

THE ITALIAN ENFORCEMENT OF CONSUMER PROTECTION LAW IN THE RAIL TRANSPORT SECTOR

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1. CONSUMER PROTECTION AND RAILWAY TRANSPORT SECTOR

The European Union is very active in rail transport issues. The primary objective of European legislation is to create a single market for rail transport services within the EU, via harmonisation of conditions for access to the infrastructure and safety rules, standardisation by means of technical specifications for interoperability and creation of freight corridors.

To this end, the third railway package legislation of 2007² opened the market for international passengers rail transport on 1 January 2010, and also - under the so-called Public Service Regulation - better defined the legal and financial framework for awarding public service contracts related to inland transport in order to ensure citizens 'quality for money' for public transport services all over Europe.

In such a context, where a single market is emerging, measures to promote users' rights are essential both to grant the consumer adequate protection and a level playing field based on quality services.

In addition to consolidating and simplifying existing legislation, in its "Third Railway Package", the European Union has created regulations for international carriage of passengers by rail, supplementing and strengthening the CIV Uniform Rules.³

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² As is well known, the European Commission adopted a third package of measures on 26 September 2007, to open up international passenger services to competition within the EU by 2010. It consists of:

i) Directive 2007/58/EC on the allocation of railway infrastructure capacity and the levying of charges for the use of railway infrastructure: envisages opening the market for international passenger services to competition from 1 January 2010;

ii) Directive 2007/59/EC on the certification of train drivers operating locomotives and trains on the railway system in the community: lays down conditions and procedures for the certification of train crews operating locomotives and trains; and

iii) Regulation 1371/2007 on rail passengers' rights and obligations.

³ "CIV" or International Convention for the transportation of Passengers (French: *Convention Internationale pour le transport des Voyageurs*) in rail transport refers to a set of uniform rules shared by European railway operators, to cover international journeys. The acronym "CIV" is printed on the corner of tickets issued to show that they are covered under the terms of

Indeed, Regulation (EC) no. 1371/2007 of the European Parliament and of the Council of 23 October 2007 aims to establish rights and obligations for international rail passengers in order to improve the effectiveness and attractiveness of international rail passenger transport. Under the Regulation, common minimum rules apply throughout Europe, for instance in case of delays or cancellation of trains. In addition, since rights are meaningless unless passengers are aware of them and know how to pursue them, the railway companies are obliged to inform passengers of their rights and obligations and to establish complaint boards. Furthermore, this Regulation aims at defining the obligations passengers have to comply with, such as the obligation to purchase a ticket and to avoid any behaviour likely to inconvenience train staff or other passengers.

These rules - as a whole - define a set of “basic” rights shared by all travellers. However, the fact that some aspects are regulated does not preclude the application of the Italian Consumer Code. Indeed, the general consumer law complements these sectorial provisions and fills any remaining gaps in the protection against unfair commercial practices. In respect of rail fares, for example, the Consumer Code's provisions come into play to prohibit commercial practices which are likely to deceive the average consumer (such as advertising and marketing of air fares), and practices which constitute aggressive conduct (such as onerous and disproportionate non-contractual barriers imposed on consumers who wish to exercise a contractual right to terminate a contract).

2. THE ICA'S PROCEEDINGS AGAINST TRENITALIA

In this regard and following the liberalization of medium and long distance national travel, the Italian Competition Authority (ICA) intensified its enforcement of consumer protection rules in the rail sector.

Despite the wider consumer choice and the investments on the network allow a quality and quantity improvement of services offered by the carriers, nowadays there are still some critical issues in terms of consumeristic profile that define the “b2c” (business to consumer) relation in the examined sector.

In this perspective, during 2014 the enforcement action had, therefore, as a main goal the encouragement of the adoption of customer-oriented conducts by the traders, throughout the implementation of simpler and less distressing procedures for the services fruition by the user, and clear and precise communication to passengers before and during the journey, and finally, a proper respect for the existing regulation.

the contract—primarily providing compensation for lost luggage and a guarantee of onward transport, in the event of cancelled or missed connections.

The last two ICA interventions in the sector concerned Trenitalia SpA (*hinc inde* “Trenitalia” or “Company”), the main Italian railway company, active in the medium and long distance passenger transport, in regional and metropolitan and in freight transport.

In its decisions of 12 November 2014 the ICA concluded two investigation proceedings in case n. PS4848 – *Trenitalia-indennizzi e rimborsi per ritardi e altri disagi*, started in March 2014 and case n. PS4656 – *Trenitalia sanzioni per irregolarità di viaggio*, started in March 2014.

2.1 PS4848, “*Trenitalia-Indennizzi e rimborsi per ritardi e altri disagi*”

The case regarding the practices challenged *prima facie* by the Authority and alleged to infringe Articles 20, 21, 22, 24 and 25 of the Italian Consumer Code was concluded without any finding of infringement since the commitments submitted by Trenitalia were accepted. This proceedings concerned:

- i) the alleged discretion of Trenitalia in establishing the reasons for train delays, the cumbersome procedure to handle customers’ requests for compensation for train delays and the lack of information and reasons in communication to customers in response to these requests;
- ii) the misleading nature of the purchase procedure on the Company’s website with regard to tickets covering different routes, since the consumer is not informed about the nature and features of the service offered (ticket covering different routes) and the related rights arising out. In other words, Trenitalia offers to the customer a single contract of carriage to be considered as a “*global ticket*”, while the compensation due in the event of a delay is calculated only on the basis of one of the routes included in the ticket, and not on the whole ticket price.

In this case, precisely with the aim of achieving tangible and immediate benefits for the consumers, the ICA accepted and consequently made binding the commitments submitted by Trenitalia Spa in order to overcome any potential risk raised in the proceedings.

