The essentiality of large hand luggage in air transport and unfair commercial practises

1. Preliminary remarks

The measures of the Competition Authority being analysed in this chapter are worthy of inclusion as they consider issues in various respects. First of all, in regards to the qualification of hand luggage and its essential character as an ancillary service in air transport; secondly, in regards to consumer protection, deprived of transparent and clear information, and therefore the activation of unfair commercial practices (e.g. articles 20-22 cod cons.); and finally in terms of the unfair nature of the clauses. According to the Authority, the disputed behaviours in the antitrust field correspond to unfair commercial practices as they are contrary to professional diligence. They are capable of significantly modifying the economic behaviour of the average consumer in relation to the service offered by the professional, by using a false representation of the real cost of the air ticket. They achieve this by removing *ex ante* from the tariff, an estimative charge related to the transportation of the hand luggage, which is an essential element of the air transport service. These methods are also contrary to the standards of professional diligence in the field of competence.

The changes made to the rules for the transport of large hand baggage therefore constitute an improper commercial practice, in that they deceive the consumer on the actual ticket price. The ticket

price, which is often offered at a much lower rate, no longer includes in the basic tariff rate, an essential element of the air transport contract, such as cabin luggage.

2. The fact

On 20 February 2019, the Competition Authority concluded two preliminary proceedings against two major low-cost airlines.[1]

The Authority determined that changes made by these low cost airlines to the rules for transporting large cabin baggage, defined as the trolley bag up to 55x40x23, constitute an improper commercial practice, in that they deceive the consumer on the actual price of the ticket by no longer including in the basic rate, an essential element of air transport which is "large hand luggage".

The two carriers, since the beginning of autumn 2018, allowed ticket holders of a flight sold at the "BASIC" / "STANDARD" fare[2] to carry a single small bag (approx. 40x30x20), to be placed under their front seats. The abovementioned airlines no longer allowed the usual standard size trolley[3] at those ticket prices, and the significant reduction of space available to the passenger was of course in the advantage of the carriers who were able to resell the aircraft space destined to carry hand luggage.

The separation of the cost of the baggage would provide, in the pronunciation of the Authority (subsequently overturned by the Administrative Court of Lazio[4]), a false representation of the real

[1] PS 11237- PS 11272, in Bulletin AGCM n. 8/2019, 25 February 2019.
[2] BASIC for Wizz Air and STANDARD for Ryanair.
[3] The established practice of considering standard carry-on baggage as the maximum trolley size of 55x40x23 is verified by the widespread presence of baggage measuring stands located in front of boarding gates. Suitcase manufacturers also advertise those measurements as being suitable for low-cost flights, further proving the practice.
[4] On 29 October 2019, the Regional Administrative Court of Lazio with sentences 12455/2019 and 12456/2019 cancelled the Authority's provision.

cost of the air ticket, as it is not a possible charge, as indicated by the art. 23 of European Regulation 1008/2008[5].

3. The distinctive features of low cost airlines

Since the end of the 20th century, low-cost transport has become increasingly popular in the air transport market.

In the United States, this phenomenon took off thanks to the Airline Deregulation Act[6], which opened the market to private operators. In Europe, the practice began in 1993 with the entry of "third package aviation", which allowed any air carrier with a Community operating license to access, from April 1997, the intra-Community market without incurring restrictions of any kind, including extra tariffs.[7] The first company that took advantage of the new regulatory structure was Ryanair, which succeeded in penetrating the market according to the model of the American airline companies, operating for some time.[8] Over the decades, the main structure that has characterized the business model of low cost companies is the progressive reduction of any "accessory" service for the traveller,

[5] Article 23 of Regulation 1008/2008 of the European Parliament and of the Council of 24 September 2008: "1. 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".

[6] Airline Deregulation Act, Pub.L. 95–504, 49 U.S.C. § 1371 et seq. Approved October 24, 1978.

[7] Regulation (EEC) n. 2407/92 of 23 July 1992 on the issue of licenses to air carriers (OJ L 240, 24.8.1992, p. 1); Regulation (EEC) 2408/92 of 23 July 1992 on access for Community air carriers to intra-Community air routes (OJ L 240, 24.8.1992, p. 8); and Regulation (EEC) n. 2409/92 of the Council of 23 July 1992 on air fares for passenger and freight transport (OJ L 240, 24.8.1992, p. 15).

[8] See S. CREATON, *Ryanair, il prezzo del low cost* (Ryanair, the low cost price), Milan, 2008; L. ORSINI, *Volare low cost. La rivoluzione del trasporto aereo* (Flying low cost. The air transport revolution), Milan, 2008; F. ROSSI DAL POZZO, *Servizi di trasporto aereo e diritti dei singoli nella disciplina comunitaria* (Air transport services and individual rights in the Community legislation), Milan, 2008.

in order to make the price of the flights more affordable than those of competing airlines. The reduction in flight prices, determined by the cancellation of all the eliminable services, was well received by the market because, in the face of big cost savings, but with presumable constant margins for the carriers, a decisive economic advantage is paid to the consumer, who is often insensitive to such onerous "frills". The actions undertaken by low-cost carriers include commercial disintermediation;[9] reduction of the turnaround, which is the time between the departure and arrival of the aircraft, which allowed, together with the use of the same aircraft, an increase in the daily number of flights; the choice and use of secondary satellite airports of smaller cities, sold as airports of the main city, with a consequent reduction in costs, airport taxes and greater bargaining power; use of variable prices depending on the conditions and time of purchase of the ticket; savings on personnel costs that perform more tasks and shifts; elimination of any service on board that is not an essential element of the transport contract; and, of particular relevance in the matter of baggage, the unbundling from the price of the flight of the cost of transporting the checked baggage. In regards to the last point, usually shipment of the checked baggage corresponds to the payment of a fee, which is often disproportionate to the cost of the main passenger transport service, and at the same time, the reduction of the measures of hand baggage allowed on board makes it necessary to purchase the transport of checked baggage.[10]

The same data provided by the airlines under investigation confirm that, as the general conditions relating to hand luggage changed, the purchase of the supplements necessary to bring “large” baggage into the cabin progressively increased, confirming the essential nature of this service and the

[9] With regard to mass air contracts purchased on the web or in the agency and the consequent potential risks for the consumer see: A. LODI, *L’acquisto del biglietto aereo on-line come “contratto di massa” ai fini dell’applicabilità delle sentenze del Giudice di Pace* (The purchase of air tickets online as a "mass contract" for the purposes of the applicability of the judgments of the Justice of the Peace*),* in comment on Cass. Civ 10 luglio 2013, n. 17080, in *Riv. it. dir. tur.,* 2014, 11, p. 165; G. CHINÈ, *La contrattazione standardizzata* (Standardized contracting*),* in *Trattato di diritto privato* (Private law treaty)*,* directed by M. Bessone, *Il contratto in generale* (The contract in general)*,* II, Tourin, 2000, p. 498; E ROPPO, *Contratti standard, autonomia e controlli nella disciplina delle attività negoziali di impresa* (Standard contracts, autonomy and controls in the discipline of business negotiation activities)*,* Milan, 1975, 3; V. ZENO-ZENCOVICH, *Le nuove condizioni generali di contratto nel trasporto aereo* (The new general contract conditions for air transport)*,* in *Dir. tur.,* 2006, p. 116; DE NOVA, *Le condizioni generali di contratto* (The general conditions of contract)*,* in *Trattato* (Treaty) Rescigno, X, *Obbligazioni e contratti* (Obligations and contracts)*,* t. II, Tourin, 1997, p. 127.

