



# Administrative Court annuls fines inflicted by Italian Competition Authority to low-cost airlines for large luggage policies



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LITIGATION, SOCIETY, GLOBALLY MINDED

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**O**n 29 October 2019, the Regional Administrative Court of Lazio (Tribunale Amministrativo Regionale del Lazio, TAR) annulled the fines inflicted on 20 February 2019 by the Italian Competition Authority (Autorità Garante della Concorrenza e del Mercato - AGCM) to *Ryanair*<sup>1</sup> and *Wizz Air*<sup>2</sup> for their cabin bag policies.

The proceedings concerned the conduct of the two low-cost airlines, consisting of the misleading presentation to

consumers of the standard fare for air transport services offered on the websites. In particular, following the update of cabin bag policies, which came into force on 1 November 2018, so-called trolley bags (large hand luggage up to 55x40x20cm), an essential and predictable element of the final price of the transport service, was no longer included. For reservations from 1 November 2018 onwards, the airlines span off from the standard fare the possibility of carrying a trolley bag, requiring passengers to pay an extra fee for their transport of between 6 and 25

<sup>1</sup> TAR Lazio 29.10.2019, Sentenza n. 12456/2019.

<sup>2</sup> TAR Lazio 29.10.2019, Sentenza n. 12455/2019.



euros depending on the mode (cabin or hold) and time of the supplement purchase.

According to the AGCM<sup>3</sup>, Ryanair and Wizz Air's updated luggage policies, and specifically the trolley bag supplement, resulted in an *ex ante* separation from the fare of a fully foreseeable charge of the air transport service, potentially

capable to provide a false representation of the actual ticket cost in breach of Articles 21, paragraph 1, letters b) and d)<sup>4</sup> and 22<sup>5</sup> of the Consumer Code of Italy. In particular, such a conduct was found deceptive as to the characteristics and price of the air transport service offered to passengers, as well as contrary to the standards of professional diligence. The AGCM therefore imposed

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<sup>3</sup> AGCM Provvedimento n. 27558 del 20.02.2019.

<sup>4</sup> Article 21 of the Consumer Code, entitled "Misleading actions", at paragraph 1 states as follows: "... A commercial practice shall be regarded as misleading if it contains false information and is therefore untruthful or in any way, including overall presentation, deceives or is likely to deceive the average consumer, even if the information is factually correct, in relation to one or more of the following elements, and in either case causes or is likely to cause him to take a transactional decision that he would not have taken otherwise:

(...)

(b) the main characteristics of the product, such as its availability, benefits, risks, execution, composition, accessories, aftersale customer assistance and complaint handling, method and date of manufacture or provision, delivery, fitness for purpose, usage, quantity, specification, geographical or commercial origin or the results to be expected from its use, or the results and material features of tests or checks carried out on the product;

(..)

(d) the price or the manner in which the price is calculated, or the existence of a specific price advantage..."

<sup>5</sup> Article 22 of the Consumer Code, entitled "Misleading omissions", states as follows: "... A commercial practice shall be regarded as misleading if, in its factual context, taking account of all its features and circumstances and the limitations of the communication medium, it omits material information that the average consumer needs, according to the context, to take an informed transactional decision, thereby causing or being likely to cause the average consumer to take a transactional decision that they would not have taken otherwise.

It shall also be regarded as a misleading omission when, taking account of the matters described in paragraph 1, a trader hides or provides in an unclear, unintelligible, ambiguous or untimely manner such material information as referred to in that paragraph or fails to identify the commercial intent of the commercial practice if not already apparent from the context, and where, in either case, this causes or is likely to cause the average consumer to take a transactional decision that they would not have taken otherwise.

Where the medium used to communicate the commercial practice imposes limitations of space or time, these limitations and any measures taken by the trader to make the information available to consumers by other means shall be taken into account in deciding whether information has been omitted.

In the case of an invitation to purchase, the following information shall be regarded as material, within the meaning of paragraph (1), if not already apparent from the context:

(a) the main characteristics of the product, to an extent appropriate to the medium and the product;

(b) the geographical address and the identity of the trader, such as his trading name and, where applicable, the geographical address and the identity of the trader on whose behalf he is acting;

(c) the price inclusive of taxes, or where the nature of the product means that the price cannot reasonably be calculated in advance, the manner in which the price is calculated, as well as, where appropriate, all additional freight, delivery or postal charges or, where these charges cannot reasonably be calculated in advance, the fact that such additional charges may be payable by the consumer;

(d) the arrangements for payment, delivery, performance and the complaints handling policy, if they depart from the requirements of professional diligence;

(e) for products and transactions involving a right of withdrawal or cancellation, the existence of such a right.

