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ESTRATTO

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City-pair method and airport-pair method alternatives for assessing  
the dominant position in the flight market.

A multidisciplinary analysis from competition law and marketing perspective

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Vincenzo Iaia, Andrea Sestino

CITY-PAIR METHOD AND AIRPORT-PAIR METHOD ALTERNATIVES FOR  
ASSESSING THE DOMINANT POSITION IN THE FLIGHT MARKET. A  
MULTIDISCIPLINARY ANALYSIS FROM COMPETITION LAW AND  
MARKETING PERSPECTIVE\* \*\*

ABSTRACT

Lo scopo di questo articolo è di far luce sulla rilevanza dei metodi cd. *city-pair* e *airport-pair* nella determinazione del mercato rilevante e della rispettiva quota di mercato di una compagnia aerea nel corrispondente mercato al fine di accertare l'esistenza di una posizione dominante. L'indagine prende le mosse dal caso *Ryanair c. Lastminute*, tenuto conto che Ryanair rappresenta una delle compagnie aeree maggiormente operative nel mercato dei voli europeo. Tuttavia, nel caso *de quo*, essa ha negato di detenere una posizione dominante stigmatizzando l'applicazione del *city-pair method*. Considerate inoltre le composite esigenze dei consumatori e i connessi problemi di scelta in condizioni d'incertezza, si procede infine ad una rassegna delle possibili implicazioni per managers e professionisti di marketing al fine di orientare la programmazione strategica in questo peculiare mercato.

The purpose of this paper is to shed light on the relevance of the *city-pair* and *airport-pair* methods in determining the flight-relevant market, and the corresponding market share, for assessing the existence of a dominant position under Antitrust Law. The analysis will focus on the *Ryanair v. Lastminute* case, in light of the fact that Ryanair is one of the biggest companies in the European flight market. However, in such case it denied being a dominant company by refusing the applicability of the *city-pair method*. Moreover, by considering the recent consumers' needs and requirements, and the recent literature about such methods, the effect on marketing strategies for marketers and managers are discussed focusing on this peculiar market.

PAROLE CHIAVE

Metodo City-pair – metodo airport-pair – mercato aereo

City-pair method – airport-pair method – flight market

SOMMARIO: 1. Introduction – 2. The *Ryanair v. Lastminute* case – 3. The identification of the relevant flight market based on the *city-pair method* – 4. (Segue) ...and on the *airport-pair method* – 5. Discussion and implications – 6. Conclusion and possible effects on marketing strategies

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\* Saggio sottoposto a revisione secondo il sistema per *peer review*.

\*\* While this paper is the result of the combined reflections of the two authors, parr. 2, 3, 4, 5 are written by Vincenzo Iaia and parr. 1, 5, 6 are written by Andrea Sestino.

1. Nowadays, the transport and consequently the tourism activities are more identified in the concept of experience lived by the consumers, rather than in the simple consumption of a product or service. In particular, the literature uses exactly the term experience to mark the process of using tourism services from a consumer perspective<sup>1,2</sup>. The places within which the tourists' experience take place may coincide with the concept of a cultural district as a natural evolution that does not produce products, but services integrated into offers of places and experiences. Moreover, tourism research has long understood the relevance of visitors' experience, defined as an escape from the ordinary of daily life<sup>3,4</sup> or, according to Larsen<sup>5</sup> «a past personal travel-related event strong enough to have entered long-term memory». Seminal literature<sup>6</sup> launched the idea of the “experience economy” as an innovative economic era, the traditional components of price discrimination strategies – such as premium price, or superior quality of products or services – cannot be anymore considered as a distinctive part of companies' offer.

Tourist consumption is driven by both utilitarian and hedonistic reasons<sup>7</sup>, the former of which identify travel as a useful means aimed at satisfying one's own need (e.g., in business travel), the latter aimed at research pleasure (e.g., in leisure travel). From this perspective, the desire to travel and live new experiences is stimulated mainly by inner desires that push individuals to leave the known place(s) of habitual residence to seek different, unusual, and distant destinations that allow living different experiences compared to the daily ones. Technology, with the consequent reduction of costs, and information, which has aroused the interest in reaching a large number of previously unpublished destinations, have made it possible to establish a highly competitive industry. In this regard, new technologies make it possible to support the consumer throughout the shopping experience, from searching for information online in the pre-purchase phase to consumption, in the post-purchase phase<sup>8</sup>, up to also to travel booking and management through platforms known as Online Travel Agencies

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<sup>1</sup> J.B. Ritchie, V.W.S. Tung, R.J., *Tourism experience management research: Emergence, evolution and future directions*, in *International Journal of Contemporary Hospitality Management*, vol. 23 no. 4, 2011, pp. 419-438.

<sup>2</sup> V. Middleton, *The importance of micro-businesses in European tourism*, in *Rural tourism and recreation: Principles to practice*, 2001, pp. 197-201

<sup>3</sup> E. Cohen, *A phenomenology of tourist experiences*, in *Sociology*, vol. 13 no. 2, 1979, pp. 179-201.

<sup>4</sup> S. Quan, N. Wang, *Towards a structural model of the tourist experience: An illustration from food experiences in tourism*, in *Tourism Management*, vol. 25 no. 3, 2004, pp. 297-305.

<sup>5</sup> S. Larsen, *Aspects of a psychology of the tourist experience*, *Scandinavian Journal of Hospitality and Tourism*, vol. 7 no. 1, 2007 pp. 7-18.

<sup>6</sup> B.J. Pine, J.H. Gilmore, *The experience economy*, in *Harvard Business Review*, vol. 76 no. 6, 1998, pp. 18-23.

<sup>7</sup> Y.S. Chung, *Hedonic and utilitarian shopping values in airport shopping behavior*, in *Journal of Air Transport Management*, vol. 49, 2015, pp. 28-34.

<sup>8</sup> D. Buhalis, P. O'Connor, *Information communication technology revolutionizing tourism*, in *Tourism Recreation Research*, vol. 30 no. 3, 2005, pp. 7-16.

