of another investigation started after the announcement that Air One, almost bankrupt in 2008, was to be merged with Alitalia; the AGCM was called upon to assess the competitive effects of the proposed merger.

Frecciarossa's Rome-Milan route, and vice versa, are substitutes. The Frecciarossa (HSR) service was launched in August 2012.

The abovementioned literature also suggests that while high-speed rail constrains airlines operating out of Paris-Orly, such is not the case for Charles de Gaulle airport. At Orly, Air France has operated through its subsidiary HOP!, after the latter was fully incorporated into Air France in September 2019. Air France operates a flight, lasting 1 h and 25 minutes, through Paris Charles de Gaulle airport, with as its destination Malpensa airport in Milan. For a hub such as Charles de Gaulle (for example, the Paris-Milan route and vice versa), it remains to be seen how the relevant market definition will evolve once also Trenitalia's HSR starts offering services from Milan to Paris (and vice versa). A high speed rail connection between the two city centres in six hours is due to start up in 2020. Considering check-in times, and travel times from Malpensa to the city centre, as well as from Paris Charles de Gaulle to the city centre, for business customers, the rail services could well constitute an alternative means of transport, with the result that the market could be broader than simply air transport services on the Paris-Milan city pair relevant market.

Hence, market definition, as illustrated, is a dynamic exercise. In addition, markets can be larger if high-speed rail services are considered substitutes. This, in turn, would impact the assessment of dominance in that market. In particular, where the markets are larger, dominance of an air carrier on a given route may be harder to establish. It will be interesting to see how such issues will be addressed in the future.

Competition from high-speed rail services may also matter when it comes to the plausibility of predatory pricing strategies on the part of a dominant firm. It remains to be seen how the introduction of high-speed rail will impact the pricing practices of air carriers, and in particular, the incentives to predate. As train services become more price-efficient, competition from high-speed rail may provide an alternative explanation as to why a decrease in fares for passenger air transport carriers has been observed. According to economists, "*when air transport services and high-speed rail compete, air transport services adapt their fares to sustain competition from rail*"<sup>224</sup>. However, this is a very general observation, and only a specific route-to-route approach would allow us to understand the complexities of the competition analysis.

To conclude, taking high-speed rail services into account allows us to understand that market definition is not a static exercise. Were rail services to be included in the relevant market for a given route, the dominance of a passenger air transport company on a given route would occur only when any such company was not sufficiently constrained by the train operators operating the high-speed service, so that the dominant firm has a sufficient degree of freedom to set prices. Second, adaptation to competitive constraints from high-speed rail in the form of decreased prices (below 'some appropriate measure of cost', as imperfect as such a measure could be) would provide an alternative explanation for reduced fares to an alleged exclusionary strategy of predatory pricing carried out by an air passenger transport company. In this case, predatory pricing may not be problematic for consumers but simply the outcome of changed competitive conditions. Hence, an allegation of predatory pricing conduct needs to be treated with caution since false positives (a finding of predatory pricing which is not indeed such) may adversely impact consumers.

These considerations are two of the challenges that competition authorities may face when it comes to a possible future complaint on a predatory pricing case in the air transport sector. The case study above, resting on an overview of some economic literature, but also on a merger precedent, illustrates this point.

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<sup>224</sup> Albalade, D., Bel, G., Fageda, X. (2015), Competition and cooperation between high-speed rail and air transportation services in Europe *Journal of Transport Geography* 42, 166-174.

### 5.1.3. The impact of an oligopoly market structure: the Barcelona-Alicante route

This second case study analyses some other aspects which the competition authority could have to examine when faced with a predatory pricing claim in the airport sector. We look into some empirical research, with the caveat, however, that this research may take positions as to the specific competition behaviour of specific competitors, who have thus far not been found liable by a competition authority (or the Commission) for violating competition laws, but we do not do so. Second, we also caveat that this analysis is country-specific and rests on partial economic literature, which we have nevertheless found relevant for our purposes.

In particular, we look into how circumstantial evidence to establish abuse may relate to the expectations of the dominant firm about the reactions of competitors. In turn, incentives to engage in predatory pricing strategies may also depend on market structure on a specific route. When the dominant firm does not expect its competitors to react promptly to its conduct (because, for example, it has hidden capacity that it can deploy, while competitors cannot), this circumstance may, in turn, impact its decision to engage in predation. A strong competitor reaction may in fact thwart any such strategy.

By reference to economic research<sup>225</sup> carried out in the Spanish market on pricing strategies in the passenger air transport sector, we take the example of the Barcelona-Alicante route, where there was an oligopoly type of competition. We show that market structure matters in understanding whether there is an intent to predate on the part of the dominant firm, or whether its behaviour is simply an adaptation to the competitors' conduct. We illustrate that the economic literature we have analysed suggests that competition authorities should monitor the pricing practices of firms enjoying market power more closely on routes where a shift from monopoly to oligopoly (e.g. a duopoly) has emerged.

In particular, on the Barcelona-Alicante route, the market shifted from a monopoly to an oligopoly, after the entrance of an LCC, Vueling. Vueling for a certain period competed with Iberia, which set up its own low-cost subsidiary, Clickair. Clickair and Vueling merged in 2009 under the name of Vueling, with Iberia being the major shareholder. It is interesting to remember that the merger was cleared by the European Commission. In its merger clearance, nevertheless, the European Commission displayed concern that the merged airline would have a significant competitive advantage on around 19 routes, asking, *inter alia*, as a remedy to clear the transaction, for the release of slots at Barcelona airport. This means that limited competition existed on these routes.

Prior to the merger, but after the market entry of Vueling, some economists consider that Iberia may have successfully carried out predatory pricing behaviour on the Barcelona-Alicante route, but that this conduct went undetected by national competition authorities. In particular, their empirical research analyses Iberia's pricing strategies: they recall that "*between 2003 and 2009, on the Barcelona-Alicante route, Iberia lowered its fares by 10.3 % to compete with Spanair, and later, through Clickair, it lowered its prices by 55.8 % to compete with Vueling*"<sup>226</sup>. After the Clickair/Vueling merger and Iberia became Vueling's parent company, and thus Iberia no longer faced competition from Vueling, the prices Iberia applied on this route increased by 35.7 %<sup>227</sup>. However, these economists point out that since data is available for one period after the merger, but it is incomplete, caution must be exercised "*before claiming that Iberia has displayed predatory behaviour*".

<sup>225</sup> Fageda, X., Jiménez, J.L., Perdiguero, J. (2011), Price rivalry in airline markets: a study of a successful strategy of a network carrier against a low-cost carrier, *Journal of Transport Geography*, Volume 19, Issue 4, July 2011, p. 664.

<sup>226</sup> Id.

<sup>227</sup> Id.

The Spanish competition authorities did not find Iberia guilty of abuse of a dominant position and neither did they investigate such conduct. Iberia was also the subject of complaints of predatory conduct at EU level: a complaint was filed by Virgin on Iberia's pricing practices on certain routes from Brussels to Barcelona and Madrid and vice versa before the European Commission<sup>228</sup>. However, this separate complaint did not lead to a finding of an infringement of EU competition laws.