Information requirements established by Community law in relation to commercial communication including advertising or marketing, shall be regarded as material within the meaning of paragraph (1)..."

finances in the amount of EUR 3 million to *Ryanair* and EUR 1 million to *Wizz Air*.

In the air transport sector, carriers' tariff freedom finds specific limits in Regulation (EC) No 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<sup>6</sup>, and specifically those of Article 23<sup>7</sup>. According to the Court of Justice in Case C-487/12, *Vueling Airlines*, large hand luggage is to be considered an indispensable element of the air transport service<sup>8</sup>, and therefore by not including *ab initio* in the proposed ticket's price a necessary cost element, the airlines provide an incomplete representation of the economic conditions applied, misleading the consumer with respect to the final total disbursement for the chosen flight. Consequently, the unavoidable and predictable supplements of the air transport service cannot be separated from the service price and neither be subjected to additional payments. On the contrary, they should be included in the base price of the ticket, in order not to negatively affect users' consumption choices.

Seized of a challenge against the decision of the AGCM, the Administrative Court found in the first place that the AGCM did not qualify the airlines'

practice as unfair with regard to the way the ticket cost was presented, but rather to the fact that they removed from the standard tariff the possibility of carrying a trolley bag larger than those currently permitted.

According to the Court, none of the elements provided by the AGCM show that the airlines prevented passengers from bringing a hand baggage on board, imposing limits only on its size and not its weight, thus, in compliance with the Court of Justice decision in the *Vueling* case. Therefore, in absence of a general tariff regulation that determines specific minimum measures, the Court held that the airlines were permitted to assess the reasonableness of baggage size and change a cost element accordingly. In the case at hand, the size imposed by *Ryanair* and *Wizz Air* for hand luggage were not unreasonable, as the passenger is neither prevented from choosing between a standard ticket with a slightly higher cost and a cheaper ticket, nor from bringing his own personal effects on board. The AGCM decision does not contain any detailed comparison between the fares of all other airlines and those of *Ryanair* and *Wizz Air* for each individual route in order to find if any difference was in existence obliging the consumer to make a specific choice.

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<sup>6</sup> OJ L 293 of 31.10.2008.

<sup>7</sup> Article 23 of Regulation 1008/2008, entitled "Information and non-discrimination", states as follows: "... Air fares and air rates available to the general public shall include the applicable conditions 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 to which the Treaty applies. The final price to be paid shall at all times be indicated and shall include the applicable air fare or air rate as well as all applicable taxes, and charges, surcharges and fees which are unavoidable and foreseeable at the time of publication. In addition to the indication of the final price, at least the following shall be specified:

a) air fare or air rate;

b) taxes;

c) airport charges; and

d) other charges, surcharges or fees, such as those related to security or fuel;

where the items listed under (b), (c) and (d) have been added to the air fare or air rate. Optional price supplements shall be communicated in a clear, transparent and unambiguous way at the start of any booking process and their acceptance by the customer shall be on an 'opt-in' basis.

Without prejudice to Article 16(1), access to air fares and air rates for air services from an airport located in the territory of a Member State to which the Treaty applies, available to the general public shall be granted without any discrimination based on the nationality or the place of residence of the customer or on the place of establishment of the air carrier's agent or other ticket seller within the Community..."

<sup>8</sup> ECJ 18.09.2014, Case C-487/12, *Vueling Airlines*, para 40.

Finally, the lack of professional diligence imputed to the airlines by the AGCM was found not to exist, as their offers were clear in pointing out from the very beginning the dimensions of the hand luggage allowed. The consumer was not, as a result, required to perform any complex logical-mathematical operation to identify the final price of the ticket, since its calculation was fully illustrated also with regard to the embarkation of a second large baggage.

Therefore, the Court granted the airlines' challenge and annulled the fines imposed by the AGCM.

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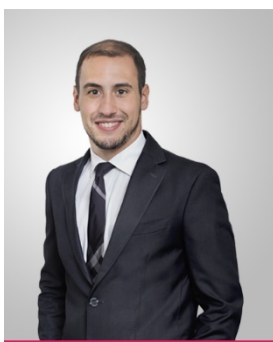
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