(OTA)<sup>9</sup>. In this way, technology has made it possible not only to retrieve information useful for choosing the best possible destination or to share experiences also encouraged thanks to the support of social network followers<sup>10</sup> but above all to make reservations directly, through a more complete evaluation framework that compares the convenience of multiple possible alternatives, taking advantage of every form of technology, e.g., including the most recent mobile devices<sup>11</sup>.

Thus, in a multidisciplinary perspective, this paper has the objective of examining the relevant legal-economic aspects of the *Ryanair v. Lastminute* dispute, paying particular attention to the correct definition of the relevant market – and the corresponding market share – under Antitrust Law based on privileged choices by travelers, as well as the main variables that influence them. Even if Ryanair is one of the most active companies in the European flight market, it denies being a dominant one. By contrast, Lastminute invokes the application of the city-pair method, according to which Ryanair would result as a dominant company because the relevant market should be determined evaluating the existence of fungible transport alternatives allowing to move from one determined city to another and Ryanair was the only operators for some routes.

By considering these premises, it will be possible to evaluate the effectiveness of the solution proposed by the Supreme Court of Cassation<sup>12</sup> to resolve this issue compared to the real market balances. Furthermore, this analysis could also be useful to suggest valuable insights to guide future managerial and marketing strategies within the flight sector, by considering the specificities of the reference market and the institutional framework within which marketers and managers operate.

2. The dispute between the well-known airline company and one of the most renowned online travel agencies arose in 2010. It followed the stand-alone action of Lastminute (given that at the time of the facts, there was not any intervention on the matter by the Italian Antitrust Authority, nor currently there are traces of possible public enforcement) against Ryanair's decision to limit the sale of its airline tickets exclusively through its website and its call center<sup>13</sup>. Thus, any other online platform was prevented from continuing to carry out that intermediation activity in the sale of

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<sup>9</sup> R. Law, K. Leung, K., R. Wong, *The impact of the Internet on travel agencies*, in *International Journal of Contemporary Hospitality Management*, vol. 16 no. 2, 2004, pp. 100-107.

<sup>10</sup> H. Liu, L. Wu, X. Li, *Social media envy: How experience sharing on social networking sites drives millennials' aspirational tourism consumption*, in *Journal of Travel Research*, vol. 58 no. 3, 2019, pp. 355-369.

<sup>11</sup> N.M. Suki, *Flight ticket booking app on mobile devices: Examining the determinants of individual intention to use*, *Journal of Air Transport Management*, vol. 62, 2017, pp. 146-154.

<sup>12</sup> Cass. Civ., Sez. I, 12 November 2019, n. 29237.

<sup>13</sup> *Amplius*, V. Iaia, *La tutela della concorrenza nell'ambito del trasporto aereo: il caso Ryanair c. Lastminute*, in *Cammino Diritto*, vol. 10, 2020, pp. 1-34.

tourist packages, which had previously been regularly offered and in which the low-cost airline tickets were included<sup>14</sup>.

It should be noted that Ryanair does not only offer air transport services, but it is notoriously usual to combine them with the simultaneous promotion of collateral services similar to those typically offered by tourist agencies. Among these, by way of example only, Ryanair offers car rental or hotel and restaurant services at affiliated hotels and restaurants, as well a “flight + hotel” packages. These are services potentially helpful to the customer-traveler once he has arrived at the destination. It should also be considered that the purchase of these collateral services guarantees the achievement of additional revenues (also called ancillary revenues), constituting a significant percentage of the profits obtained by Ryanair from the commercial partners.

From a marketing perspective, ancillary revenues have ensured exciting business opportunities for companies promoting air transport services. Also, given the liberalization of air services, high levels of competition, increased fuel costs, and unstable operating environments, ancillary revenues have seen their returns decrease, thus seeking a new key to competitiveness in secondary sources. However, research confirms that despite a general positive consumer perception of new ancillary services, airlines need to take a balanced approach to develop ancillary services and take active measures to ensure that the core of the service remains the main focus<sup>15</sup>.

By considering the monopolistic or dominant position held by Ryanair on numerous routes, the decision taken by the Irish company to sell its tickets exclusively through its channels led to the automatic exclusion - total or partial depending on the monopoly or dominant position held by Ryanair in each route - of the online travel agencies from the possibility of offering their multiple services in the destinations where this carrier was the only or the primary airline to operate.

Thus, Lastminute sued Ryanair before the section specialized in business matters of the Milan Court of First Instance to restore the offer of tourist packages also in these destinations and pay compensation for the subsequent damages, considering that Ryanair’s strategy integrates an abuse of a dominant position, according to art. 3, Law 247/1990 (Italian Antitrust Law).

This case assumes central importance in antitrust matters considering the controversial definition of the relevant market in the air transport sector as it is crucial to ascertain the dominant position and its eventual abuse in vertically integrated

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<sup>14</sup> The growing economic and social role assumed in recent years by the online intermediaries of goods and services (the so-called cybermediaries) raised intricate issues from a competitive point of view which has raised significant discussion among the doctrine. For an interesting study on the recent antitrust developments regarding online agencies, see M. Colangelo, Z. Zeno-Zencovich, *Online platforms, competition rules and consumer protection in travel industry*, in *Journal of European Consumer and Market Law*, vol. 2, 2016, pp. 75-96.

<sup>15</sup> J.F. O’Connell, D. Warnock-Smith, *An investigation into traveler preferences and acceptance levels of airline ancillary revenues*, in *Journal of Air Transport Management*, vol. 33, 2013, pp. 12-21.

markets<sup>16</sup>. More specifically, it was necessary to determine whether Ryanair holds a dominant position in the flight market to establish whether the decision to reserve the sale of its tickets exclusively through its website and call center constitutes an abuse of dominant position in the downstream market of tourist services.