[10] M. DEIANA, *Problematiche giuridiche nel trasporto aereo low cost,* in *Dir. trasp.,* 2010, pp. 671 and following.

preference given by travellers to hand luggage, compared to checked baggage, especially for short journeys (which are usually offered by low cost airlines).

Further, "low cost carriers adopt an organizational model that, in order to obtain cost, time and human resource savings, compresses the rights and constitutes charges for the passenger. The other traditional companies are also conforming to this model, and in this context, a more intense protection of the consumer of the service is made more and more necessary by means of general terms and conditions that are certain, determined and balanced…"[11]

It is precisely because of the essential nature of this service that the question submitted to the judgment of the Antitrust Authority is examined.

4. The regulation of cabin baggage in air transport and the "essentiality of large hand luggage"

Regulation of the air transport contract in Italy faces some problems in terms of identification and coordination of the applicable law, since there are several sources of laws: international, European and internal.[12]

With the Montreal Convention of 28 May 1999 coming into force for the unification of certain rules relating to international air transport[13] (signed by the European Community on 9/12/1999 and

[11] The words are by C. VIGNALI, *Le condizioni generali di contratto nel trasporto aereo di persone* (General terms and conditions for the carriage of passengers by air), in C. Vignali (edited by), *Trasporti e turismo. Profili privatistici* (Transport and tourism. Private law profiles), Milan 2016 p. 184.

[12] For sources, see among others: G. MASTRANDREA – L. TULLIO, *Il compimento della revisione della parte aeronautica del codice della navigazione* (The completion of the revision of the aeronautical part of the navigation code), in *Dir. Mar.,* 2006, p. 699 and following; S. BUSTI, *Contratto di trasporto aereo* (Air transport contract), Milan, 2001; E.G. ROSAFIO, *Problemi applicativi a seguito dell'entrata in vigore della Convenzione di Montreal del 28 maggio 1999, per l'unificazione di alcune norme relative al trasporto aereo internazionale* (Application problems following the entry into force of the Montreal Convention of 28 May 1999, for the unification of certain rules relating to international air transport), in *Dir. tur.,* 2004, p. 32. On air transport, see: A. CORRADO, *Il contratto di trasporto aereo di persone* (The air transport contract of persons), in Vignali (edited by), *Trasporti e turismo* (Transport and tourism), Milan, 2016, p. 167.

[13] The Montreal Convention did not lead to the denunciation of the previous Warsaw Convention of 12 October 1929, so both laws can be enforced, but within the limits of art. 55 of the Montreal Convention which provides for its prevalence in all countries where both Conventions have been signed.

approved with Decision 2001/359/EC of the Council on 5/4/2001), an international disciplinary uniformity has been reached. The Convention was ratified in Italy with the law of 10 January 2004, n. 12 and entered into force on June 28, 2004. The European Community, in addition to ratifying the Montreal Convention in 2001, has also issued various regulatory provisions on air transport.

With regard to baggage regulations, in particular the Council Regulation (EC) of 9 October 1997, no 2027/97 "on the liability of the air carrier with regard to the air transport of passengers and their baggage", as amended by Reg. EC No 889/ 2002 of the European Parliament and of the Council of 13 May 2002[14] and, with regard to prices, Regulation (EC) 1008/2008 of the European Parliament and of the Council of 24 September 2008 laid down common rules for the provision of air services in the community.

In addition to the general discipline of the transport contract in art. 1678 and following of the civil code, in Italian law, this refers to the code of navigation, modified with the d. lgs. 9 May 2005, n. 96 “Review of the aeronautical part of the Code of Navigation pursuant to art. 2 of the law 9 November 2004, n. 265”, entered into force on 21 October 2005, and d. lgs 15 March 2006, n. 151 “Corrective and supplementary provisions to Legislative Decree n. 96 of 9 May 2005” on the revision of the aeronautical part of the Navigation Code, which entered into force on 29 May 2006. Art 941 of the Code of Navigation expressly refers to the carriage by air of persons and luggage and includes the carrier’s liability for personal injury to the passenger and Community, as well as international rules in force in the Republic.[15]

On the Convention for the unification of certain rules relating to international air transport, signed in Warsaw on the 12nd of October 1929, (amended by the Hague Protocol of), see: M. COMENALE PINTO, *La responsabilità del vettore aereo dalla Convenzione di Varsavia del 1929 alla Convenzione di Montreal del 1999* (The liability of the air carrier from the 1929 Warsaw Convention to the 1999 Montreal Convention), in *Diritto e Storia* (Law and History), n. 2, 2003, in http://www.dirittoestoria.it/lavori2/Contributi/Comenale-Responsabilit.htm.

[14] The Community also intervened with: EC Reg. of the European Parliament and of the Council n. 261/2004 of 11 February 2004, which established common rules on compensation and assistance to passengers in the event of denied boarding, flight cancellation or prolonged delay; EC Reg. of the European Parliament and of the Council n. 2111/2005 of 14 December 2005, concerning the establishment of a Community list of air carriers subject to an operating ban within the Community and to information to be provided to air passengers on the identity of the actual air carrier and repealing the 'art. 9 of Dir. 2004/36 / CE.

[15] For a critical analysis see: S. ZUNARELLI – M.M. COMENALE PINTO, *Manuale di diritto della navigazione e dei trasporti* (Manual of navigation and transport law), Padova, 2013 p. 83.

Going back to our subject matter of hand luggage, the carrier's responsibility is referenced in the general discipline of the transport contract in art. 1678 and art. 1681 on the responsibility of the carrier in the transport of persons, which establishes the responsibility of the carrier for the things that the passengers carry with them, making explicit reference to the baggage "by hand" in the Code of the Navigation and in Montreal Convention of 1999.

In air transport, "baggage delivered" is one that the passenger drops off at a baggage desk, depriving themselves of it and entrusting it completely to the carrier, which is in turn obliged to transport it safely to its destination. "Hand baggage" is any baggage that the passenger does not deprive himself of, in which case the baggage remains in the custody of the passenger for the entire trip. The hand baggage normally contains everything the passenger intends to keep in their custody (personal items or valuables).