Currently, Vueling and Iberia operate short flights between the two cities, Barcelona and Alicante of little more than one hour. A train is also available, which connects the two towns in 4 hours 55 minutes. It is interesting to see that in terms of travel time, no other competing airlines offer a comparable service. All other flights with competing airlines are longer. This may impact the choices of the business customer part of demand.

Given that only Vueling and Iberia operate on these routes (and Vueling is controlled by Iberia), Iberia enjoys some degree of market power on this route in the absence of other competitors. However, to conclude that Iberia is dominant, a given relevant market must be defined. This is not the purpose of this exercise. What is interesting to see, is that, aside from the question of whether rail and air services compete on this route, and there is thus a crucial need to properly define the relevant market (something we discuss under 5.1.2), there are several lessons worth drawing from the empirical observations above.

The most important of these is that the structure of the relevant market, in which there is competition between air transport carriers, matters when it comes to incentives to compete, and incentives to (or not to) predate. Sometimes, lower prices can be an adaptation to a competitor's strategy and are not anti-competitive as such. This may be the case in oligopoly structures where any such adaptation is in line with competition rules. In such a case, lower prices are a benign response to a competitor's pricing. As easy as it may sound in theory, differentiating between the two situations is not straightforward. It may also be important to understand why only one carrier operates on given routes. This may be the case because the routes are more regional. In these cases, the competition authorities may also have a role to play. As the OECD has pointed out *"determining whether an airline enjoys market power requires that the relevant markets be carefully defined. Usually markets are defined on an O&D basis. However numerous routes and city pairs (especially from/to small or remote areas) may only support one carrier, hence competition authorities have to carefully determine whether the absence of competition is [due] to the result of exclusionary conducts on the part of that airline, or whether it merely reflects an unavoidable industry structure."*<sup>229</sup>

The second of these lessons is that circumstantial evidence to prove predation, which entails a robust finding of intent to predate when prices are above AVC, as per the Akzo jurisprudence, requires a competitive assessment of the market conditions at the time of the conduct, and how they evolve, who are the competitors of the alleged firm and what instruments they have in place to counter such conduct. Bigger LCC competitors, such as Ryanair, are not expected to react in a similar fashion as to a small regional air carrier.

The final of these lessons is that, because competition authorities have not reached a finding of predatory pricing, it does not mean that there has been no such predation. Across the world, several competition authorities, such as Canada's and India's, are currently looking into such pricing conduct. It is necessary to look at market structure and market conditions in dynamic terms once the conduct of

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<sup>228</sup> Lall, A. (2005). "Predatory Pricing: Still a rare occurrence?", Chapter 2, p. 37-56 in Forsyth, P., Gillen D.W., Mayer O. G. Niemeier, M. H. eds, Competition versus Predation in Aviation Markets: A Survey of Experience in North America, Europe and Australia, Ashgate Publishing.

<sup>229</sup> OECD, cited, DAF/COMP(2014)14, p. 40-41.

a given operator comes under scrutiny in the light of any such operator's dominant position. The competition authorities are well tasked to carry this exercise out.

#### 5.1.4. Conclusions

To conclude, in markets such as the air transport sector given the rise of LCCs, the emergence of hybrid business models, and, more recently, technological advances such as HSR services, the *"challenge is indeed to draw a line between anti-competitive predation and effective competition through meeting a competitor's price."*<sup>230</sup>

To begin with, aside from the imperfection of price-cost tests in understanding the complexities of how fares are set by air carriers, dynamic technological and commercial developments and the presence of an oligopoly structure in given routes also render the competition law analysis complex. A dominant company in a relevant market enjoys the power to behave, to a certain extent, independently of customers and consumers<sup>231</sup>. Competition authorities only look more closely at the pricing conduct of a dominant firm.

Second, that said, however, *"market power should be assessed not only on a given O&D, but also in light of the airline's network and alliances to which the air service carrier belongs."*<sup>232</sup> Market power does not occur in a vacuum. An airline belonging to a large network may be able to exploit economies of scale that lead to cost efficiencies that a smaller operator cannot. Then, the market definition in the case of networks needs to capture the effects of such networks.

Third, other behavioural factors of the company engaging in lower fares matter too: for example, whether the lowered prices are accompanied by a capacity increase, i.e. flying on a given route not previously flown, and coinciding with the route covered by the competitor who faces the choice of how to react to predatory pricing by the dominant firm. In fact, the competitor's behaviour and its impact on the strategy of the dominant firm should be assessed. This was shown in the Iberia case, where the strategy of the dominant company to successfully drive the competitor out of the market depends on market structure and the capacity of competitors to quickly adapt to and counter the dominant firm's pricing strategies<sup>233</sup>.

## 5.2. The Malta case study

Like many islands, Malta has much a high propensity for air travel. It is the third largest European island in the aviation market after Cyprus and Iceland, with potential for further expansion<sup>234</sup>. Its aviation market is therefore rather attractive to airlines since air passenger transport is vital to connect it to other places. However, unlike other countries<sup>235</sup>, after Malta joined the EU in 2004, its European traffic only grew by 6.4 %, and the growth rate then reduced to 0.2 % in 2005 and even declined by 1.4 % in 2006. This drove the Maltese government to provide price incentives (in the form e.g. of discounts on passenger and landing charges) for new routes, especially in order to attract LCCs. As a result, a number of LCCs (including Clickair, Jet2.com, Norwegian, Ryanair, Volotea, Vueling and Wizz Air,) started routes

<sup>230</sup> OECD, cited, DAF/COMP(2014)14, p. 41.

<sup>231</sup> Id., p. 40-41.

<sup>232</sup> Id., p. 40-41.

<sup>233</sup> Fageda, X., Jiménez, J.L., Perdiguero, J. (2011), Price rivalry in airline markets: a study of a successful strategy of a network carrier against a low-cost carrier, *Journal of Transport Geography*, Volume 19, Issue 4, July 2011.

<sup>234</sup> Centre for aviation Report, CAPA, Malta aviation: Air Malta, Ryanair and now Malta Air, July 2019.

<sup>235</sup> This was the case, for instance, in some Eastern European countries with less mature markets, such as Poland or Hungary, where the entry in the EU led to rapid traffic growth also due to the introduction of new LCC services. See Graham, A, & Dennis, N. (2010), The impact of low cost airline operation to Malta, *Journal of Air Transport Management* 16, p. 127 – 136 and Graham, A. (2013), Understanding the low cost carrier and airport relationship: A critical analysis of the salient issues, *Tourism Management* 36 (2013,) p. 66-76.



to Malta and after years of very little overall growth, the island's air traffic increased by 10.9 % in 2007<sup>236</sup>. In the last ten years, according to data from CAPA and OAG<sup>237</sup>, LCCs' share of seats in Malta has doubled (from 24.7 % in 2009).