The first step is to determine the airlines' market, especially considering that there is no consensus on how it should be calculated. In this regard, Ryanair claimed that it did not hold any dominant position considering that it only holds a market share of 10%, calculated concerning the totality of the flight market in the European territory, also including the shares held by the – more expensive – flag carriers (and therefore assuming that these airlines can actually consider themselves as competitors of the low-cost company). On the contrary, Lastminute argued that it was necessary to drastically reduce “the opening of the compass” in the air transport market, applying the so-called city-pair method. According to this criterion, each route is suitable to constitute a relevant market, with the consequence that in the routes where Ryanair was the only or the majority operating company, it would hold a market share respectively equal to 100% or in any case a percentage certifying a dominant position.

The assessment of the market share based on the correct perimeter of the relevant market is the logical prerequisite necessary to establish the existence of a dominant position and consequently determine whether the choice of one's own sales channels, typically falling within the free exercise of private economic initiative, constitutes exclusionary abusive conduct in the downstream market for tourist services considering the dominant position held by Ryanair in the upstream market.

3. The assessment of the dominant position of one or more companies requires a double check: firstly, it is necessary to define the relevant market both from a product and territorial point of view; secondly, it is required to calculate the percentage share held in the reference market and evaluate it together with other indicators<sup>17</sup>. Concerning the first operation, preparatory to the second, it is essential to correctly outline the product market and the geographic market based on the objective and subjective interchangeability. From the objective perspective, the extent of the commodity sector of the good or service under investigation depends on the degree of fungibility of the same with other goods or services that demand considers substitutes based essentially

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<sup>16</sup> For a complete and interesting analysis of the abuse of dominant position see: F. Ghezzi, G. Olivieri, *Diritto antitrust*, II, Giuffrè, Milan, 2019, pp. 181-238.

<sup>17</sup> According to the Lazio Administrative Regional Court, judgement of the 21<sup>st</sup> June 2012, n. 5869, *Sky Italia v. Auditel*, the evaluation regarding the existence of dominance of a company must be conducted in the same way as a factual historical analysis in which the consistency of the market share held is the main index of dominance. It is flanked by a prospective and dynamic assessment of its possible evolution, in the context of which the additional indices such as the barriers to market entry, the replicability of the activity of the dominant operator and the reputation it boasts.

on three parameters: consumer habits and trends, characteristics product/service specifications and its price<sup>18</sup>.

Conversely, by the subjective perspective, it is necessary to investigate the preferences of consumers, by considering that it cannot be excluded *a priori* that theoretically fungible products from an objective point of view are equivalent in the eyes of consumers for purely subjective reasons, linked to their personal taste, thus creating the birth of a market in its own right<sup>19</sup>.

By considering the geographical market, from an objective point of view, it is necessary to identify the main areas in which the company offers its goods and services, acknowledging that the technological advances that led to the birth and development of e-commerce would allow likely to operate in any place reachable by a courier, potentially extending the geographical market of reference to the whole world. On the subjective side, to establish whether two companies located in different areas are alternative sources of supply, it is necessary to assess whether and under what conditions consumers are willing to obtain supplies from the potentially competing company operating in another area, concerning the other index of territorial distance that separates them.<sup>20</sup>

Once the contours of the relevant market have been traced by following the difficult combination of the commodity and geographic market, as determined about the particular objective and subjective characteristics, it is possible to proceed with the calculation of the market share held by the company being assessed, which is normally identified concerning the total reference turnover. In general, a percentage higher than 50% reveals the existence of a dominant position. By contrast, below this percentage, it is necessary to examine further indices such as, for example, barriers to entry,

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<sup>18</sup> These criteria were reiterated in the judgement of Cass. civ. Sez. I, 4 June 2015, n. 11564, in accordance with what was already established by the European Union (hereinafter EU) Commission, *Communication from the Commission on the definition of the relevant market for the purposes of applying EU competition law*, C 372 of 9 December 1997. Furthermore, in light of the recent principle established by the Court of Justice of the EU in the Hoffmann-La Roche case, case C-197-16, judgment of the 23<sup>rd</sup> January 2018, the reference market could be susceptible to expansion, including goods and services relating to product sectors other than the one taken in to consideration if they could be used for the same purposes as the good or service under scrutiny.

<sup>19</sup> As it is established by par. 15 of the Communication of the EU Commission of 1997 on the determination of the relevant market which places emphasis on the personal preferences of the consumer, expressly providing that «The analysis of the substitutability on the demand side implies the determination of the range of products that are considered as interchangeable by consumer».

<sup>20</sup> According to par. 29 of the aforementioned Communication, to determine the relevant geographic market from a subjective point of view, it is necessary to carry out the analysis of the characteristics of the demand (importance of national or local preferences, current consumer purchasing habits, differentiation and product brands, other factors) to determine whether businesses located in different areas are truly an alternative source of supply for consumers. The theoretical test is also based on the substitution effects that occur in the event of changes in relative prices. The question to be answered is always the same: if the customers of the parties decide to turn to companies located in another area, in the short term, and with negligible costs.

financial capacity, capillarity of the distribution network, the holding of intellectual property rights, the number of competitors and their market shares.

Thus, it should be specified that each business sector may present specific characteristics that may determine the expansion or restriction of the breadth of the relevant market. Therefore, it is crucial to pay attention to the substantial effects that certain behaviors may have on customers and competitors. In this regard, with consideration to the particular business of air transport, the European<sup>21</sup> and Italian<sup>22</sup> Antitrust Authority have developed an orientation – shared at the jurisprudential level<sup>23</sup> – aimed at separating first of all the relevant market of low-cost airlines from that of flag companies and, within of these different markets, circumscribe the perimeter not only in relation to the individual routes in which the air carriers were operating, in light of the origin and destination pairs (O&D, also referred as city-pair method), for which each route would be suitable to constitute a relevant market *ex se*, but segmenting it further with to the demand for the same route<sup>24</sup>, thus distinguishing between time-sensitive travelers and price-sensitive travelers.