For baggage delivered by the airline, the Montreal convention art. 17 paragraph 2 establishes that the carrier has an automatic liability in the event of any destruction, loss, or deterioration occurring during the period in which the carrier has custody of the luggage wherein it becomes liable, unless it can prove that the damage was caused by the nature of the baggage delivered, by its flaw or by an inherent flaw contained within it. On the other hand, for baggage that is not delivered, art. 17 par. 2 of the Convention stipulates that the carrier is liable only when the damage is its own fault or the fault of its employees or appointees. In any case, thanks to the combined provisions of art. 20, carriers may still exempt themselves from liability if they can prove that the damage was also caused by an unlawful act or omission by the passenger themselves.[16]

[16] On carrier liability see, among others: A. ANTONINI, *La responsabilità del vettore aereo per il trasporto di persone e cose nella più recente normativa: protocolli di Montreal, Varsavia-Montreal, Regolamento comunitario* (The responsibility of the air carrier for the transport of people and things in the most recent legislation: Montreal, Warsaw-Montreal protocols, Community Regulation), in *La nuova disciplina del trasporto aereo, atti del convegno di Ispica – Ragusa del 29 Agosto – 4 settembre 1999* (The new discipline of air transport, acts of the convention of Ispica - Ragusa of August 29th - September 4th 1999), Messina, 2000; S. VERNIZZI, *La perdita del bagaglio: responsabilità del vettore e della società di gestione dei servizi aeroportuali* (Loss of baggage: liability of the carrier and of the airport services management company), in P.G. De Marchi (edited by), *I diritti del consumatore e la nuova class action* (Consumer rights and the new class action), 2010, p. 203 and following.

The air carrier can therefore invoke to total or partial “contributory negligence,” which is the negligence of the passenger themselves, relieving the carrier of some or all liability towards the damage or loss.

The relevant issue to be analysed isn’t so much about the responsibility of the airline towards passenger luggage, which is not disputed, but rather to the essential character that the "large hand baggage" assumes within the discipline of the air transport contract.

By taking into consideration internal, international and community rules, it’s easy to deduce the essential character of the ancillary supply of carry-on baggage in favour of travellers in the transport industry in general, and especially in air transport.[17]

In fact, in the cases considered within this chapter, the Authority does not doubt the importance of the transportation of carry-on baggage, but rather considers it essential to guarantee passengers a minimum set of dimensions for their luggage, so that they are of a certain utility for the traveller; which is precisely one of the points on which the Lazio Regional Administrative Court does not agree. In the cases considered here, in the opinion of the Authority, the consumer is deceived on the actual price of the ticket since the carrier has extrapolated from the basic tariff (the minimum, which must still include all the performances guaranteed by type of contract) an essential element of air transport, which is the transport of 'large hand baggage'.

The Authority declares that “the request for a supplement for the transport of large hand baggage entails the *ex-ante* separation from the rate of a non-foreseeable and foreseeable charge of the air transport service.”[18] It follows that the air carrier’s main activity is to transfer passengers and their belongings which are enclosed within a certain size of luggage.

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[17] See A. CUSMAI, *Le sanzioni amministrative nel traporto dei bagagli* (Administrative penalties in the transport of luggage), p. 198, in A. Cagnazzo, S. Toschei, C. Pozzi (edited by), *Le sanzioni in materia di trasporto marittimo, aereo, terrestre e codice della strada* (Sanctions on maritime, air, land and road traffic regulations), Tourin, 2012.
The two companies claim to the contrary that "the non-essential baggage is always an optional and priced item as a possible element of the transport contract", so in PS11272 and in PS11237 of 20 February 2019, in Bulletin 8/2019 of 25 February 2019.

[18] Thus the ACGM, PS11272, resolution of 20 February 2019, p. 20, n. 69, in Bulletin 8/2019 of 25 February 2019.

In our system, the essential nature of the baggage transfer service is also based on article 410 of the navigation code on the transport of unchecked baggage, which states that the price of the transfer includes the consideration for the transportation of the passenger's baggage, which must be within the weight and volume limits established by the carrier or according to use.[19] The Authority therefore affirms that the "large hand" luggage, the 50x40x23 trolley, is the type of baggage used in established practice and accepted by the main competitors and by the same air carriers sanctioned, until a few months ago.[20]

The particular means of transport, the aircraft, does not materially allow the traveller to access the hold during the flight, unlike other vehicles on which the passenger has access, even for a limited period of time (during stops) to the suitcases delivered (e.g. coaches, trains, motor vehicles); without considering also the fact that from the drop off to the end of the trip the traveller hasn't any type of control of the checked baggage, because he cannot verify that it is physically loaded on the correct aircraft. It is therefore inevitable to conclude that in air travel there is a greater need for the passengers to carry with them all that is necessary for the duration of the journey and beyond, when leaving the aircraft they will have to wait until the delivered baggage is returned; time that must inevitably be added to the flight time and that should perhaps also be measured for the purpose of calculating the quantification of a possible delay.[21] In fact, most airlines have contractual clauses that allows them time to evaluate on a discretionary basis what is the right period for the baggage in the hold to be

[19]As regards the prohibition of boarding certain items with hand baggage, see M. BASILE *Presupposti di efficacia nei confronti dei privati della normativa europea in tema di sicurezza aerea* (Assumptions of effectiveness in relation to private individuals in European legislation on aviation safety), comment on Justice Court CE, Causa C-345/061), in *Dir. trasp.,* 2010, p. 94; on safety, see: C. CAMARDA, *La sicurezza del volo in ambito aeroportuale, competenze e responsabilità* (Flight safety in airports, skills and responsibilities), in *Dir. Trasp* .2003, 1.

[20] To the contrary, the airlines which cite the judgment of the Court of Justice of September 18, 2014, Vueling Airlines, C-487/12, which recalls article 22 of EU Regulation 1008/2008 and states the principle of freedom of the carrier and that is to provide, once guaranteed the free hand luggage, a fee for the transport of a second larger hand luggage if specific conditions are met; according to Wizz Air it certainly seems reasonable to state that the carrier is free to provide for the payment of a specific fee for the transportation of each hand baggage that exceeds "reasonable requirements, in terms of weight and size", provided that the carrier guarantees transport free in the cabin of the personal and essential effects of all passengers, which are "documents, house keys, mobile phone, laptop, wallet, beauty case and a first change of clothes".

[21] As regards the delay in the return of the baggage, see among others: F. BRUGNONE, *Il danno non patrimoniale da ritardo nella riconsegna del bagaglio da parte della compagnia aerea* (Non-pecuniary damage from delayed baggage delivery by the airline), comment on GdP Bari 20 January 2010, n. 399, in *Riv, it. dir. tur.,* 2011, 3/3, p. 100; S. VERNIZZI, *Il trasporto aereo di bagaglio: ulteriori profili di responsabilità,* in *Resp. civ. e prev.,* 2009, 12, 2620.

returned, using the term "reasonable time", if the baggage is not embarked on the same flight as the passenger.