However, despite the increase in traffic and the fact that LCCs are today highly significant in Malta, the situation in Maltese skies is characterised by the presence of two main carriers – Ryanair, by far the biggest LCC on routes to the island and the state-owned flag carrier Air Malta. According to OAG data<sup>238</sup> the two leading airlines in Malta today have a very similar share of seats to and from Malta. For several years, they have swapped the lead back and forth in terms of seat share. While Ryanair has more routes and annual passengers, and it has been the leading airline by summer seats to the island, there difference is only a few decimal points.

### 5.2.1. Recent developments in the relationship between Air Malta and Ryanair

In recent years, Air Malta has made a significant effort to expand its network of destinations and improve its fare structure and on-board service. This led to strong growth in seats in 2017 and 2018. However, at the same time, the company has been struggling with profitability, including due to competition from Ryanair.

On 21 August 2018, the two companies announced their decision to cooperate in a form of code-sharing agreement. Standard code-sharing agreements consist in arrangements where two airlines share the same flight, providing for the possibility of purchasing a seat from the first airline on a flight that is operated by the second. In this case, the airlines agreed to liaise on sales and marketing initiatives, like the sale of Air Malta flights from the Ryanair website, providing the flag carrier with an important new distribution channel<sup>239</sup>, which is supposed to lift its ticket sales. For Ryanair, the partnership is meant to offer the possibility of enjoying new routes from Malta on top of those already existing, while Air Malta can draw on new revenues and increase its weight in overseas markets.

More importantly, however, and more recently (on 11 June 2019), Ryanair concluded an agreement to buy a Malta-based start-up airline named Malta Air, launching it as a new subsidiary airline to operate low-cost operations on the island with competitive fares. The new carrier is expected to take over 61 routes that Ryanair already operates to and from Malta. It will fly to over 60 destinations across Europe and North Africa. For this purpose, a fleet of six Ryanair aircrafts was been transferred to the island. In 2020<sup>240</sup> they will be rebranded under the new airline's name. More planes will be added in the next few years.

The acquisition had the support of the Maltese government, with the aim of boosting tourism to the island. The new airline will operate alongside the state-owned Air Malta, which is thought to run parallel with the development of Malta Air. To protect the country's interests, the Maltese government maintains a golden share in the new airline, meaning that it is able to outvote all other shares in certain circumstances, thereby preventing changes in the company's name and/or transfer of the Aircraft

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<sup>236</sup> Graham, A., Dennis, N. (2010), The impact of low cost airline operation to Malta, *Journal of Air Transport Management* 16, p.127 – 136 and Graham, A. (2013), Understanding the low cost carrier and airport relationship: A critical analysis of the salient issues, *Tourism Management* 36, p. 66-76.

<sup>237</sup> Centre for aviation Report, CAPA, European islands: high volume of air travel and a variety of airlines, March 2019. OAG is an Air Travel Intelligence company specialised in the delivery of digital information and travel planning solutions to clients such as airlines, airports, government agencies and travel-related service companies.

<sup>238</sup> See <https://centreforaviation.com/analysis/reports/malta-aviation-air-malta-ryanair-and-now-malta-air-480099>. The data shows that, during the peak summer week (i.e. week of 26 August 2019) Ryanair had 32.3 % of seats in Malta, but was very closely followed by Air Malta, with 32.1 % of seats. In the third position, but far ahead, was placed easyJet (with only 5.9 %) followed by Wizz Air (5.3 %), Lufthansa (4.5 %), Emirates (2.5 %), Turkish Airlines (2.2 %), Jet2.com and Alitalia (both 2.1 %), and Vueling (1.2 %). In addition, seventeen more airlines altogether had a combined share of 9.9 %.

<sup>239</sup> Ryanair.com is today the world's largest travel website, with a record of 1 billion platform visits per year (April 2017 to March 2018).

<sup>240</sup> According to the CAPA Fleet Database at 26 June 2019.

Operating Certificate or Aircraft Operating Licence to the oversight of a civil aviation authority outside Malta.

### 5.2.2. Possible impacts of Ryanair's acquisition of Malta Air

We next consider to what extent the launch of Ryanair's subsidiary in Malta will affect competition and consumers. In terms of impact on consumers, Ryanair's initiative fits into the context of a general trend of air traffic growth all over Europe. The overall increase in aircraft and routes is argued to lead to a positive outcome by bringing about an improvement in the efficiency of air passenger transport services. In parallel, it leads to a decrease in prices due to the upturn in the supply of low-cost flights. This should have a wide-ranging effect on enhancing Malta's connectivity and tourism.

From a competition perspective, Ryanair's acquisition of Malta Air might arguably affect competition in Maltese passenger air transport. However, although a new operator was launched on the Maltese market, this does not seem to have the potential actually to boost competition in any way, since Malta Air is owned and operated by the already operating Ryanair. Hence, while the entry of new actors into a given market usually entails greater competition, this is not the case in the example at hand. On the contrary, higher market share could put Ryanair at a competitive advantage, especially compared to the national non-LCC Air Malta and also given the benefit, in terms of labour relations, costs and flexibility to grow, that the LCC gets from establishing separate operating subsidiaries.

It needs to be stressed, however, that in practice, that the distribution models used by the two leading airlines on the island is different, since the two LCCs operate point-to-point, unlike Air Malta that uses the hub-and-spoke model. A hub-and-spoke model, because it is centralised, requires fewer routes as compared to the point-to-point model, but provides less flexibility.

Additionally, the new Ryanair subsidiary is intended to offer different routes and networks compared to Air Malta. For instance, the latter is the sole airline serving routes to North Africa and the Middle East, and will therefore maintain its advantage over Ryanair on these. Against this backdrop, it can be argued that Malta Air and Air Malta could reciprocally strengthen each other in different markets. However, while it seems unlikely, there is no guarantee that the airlines' two routes will not eventually overlap. Moreover, considering that intra-EU transport is critically dominant – accounting for around 92 % in the case of Malta – it is possible that the enhancement of the island's tourist traffic and connectivity will be achieved to possible detriment of the flag carrier.

Despite the mutual cooperation that has marked the relationship between the two leading carriers so far, it cannot be excluded that the launch of Malta Air will create a break with the current 'tied' market share situation. As noted previously, Ryanair and Air Malta have been alternating in vying for the top spot in terms of seat share (though the LCC already has a slight edge). From now on, Ryanair will certainly grow its already sizeable presence in Malta, including gaining access to non-EU markets in North Africa. Consequently, the LCC could potentially become the dominant airline and ultimately drive the Maltese flag carrier out of the market.

### 5.2.3. The MCCA position

Although the MCCA has not yet expressed any view on the very recent developments in the Maltese air traffic framework explored in the previous paragraphs, it has recently expressed its view on the use of 'no-show' clauses by airlines operating to and from Malta<sup>241</sup>. From the specific attention paid by the competent authority to ticket price transparency, it may be inferred that it will be keeping relevant airlines' policies under observation in future, especially in the light of the increased traffic and the new

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<sup>241</sup> See under Chapter 3.

agreements in place. As a consequence, the MCCA might be called on to verify, for example, if the online booking procedure through Ryanair's website, now also offering Air Malta's tickets, complies with the level of information deemed necessary.