Consequently, according to this reasonable reconstruction, the single route, in addition to constituting an autonomous market, can be further divided by considering two relevant and separate markets: one made up of travellers who need to reach a given destination regardless of the cost of the ticket (the so-called business or time-sensitive

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<sup>21</sup> See the emblematic measure adopted by the EU Commission in the decision of the 27 February 2013, case COMP M.6663 III, in which the European Antitrust Authority decided to apply the city-pair method to assess the anticompetitive effects on the flight market deriving from the merger between Ryanair and Air Lingus. The request was rejected because the operation would have given rise to a situation of substantial monopoly on six European routes on which the two companies are currently competitors. The authorization would have harmed competition and in particular consumers for the six routes mentioned, employing a foreseeable reduction in contractual freedom and an abusive increase in prices.

<sup>22</sup> By following the decision of the Italian Antitrust Authority, n. 23008 / C9812B, *Post-merger monitoring / Italian airline / Alitalia - Italian airlines - Air One*, according to which the Authority, in addition to deeming the city-pair method applicable, it further specified that it is appropriate to distinguish customers according to whether they are more sensitive to the price of the plane ticket (price-sensitive travelers) or the arrival time (time-sensitive travelers) at the destination airport and its proximity to the city (the so-called “catchment area”).

<sup>23</sup> In this regard, see Lazio Administrative Regional Court, judgement n. 1615 of the 25 February 2008, which excluded the competitive relationship between Ryanair and Alitalia, establishing that: «A comparison between the cheapest promotional rates of Ryanair and the ordinary business rates of Alitalia, intended for a different target, would not be correct. There is no identity of service between flights with different airports of departure and arrival. The cheapest fares available of Alitalia would not have been indicated, but the comparison would be between promotional fares of the only class available to Ryanair and ordinary business class fares of Alitalia aimed at a non-price-sensitive but time-sensitive target audience».

<sup>24</sup> The distinction between the relevant market of low-cost airlines and that of flag companies, as well as the applicability of the origin and destination criterion, were already applied by the Italian Antitrust Authority in the decision n. 6793 / I276B of the 13 January 1999, when assessing the effects on competition deriving from the agreement (specifically code sharing/block space agreements) between Alitalia and Meridiana.

customers), the other including travellers who purchase tickets for a particular destination only if it is accessible at a low price (leisure or price-sensitive customers).

Applying this methodology for calculating the market share in the special sector of the transport market, it could be argued that the product market can be identified in the section that connects two cities. Conversely, the geographic market is made up of the respective areas of origin and destination in which the traveler would be willing to move if consumers wanted to travel on a given route (catchment area)<sup>25</sup>. It should be noted that in the determination of the geographical areas that make up the respective market, not only the neighboring airports are included, but also the railway stations and maritime ports, in the case it is provided that the rail and sea transport that connect the two cities identifying the product market are equally efficient options.

4. As an alternative to the city-pair method, overseas studies<sup>26</sup> have developed the so-called airport-pair method<sup>27</sup>. By considering this criterion, there would be a further circumscription of the reference market under which in the route connecting two cities there would be as many relevant and separate markets as airports are connecting the city of origin to that of destination.

Thus, it clearly appears how this method can be applied only in cities with more than one airport<sup>28</sup>. From its application, it follows that instead of considering cities as departure and destination points reachable through any neighboring airport, each pair

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<sup>25</sup> This interpretation regarding the determination of the geographical reference market in the air transport sector is in line with the historical case-law of the Court of Justice of EU, case 66/86, judgement of the 11 April 1989, according to which «In order to determine whether an airline company engaged in scheduled transport holds a dominant position, it is first necessary to define the transport services market in question. In this regard, the discussion that took place before the Court highlighted two theses: the first, according to which the scheduled flight sector constitutes a separate market, and the second, according to which there is the need to consider alternative transport possibilities, such as the charter transport, by rail or road as well as scheduled flights on any other replacement routes». Further confirmation of the validity of this criterion is given by its application by the EU Commission to assess the effects on competition deriving from the merger between British Airways and Iberia Líneas Aéreas de España in the decision Comp. M.5747 of the 14 July 2010. For the sake of completeness, see the application of the origin or destination criterion in the authorization of the merger between US Airways and American Airlines in the decision of the EU Commission Comp. M6607 of 5 August 2013.

<sup>26</sup> See P. Gayle, *An empirical analysis of the competitive effects of the delta/continental/northwest code-share alliance*, in *Journal of Law and Economics*, 51, 2006, pp. 743-766; C. Peters, *Evaluating the performance of merger simulation: Evidence from the U.S. airline industry*, in *Journal of Law and Economics*, vol. 48, 2006, pp. 627-649.

<sup>27</sup> For an interesting comparison of the two different calculation criteria involving the definition of the relevant market in the aviation sector, with specific regard to which of them may be the most appropriate in metropolitan areas, see J.K. Brueckner, D. Lee, E. Singer, *City-Pairs Versus Airport-Pairs: A Market-Definition Methodology for the Airline Industry*, in *Review of Industrial Organization*, vol. 44, 2014, pp. 1-25.

<sup>28</sup> The applicability of this criterion was also introduced in Italy with reference to the substitutability of the connections operated by the Milan Linate airport compared to those of the Milan Malpensa airport, on which the Italian Antitrust Authority, in the decision of the 10 July 2003, n. 12185 (Alitalia/Volare), ruled negatively.

of airports would be suitable to constitute an autonomous market, thus excluding that a route connecting the same city of departure and arrival through different airports can be considered a reasonable alternative solution for travelers.

For instance, a route connecting Rome to Marrakech will have two separate relevant markets if flights depart from Rome Fiumicino and Rome Ciampino airports. Therefore, the product market would be identifiable in the route connecting the two cities, while there would be separate geographical markets coinciding with the different airports that allow transport between the two cities identifying the product market. It is excluded that those different airports located in neighboring areas to the city of departure or destination compete with each other, as for manifold subjective reasons travelers would maintain a preference for a given airport to travel to a specific destination.

