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

The original full 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.

Background

One of the most noticeable impacts of the liberalisation of the EU aviation market was the expansion of the European passenger air transport sector in terms of number of air carriers, routes and frequency of services. A number of low cost carriers (LCCs) penetrated the EU aviation market, which increased competition with the incumbents - full-service carriers (FSCs) - bringing lower prices for consumers. In turn, this stimulated customer demand and led to additional capacity increase. Technological developments led to high-speed rail services also competing with airlines on certain routes. The increasingly competitive environment of the air passenger transport market and the expansion of the sector have been accompanied by several cases of unfair commercial practices (UCPs), on which national competition and consumer protection authorities across Member States have turned the spotlight. Since passenger air transport competition is essentially price-driven, the study examines the various yield management techniques and pricing strategies as applied by different air carriers. In the context of the freedom of air carriers to set prices enshrined in the Air Services Regulation, 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.

Some pricing strategies can be unfair, some can be anti-competitive but not unfair, or some can be both. Against this background, the study examines the intersection of the two distinct and partly overlapping branches of law: the law regulating unfair practices on the one hand, and competition law on the other. It consists of two main parts: (1) the impact of UCPs on consumers and the intervention of consumer protection authorities in passenger air transport; (2) the impact of UCPs on competition in the passenger air transport sector, and national competition authorities’ intervention against airlines. The analysis is complemented by case studies and an overview of the current legislative initiatives on UCPs and possible future interventions.
Key findings

This study explores some decisions by a selection of consumer protection authorities across Europe that have intervened to tackle UCPs. It finds that unfair commercial conduct relating to pricing has still been very frequent in the passenger air transport sector over the past few years. In LCCs’ price patterns, the final price to pay is usually increased by a large number of additional charges, which in some cases was found to amount to UCPs.

A number of national consumer protection authorities 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 the national laws implementing the Unfair Commercial Practices Directive (UCPD). Among the most controversial additional charges applied by LCCs appears to be the one 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. The Italian Administrative Court held that a charge for large hand luggage was compliant with the CJEU ruling, while the Spanish court found hand luggage essential and obliged companies to carry it without demanding an extra charge.

In the context of competition law, some pricing strategies may constitute predatory pricing, when they are adopted by a dominant firm and involve below cost pricing amenable to drive competitors out of the market. Whilst lower consumer prices may seem beneficial in the short run, in the long run, the diminished competition in the market allows the dominant undertaking to set prices higher than at competitive level, thereby causing a consumer harm.

Predatory pricing has been alleged in the passenger air transport sector, but has seldom been upheld by the competent national competition authorities, and never by the European Commission. In this sector, the 2002 BkartA Lufthansa decision is the landmark case on predatory pricing and remains one of the very few such decisions. Predatory pricing is difficult to prove and requires a complex analysis of several elements: defining the relevant market, establishing a position of dominance by the relevant undertaking in that market, comparison between the dominant undertaking’s pricing and costs and, in some cases, proving an intent to eliminate a competitor. Different price-cost benchmarks are used, with EU courts commonly using the average variable cost (AVC) and the average total costs (ATC). Prices set below AVC are presumed predatory, while when they are set above the AVC but below ATC, 'intent to eliminate a competitor' by the dominant firm must be shown by the authority alleging the abuse. Evidence to establish such intent may be difficult to find. Furthermore, the simplified price-cost benchmarks used in competition law analysis fail to fully capture the complexity of fare setting by airlines, which is based on complex calculations and customer segmentation.

Using a few case studies, the authors illustrate the role of technical developments and of market structure in the competition law analysis of predatory pricing. 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. Also, 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. In the context of an oligopolistic market structure, lower prices can be an adaptation to a competitor’s strategy and would not necessarily be anti-competitive as such. The study also provides a few illustrative examples of predatory pricing cases in rail and maritime passenger transport, both at EU level and at national level, which albeit in a different branch of the passenger transport sector, display some similar features.