Not to mention the risk that the luggage will be lost or damaged.[22]

To further analyse the issues, another element not to be underestimated for the purposes of the essentiality of large hand luggage is the type of flights performed by the two air carriers in question. Neither of them carries out long range routes, but rather focuses on short and medium range. As a short duration flight, any extra waiting time for baggage in hold becomes a significant portion of the total flight duration and not something travellers can feel indifferent to. The proof is that in the face of these new travel conditions, most travellers have opted to purchase extra hand luggage by paying for it as an additional service, or, in compliance with the old travel conditions, they have acquired priority boarding at a higher price, which also allows them to bring their trolley onto the aircraft.

It has long been common practice for low-cost airlines to allow access to a maximum number of luggage in the overhead compartments for capacity and security reasons, including information in the conditions of the contract.[23] These conditions are subject to unfairness, as in the present case, the airline deprives the passenger of an essential transport service, thus forcing them to purchase a more expensive ticket to be among the first to board the aircraft and be allowed to bring a trolley with them on board. One clause that is present in the general conditions of some airline companies and that has elements of unfairness under the art. 33, paragraph 2, lett. d), c. cons., reserves the carrier the right to refuse persons or their baggage on board for various reasons such as safety, conduct of the individual that, in view of a final commitment by the consumer from the time they conclude the contract, the

[22] See, among others: M.C. DESSARDO, *Ritardata consegna del bagaglio e diritto a un equo risarcimento* (Delayed delivery of baggage and the right to fair compensation), in *Riv. it. dir. tur.,* 2013, 7, p. 82 and following; F. BRUGNONE, *cit.*; S. VERNIZZI, *cit.*; V. MANCA, *Ritardo aereo e danno esistenziale* (Air delay and non-pecuniary loss), comment on GdP Milan, 19 February 2010, n. 3541, in *Riv. it. Dir. tur.,* 2011, 3, p. 107; N. FABBRIO, *La risarcibilità del danno morale entro il limite della responsabilità del vettore aereo e l'assicurazione obbligatoria* (The compensation of non-material damage within the limit of the air carrier's liability and the compulsory insurance), in *Dir. trasp.,* 2010, p. 738.

[23] Easyjet allows a maximum of 70 bags of the maximum size of 56x45x25 to be placed in the hatboxes, starting from the seventy-first the bags are transferred to the hold and returned along with the baggage delivered. www.easyjet.com 12 April 2019.

performance of the carrier is subject to the unquestionable discretion of the carrier, without even providing a refund of the sums paid, except for embarkation fees.[24]

As previously stated, in contracts for adhesion of airlines, the clauses that present the greatest risk profiles in terms of unfairness are those that are concerned with times, rates, delays and baggage.[25]

Also the Ministerial Decree n. 001/36 of January 28th 1987 concerning baggage on board with the passenger states that "for the purposes of airport security and flight safety, each passenger is allowed to carry only one hand baggage in the cabin, identified by name and surname, provided that the sum of the dimensions (base, height and depth) does not exceed a total of 115 cm. In addition to this baggage, the passenger must also be allowed to bring a purse or a briefcase, a camera ... items purchased at the duty free shop."

Therefore, even on the regulatory front, the essential nature of a minimum guaranteed volume of hand baggage in air transport appears undisputable.

Hypothetically, the reduction in size of hand luggage allowance operated by the two carriers could have been far less controversial if the volume and weight allowed to a single passenger had been the result of a fair distribution of space in the overhead bins between all passengers of the plane. In doing so, the airline would guarantee everyone, regardless of their position of entry into the aircraft, of being able to carry their personal belongings with them; therefore, it would have been motivated by the objective of overcoming the inequitable treatment of passengers. However, this has not been verified and proof is the contextual resale of the entire remaining space of the overhead bins[26] for the sole benefit of the carrier.

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[24] V. FRANCESCHELLI, C. VIGNALI, G. GIUGGIOLI, *Volare in equilibrio. Parere in materia di clausole vessatorie nei contratti di trasporto aereo nazionale/comunitario di persone e bagaglio al seguito* (Fly in balance. Opinion on the subject of unfair terms in national / community air transport contracts for people and luggage). Milan Chamber of Commerce website.

[25] See: C. VIGNALI, *cit*, p. 185.

[26] The same Ministry of Innovation and Technology - Hungarian Aeronautical Supervision Administration had stated that "specifically, the Authority first of all noted that ... each passenger must be allowed to carry a carry-on bag on board the aircraft and therefore highlighted that, under the previous hand baggage policy, a considerable percentage of passengers who had purchased the basic fare had their hand baggage transferred to the hold only at the time of boarding the flight, in

The Regional Administrative Court of Lazio is not of this opinion[27]. The TAR argues that it does not result from any regulatory provision or even from the uses that the size of the hand baggage included in the rate must correspond to the large hand baggage. In addition, the companies in question do not prevent the consumer from carrying cabin baggage in the cabin without weight limits, but only with limits on its size. Then, citing the Vueling judgment of the Court of Justice[28], referred to by the AGCM, the Court states that in no part of it is indicated what the minimum or maximum dimensions and the number of such bags must be; and that the EU Court itself specifies that price supplements cannot therefore be imposed in relation to these "provided that such hand baggage has certain reasonable requirements in terms of weight and size". The Court thus shifts the question to the (subjective) criterion of the reasonableness and indispensability. And, having established that carriers, like other entrepreneurs, enjoy the freedom to change their baggage policy, without having to follow previous behaviours or habits, wonders if the new dimensions of hand baggage can be considered reasonable, giving an affirmative answer. The TAR also recalls the Ministerial Decree 1/36 of January 28, 1987 and the related APT-09 circular relating to what is meant by hand luggage. According to the provisions of the circular for hand luggage we mean those items that the passenger can take with him to the cabin to place them in the storage compartments above or under the front seat.[29]

Regarding the volume criteria, since the circular does not refer to minimum, but maximum measures (115 cm.), the Court argues that since "technological innovations" have placed flexible objects on the market suitable for storage in small spaces and, since low-cost travel often relates to short travel periods, the new size of hand luggage is entirely reasonable.

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reason for the exhaustion of the appropriate spaces on board the aircraft ". AGCM, PS 11272, in Bulletin 8 February 2019, of 25 February 2019, p. 14. According to Wizz air, if the average number of cabin bags exceeds the space available in the overhead compartments, it is certainly reasonable to believe that the carrier can limit the number and size of baggage that can be carried in the cabin and this not only in order to comply applicable safety requirements, but also to avoid consequences on the regular operation of flights, especially in terms of delays. The new policy, on the other hand, guarantees all passengers to carry all their personal.

[27] in the two appeals judgments of the AGCM: 12455/2019 and 12456/2019.

[28] Court of Justice of 18 September 2014, in case C.487 / 12 (Vueling Airlines).

[29] The Court adds that the EU Commission in the "guidelines for the implementation / application of Directive 2005/29 / EC relating to unfair commercial practices (so-called Guidelines) of 25 May 2016" specifies that "the optional expenses may include those relating to the choice of seat or checked baggage compared to hand baggage ".