From an antitrust perspective, the further restriction of the relevant market would entail acquiring a monopoly position for those airlines that exclusively connect two airports, thus considering irrelevant from a competitive point of view any flights connecting the same cities proposed by other airlines operating at different airports.<sup>29</sup>

Since the need to determine the relevant market according to consumers' actual preferences is undisputed, it would be appropriate to further restrict the reference market in the light of the airport-pair method only and exclusively if a category of customers can be identified as distance sensitive. They are those travelers who want or prefer to reach a given destination through a specific pair of airports, probably those closest to the cities of departure and destination, which could be in some ways similar to time-sensitive customers. In concrete terms, distance-sensitive travelers are not influenced - or are minimally affected - by the changing conditions of flights departing or arriving from the nearest airport or more easily accessible from the city.

To precisely define the market share held by an airline company in the flight market, it appears appropriate to apply the city-pair method in general. The further circumscription of the relevant market in time and price is rather necessary if the market surveys reveal the existence of price-sensitive and time-sensitive customers. It could be also applied when there are the so-called distance-sensitive customers, which are

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<sup>29</sup> The further restriction of the relevant market would also risk hindering the merger operations between airlines operating in the same airports as this would much more easily imply the result prohibited by the discipline in question, namely the achievement of a dominant position from external growth. In this regard, the American Department of Justice (DOJ) was able to give the green light (under certain conditions) to the merger operation between Continental Airlines and United Airlines because according to the city-pair method it would not have involved the «obtaining a dominant position on the routes connecting New York and San Francisco, when such authorization would not have been possible under the airport-pair method which, limiting the relevant market exclusively to the routes between Newark Liberty International airport and San Francisco International Airport, would have given the merged company a market share of 95%». For further studies, see S. Fleming, *Airline Mergers: Issues Raised by the Proposed Merger of United and Continental Airlines*, in *GAO-10-778T*, 2010.

those travelers that are not indifferent in the choice between two neighboring airports of the same city<sup>30</sup>.

5. Given these premises, it has been ascertained that the double dominance position in the upstream and downstream markets is not necessary. Indeed, it is sufficient for a company to have control over the upstream market – possibly reinforced by owning an essential facility –, as it is the case of Ryanair, for adopting exclusionary conduct in the derivative market<sup>31</sup>. The acknowledged dominance in the upstream market now requires identifying the most appropriate criterion to assess the effective market share held by Ryanair in the air transport sector.

If the criterion proposed by the Irish company were used, referring to a relevant market characterized by a European geographical dimension including all airlines, low cost and flag, Ryanair would not be contested any dominant position. In this case, it would limit itself to holding a market share of 10%, a percentage peacefully unsuitable for proving the existence of control of the air market and, consequently, the vertically integrated market of the other tourist services. On the contrary, if the city-pair method would be applied, as proposed by Lastminute, the undisputed dominant position of Ryanair would ensue in the 49 intra-community routes concerning which it operates as a monopolist (and therefore, Ryanair would hold a market share equal to 100%) and in the other 19 in which it would result the primary company (having a market share greater than 50%). In this case, it would be required to determine whether the exclusive sale of Ryanair's airline tickets through its website and its call center constitutes an unjustified denial of an essential facility, therefore suitable for integrating an exclusionary abuse of dominant position, according to art 102 of the Treaty on the Functioning of the EU (hereinafter TFEU) and art. 3 of the Italian Antitrust Law<sup>32</sup>.

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<sup>30</sup> J.K. Brueckner, D. Lee, E. Singer, *City-pairs versus airport-pairs: a market-definition methodology for the airline industry*, in *Review of Industrial Organization*, vol. 44 No. 1, 2014, pp. 1-25.

<sup>31</sup> In this regard, the Court of Justice of the EU, in the judgement of the 14 November, 1996, case C-333 / 94P, established that a company that holds a quasi-monopolistic position on specific markets and a leading position on distinct but closely related markets is in a situation comparable to holding a dominant position on all the markets in question.

<sup>32</sup> The dominant company's freedom of private economic initiative is more compressed than that of other companies, in the light of the special regime of responsibility of an ordoliberal matrix that belongs to them. This regime follows the primary objective of protecting the market and consumers by trying to neutralize – or at least limit – the advantages obtainable from a position of market control through the employing of a series of measures aimed at ensuring that the dominant company behaves as if it were operating in a competitive market. This principle was reiterated by the Italian Council of State, decision of the 13 September 2012, n. 4873, according to which «[...] The company in a dominant position is required to behave differently from those normally allowed to market operators, and it is required to observe a greater degree of diligence and precaution in carrying out its activities in the market in order to not further compromise with its conduct the residual competitive confrontation, already compromised by the significant market power of which it holds».

Finally, although the most appropriate solution to the case may seem almost immediate, there was a sharp contrast between the first and second instance decisions. Indeed, the Milan Court of First Instance applied the city-pair method and affirmed the exclusionary abuse of the dominant position performed by Ryanair against the online travel agencies<sup>33</sup> while the Milan Court of Appeal followed Ryanair's thesis according to which the airline company, holding a market share only equal to 10%, does not detain a dominant position<sup>34</sup>. According to the decision of second instance, Ryanair had exercised its contractual freedom of determining its partners, and its commercial strategy would not generate anticompetitive effects.

The Italian Supreme Court of Cassation intervened to correct the balance between freedom of private economic initiative and protection of competition, censuring the second-degree decision for incorrect interpretation of art. 102 TFEU and art. 3 of the Italian Law 287/1990.

In particular, the interpretative error would concern the correct subsumption to the concrete case into the abusive conducts established in letter b) of both articles that qualify the limitation of production, market access, and technical development illegitimate practices of the company detaining a dominant position which causes detriment to consumers and competitors.

However, before assessing the integration of an exclusionary abuse or exploitation, it appears necessary to respect the logical *ratio* consisting of understanding the competitive dynamics of the companies involved by determining the relevant market and, based on it, the market share held by the company whose conduct is reported<sup>35</sup>.

