



The EU Public Interest Clinic and BEUC present: *Eliminating airline “No-show clauses” in the EU*

Prepared by Jessica Boulet, Carter Nelson, Megane Seguin, Lamin Khadar, Anne-Lise Sibony and Alberto Alemanno

May 2015

Executive Summary

The following paper, prepared by the HEC-NYU EU Public Interest Clinic for BEUC (the European consumers organization), advocates for the elimination of so-called “no-show clauses” throughout the European Union.

No-show clauses operate by permitting airlines to cancel reservations of passengers who have missed either: (a) the first leg of a multi-leg itinerary; or (b) the outbound flight of a round-trip itinerary. These controversial no-show clauses have long been a staple of sales contracts for airline tickets, despite long-standing objections from various stakeholders and, increasingly, from national courts in the European Union.

Although the European Commission has issued a proposal to (partially) ban no-show clauses, which was supported and even reinforced by the European Parliament, the Council has removed the relevant provision from the legislative proposal.

This paper explores several arguments put forward by different stakeholders, particularly BEUC and the airline industry, regarding the use of the no-show clause in airline contracts.

BEUC makes two central arguments in favour of a ban of the no-show clause:

1. No-show clauses are unfair under Council Directive 93/13/EEC on Unfair Terms in Consumer Contracts. Counter to the requirements of that Directive, no-show clauses create a “significant imbalance” between the consumer and the airline. This is further demonstrated by their close resemblance to many of the terms listed in the Directive’s Annex as “indicative of... the terms which may be regarded as unfair.”
2. Several EU Member State courts have already struck down no-show clauses. Both the German and Spanish courts have ruled that no-show clauses are unfair contract terms, following national laws based on the unfair contract terms directive (Directive 93/13/EEC) reasoning, *inter alia*, that:
 - a. The loss of the entire ticket as a result of the choice not to use part of it is disproportionate and lacks plausible justification.
 - b. Such clauses create a significant imbalance between the consumer and the airline in that the consumer does not receive any proportionate or additional benefit for the curtailment of their right to not travel.
 - c. Such clauses constitute an impermissible “surprise” for consumers, since no justification for denied boarding would exist absent the clause.

Airlines, meanwhile, make both:

1. *Commercial arguments* suggesting that such clauses are a crucial part of airline pricing strategy and competition within the air travel market; and
2. *Legal arguments* suggesting that an international agreement, namely the Open Skies Agreement (OSA), prevents the EU from banning the use of no-show clauses in any event.

However, we refute these arguments by demonstrating that:

- No-show clauses are not commercially essential because if no-show clauses were prohibited, airlines would be left with a range of other pricing strategies that may compensate for this loss.
- Eliminating no-show clauses would not force airlines to withdraw from certain markets. Firstly, given the relatively small cost of individual flights, airlines will not reduce the number of flights on certain routes as long as there is demand for those flights. Secondly, if serving certain markets is becoming too expensive, airlines should (and have) cut costs rather than unfairly penalizing passengers.
- Rather than reducing competition, eliminating no-show clauses might actually increase competition within the European airline market by requiring airlines to compete for business on every leg of passenger’s trip.
- The language of the Open Skies Agreement leaves it open to the EU to ban no-show clauses; an EU ban on the no-show clause would not be at odds with the object and purpose of the Open Skies Agreement.

Table of Contents

Executive Summary	2
Table of Contents	3
I. Introduction.....	4
a. What is a “No-Show Clause” and why do airlines use it?	5
b. Background	6
II. The Strong Case for a Ban on No-Show Clauses.....	8
a. No-Show Clauses Are Illegal Under EU Consumer Protection Law	8
b. Several EU Member State Courts Have Already Declared No-Show Clauses to be Illegal.....	12
III. The weak case against an EU ban on No Show Clauses.....	16
a. No-Show Clauses Are Not Commercially Necessary.....	16
b. Banning No-Show Clauses is Not Legally Impossible.....	20
Conclusion	24
Annex.....	25
Bibliography	27

I. Introduction

A real consumer story...

Imagine you have booked a return flight from Berlin to Paris from 14 to 18 August for €120 with Air France. You need to travel because you are planning to visit your grandfather for his birthday.

Unfortunately, your grandfather dies the week before you are due to travel. You now need to travel a few days earlier to help your family with funeral planning.

You try to change your outbound Air France flight but are told you cannot because your ticket is non-refundable and non-changeable. So, you book another outbound journey with Ryanair for €80 from Berlin to Paris on 11 August. You plan to return to Berlin on 18 August with Air France on your original booking.

However, when you arrive at the airport in Paris on 18 August for your return flight, Air France informs you that you cannot check-in and cannot board. Why? Because when you missed your original outbound journey on 14 August, Air France registered you as a “no-show” and automatically cancelled your entire reservation.