## 6. CURRENT LEGISLATIVE INITIATIVES ON UCP'S AND POSSIBLE FUTURE INTERVENTIONS

### KEY FINDINGS

- The new Directive on better enforcement and modernisation of EU consumer protection, revising four consumer protection directives and part of the 2018 New Deal for Consumers should impact consumer protection positively and ensure more protection against UCPs by airlines.
- The strengthened rules on penalties, the availability of individual remedies to consumers, and the enhancement of transparency in online business-to-consumer transactions and in search results in marketplace and comparison tools should improve consumer protection.
- The Representative Actions proposal, if adopted, should considerably empower consumers to secure their rights in case of UCPs by air carriers.
- However, it also seems necessary to clarify which elements in air transport contracts are to be considered essential and must be included in airlines' fares independently of the business model applied.

Case law, both at a national and Union level, and the European Commission's Guidance on the application of the UCPD have facilitated more effective application of national legislation implementing Union rules on consumer protection<sup>242</sup>.

In April 2018, the European Commission proposed a new package to strengthen consumers' rights. The New Deal for Consumers is composed of two proposals amending four Directives, in order to protect the economic interests of consumers, namely:

- (i) A proposal to amend the Council Directive on unfair terms in consumer contracts, the Directive on consumer protection in the indication of the prices of products offered to consumers, the Directive concerning unfair business-to-consumer commercial practices and the Directive on consumer rights. This proposal's aim was to ensure better enforcement and to modernise EU consumer protection rules, in particular in the light of digital developments. As a result, the **Directive on better enforcement and modernisation of EU consumer protection** was adopted by the European Parliament and the Council on 27 November 2019 ('Directive 2019/2161')<sup>243</sup>.
- (ii) A proposal on **representative actions for the protection of the collective interests of consumers** and repealing the Injunctions Directive ('Representative Actions proposal')<sup>244</sup>. The objective of this proposal is to strengthen the tools for stopping illegal practices and facilitating redress for consumers where many of them are victims of the same infringement of their rights, in a mass harm situation. Representative actions for redress will be carried out on behalf of consumers by qualified entities, such as consumer organisations and independent public bodies, designated

<sup>242</sup> European Commission. (2017). Study for the Fitness Check of EU consumer and marketing law (Final report Part 1 – Main report). p. 268.

<sup>243</sup> Directive (EU) 2019/2161 of the European Parliament and of the Council of 27 November 2019 amending Council Directive 93/13/EEC and Directives 98/6/EC, 2005/29/EC and 2011/83/EU of the European Parliament and of the Council as regards the better enforcement and modernisation of Union consumer protection rules, OJ L 328, 18.12.2019.

<sup>244</sup> Proposal for a Directive of the European Parliament and of the Council on representative actions for the protection of the collective interests of consumers, and repealing Directive 2009/22/EC, COM/2018/0184 final - 2018/089 (COD).

by the EU Member States. The work on the Representative Actions proposal continues in the European Parliament and Council.

The Commission Communication accompanying the proposals above included an action plan to develop and strengthen coordinated enforcement actions among authorities and their international cooperation with authorities from key trading partners.

The Representative Actions proposal and the recently adopted Directive 2019/2161 included in the New Deal for Consumers could significantly help the fight against airline UCPs. The **enhanced harmonisation of rules on penalties** is a key element in the new measures. Under Directive 2019/2161, national authorities will in particular have the power to impose a fine of at least up to 4 % of a trader's turnover for widespread cross-border infringements when enforcing the UCPD, the Consumer Rights Directive and the Unfair Contract Terms Directive. This new system of penalties could positively impact protection of consumers against abuses carried out by professionals, in particular by passenger air transport carriers. The various airline UCPs have been proven by national and EU case law to constitute a series of widespread infringements with a Union dimension, affecting consumers located in several Member States. For online trade, it does not seem enough to address the problems that consumers may encounter at national level. In particular, many online marketplaces and providers of digital services trade across Europe and across borders. Therefore, better harmonisation and coordination of the penalties imposed by national courts, and by national competition and consumer protection authorities, **could have a more effective deterrent impact** on this kind of behaviour by airlines.

In addition to the enhancement of the rules on penalties, the measures described above focus on the **right of consumers to resort to individual remedies** when they are harmed by UCPs, such as aggressive marketing. They also provide that these remedies must be proportionate, effective and must not affect the application of other remedies available to consumers under EU or national law. Individual remedies include **contractual** and **non-contractual remedies**. Both measures stipulate that the contractual remedies to which consumers may have access should include the right to contract termination or a price reimbursement. Non-contractual remedies should, as a minimum, include the right to compensation for damages<sup>245</sup>. This kind of remedy would give the consumer affected by UCPs the possibility of eliminating or at least limiting the negative effects of such practices. This will be beneficial for individual consumers in the EU.

Directive 2019/2161 also aims to improve the **transparency of online market places**. Consumers who make use of digital applications such as **online marketplaces**, comparison tools, app stores or search engines expect search results to be displayed based on the relevance to their search queries. Hence, online platforms must clearly communicate when, by contrast, search results contain **'paid placements'** and are therefore shown based on payments received by third parties. This is the case, for instance where third parties pay to have a higher ranking or to be included in the list of search results (so-called **'paid inclusion'**). Therefore, online marketplaces need to clearly inform consumers about how the offers are ranked in a search and paid placements will have to be clearly indicated. Failure to do so will be added to the list of practices, which are considered as unfair under the UCPD. Considering that LCCs in particular use digital platforms to sell their services to consumers and that most of the UCPs analysed occurred on the airlines' websites, enhanced rules on transparency in business-to-consumer transactions carried out on online marketplaces would strengthen consumer protection, limiting the possibilities of airlines from taking advantage of the often unclear and complicated procedures displayed on their websites.

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<sup>245</sup> Directive 2019/2161, article 3.5 amending Directive 2005/29/EC.

**Representative actions** can help consumers all over the EU to secure their rights, especially those who cannot afford to pursue redress or who shy away from individual litigation. The current framework (i.e. the Injunctions Directive) requires Member States to establish procedures only for stopping or prohibiting infringing practices, but not for obtaining consumer redress. If adopted, the Representative Actions proposal would also require Member States to put in place procedures for **compensatory redress** (i.e. compensation or reimbursement) to be sought by qualified entities on behalf of consumers.

The changes included in the Representative Actions proposal and in Directive 2019/2161 seem to tackle most of the issues concerning consumer protection in the passenger air transport market. However, stronger regulation is necessary to address the current lack of clarity as to which elements in air transport contracts are to be considered essential and must be included in airlines' fares independently of the business model applied.

In this context, it is worth mentioning that, the review of the Air Services Regulation is included among the planned initiatives in the Commission Work Programme 2020<sup>246</sup> adopted on 29 January 2020. The planned review follows an evaluation carried out in 2019<sup>247</sup>, which, inter alia, assessed whether the legislation is still fit for purpose. A forthcoming legislative proposal on this (with an accompanying impact assessment) is announced for the fourth quarter of 2020.