The Court, therefore, in evaluating the reasonableness, does not take into consideration, neither the market standards nor the behaviour of travellers, who, for the reasons highlighted by the Authority, in order to carry their own large luggage, before the restrictions imposed by the two companies, were use rushing to make sure to get on board among the first ones, to avoid your trolley from being loaded in the hold, albeit at no cost, and who are now willing to buy higher rates, just to bring their personal items with them.

5. Unfair commercial practises

The Authority also wondered whether or not the abovementioned airlines have perpetrated unfair commercial practices when informing potential buyer of their flights. The doubt submitted to the Authority does not therefore pertain to the principle of tariff freedom, invoked by the airline already in the appeal accepted by Regional Administrative Court of Lazio on the 22 November 2018[30] against the provision of the 31 October 2018 of the AGCM, which had ruled the suspension of the new baggage policy shortly before its entry into force, with regard to the issue of a lack of transparency concerning the communication of the final transport price.

The rulings of the Authority in question, in fact, denounced the two low-cost airlines of having violated articles 21, paragraph 1 lett. b) and d) and art. 22 of the Consumer Code for having misleading behaviour on the characteristics and price of the passenger air transport service.

In fact, it is precisely Regulation 1008/2008 of the Parliament and of the Council, invoked by the succumbing parties, to limit the right to freedom of tariff enshrined in article 22 with the duty of transparent communication of the same price, laid down in article 23 of the paragraph 1 which states that the final price to be paid is always indicated and includes all applicable passenger or freight air

[30] Decree of the Regional Administrative Court number 7046 of 22 November 2019.

fares, as well as all the taxes and charges which are inevitable and foreseeable at the time of publication, while optional price supplements must be communicated in a clear, transparent and unambiguous way at the beginning of any booking process and their acceptance by the passenger must take place on the basis of explicit "opt-in" consent.

Considering the transport of the trolley not a supplement, but an essential and inevitable element of the fare, its transport cost must be included in the total fare price from the beginning, contrary to what is declared by the two airlines, which consider it instead an optional service. But, even if it were considered an optional element, as, however, decided by the Regional Administrative Court of Lazio[31] its cost should still be indicated when the contract is stipulated in a clear, transparent and unambiguous way.[32]

The objective of these set of rules, as emphasized by the Authority, is to allow the customer to effectively compare the prices for the services of the various airlines. Furthermore, to implement an effective price comparison, it is necessary to guarantee a correct representation of the ticket price; specifically that the prices are clearly and fully indicated, from the first contact with the consumer, in order to make the final payment immediately and clearly perceptible.

This is the only way to protect the consumer, who is free to make an informed choice, and at the same time to protect competition between undertakings.

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[31] Judgments 12455/2019 and 12456/2019. The TAR affirms that *there is no evidence that the airline prevents the consumer from carrying hand luggage in the cabin, placing only limits on its size, but without weight limits (omissis). Nowhere in the judgment (Vueling) it is indicated what the minimum dimensions should be or maximum and the number of such items. The EU Court itself specifies that price surcharges cannot therefore be imposed in relation to these "provided that such hand baggage possesses certain reasonable requirements in terms of weight and size*".

[32] In this regard, the Court of Justice UE, C-487/12 18 September 2014, points 39, 40 and 41: "Having regard to those considerations, it must be held that the price to be paid for the carriage of air passengers' checked-in baggage constitutes an optional price supplement, within the meaning of Article 23(1) of Regulation 1008/2008, given that such a service cannot be considered to be compulsory or necessary for the carriage of those passengers.
By contrast, as regards baggage that is not checked in, namely hand baggage, it must be observed, in order to give a complete response to the referring court, that such baggage must be considered, in principle, as constituting a necessary aspect of the carriage of passengers and that its carriage cannot, therefore, be made subject to a price supplement, on condition that such hand baggage meets reasonable requirements in terms of its weight and dimensions, and complies with applicable security requirements.
It is appropriate to have regard, as the Advocate General did at points 54 and 55 of his Opinion, to the differences that exist between the nature of the service of carrying checked-in baggage, on the one hand, and the service of carrying hand baggage, on the other hand. In that respect, when checked-in baggage is entrusted to the airline, the latter takes responsibility for processing and storing it, which is likely to lead to additional costs for the airline. That is not the case with the carriage of baggage that is not checked in, such as, in particular, personal items that a passenger keeps with him".

Therefore, it is a transparent communication both in the pre-contractual phase of an advertising nature, and in the negotiation phase.

Both at the European level[33] and at the internal level, increasing importance is given to the transparency of information as a tool to compensate for the presumed asymmetry in the relationship between the company and the consumer.[34] The "transparency, therefore, as a guarantee of knowledge or concrete knowability of the terms of the contract or transaction concluded, and of certainty in the performance of the relative relationship,"[35] The aim is to provide consumers with sufficiently clear and complete information that enables them to form a free negotiating will, free of false information.[36]

Negotiation transparency relates to the form, the form of the clauses and the information content.

"The main purpose of the new Community-style contract rules is to establish a uniform information platform in contracts. In this way, each contract contains ("must" contain) timely, precise and comprehensible information on the most qualified legal profiles of the transaction, so that the contract itself becomes an information tool that facilitates the operation or even the structuring itself of the market."[37]

As regards the pre-contractual phase, transparency concerns in particular commercial communication, hence commercial practices.

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[33] Already in 1975, with the resolution of the EC Council of April 14th, we talk about a "preliminary EEC program for a consumer protection and information policy, Official Journal of the EC, 25 April 1975, C92.

[34] On consumer see R. PARDOLESI, *Clausole abusive (nei contratti con i consumatori): una direttiva abusata? (*Unfair terms (in consumer contracts): an abused directive?)*,* in *Foro it.,* 1994, V, p. 137. On the subject of information asymmetry, see M. DE POLI, *Asimmetrie informative e rapporti contrattuali* (Information asymmetries and contractual relationships)*,* Padova, 2002.

[35] The words are from M. DE POLI, *La trasparenza delle operazioni bancarie secondo il Testo Unico: primi appunti* (The transparency of banking operations according to the Testo Unico: first notes)*,* in *Riv. dir. civ.,* 1994, II, p. 523.

[36] Regarding article 1341 of the Civil Code and the transparency and comprehensibility of the conditions see: F. DI GIOVANNI, *La regola della trasparenza* (The rule of transparency)*,* in E. Gabrielli – E. Minervini (edited by), *I contratti dei consummatori* (Consumer contracts)*,* Tourin, 2005, I, p. 330; V. ROPPO, *Contratti standard. Autonomia e controlli nella disciplina delle attività negoziali di impresa* (Standard contracts. Autonomy and controls in the discipline of business negotiation activities)*,* Milan, 1975, p. 184; C.M. BIANCA, *Diritto civile* (Civil rights)*,* III, Milan, 2000, p. 390; C.M. BIANCA – F.D. BUSNELLI, *Commentario al capo XIV bis del Codice Civile: dei contratti del consumatore, art. 1469-bis 1469-sexies* (Commentary on chapter XIV bis of the Civil Code: consumer contracts, art. 1469-bis 1469-sexies)*,* Padova, 1999, p. 802.