Now you need to book a new flight to Berlin with Ryanair on 19 August at a cost of €150. Through no fault of your own, your entire flight has cost you €350 instead of the €120 you originally agreed to pay.

Apparently Air France had the right to cancel your ticket and it was stated in the Terms and Conditions of your air transport contract. It is your fault that you failed to read these.

The story of many consumers...

The above story is based on a real situation experienced by a consumer who decided to [vent her anger on ripoffreport.com](#). However, this is the story of many consumers. All across Europe, air passengers may find themselves in this situation for one reason or another.

There may be many reasons why you might miss an outbound flight: you fall ill, you misplaced your passport, you have to work, your train is delayed. Regardless of the reason, many airlines will simply classify you as a “no-show” and cancel your return journey.

This document is the result of research carried out by students and faculty of the [HEC-NYU EU Public Interest Clinic](#) (“the Clinic”) for [BEUC](#) (the European Consumers Organization).

BEUC, as the representative of various consumer organizations all across the EU, engaged the Clinic to investigate the merit of arguments made by airlines in favour of the continued use of “no-show clauses” in air-transport contracts” and to put forward legal arguments against the use of such clauses.

The remainder of this introductory section will be used to explore what so-called “no-show clauses” are and why they are used and, briefly, some of the political background context.

a. What is a “No-Show Clause” and why do airlines use it?

Controversial “no-show clauses” (NSCs) have long been a staple of sales contracts for airline tickets,¹ despite long-standing objections from various stakeholders² and, increasingly, from national courts in the European Union.

Traditionally, NSCs operate in the following manner: if a passenger misses either (a) the first leg of a multi-leg itinerary (“Scenario A”); or (b) the outbound flight of a round-trip itinerary (“Scenario B”), a NSC allows the airline to refuse that passenger boarding on later segments of the itinerary. The passenger’s seat is then sold to another customer, often from a reserve-booking list maintained by airlines for this purpose. Meanwhile, the airline retains the original passenger’s payment, in addition to any payment for the ticket’s re-sale.

This “no-show” policy results in situations where passengers who miss a flight or decide not to take it, for whatever reason, are denied boarding for their subsequent flights and then obliged to buy another ticket (subject to availability) or pay a supplementary fee. As will be discussed below, Airlines argue that NSCs are an essential mechanism of their pricing policies, without which their pricing models would have to be completely restructured.³

As noted, NSCs apply to two different types of tickets (Scenario A and Scenario B above), and airlines posit different justifications for the use of the clause in each circumstance. The first type of ticket (Scenario A) is for subsequent or connecting flights, in which a ticket from A to C is sold with a connection through B. In this instance, a NSC becomes operative if the passenger does not take the first leg, from A to B, and instead attempts to board at B to arrive at C. Under the clause, the passenger would be denied boarding at B.

The second type of ticket (Scenario B) is a round trip itinerary, where an airline would bar a passenger from boarding the return flight if the passenger had not taken the initial leg of the journey.

In the case of subsequent flights (Scenario A), airlines argue that NSCs allow airlines to compete for markets that would otherwise be inaccessible, and in turn offer cheaper alternatives for consumers. For instance, if an airline does not serve a direct route from Paris to New York, it may charge a lower price to connect Paris-London-New York in order to compete with airlines that do offer direct flights. However, if demand is higher and competition is lower for direct flights from London to New York, they may wish to charge a higher rate for that route. According to airlines, a passenger who buys the indirect Paris-New York flight at the lower rate, but actually boards in London, undermines the airline’s ability to price competitively for either route. This could lead to a reduction of competition on the affected routes and would be to the detriment of consumers, especially the less time-sensitive travellers that would have opted for a longer but less expensive indirect flight.

For round trip flights (Scenario B), airlines argue that there may at times be higher demand to fly from A to B than from B to A; this is referred to as a “directional imbalance”. Where a directional imbalance exists, airlines assert that NSCs allow them to price one direction

¹ International Air Transport Association [hereafter IATA] General Conditions of Carriage Recommended Practice 1724, Art. 3.3.

² See, e.g., Public consultation on the Possible revision of Regulation (EC) No 261/2004 on air passenger rights (19/12/2011 – 11/03/2012), p. 50, available at <http://ec.europa.eu/transport/themes/passengers/consultations/doc/2012-03-11-apr-public-consultation-results.pdf>.

³ See generally G. Bischoff et al, ‘Airline Pricing Strategies Versus Consumer Rights – Is there a Need to Maintain the ‘Full and Sequential Use of Flight Coupons’ Rule?’. 13th Air Transport Research Society (ATRS) World Conference, June 2009, pp. 3-5.

higher than the other, in order to reflect the difference in demand. A customer who buys a cheaper round trip ticket and only uses it to travel in the more expensive direction undermines the airline's ability to charge a higher price for the in-demand route.