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<sup>246</sup> Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Commission Work Programme 2020 - A Union that strives for more, COM(2020) 37 final of 29.1.2020.

<sup>247</sup> Commission Staff Working Document Evaluation of the Regulation (EC) No 1008/2008 on common rules for the operation of air services in the Community (SWD(2019) 296 final).

## 7. CONCLUSIONS

This study analysed the impact of UCPs on competition in the EU's passenger air transport sector. To this end, it has explored developments in the EU's passenger air transport market, with a particular focus on the pricing strategies adopted by air service carriers. The study found that UCPs in the EU passenger air transport sector are very frequent at present.

The increasingly competitive environment of the air passenger transport market and the expansion of the sector have been accompanied by several cases of UCPs, on which national competition and consumer protection authorities across Member States have turned the spotlight.

Against this background, the study analysed both the instances where national authorities have intervened to tackle practices deemed detrimental to consumers and the competition aspects when these practices have been allegedly carried out by dominant firms: to this end, the interplay between UCPs and predatory pricing has been analysed. Case studies were presented on the relevant competition law aspects, both with respect to the market definition intricacies given the growing uptake of HSR, and with respect to the relevant elements to be taken into account when a competitive assessment is carried out. A case study on passenger air transport in Malta was presented in order to analyse the interaction of FSC and LCC business models in the light of the recent developments in the Maltese air passenger transport market. The case study showed the possible different impacts of airlines' strategies in terms of consumer protection and competition.

This Chapter presents the conclusions based on the findings from the analysis.

First, the study has shown that the liberalisation of the EU air transport market has increased competition and reduced air fares, including as a result of new business models, such as those of the LCCs. This has prompted the FSCs to reconsider parts of their business model.

The study also found that competition in air passenger transport is mainly (but not exclusively) price driven. Therefore, airlines use different yield techniques to extract value from their passengers, including price discrimination, intertemporal price discrimination (low price before high) and personalised advertising. However, in some cases the airlines' offers lack transparency in terms of the final price to be paid by the passengers and with regard to the essential elements of travel included in the final fare.

The reduced transparency in terms of the final fare negatively impacts informed consumer choices. In the decisions of the Member States' national consumer protection authorities, the most common airline UCPs are misleading advertising, hidden payment card surcharges, non-transparent insurance policies, overcharged call centre facilities, incorrect application of the 'no-show' rule, mass cancellation of flights, unfair hand luggage policies, hidden elements of the final price of the tickets and penalty fees for the correction of a passenger's name.

In terms of competition in the relevant market, decreased airfares are the result of increased levels of competition in the EU air passenger transport market, including the entry of LCCs. Nevertheless, although price competition is one of the main drivers behind air ticket prices, aggressively low air fares, when adopted by dominant firms for the purpose of driving competitors out of the market (and potentially raising prices in the long run), may represent a market conduct violation, both in terms of competition law and consumer protection.

The study analysed how certain pricing strategies undertaken by an air service carrier, in particular very low prices (below a certain cost benchmark), can constitute abuse of dominant position in the form of predatory pricing when undertaken by a dominant firm. EU competition law disciplines the ability of a dominant undertaking (i.e. which enjoys the capacity to act to a significant extent independently of

competitors and consumers) to set prices as it best wishes. It does so, by not allowing it to abuse its dominant position in the light of the special responsibility incumbent on it. This is the case when such pricing conduct entails below cost pricing, which is likely to eliminate/foreclose competitors. This occurs when such prices are below a certain cost benchmark and the conduct is proven to display intent to exclude competitors (or in some cases, such as when prices are below AVC, the exclusionary intent can be automatically presumed by such price setting, unless the dominant company is able to rebut such presumption), provided there is no objective justification. Lower consumer prices may seem beneficial in the short run. However, in the long run, the diminished competition in the market due to the dominant undertaking's pricing practices allows it to set prices higher than at competitive level, thereby causing consumer harm.

Allegations of predatory pricing in the passenger air transport sector have been often made, but seldom have they been upheld by national competition authorities, and never by the European Commission. The examination of several cases at Member State level highlights the fact that, aside from the BKartA in Germany taking action against Lufthansa, there are very few cases where other national competition authorities, such as the UK Competition and Markets Authority, have chosen to embark on claims of predatory conduct in this sector, and these investigations have not led to a finding of infringement. In very few cases was predatory conduct upheld by national courts in the context of private antitrust enforcement actions.

The reasons for this are various. First, the dominance of an undertaking in a given relevant market is hard to establish. In addition, new developments, such as the increase in the number of HSR services to address increasing ecological concerns in the EU, also impact how markets are defined in this context. With air transport services and rail services constraining each other on a given route, it becomes even more difficult to prove that an air service provider may hold a dominant position. The consequences of any such development can be larger product markets than is otherwise the case at present. A case study illustrated some characteristics of a market definition as a dynamic exercise when HSR services constrain air carriers on certain routes. Furthermore, the presence of networks and alliances renders the market definition analysis particularly complex and may lead to broader markets than the traditional O&D pair approach would suggest.

Second, distinguishing between legitimate price conduct, on the one hand, and abusive predatory pricing, on the other, is a challenging task for competition authorities. Problematic conduct may be hard to detect by virtue of the very fact that incumbents are nowadays much less able to behave independently in setting prices due to the pressure put by the LCCs that are their direct competitors. At times, lower prices are the reflection of increased competition rather than an expression of eliminatory intent. In this respect, the analysis of market structure which also impacts the behaviour of competitors when faced with predatory pricing practices could clarify when some of these practices would need to be examined more closely. Another aspect to consider are whether a capacity increase accompanies such pricing strategies. Predatory pricing strategies can be accompanied by a capacity increase, which is easier to implement when the undertaking belongs to a network or an alliance. In such instances, pricing above a certain level of cost (or above a competitor's fare) does not exclude the existence of a predatory strategy, since pricing and capacity increases must be analysed in tandem.

Third, when prices are set below ATC but above AVC (provided any such price-cost benchmark is an appropriate one), a competition authority pursuing an allegation of abuse must prove that the dominant undertaking has an intent to eliminate a competitor. Evidence of the existence of such intent to eliminate is difficult to establish. Direct evidence of such intent may be found at times in the company's internal documents. However, internal documents entail a level of subjectivity as to how such intent can be construed. Circumstantial evidence can also be helpful to establish such intent: for



example, when a duopoly exists, pricing below costs can be predatory, but can also be benign, i.e. a reaction to a competitor's pricing decisions. Only the former is subject to sanctions by competition laws. Another circumstantial element is how sustainable the pricing strategy may be: this depends on the capacity of competitors to react to the predatory conduct. Such capacity may be bigger when the competitor is an established LCC, like Ryanair, but less so in the case of a regional LCC. In a case study, subject to certain caveats, we have illustrated the effects of market structure on the incentives of the dominant firm to apply a predatory strategy in its pricing decisions, as well as how they can be thwarted depending on the competitors' reactions. The reaction of competitors to lower pricing by the dominant firm is *"merely one factor of many in markets with some measure of concentration"*<sup>248</sup>.