[37] The words are from DI E. GUERINONI, *La trasparenza contrattuale* (Contractual transparency)*,* in G. Cassano – A. Catricalà – R. Clarizia (edited by) *Concorrenza, mercato e diritto dei consumatori* (Competition, market and consumer law)*,* Vicenza, 2018, p. 1547.

It is a fact that these play a strategic role in company marketing policies for the purpose of increasing sales of their services and / or products, conditioning more or less profoundly and more or less legally, the economic choices made by the recipient of the message. However, in order for the practice to remain within the sphere of lawfulness it is necessary that the promotional message remains such and does not go beyond deception. Advertising is protected in the same consumer code under article 20 paragraph 3 which establishes that the common and legitimate advertising practice consisting of exaggerated statements or statements that are not intended to be taken literally.

In Italy, the discipline in advertising is rather recent and of European origin. The first intervention in the field of misleading advertising is with Directive 84/450 / EEC implemented with Legislative Decree n. 74 of 25 January 1992. Before that, the protection was entrusted to self-discipline.[38]

Given the strategic role of communication within the community policy, the European Parliament and the Council, following the issue of the Green Paper[39] on commercial communication and of the European Commission's Consumer Protection White Paper,[40] approved the Directive n. 29 of the 11 May 2005 on the subject of "unfair commercial practices between businesses and consumers in the internal market" which amended the EEC Directive 84/450, the EC Directives 97/7 and EC 98/27 and EC 2002/65 and the EC Regulation 2006/2004 of the European Parliament and of the Council.

The aim of the Directive is to protect consumers and hence free competition through a strong degree of harmonisation.[41] Whereas 12 states that, "Harmonisation will considerably increase legal certainty for both consumers and business. Both consumers and business will be able to rely on a

[38] The first Advertising Self-Regulation Code was promulgated by industry organizations on 12 May 1966.

[39] Green book "Commercial communication in the internal market", COM (96) 0192(4-0365)96, in OJ c-286 of 22 September 1997. The Green Paper proposes "to clearly identify the interventions necessary for the full application of the single market in the field of commercial communication…". M. Monti at the time Commissioner responsible for the internal market. www.europa.eu/rapid/press-realease_IP-96-396.it

[40] (COM (2001) 531-C5-0295/2002).

[41] As regards the definition of consumer and average consumer, see: G. ALPA, *Introduzione* (Introduction), in G. Alpa – A. Catricalà (edited by), *Diritto dei consumatori* (Consumer law), Bologna, 2016, p. 17; L. ROSSI – CARLEO, *Diritto dei consumi* (Consumer law), Tourin, 2015; P.F. GIUGGIOLI, *Il contratto del consumatore* (The consumer contract), in *Tratt.* Sacco, Tourin, 2012, p. 80; V. ZENO-ZENCOVICH, *Consumatore (dir. civ.)* (Consumer (civil law), in *Enc. Giur.,* IX, Roma, 1988; N. IRTI, *L'ordine giuridico del mercato* (The legal order of the market), Roma-Bari, 1998, p. 50; P. PERLINGERI, *Il diritto civile nella legalità costituzionale secondo il sistema italo-comunitario* (Civil law in constitutional legality according to the Italian-Community system), Naples, 2006, p. 511.

single regulatory framework based on clearly defined legal concepts regulating all aspects of unfair commercial practices across the EU. The effect will be to eliminate the barriers stemming from the fragmentation of the rules on unfair commercial practices harming consumer economic interests and to enable the internal market to be achieved in this area."[42]

The Directive was implemented in Italy with Legislative Decree 2.8. 2007, n. 146, which amended articles 18-27 of the Consumer Code, Legislative Decree 206/2005, and inserted the articles 27-*bis*, *te*r and *quater*, and with Legislative Decree 2.8.2007 n. 145 which governs misleading advertising for professionals, therefore excluded from the Consumer Code.[43]

Subsequently, with the D.L. 24.1 2012, n.1, converted with the law 24.3.2012, n.27, the prohibition of unfair commercial practices was extended to micro-enterprises as subjects of protection in the relationships with the professionals.[44]

The current internal regulation of commercial practices to the potential damage of the consumer is contained in the Consumer Code. In paragraph 1 of article 20, unfair commercial practices were therefore prohibited, and are indicated in paragraph 2 as those contrary to professional diligence and are false or suitable to falsify the economic behaviour in relation to the product of the average consumer that they reach, or to which they are directed, or by the average member of a group if the commercial practice is directed to a specific group of consumers.

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[42] On the benefits of harmonization, see: G. DE CRISTOFARO, *La direttiva 2005/29/CE* (Directive 2005/29/EC), in G. De Cristofaro (edited by), *Pratiche commerciali scorrette e codice del consumo* (Unfair commercial practices and consumer code), Tourin, 2008.

[43] See C. GRANELLI, *Il codice del consumo a cinque anni dall'entrata in vigore* (The consumer code five years after its entry into force), in *Obbligazioni e contratti,* 2010, p. 731.

[44] Article 1 of the Legislative Decree 1/2012 defines micro-enterprises as the "entities, partnerships or associations, which, regardless of their legal form, carry out an economic activity also on an individual or family basis, employing less than ten people and achieving an annual turnover or a total of budget year not exceeding two million euros, pursuant to article 2, paragraph 3, of the annex to recommendation no. 2003/361 / EC of the Commission of 6 may 2003".
On micro-enterprises, see among the others: G. DE CRISTOFARO, *Pratiche commerciali scorrette e "microimprese"* (Unfair commercial practises and "micro-enterprises"), in *Leggi civ. e comm.,* 2014, p. 3; E. BACCIARDI, *La limitazione del recesso delle microimprese tra pratiche commerciali scorrette e pubblicità ingannevole* (The limitation of withdrawal for micro-enterprises between unfair commercial practices and misleading), in *Nuova giur. Comm.,* 2014, p. 239; E. LABELLA, *Tutela della microimpresa e "terzo contratto"* (Protection of micro-enterprises and "third contract"), in *Europa e dir. priv.,* 2015, p. 857; F. TRUBIANI, *Le microimprese dentro e fuori il Codice del consumo* (Micro enterprises inside and outside the Consumer Code), in *Studium iuris,* 2016, p. 1151.