In this regard, the Italian Supreme Court highlighted the lack of a general rule for the correct delimitation of any market, having instead to carry out a case-by-case analysis so that the indeterminate legal concepts of relevant market and abuse of dominant position can be correctly filled. However, taking into account the special feature of the air transport market, a method of mapping the relevant market has developed at the European level, which is well implemented in the Italian legal context,<sup>36</sup> by considering that each connection between two cities must be considered an independent relevant market, with the further segmentation of it if customers are also distinguishable in relation to the factors of time and price (identified as business and leisure customers).

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<sup>33</sup> Milan Court of First Instance, judgement of the 4 June 2013, n. 7708.

<sup>34</sup> Milan Court of Appeal, judgement of the 12 October 2015, n. 3585.

<sup>35</sup> In this sense, the Italian Supreme Court recalls the sentence of the Italian Council of State, n. 1673 and 2837, 2014.

<sup>36</sup> In this regard, the Italian Antitrust Authority's decision is invoked in the case C-11608 of the 6 June 2012, related to the investigation launched on the acquisition of the activities of WindJet Ltd. by Alitalia-Compagnia Aerea Italia Ltd. It ended by affirming the need to apply the city-pair method as «This approach to defining the relevant market has an intrinsic geographical dimension typical of transport services, for which it becomes irrelevant to trace a dividing line between the geographical dimension and the product».

On the evidential level, it follows that Lastminute was not burdened of proving the fragmentation of the European flight market because of the absence of a decision of the Italian Antitrust Authority in the sense of affirming this fragmentation. It complies with the orientation of the Italian case-law<sup>37</sup> according to which in the absence of public enforcement by the Antitrust Authority (concerning which the so-called follow-on actions would follow before the ordinary judge), the judge must not mechanically apply the classic principle of the burden of proof stating that *onus probandi incumbit ei qui dicit*. It rather must consider the asymmetries existing between the parties in accessing to the market so that it will be sufficient to assume that the plaintiff attaches plausible evidence of anticompetitive conducts and the judge would use its investigative powers to assess the legitimacy of the conducts under scrutiny.

As correctly stated by the Italian Supreme Court in this judgement, the error committed by the Milan Court of Appeal regards the correct definition of the relevant market in which Ryanair operates. This error has undermined all subsequent reasoning, starting from the ascertainment of the existence of a dominant position, to that relating to the abuse of this position for the unjustified refusal of an essential facility, to the anticompetitive effects yielded in the downstream market of tourist services.

Indeed, the correct application of Art. 102 TFEU and Art. 3 of Italian Antitrust Law, as commonly interpreted at both national and European level, would have required the application of the city-pair method. It would have ascertained the dominant position of Ryanair in the 49 monopoly routes and its predominance in further 19 routes, with the consequent recognition of the anti-competitive foreclosure effects on online travel agencies following the denial of access to the essential facility managed exclusively by the low-cost company. The Milan Court of Appeal's incorrect reconstruction is also proven by the alleged absence of a link between the market in which Ryanair operates and how the online travel agencies operate. The Court seemed unaware of the relevant *acquis communautaire*<sup>38</sup> which clarifies that there may be an exclusionary abuse of the dominant company in the upstream market that unfolds the effects in the different related market, although it is not also subject to its dominion. The exclusionary conduct has the objective of strengthening its dominant position and conquering another success in a derivative market, trying to weaken its competitors with means other than its own merits.

In fact, OTAs have been widely recognized by the reference literature as one of the leading competitiveness drivers for business<sup>39</sup>, and the spread of digital technology in the tourism sector has supported the growth of online platforms used by tourists to book most of the facilities they need during the trip, leveraging the active role and

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<sup>37</sup> Cass. civ., Sez. I, 4 June 2015, n. 11564.

<sup>38</sup> Cfr. CJEU, 14 November 1996, C-333/94 P; CJEU, 11 February 2011, C-52/09; CGUE, 19 April 2018, C-525/16.

<sup>39</sup> W.G. Kim, H.Y. Lee, *Comparison of web service quality between online travel agencies and online travel suppliers*, *Journal of Travel & Tourism Marketing*, vol. 17 no. 2-3, 2005, pp. 105-116.

involvement of potential tourists in the co-creation process through online portals<sup>40,41</sup>. In doing so, consumers benefit from hyper-personalized offers with unique value<sup>42</sup>.

For these reasons, the Italian Supreme Court has welcomed the appeal presented by Lastminute and quashed the contested sentence with referral to the Milan Court of Appeal in a different composition.

Based on the discussions above, it should be remembered that the studies relating to consumer behavior and the related implications deriving from the determinants that guide his choice criteria have particularly concerned economic and marketing research. The choice of a particular airport by an individual, especially in contexts characterized by a plurality of airport spaces - such as those identified in the legal case described above - has in fact become a topic of great interest not only for the academic world, but also and above all for marketers and managers. The research has offered numerous insights to understand to what extent consumers are more inclined to choose an airport rather than another when there are more than one in their region.

The major implications are to be traced back to econometric studies and models for estimating transport demand<sup>43</sup>, in which the choice of each user is configured as a “discrete choice”, carried out among a finite set of alternatives of transport, each of which excludes all the others. Since the users are rational individuals, by nature endowed with discriminating ability and information processing capacity, they will thus choose the airport option with respect to which they perceive the greatest grade of utility<sup>44,45</sup> from a tourism perspective. In order to avoid the risk that this solution falls into a mere tautology, it should be noted that the level of utility perceived by the consumer is determined by the different degree of incidence of multiple variables. In this regard, some studies have shown that some consumers are more sensitive to factors strictly related to travel, such as the type of airline (e.g., as for low-cost flights), waiting times, flight frequency, connectivity, availability of parking spaces<sup>46</sup>.

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<sup>40</sup> B. Neuhofer, D. Buhalis, A. Ladkin, *A typology of technology-enhanced tourism experiences*, in *International Journal of Tourism Research*, vol. 16 no. 4, 2014, pp. 340-350.