In addition, under EU competition rules, and unlike in the US, the possibility of the dominant firm recouping losses after an initial period is not a necessary condition to prove predatory pricing. However, such a possibility of recoupment is a useful element in building an evidentiary case in assessing how plausible and successful a predatory strategy may be. In order for the possibility of recoupment to be sustainable, it is necessary for the dominant undertaking to anticipate the behaviour of a competitor and adapt to it. When the competitor is a large LCC, like Ryanair, sustainability of the strategy can be hard, but neither can it be ruled out. Hence, a competition assessment of predatory pricing entails looking at who the competitor's incumbents are. A case study dealing with some recent EU competition economic analysis was provided to illustrate this point, and in particular how the behaviour of a dominant firm to set prices can be constrained, or not, by the prompt reactions of competitors to its conduct.

Given the lack of meaningful precedents in the passenger air transport sector, with a few exceptions, some examples of predatory pricing in the ferry passenger services and the rail services sector at national level were analysed. These additional examples illustrated how the competition analysis in these cases may be informative for competition authorities, which may face similar claims in the passenger air transport sector in the future.

As technology evolves, and rail services become quicker, thus leading to HSR operating on routes previously operated only by air carriers, short haul air transport services are likely to be affected, including by the pricing strategies of companies enjoying a certain level of market power (albeit not necessarily up to the point of dominance as per EU competition laws). As the air transport sector, in which the liberalisation has been a success, grapples with such developments, competition law has a role to play to avoid practices, which may go undetected but which may ultimately, and in the long run, harm consumers.

The final part of the study, provides an analysis of recent and pending EU legislative instruments regulating consumer protection, and shows that the changes brought by the digital economy may require further reconsideration of the existing rules.

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<sup>248</sup> Beck, S., Intent as an Element of Predatory Pricing Under Section 2 of the Sherman Act, Cornell Law School (1991).

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## ANNEX

## DECISIONS/INVESTIGATIONS OF NATIONAL COMPETITION AUTHORITIES ON UCPs (PRICING)

Authority issuing the decision	Reference	Grounds	Decision	Enforcement / Appeal
German Bundes-kartellamt (BKartA)	Decision 18. February 2002, n. B 9 – 144/01 - <b>Deutsche Lufthansa AG, Köln</b>	Overcharged one-way ticket	The BKartA held that Lufthansa was illegally squeezing its competitor, Germania, off the Berlin-Frankfurt route. A central aspect of the BKartA's decision to prohibit such conduct was the evaluation of services and cost allocation (flight frequencies, bonus miles programme, service etc.)	N/A
Italian Competition Authority (AGCM)	Decision of 15 May 2008, n. PI4768 - <b>Ryanair</b>	Misleading advertising, additional charges	<p>The AGCM imposed fines on Ryanair for the deceitfulness of their advertising of discounted plane tickets. The carrier's unfair practice consisted of promotional messages, advertising air services offered "free of charge" by Ryanair, with the sole charge of taxes and administrative costs not exceeding a certain sum indicated in the advertisement. Based on this information, consumers would have reasonably been likely to believe that the cost of the passenger air transport service for the routes advertised would have been exclusively attributable to "taxes" and "administrative expenses", for a maximum amount of the sum indicated in the advertisement. The warnings at the bottom of the message contained other small charges that the consumers could reasonably have deduced were a specification of some of the "taxes and administrative expenses" included in the sum indicated in the advertisement.</p> <p>Furthermore, the message, as it was formulated, suggested that the promotion referred to both outbound and return connections from the European cities indicated. Following various reports made by the airline's consumers, the actual price paid by the consumers was significantly different from the one proposed in the advertisement, as the security supplement had to be added, as well as any administrative costs per passenger in the case of credit card bookings, both for the outward and the inward journey.</p>	N/A

Authority issuing the decision	Reference	Grounds	Decision	Enforcement / Appeal
Italian Competition Authority (AGCM)	Decision of 30 May 2012, n. IP117 - <b>Ryanair</b>	Payment card surcharges	The AGCM deemed as unfair the Ryanair commercial practice of separating the amount of the credit card surcharge from the price of air tickets offered on the airline's websites and on the related online booking and purchase systems, since it is a component of cost of the service offered by the airline, and as such not avoidable or separable from the price of the air ticket. The unfairness of the commercial practice was also related to the deceptive indications provided by the airline on its websites on the presence and criteria for the application of this price supplement.	Appealed before the Regional Administrative Court (TAR Lazio) in 2013. The appeal was rejected.
Italian Competition Authority (AGCM)	Decision of 30 May 2012, n. IP138 - <b>Alitalia</b>	Payment card surcharges	The AGCM deemed as unfair Alitalia's commercial practice of separating the amount of the credit card surcharge from the price of air tickets offered on the airline's websites and on the related online booking and purchase systems, since it is a component of cost of the service offered by the airline, and as such not avoidable or separable from the price of the air ticket. The unfairness of the commercial practice was also related to the deceptive indications provided by the airline on its websites on the presence and criteria for the application of this price supplement.	In 2012, the AGCM fined the airline, which did not comply with its decision.
Italian Competition Authority (AGCM)	Decision of 30 May 2012, n. IP136 - <b>Blue Panorama</b>	Payment card surcharges	The AGCM deemed as unfair Blue Panorama's commercial practice of separating the amount of the credit card surcharge from the price of air tickets offered on the airline's websites and on the related online booking and purchase systems, since it is a component of cost of the service offered by the airline, and as such not avoidable or separable from the price of the air ticket. The unfairness of the commercial practice was also related to the deceptive indications provided by the airline on its websites on the presence and criteria for the application of this price supplement.	In 2012, the AGCM fined the airline, which did not comply with its decision.
Italian Competition Authority (AGCM)	Decision of 30 May 2012, n. IP131 - <b>EasyJet</b>	Payment card surcharges	The AGCM deemed as unfair easyJet's commercial practice of separating the amount of the credit card surcharge from the price of air tickets offered on the airline's websites and on the related	In 2012, the AGCM fined the airline, which