Articles 21, 22, and 23 then list the cases that constitute misleading actions (art. 21), misleading omissions (art. 22), misleading advertising of maritime tariffs, (art. 21 bis) and commercial practices considered in each case misleading (art. 23), without however outlining a closed list.[45]

Therefore, the occurrence of one of the misleading actions, listed in article 21, should lead to assume the presence of a behaviour that can be sanctioned by the Authority until proven.[46]

Presently, although companies are sanctioned for violating art. 20, both article 21, paragraph 1, letters b) and d) and article 22, which governs misleading omissions, deserve further investigation.

The code states that omitted information must be relevant.[47] The concept of relevance, as subjective, must be always compared to the circumstances and, in particular, to the information needs of the average consumer so that they can make an informed decision of a commercial nature.[48] In determining whether the omission of clear information on the additional price of large hand baggage can be considered more or less relevant, it is sufficient to refer to paragraph 4 of the same article which, in relation to the invitation to purchase, specifies that they are considered relevant (therefore without the need for measuring the circumstances): the main characteristics of the product to an adequate extent with respect to the means of communication and the product itself; "...the price including taxes or, if the nature of the product entails the impossibility of reasonably calculating the price in advance, the methods of calculation of the price and, if necessary, all additional shipping,

[45] As regards the issue concerning the prevalence of the general and special clause, see: G. DE CRISTOFARO, *Il divieto di pratiche commerciali scorrette e i parametri di valutazione della "scorrettezza"* (The prohibition of unfair commercial practices and the parameters of evaluation of "unfairness"), in G. De Cristofaro (edited by), *Pratiche commerciali scorrette e codice del consumo* (Unfair commercial practices and consumer code), Tourin, 2008, p. 120; M. LIBERTINI, *Clausola generale e disposizioni particolari nella disciplina delle pratiche commerciali scorrette* (General clause and special provisions governing unfair commercial practices), in *Contratto e impresa,* 2009, p. 74.

[46] On the relationship between the general rule and typical cases, the opinion that gives the special cases the effect of facilitating the consumer in providing proof of the incorrectness of the practice is considered to be acceptable. See E. LABELLA, *Pratiche commerciali scorrette* (Unfair commercial practises), in G. Cassano – A. Catricalà – R. Clarizia (edited by), *Concorrenza, mercato e diritto dei consumatori* (Competition, market and consumer law), Vicenza, 2018, p. 1237 and following.

[47] On the subject of omissions, see: A. FACHECHI, *Pratiche commerciali scorrette e rimedi negoziali* (Unfair commercial practices and negotiated remedies), Neaples, 2012; A. FACHECHI, *La pubblicità, le pratiche commerciali e le altre comunicazioni* (Advertising, business practices and other communications), in G. Recinto – L. Mezzasoma – S. Cherti (edited by), *Diritti e tutele dei consumatori* (Consumer rights and protections), Neaples, 2014.

[48] Subject "normally informed and reasonably observant and circumspect, taking into account social, cultural and linguistic factors". See Court of Justice 10.11.1982, C-261/81, in *Racc.,* 1983, I-3961; Court of Justice 18.5.1993, C-126/91, in *Racc.,* 1993, I-2361; Court of Justice 6.7.1995, C-470/95, in *Racc.,* 1995, I-1923.

delivery or postal charges or, if such costs cannot be reasonably calculated in advance, the indication that these costs may be charged to the consumer...".[49] In any event, the information requirements under European law relating to commercial communications, including advertising or marketing of the product, are considered to be always relevant.

In the cases under consideration, the completeness of information regarding the price / fare of the flight would include transporting large hand luggage, if this service is considered essential (as Authority does), separating the cost of it from the total amount, to make it subsequently the object of a separate sale, involves a violation of article 22 concerning omissions on the price, and therefore a lack of transparency, and a violation of article 20 which establishes the general rule of misleading. It is also a violation of article 21 paragraph 1 letters b) and d) where the commercial practice contains information that does not correspond to the truth, suitable to mislead the consumer with regard to the main characteristics of the product / service or the price or the way it is calculated, or the existence of a specific price.

In all these cases, the subjective state of the carriers is of little importance, even in the presence of good faith; what is relevant is the potential conditioning of the behaviour of the recipient of the commercial practice.

Thus, in the cases under consideration, failure to compare carriers' tariffs fairly with those of competitors would have made them an advantage in the face of a disadvantage for the consumer who purchased an incomplete or lower service at the same price (and a disadvantage for competitors). The infringement of the rules on commercial practices would seem quite evident.

Also on this point, however, the two companies have appealed to the TAR of Lazio, complaining that the resolution infringes the principle of tariff freedom. The TAR first accepted the appeal and suspended the provision of the AGCM, considering that, "in balancing the interests to be assessed

[49] On the discipline of price transparency, see: A. MASUTTI, *Il diritto aeronautico* (The aeronautical law), Tourin, 2009, p. 1777 and following; D. BOCCHESE, *La rifusione della disciplina comunitaria sulla prestazione dei servizi aerei* (The recasting of the Community legislation on the provision of air services), in *Dir. Trasp.,* 2009, p. 342 and following; G. RASI, *I supplementi di prezzi opzionali per prestazioni offerte da persone diverse dal vettore aereo* (The optional price supplements for services offered by people other than the air carrier), in *Dir. trasp.,* 2013, p. 177 and following.

pending the discussion of the merit (it is to be considered) prevailing to maintain the *res adhuc integra*, since the return to the "old" policy followed by a possible acceptance of the burden on the merit, with consequent reintroduction of the "new" one, could create disorientation among the consumers themselves."

Than on October 29, 2020 the administrative court issued the verdict. The TAR considered that the AGCM did not identify the incorrectness of the commercial practice in reference to the way in which the cost of the ticket was presented, therefore having to believe that what was also proposed at the time of the initiation of the procedure can be considered outdated in the sense of the formal display clarity of the message proposed to the consumer on the website of the airline in question. The consumer was perfectly able to immediately understand the price in the hypothesis he wanted to embark the large baggage".

Considering the verdict of the Administrative Court in regards to the failure of the confirmation of the infringement of the rules on unfair commercial practices, it is still relevant to note the possible unfairness of baggage clauses, ex Consumer Code art. n. 33.

The question arises as to whether the content of these clauses as a source of imbalance and substantive inequity in the contractual regulation can be abused, since it aggravates the information asymmetry between the consumer and the undertaking.[50]

In fact, article 33 states in paragraph 1 that in the contract concluded between the consumer and the professional, clauses that, despite good faith, determine a significant imbalance of rights and obligations arising from the contract are considered unfair to the consumer.

[50] See, Trib. Roma, 21.1.2000, in *Corriere giur.,* 2000, p. 496 and following, with comment by A. ORESTANO and A. DI MAJO.
On the qualification of the criterion of good faith (whether subjective or objective) for the judgment of unfairness of a clause and of the relationship of good faith with respect to the criterion of significance, see: F.D. BUSNELLI – U. MORELLO, *La Direttiva 93/13 CEE del 5 aprile 1993 sulle clausole abusive nei contratti stipulati con i consumatori* (The 93/13 EEC Directive of 5 April 1993 on unfair terms in consumer contracts), in R*iv. notariato,* 1995, p. 374; G. LENER, *La nuova disciplina delle clausole vessatorie nei contratti dei consumatori* (The new regulation of unfair terms in consumer contract, in *Foro it.,* 1996, V, p. 160; V. RIZZO, *Le clausole abusive: realtà e prospettive. La Direttiva CEE del 5 aprile 1993* (Unfair terms: reality and prospects. The EEC Directive of 5 April 1993), in *Rass. dir. civ.,* 1993, p. 590.