<sup>41</sup> E. Oliveira, E. Panyik, *Content, context and co-creation: Digital challenges in destination branding with references to Portugal as a tourist destination*, in *Journal of Vacation Marketing*, vol. 21 no. 1, 2015, pp. 53-74.

<sup>42</sup> I. Rihova, D. Buhalis, M. Moital, M.B. Gouthro, *Conceptualising customer-to-customer value co-creation in tourism*, in *International Journal of Tourism Research*, vol. 17 no. 4, 2015, pp. 356-363.

<sup>43</sup> E. Cascetta, A. Papola, *Random utility models with implicit availability/perception of choice alternatives for the simulation of travel demand*, in *Transportation Research Part C: Emerging Technologies*, vol. 9 no. 4, 2001, pp. 249-263.

<sup>44</sup> K.J. Lancaster, *A new approach to consumer theory*, in *Journal of Political Economy*, vol. 74 no., 1996, pp. 132-157.

<sup>45</sup> X. Wang, J. Sun, H. Wen, *Tourism seasonality, online user rating and hotel price: A quantitative approach based on the hedonic price model*, in *International Journal of Hospitality Management*, vol. 79, 2019, pp. 140-147.

<sup>46</sup> E. Valeri, *Analisi della scelta dell'aeroporto di partenza in un'area Multiaeroporto: Teoria e applicazione*, in *Working papers Università degli Studi di Trieste*, 2010, Retrieved on: [http://www.sietitalia.org/wpsiet/WP\\_siet\\_17\\_feb\\_1\\_.pdf](http://www.sietitalia.org/wpsiet/WP_siet_17_feb_1_.pdf)

The importance of attracting consumers by leveraging only the airlines available, opening new routes, or increasing the frequency of existing ones is undoubtedly a fundamental component for determining consumer choice, but it cannot be considered sufficient since it neglects the concept of retail marketing and more generally the airport experience<sup>47</sup>, focusing only on the utilitarian aspects of consumption. It must be considered, however, that the new consumer is also looking for pleasant experiences<sup>48</sup> in which not only the good or service sought and purchased is highlighted, but also everything that is around it. In this sense, consider some interesting strategies that have exploited the spaces in front of the airports to expand the boundaries of traditional airport activities, developing ad hoc commercial structures<sup>49</sup> or other strategic options that have focused on the specialization of duty-free or tax-free zones according to the profile of the consumers who frequent those airports, in line with the proposed routes<sup>50,51</sup>. Considering that nowadays millions of people pass through airports, for example in the Italian territory there were approximately 193, millions passengers' transits in the period January-December 2019 alone (<https://www.istat.it/it/files/2020/05/Trasporto-aereo.pdf>), excluding the 2020 due to the Covid-19 pandemic, interesting marketing strategies could be developed by airport companies. However, a different element of shopping at airports compared to traditional shopping in a retail, on the street, or in shopping centers, is represented by the fact that it occurs only in a specific period, when consumers are in transit.

Indeed, parallel to the change in the consumer, the context within which these actions are carried out in the sales environment - and by extension, airports - could also be perceived differently, transforming from a place of purchase to a place for socializing and entertainment. In fact, the decision-making process based on models of strong economic appeal that attribute to the consumer a rational ability to choose, for example in the model of expected utility, in which individuals perform actions to reach the rationally cheapest choice<sup>52</sup> may fail. Such theories, in fact, do not consider, for example, the sensitivity of consumers concerning situational factors or atmospherics<sup>53</sup>, that denote the purposeful design of a shopping environment that produces a desired

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<sup>47</sup> A. Bork, *Developing a retail marketing strategy to promote both airport and retailers*, in *Journal of Airport Management*, vol. 1 no. 4, 2007, pp. 348-356.

<sup>48</sup> Addis, M., *New technologies and cultural consumption—edutainment is born!*, in *European Journal of Marketing*, vol. 39 no. 7/8, 2005, pp. 729-736.

<sup>49</sup> B. Reiss, *Maximising non-aviation revenue for airports: Developing airport cities to optimise real estate and capitalise on land development opportunities*, in *Journal of Airport Management*, vol. 1 no. 3, 2007, pp. 284-293.

<sup>50</sup> S.D. Barrett, *Airport competition in the deregulated European aviation market*, in *Journal of Air Transport Management*, vol. 1, 2000, pp. 13-27.

<sup>51</sup> A. Graham, *Airport strategies to gain competitive advantage*, In Ashgate, 2010, pp. 81-98.

<sup>52</sup> G.I. Crouch, T.M. Devinney, J.J. Louviere, T. Islam, *Modelling consumer choice behaviour in space tourism*, in *Tourism Management*, vol. 30 no. 3, 2009, pp. 441-454.

<sup>53</sup> H. Han, S.S. Hyun, *Investigating customers' shopping behaviors at airport duty-free shops: impact of shopping flow and alternative shopping malls' attractiveness*, in *Asia Pacific Journal of Tourism Research*, vol. 23 no. 7, 2018, pp. 627-638.

effect, by leveraging on images, colors, music, scent to affect consumers' behaviour<sup>54</sup>. Furthermore, they also do not consider the reasons for the trip since they do not distinguish, for example, between the observed profiles of business/time sensitivities whose reasons are to be found in the utilitarian purpose of the trip, and leisure/price sensitivity whose reasons for the trip are instead more hedonistic and therefore may be more sensitive to further marketing stimuli<sup>55</sup>. This variable is instead decisive as demonstrated by the Ryanair v. Affair. Last minute. To confirm the validity of this approach, the literature has shown how purchasing behavior in airports has been more strongly influenced by hedonistic purposes rather than by utilitarian purchase values<sup>56</sup>.