Authority issuing the decision	Reference	Grounds	Decision	Enforcement / Appeal
			online booking and purchase systems, since it is a component of cost of the service offered by the airline, and as such not avoidable or separable from the price of the air ticket. The unfairness of the commercial practice was also related to the deceptive indications provided by the airline on its websites on the presence and criteria for the application of this price supplement.	did not comply with its decision.
UK Office of Fair Trading (OFT)	Investigation CRE-E/27017 closed on July 2012, into <b>Aer Arann, Aer Lingus Limited, BMI Baby Limited, Eastern Airways Limited, easyJet, Flybe Group, German Wings GmbH, Jet2.com, Deutsche Lufthansa AG, Ryanair, Thomas Cook Airlines, Thomson (TUI UK Limited), Vueling Airlines, Wizz Air</b>	Payment card surcharges	<p>The OFT investigated several airlines which were charging consumers an additional fee for making a payment by debit card, which was not included in the headline price, and/or were not presenting their credit card charges in a clear and transparent manner. These practices made it difficult for consumers to compare prices easily, damaged consumer confidence and impeded effective competition.</p> <p>The OFT was concerned that airlines' payment surcharges were a system put in place by airlines in order to conceal the true or genuine price of their services. The average consumer was not in a position to pay by these payment cards, which were presented by airlines as a free payment mechanism. The OFT was further concerned that there was no reasonable or legitimate reason for the airlines' failure to provide headline prices which included all unavoidable charges, such as any cost for paying by debit card.</p>	Most airlines gave formal undertakings to the OFT, and others made changes to their pricing practices and these changes were accepted by the OFT in lieu of undertakings.
Latvian Consumer Protection Authority (CRPC)	Decision of 23 October 2012 No.E03-PTU-K115-39 – <b>AirBaltic</b>	Lack of transparency about insurance policies (use of pre-ticked boxes)	The online ticket booking system of AirBaltic, which required consumers to carry out active actions (i.e. click on a refusal button) in order to decline additional services offered by a trader, such as additional insurance policies, were considered unfair (aggressive) commercial practices by the Latvian Consumer Rights Protection Centre.	N/A
Italian Competition Authority (AGCM)	Decision of 20 December 2013, n. PS7245 - <b>Ryanair</b>	Lack of transparency about insurance policies ('no insurance' option hidden)	The AGCM found that Ryanair had put in place UCPS by not supplying adequate information or by giving misleading essential information when consumers were to acquire the insurance policy covering the risk of travel cancellation. In particular, during the online reservation process, the risks actually covered by the	N/A

Authority issuing the decision	Reference	Grounds	Decision	Enforcement / Appeal
		among a list of potential countries of residence)	<p>insurance policy were not clearly indicated. They were only available by reading the full conditions of contract through a link. In addition, the sum of the deductible excess, which was very high in proportion to the cost of ticket, was not immediately clear and there was no explanation that the refund did not cover taxes and airport charges. These omissions could have misled consumers on the extent of insured risks, thereby causing them harm such as to take a transactional decision that they would not have taken otherwise.</p> <p>The mechanism imposed by Ryanair on consumers in order to select the no-purchase option of the travel insurance policy was also considered misleading: in the booking process it was necessary to scroll through the Country of Residence list and select the “refuse insurance” option, which – on the Italian website – came between Netherlands and Norway.</p> <p>The Authority also considered as an unfair commercial practice the fee requested by the airline to issue the certificate declaring that the consumer had not made use of the transport service that the consumer needed to obtain a refund of expenses encountered.</p>	
Italian Competition Authority (AGCM)	Decision of 20 December 2013, n. PS7488 - <b>easyJet</b>	Lack of transparency about the insurance policies (‘no insurance’ option hidden among a list of potential countries of residence)	<p>The AGCM deliberated that easyJet put in place UCPs by not supplying adequate information or by giving misleading essential information when consumers were to acquire the insurance policy covering the risk of travel cancellation. In particular, during the online reservation process, the risks actually covered by the insurance policy were not clearly indicated. They were only available by reading the full conditions of contract through a link. In addition, the sum of the deductible excess, which was very high in proportion to the cost of ticket, was not immediately clear and there was no explanation that the refund did not cover taxes and airport charges. These omissions could have misled consumers on the extent of insured risks, thereby causing them harm such as to</p>	N/A

Authority issuing the decision	Reference	Grounds	Decision	Enforcement / Appeal
			<p>take a transactional decision that they would not have taken otherwise.</p> <p>The Authority also considered as an unfair commercial practice the fee requested by the airline to issue the certificate declaring that the consumer had not made use of the transport service that the consumer needed to obtain a refund of expenses encountered.</p>	
Italian Competition Authority (AGCM)	Decision of 19 January 2015 PS8378 - <b>Ryanair</b>	Overcharged call centre facility	<p>The AGCM imposed fines on Ryanair for the lack of transparency on the prices of their paid call centre service, thus imposing on the client a burden, the scale of which they could not determine in advance.</p> <p>Consumers also complained about a lack of transparency about the need to contact the paid call centre in order to exercise their rights as provided for by the tickets purchased. At the moment of the reservation, in fact, the carrier would not provide the passengers with clear and complete information about the channels available through which they could exercise the rights attributed to them by the transport contract. Finally, consumers highlighted the extreme cost of the telephone assistance service, deriving from high rates, from long waits before speaking to an operator, as well as from the inconvenience related to the procedure for unblocking landline telephone lines in order to contact the surcharged numbers used by the airline.</p> <p>In many cases, the AGCM found that the difficulties encountered induced the clients to give up the exercise of their rights and contractual prerogatives, preferring to make a new reservation, rather than incur additional call centre related costs.</p>	N/A
Direction générale de la concurrence, de la consommation et de la répression des fraudes (DGCCRF)	Investigation closed in 2016.	Ticket sales in the low-cost airline sector, information on prices and general conditions of sale	The violations resulted in 5 warnings, 1 injunction, 1 administrative fine.	

Authority issuing the decision	Reference	Grounds	Decision	Enforcement / Appeal
Direction générale de la concurrence, de la consommation et de la répression des fraudes (DGCCRF)	Investigation closed in 2017.	Travel insurance taken out online or via a credit card	The investigation resulted in checks on 4 airlines.	
Direction générale de la concurrence, de la consommation et de la répression des fraudes (DGCCRF)	Investigation closed in 2017.	Online sale of airline tickets (lack of information, misleading commercial practices (on the price or essential characteristics), poor compliance with the obligation to display the taxes refundable in the event of a passenger not boarding	The investigation resulted in 45 warnings, 12 injunctions, 2 minutes, 4 administrative fines.	
Italian Competition Authority (AGCM)	Decision of 6 July 2017, n. PS9856 - <b>Vueling</b>	Misleading information on prices (online check-in; discount coupons) and access to the exercise of passengers' contractual rights (assistance and complaint)	The AGCM imposed fines on low-cost airline, Vueling, for a series of UCPs involving misleading and false information on the cost and the functioning of check-in procedures. On its website, the airline promoted its online check-in procedures as free of charge, avoiding mentioning that the online check-in procedures could be subject to other fees under certain conditions. The company also failed to mention the possibility of completing the check-in procedures free of charge at the airport.	Appealed before the Regional Administrative Court (TAR Lazio) in 2017. The appeal was rejected.
Italian Competition Authority (AGCM)	Decision of 26 July 2017, n. PS10381 - <b>British Airways</b>	Application of the no-show rule	The AGCM imposed fines on British Airways for an UCP consisting of failure to inform consumers, during the online purchase procedure of return tickets or sequential tickets, about the existence, conditions and limits of the so called no-show rule, as well as failure to set up a suitable procedure for allowing passengers to use the return flight (and the subsequent sections of a multi-leg journey) at no additional cost even in the event of failure to use the outbound flight.	Enforcement of the commitments presented by the airline.