However, it should be noted that the asymmetry which must be assessed should not adhere to the economic content of the contract, therefore to the economic convenience of the same in relation to which the legislator has no interest in interfering, but rather in an imbalance in terms of rights. It is article 34 in paragraph 2 which clearly specifies that the evaluation of the unfair impact of the clause does not concern the determination of the object of the contract, nor the adequacy of the consideration of goods and services, provided that these elements are clearly identified and comprehensible.[51]

Therefore, for the cases in question, if the large hand luggage were considered an essential element of the air carrier's transfer service (as AGCM does), separating the price of said service from the basic (or standard) rate, then rendering a service for which it has already been paid, would most certainly generate an imbalance between professional and consumer, since the object and the consideration of the service would not be clear or easily understandable, and all this independently of the principle of tariff freedom due to the carrier. In this specific case, the carrier reserves the right to resell a right a passenger has already purchased at the time of payment of the trip, without providing any additional information to the passenger themselves.

For the cases outlined in this paper, even if the information regarding the price of the trip (without luggage) was complete, clear and transparent from the first contact with the ticket sales site, and was therefore easily comparable with competing operators (as established by TAR), the average consumer would still not be informed about the essentiality of the transfer service of large hand baggage with respect to the main transfer service.

The asymmetry perpetrated is significant because, although apparently economic, it pertains to the rights and not to the economic convenience of the deal (in this case, the flight). This is because it concerns the content of the purchased consideration, of which the traveller is unable to assess the economic unsuitability.

[51] On the interconnection between the regulatory profile and the economic profile, therefore the difficulty in separating the two plans, see: G. CIAN, *Il nuovo capo XIV-bis (titolo II, libro IV) del codice civile, sulla disciplina dei contratti con il consumatore* (The new chapter XIV-bis (title II, book IV) of the civil code, on the regulation of contracts with the consumer), in *Studium iuris,* 1996, p. 379.

When assessing the unfairness of a clause, the nature of the service covered by the contract must be taken into account, referring to the circumstances that exist at the time of its conclusion[52] and this *a fortiori* if the fallacy of the commercial practice is confirmed.[53]

In summary, the hypothesis of unfairness regards both the opacity of the content of the clauses, in violation of the principle of transparency and completeness, and their explicit content, which places the consumer in a condition of greater disadvantage compared to the professional who resells the same consumer a right already acquired and already paid for. This issue needs to be assessed in the presence of an imbalance contrary to good faith, in relation to the nature of the service covered by the contract and the circumstances existing at the time of its completion.[54]

In regards to unfair clauses, past authoritative doctrine has already expressed itself in favour of the unfairness of those clauses, contained in different contractual regulations of the low cost carriers, which allow airlines to stow large hand baggage in hold when a certain amount of luggage on board is exceeded, at the carrier's discretion, all in the name of safety.[55] The passenger has the right to carry large hand luggage, but that right is conditional and weighs on the fact that an *x* number of passengers with trolleys do not embark the aircraft before them. Passengers may not know until the time of boarding, unless they have purchased a priority ticket, whether or not during the flight their personal belongings will actually be with them.

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[52] On the criteria for the evaluation of the vexation of the clauses, see: S. MONTICELLI, *Sub art. 1469-ter c.c* (Sub art. 1469-ter of the civil code), in E. Cesaro (edited by), *Clausole vessatorie e contratto del consumatore* (Unfair terms and consumer contract), Padova, 1998.

[53] On the subject of significant imbalance, see: S. TROIANO, *Commento all'art. 1469 bis, I comma* (Comment on the art. 1469 bis, first paragraph), in G. Alpa – S. Patti (edited by), *Il Codice Civile Commentato* (The Commented Civil Code), Milan, 2003, p. 33 and following.

[54] As regards the criteria of good faith (objective or subjective), see: R. SACCO, *La presunzione di buona fede* (The presumption of good faith), in *Ric. dir. civ.,* 1959, p. 9 and following; G.M. UDA, *Art. 1469-bis (clausole vessatorie nel contratto tra professionista e consumatore) - 1° comma, la buona fede nelle clausole abusive* (Art. 1469-bis (unfair clause in the contract between professional and consumer) - 1st paragraph, good faith in unfair clause), in G. Alpa – S. Patti edited by), *Clausole vessatorie nei contratti del consumatore* (Unfair clause in consumer contracts), in Comm. cod. civ. Schlesinger, Milano, 2003, p. 97 and following.

[55] C. VIGNALI, *op. cit*.

6. Conclusions

The judgements under analysis allow us to reflect on the legal level, and on the level of practical relevance.

From a legal point of view, the issue shifts from the principle of negotiating autonomy and tariff freedom to that of transparency and fairness. It is precisely in these principles that tariff freedom finds its first limit. The tariff is free, but it must be communicated in a clear and complete manner and must at the same time pay for a performance which, in addition to the main benefit, includes ancillary but essential services, like having all our personal belongings.

On TAR opinion the two airlines have not violated the obligation of transparency and fairness, and have not therefore perpetrated an unfair commercial practice. From the legal point of view, therefore, there are no infringements. What is certain, however, is that regardless of legal assessments, passengers having boarded a low-cost air journey under certain conditions may not be able to declare they had a good experience.

Beginning with the objective discomfort that they suffer in reading and understanding the contractual content and all its clauses that are almost always difficult to comprehend (whether contained in a condensed contractual model or in a more lengthy contractual model), and until the journey is over (with the arrival of their baggage in the hold), it cannot be stated that everything was comfortable and agreeable.

There is a lot of anxiety when passengers realises they have purchased a ticket that does not provide them with enough space for their personal belongings. The anxiety starts from calculating and estimating the measurements of the small luggage (backpack or purse), buying all those "modern products that allow to be compacted" so as to take up little space, to the anxiety of running to the gate and arriving before others to be guaranteed the right to take your own trolley on board if you have not bought a priority ticket or you have not compacted your luggage well into a small one. All this

makes the journey a source of stress, worry and even more competition with other passengers, who, from simple travelling companions, become competitors in the race for space in hatboxes.

If it is true that travel today costs less in terms of money, what is the real cost in terms of stress, anxiety and time? And if airlines are free to restrict transport services more and more, what will be the journey of the future?

What should not be forgotten is that in carrying out its service the carrier has a duty of protection towards the traveller and the goods he brings with him, as well as a duty of good faith and diligence that find their basis in the general principles of law .

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