6. The most effective marketing strategies could be derived from the type of consumer most represented. For example, the level of attention during waiting times could be exploited with a series of activities not strictly related to the original purpose of their presence - air travel - providing more suitable content for the average traveler within the catchment area. Given the institutional framework within which they operate, hand in hand with the increase in competition in the reference sector, airports should thus diversify their position in new, comparable ways that are able to involve end consumers more. In this sense, given the predisposition of consumers, so those possible purchase intentions are transformed into actual consumption in the catchment areas, marketers and airport managers should not only consider the consumer's moods but above all also produce stimuli in these spaces marketing strategies to guide, encourage, and maximize purchasing choices. Some of the factors traditionally considered such as waiting times and congestion levels could in fact also have a positive impact on the permanence of passengers by allowing them to navigate in the airport spaces, exploiting their presence to encourage shopping activities in the airport space by mitigating them in the negative perception starts<sup>57,58</sup> and indeed, reversing the negative effect identified by the econometric doctrine<sup>59</sup>, exploiting it as a strength. In fact, the literature demonstrates how situational factors, can reduce the subject's perception of the interval of waiting times, improving his reaction to this episode he

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<sup>54</sup> P. Kotler, *Atmospherics as a marketing tool*, in *Journal of Retailing*, vol. 49 no. 4, 1973, pp. 48-64.

<sup>55</sup> S. Hosany, D. Gilbert, *Measuring tourists' emotional experiences toward hedonic holiday destinations*, in *Journal of Travel Research*, vol. 49 no. 4, 2010, pp. 513-526.

<sup>56</sup> Y.S. Chung, *Hedonic and utilitarian shopping values in airport shopping behavior*, in *Journal of Air Transport Management*, vol. 49, 2015, pp. 28-34.

<sup>57</sup> H. Han, S.S. Hyun, *Investigating customers' shopping behaviors at airport duty-free shops: impact of shopping flow and alternative shopping malls' attractiveness*, in *Asia Pacific Journal of Tourism Research*, vol. 23 no. 7, 2018, pp. 627-638.

<sup>58</sup> E. Torres, J.S. Dominguez, L. Valdès, R. Aza, *Passenger waiting time in an airport and expenditure carried out in the commercial area*, in *Journal of Air Transport Management*, vol. 11 no. 6, 2005, pp. 363-367.

<sup>59</sup> E. Valeri, *Analisi della scelta dell'aeroporto di partenza in un'area Multiaeroporto: Teoria e applicazione*, in *Working papers Università degli Studi di Trieste*, 2010, Retrieved on: [http://www.sietitalia.org/wpsiet/WP\\_siet\\_17\\_feb\\_1\\_.pdf](http://www.sietitalia.org/wpsiet/WP_siet_17_feb_1_.pdf)

experiences. Travelers may also experience feelings of anxiety, stress and excitement leading them to react in unusual ways, making it urgent to design airport shopping to remedy the incidence of situational factors<sup>60</sup>, thus minimizing or eliminating barriers to purchasing<sup>61</sup>.

In this sense, airport management (given the limited physical spaces) will have to act in order to develop a mix modeled on the specific characteristics of its target, as well as offering entertainment services also deriving from the exploitation of modern technologies, guaranteeing network connectivity and routes of hyper-personalized purchasing<sup>62,63</sup>. The marketing techniques applied to shopping should thus be borrowed when considered as an activity not only aimed at purchasing according to a utilitarian vision, but as an activity whose value for the consumer also lies in pleasure, fun, experience linked to the points of sale, according to a more hedonistic approach, also in the particular type of shopping in transit examined. In this sense, the approaches useful for influencing consumers according to traditional situational factors, such as the physical setting (in terms of physical and spatial aspects of the reference environment), the social environment (intended such as the people with whom individuals interact), the temporal perspective (understood as the management of the time available to a consumer), the reasons that induce the need to purchase, the antecedent states of consumption (such as physiological or moods that characterize it along with the shopping activity). Moreover, marketers and managers should be able to rapidly acknowledge and benefit these changes also with a view to greater movements expected in the post-pandemic era, induced by an emerging concept of responsible travel and consumption<sup>64</sup>, due to a renewed cultural or personal enrichment matrix arise from individuals forced to social distancing or periods of lockdown.

A thorough and analytical knowledge of the purchase paths and the desires of the various demand segments can be highly useful in order to define the right composition of the offer mix, also acting on the stimulation of his senses to create the perception of

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<sup>60</sup> R.W. Belk, *Situational variables and consumer behavior*, in *Journal of Consumer Research*, vol. 2 no. 3, 1975, pp. 157-164.

<sup>61</sup> G. Crawford, T.C. Melewar, *The importance of impulse purchasing behaviour in the international airport environment*, in *Journal of Consumer Behaviour: An International Research Review*, vol. 3 no. 1, 2003, pp. 85-98.

<sup>62</sup> A. Sestino, C. Amatulli, A.M. Peluso, G. Guido, *New technologies in luxury consumption experiences: The role of individual differences*, in *Proceeding of Italian Society of Marketing Conference*, 2020, pp. 1-6.

<sup>63</sup> P.C. Verhoef, K.N. Lemon, A. Parasuraman, A. Roggeveen, M. Tsiros, L. A. Schlesinger, *Customer experience creation: Determinants, dynamics and management strategies*, in *Journal of Retailing*, vol. 85 no. 1, 2006, pp. 31-41.

<sup>64</sup> C. Amatulli, A.M. Peluso, A. Sestino, G. Guido, *New consumption orientations in the COVID-19 era: Preliminary findings from a qualitative investigation*, in *Proceeding of Annual Conference Marketing Trends 2021, Venice*, 2021, pp. 1-7.

positive emotional states that induce favorable purchasing behavior<sup>65</sup>. Finally, airports should thus enrich their essential services while also by focusing of the quality of travelers' stay, paying more attention to the physical structure, the design of spaces and equipment, offering experiences and opportunities for recreation within the airport area.

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<sup>65</sup> R. Vreeker, P. Nijkamp, C. Ter Welle, C., *A multicriteria decision support methodology for evaluating airport expansion plans*, in *Transportation Research Part D: Transport and Environment*, vol 7 No. 1, 2002, pp. 27-47.