Authority issuing the decision	Reference	Grounds	Decision	Enforcement / Appeal
Italian Competition Authority (AGCM)	Decision of 26 July 2017, n. PS10047 - <b>Etihad</b>	Application of the no-show rule	The AGCM imposed fines on Etihad for an UCP consisting of failure to inform consumers, during the online purchase procedure of return tickets or sequential tickets, about the existence, conditions and limits of the so called no-show rule, as well as failure to set up a suitable procedure for allowing passengers to use the return flight (and the subsequent sections of a multi-leg journey) at no additional cost even in the event of failure to use the outbound flight.	Enforcement of the commitments presented by the airline.
Italian Competition Authority (AGCM)	Decision of 26 July 2017, n. PS10181 – <b>Iberia Airlines</b>	Application of the no-show rule	The AGCM imposed fines on Iberia Airlines for an UCP consisting of failure to inform consumers, during the online purchase procedure of return tickets or sequential tickets, about the existence, conditions and limits of the so called no-show rule, as well as failure to set up a suitable procedure for allowing passengers to use the return flight (and the subsequent sections of a multi-leg journey) at no additional cost even in the event of failure to use the outbound flight.	Enforcement of the commitments presented by the airline.
Italian Competition Authority (AGCM)	Decision of 26 July 2017, n. PS10624 – <b>Emirates</b>	Application of the no-show rule	The AGCM imposed fines on Emirates for an UCP consisting of failure to inform consumers, during the online purchase procedure of return tickets or sequential tickets, about the existence, conditions and limits of the so called no-show rule, as well as failure to set up a suitable procedure for allowing passengers to use the return flight (and the subsequent sections of a multi-leg journey) at no additional cost even in the event of failure to use the outbound flight.	Enforcement of the commitments presented by the airline.
Italian Competition Authority (AGCM)	Decision of 26 July 2017, n. PS10642 – <b>KLM</b>	Application of the no-show rule	The AGCM imposed fines on KLM for an UCP consisting of failure to inform consumers, during the online purchase procedure of return tickets or sequential tickets, about the existence, conditions and limits of the so called no-show rule, as well as failure to set up a suitable procedure for allowing passengers to use the return flight (and the subsequent sections of a multi-leg journey) at no additional cost even in the event of failure to use the outbound flight.	Enforcement of the commitments presented by the airline.

Authority issuing the decision	Reference	Grounds	Decision	Enforcement / Appeal
Italian Competition Authority (AGCM)	Decision of 28 May 2018, n. PS10972 - <b>Ryanair</b>	Flight cancellations, misleading information on monetary compensation	The AGCM stated that Ryanair had engaged in “unfair commercial practices” when it cancelled thousands of flights in late 2017. Ryanair blamed the cancellations on a combination of air traffic control strikes, weather disruptions and a backlog of annual leave owed to crew members after the imposition of new regulations by the Irish Aviation Authority (IAA) <sup>249</sup> . From the AGCM point of view, the cancellations were due to management and organisational issues that were not “dependent on occasional and exogenous causes or outside [the airline’s] control”. Moreover, according to AGCM, Ryanair had also acted in a “misleading manner” when they informed the passengers of the cancellations, as they had not adequately informed them of their right to additional compensation.	Appealed before the Regional Administrative Court (TAR Lazio) in 2018. The appeal was rejected.
Italian Competition Authority (AGCM)	Decision of 8 May 2019, n. PS11076 - <b>Blue Panorama</b>	Penalty fee for correction of the passenger’s name	In one of its most recent decisions, the AGCM sanctioned low-cost airline Blue Panorama for UCPs consisting of the application to consumers of a penalty, which was initially payment for a new ticket to be able to use the service already purchased and, subsequently, a fee of 50 euros for the omission of the possible second/third name or surname or in the case of alteration/lack of some letters.	Appealed before the Regional Administrative Court (TAR Lazio) in 2019. The appeal was rejected.
Italian Competition Authority (AGCM)	Decision of 9 May 2018, n. PS10378 <b>Pegasus</b>	Misleading information on prices	The AGCM sanctioned Pegasus for failure to include in the final price of the air tickets advertised on its website a service fee/commission that would be added to the final price of the flight, before the payment and in the dissemination of misleading information regarding free online check-in and the request for payment for a service not rendered.	
Italian Competition Authority (AGCM)	Decision of 11 May 2016, n. PS10063 - <b>Volotea</b>	Misleading information on prices	AGCM imposed sanctions on Volotea in 2016 for an UCP consisting of omitting to provide an immediate, clear and complete indication of the real price of the air ticket offered to the consumer by publishing on their website not the standard ticket price but the lowest price, available only to those belonging to	Appealed before the Regional Administrative Court (TAR Lazio) in 2016.

<sup>249</sup> Irish Aviation Authority (IAA): a commercial semi-state company, mainly responsible for the regulation of safety aspects of air travel.



Authority issuing the decision	Reference	Grounds	Decision	Enforcement / Appeal
			the Supervolotea programme, which allows the purchase of tickets at discounted prices upon payment of a tacitly renewable annual subscription. Furthermore, it emerged that the airline, on the website page dedicated to online check-in, while reminding consumers that check-in at the airport has a cost, failed to indicate the amount (EUR 30), instead redirecting the consumer to a price list in which the costs of a series of additional services were shown.	The appeal was rejected.
Italian Competition Authority (AGCM)	Decision of 21 February 2019 n. PS11272, <b>Wizz Air</b>	Hand luggage policies	Following a change in its previous luggage policy, Wizz Air was investigated by the Italian Competition Authority, which deemed that the introduction of the new policy requiring an additional charge for large hand luggage (trolleys) represents a non-foreseeable burden for the consumer, which should be included in the standard rate. In the view of the Italian Authority, the request for a supplement for an essential element of the passenger air transport contract, such as hand luggage, misleads consumers, providing a false representation of the actual ticket price and not allowing them to make a proper comparison with the rates proposed by other companies.	Appealed before the Regional Administrative Court (TAR Lazio) in 2019. The court upheld the appeal and annulled the decision rendered by the AGCM.
Italian Competition Authority (AGCM)	Decision of 21 February 2019, n. PS11237 <b>Ryanair</b>	Hand luggage policies	Following a change in its previous luggage policy previously in force, Ryanair was investigated by the Italian Competition Authority, which deemed that the introduction of the new policy requiring an additional charge for large hand luggage (trolleys) represents a non-foreseeable burden for the consumer, which should be included in the standard rate. In the view of the Italian Authority, the request for a supplement for an essential element of the passenger air transport contract, such as hand luggage, misleads consumers, providing a false representation of the actual ticket price and not allowing them to make a proper comparison with the rates proposed by other companies.	Appealed before the Regional Administrative Court (TAR Lazio) in 2019. The court upheld the appeal and annulled the decision rendered by the AGCM.

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The study aims at identifying and analysing the unfair commercial and trading practices in passenger air transport that not only are detrimental to consumers but which can also distort competition in the Single Market. The study analyses the main air carriers' business models and price patterns, as well as the decisions adopted by the national competent authorities with regard to unfair commercial practices and predatory pricing.

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