Due to the ICA action, Trenitalia lowered the recognition threshold for a bonus (not cash) equal to 25% of the ticket price from 60 to 30 minutes of delay, in favour of all travellers using medium and long distance national services (leaving out only those covered by public service contracts), starting from March 2015.

In order to further facilitate the exercise of the right to compensation in accordance with EU Regulation no. 1371/2007, the ICA made binding the commitment of Trenitalia aimed to dramatically reduce the time span needed to get bonuses and compensations that, from March 2015, was reduced to three days from the date of arrival at destination of the used train, instead of the previously needed twenty days.

Trenitalia finally committed to add to all the delays detecting system a three minutes margin, regarding trains arriving in large railway junctions. In the evaluation of the measures proposed by the trader, it also considered the important improvement in the degree of transparency that has been achieved in communicating with consumers through the acceptance of the commitments. Indeed, in addition to an

extensive information campaign, Trenitalia will guarantee an update on the duration of the delay as well as the consumers' right to claim the bonus and the compensation will in fact be available on-board the train. The advantages achieved for consumers, however, are also tangible in terms of increased protection in the event of missed connections. In fact, in case of accumulated delay because of travel solutions, proposed by the carrier through its sales systems, which provide for the use of two (or more) of the medium and long distance trains, travellers will be paid compensation for the delays on the entire ticket price (except for international services) and not just on the amount paid regarding the segment that has actually produced the delay.

The ICA finally made binding the commitment on the introduction of the so-called through mixed ticket⁴ that will ensure the traveller both the delay compensation on the full amount paid and the journey continuation in the event of missing the next train listed in the travel schedule, for a travel solution, proposed by the carrier, using either Trenitalia regional train (via a ticket that will clearly identify the used train) or a medium/long distance service (except for international services).

2.2 PS4656, “Trenitalia sanzioni per irregolarità di viaggio”

As to the second case, the ICA found that Trenitalia breached Articles 20, 24 and 25 of the Italian Consumer Code by implementing certain unfair commercial practices and, accordingly, the Authority imposed on the Company an administrative fine of 1 million Euro.

This case concerned a distinct conduct of Trenitalia, repeatedly reported by consumers and consumers' associations, regarding the national rail passenger sector, pertinent to the definition and application of a rigid system of clear ticketing on board trains and the subsequent repression of any travel irregularities through the infliction of sanctions of a significant amount for the passengers.

In particular, preliminary investigations established that:

- i) in the General Conditions of Carriage of Trenitalia, as licensed railway agency, autonomously identified - and applied - the various cases of “irregularities” indistinctly ascribing them to the category of “lack of ticket” not only the circumstances in which the passenger was physically without the ticket but also the cases in which the traveller proved however to be in possession of a travel pass only partially dissimilar (e.g. for the time) to the undertaken transport;
- ii) with the same autonomy, Trenitalia established the respective fines imposed on the passengers - usually disproportionate to the due ticket price;
- iii) Trenitalia implemented this fine system by adopting a lexicon (“tax”, “surtax”, “fine”) and an anachronistically “publicistical” collection procedure: this system, connecting to the inert lapse of time

⁴ “Through ticket” is a ticket or tickets representing a transport contract for successive railway services operated by one or several railway undertakings.

the progressive increase of the impossible fine, could not guarantee an effective debate with the passenger before the payment;

iv) finally, the above-mentioned fine system resulted rigidly applied by the Trenitalia ticket inspection personnel even when passengers were in a clear impossibility - because of force majeure or even because of disruption due to the same company - to validate their position and even in case of free seats on-board the train;

v) the contested conduct - as a whole and in the light of all the peculiar aspects that it is made of - is found to be incorrect and against professional diligence, as it is liable to mislead the consumer about the nature of the applied fines and the basis on which the payment is required, giving the passenger regularization procedure a publicistical aura, instead, by the Terms and Conditions set by the carrier.

Because of the rigidity and the distress of the procedure, such conduct acquired specific features of aggressiveness, in addition to publicistical features, also the pressing payment timing and the extended identification of “lack of ticket” cases in causing an indistinct application of a high fine. In fact, in relationship to the specific system put in place, the depicted fining model, was likely to significantly impair the consumers’ behaviour freedom, conditioning them to the immediate payment of the required fine as “tax” and “surtax” and preventing the real possibility of dispute in order to avoid the imposition of the fine. Thereby, it has not allowed an effective and reasonable “regularization” of the so called unsuitable travel pass.

The ICA evaluated the extreme gravity of the conduct and imposed Trenitalia an administrative fine of Euro 1 million, also taking into account: i) the economic dimension of the Company (which is the largest national railway carrier); ii) the widespread nature of the practice and “*its ability to affect a very large share of consumers*”; iii) the total revenue acquired - limited to three-year period 2011/13 - in ascertaining irregularities travel; iv) the strategic characteristics of the practice to the detriment of consumers and the undue competitive advantage to the Company.

As for the length, the breach extends for at least seven years, since it started in 2007 when it operated a massive remodelling increasing the amounts set for the penalty related to different hypotheses of irregularities travel.

Moreover, the aggravating circumstance of recurring breaches was applied since “*Trenitalia has already had other measures applied to it by the ICA under the provisions of the Consumer Code in the framework of unfair commercial practices*”.

Finally, the two above-mentioned proceedings demonstrate that the horizontal frameworks for consumer protection intersect the vertical ones for the travellers’ protection: Reg. EU no. 1371/2007, outlining a network of rules that raises consumer protection level, has a complementarity perspective and not an overlapping one with the general/horizontal framework.