Therefore, according to airlines, allowing passengers to use their coupons as they wish would impinge on their pricing policies. Furthermore, from the airlines' perspective, no-show passengers deprive airlines of potential revenue. If the flight was fully booked and the airline is forced to turn away potential customers, yet seats remain unused, then revenue is forgone. Put another way, seats on a particular flight might be thought of as perishable goods – once a flight leaves, that seat ceases to exist as a potential source of revenue.⁴

b. Background

In March 2013, the European Commission issued a proposal⁵ for a Regulation revising Regulation 261/04 on the rights of air passengers in the event of denied boarding, cancellation and long delays.⁶ The Regulation applies to European Union airlines and airlines flying from the European Union. The European Commission included a provision that would partially prohibit the use of “no-show clauses” – only for return flights (Scenario B):

“[P]assengers may not be denied boarding on a return journey of the same ticket on the grounds that they did not take the outward journey. However, such ban does not affect the right of airlines to impose particular rules with regard to the sequential use of flights within a same journey.”⁷

The Commission justified its decision to ban NSCs only for round-trip tickets on the basis of concern that a full ban “would impair airlines from offering indirect flights at lower prices than direct flights and therefore hurt competition⁸ (Article 1(3(b)) of the proposal – Article 4(4) of the amended Regulation (EC) No 261/2004”.⁹

The text proposed by the Commission was the following:

“In order to improve levels of protection, passengers should not be denied boarding on the return journey of a two-way (return) ticket because they have not taken the outward journey”.

This approach was supported and even reinforced by the European Parliament. Its amendment was the following:

“In order to improve levels of protection, it should not be possible for passengers to be denied boarding on a section of the journey of a two-way (return) ticket on the grounds that they have not travelled on every leg of the journey covered by the ticket.”

⁴ See, e.g., Bischoff, p. 5.

⁵ European Commission Proposal for a Regulation amending Regulation 261/2004 on the rights of air passengers, COM(2013) 130 final.

⁶ For a thorough discussion of the legal and political backdrop to the proposal, see J. Prassl, ‘Reforming air passenger rights in the European Union’, Air and Space Law, vol. 39, 2014, 59–69. Prassl also notes that, although the proposed amendments will doubtless garner opposition from the industry, the authority of the EU (under the subsidiarity principle) is well-established and any arguments that the amendments do not violate the proportionality principle are likely to fail in the face of the high importance that the Court places on consumer protection. *Id.* at 62–63.

⁷ See, COM(2013) 130, at 3.3.1.1, Clarification of key principles.

⁸ *Id.* Explanatory memorandum of the Commission proposal.

⁹ *Id.*

The Parliament justified its amendment by saying that, “*If a booked flight consists of several legs, the passenger should be allowed to use up only one or some of them without being punished by forfeiting the rest of the journey or being obliged to pay a high additional charge*”¹⁰.

Notably, the proposed revision only addressed round-trip itineraries and not subsequent flights (Scenario A). Because the political environment happens to be more receptive to this type of restriction, and because the economic arguments against the use of NSCs in the former scenario are more straightforward, the remainder of this memo will primarily address NSCs in round-trip tickets (Scenario B).¹¹

¹⁰ European Parliament, Report 1st reading, on the proposal for a regulation of the European Parliament and of the Council amending Regulation (EC) No 261/2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights and Regulation (EC) No 2027/97 on air carrier liability in respect of the carriage of passengers and their baggage by air (A7-0020/2014).

¹¹ For clear-cut summary of complications that may arise from banning the use of NSCs for subsequent flights, see Bischoff, p. 12.

II. The Strong Case for a Ban on No-Show Clauses

a. No-Show Clauses Are Illegal Under EU Consumer Protection Law

Ideally, the European Parliament and Council should clearly state in legislation that the use of NSCs is unfair; this would provide a clear signal to the courts and to the airlines that such clauses will no longer be given legal effect.¹² In order to galvanize support for such legislation, an effective step would be to highlight what the airlines don't say: that *NSCs violate existing EU law governing unfair contract terms*.¹³

For ticket sales to individual consumers, airlines almost always rely on pre-formulated contracts, also known as “contracts of adhesion”, which apply a standard set of terms (including NSCs) for all purchases. Airlines, like other big businesses utilizing pre-formulated contracts, are presumed to be the stronger party in situations where the other party has no opportunity to negotiate terms.¹⁴ Council Directive 93/13/EEC on Unfair Terms in Consumer Contracts (also known as the Unfair Contract Terms Directive, or the UCTD) attempts to correct this imbalance by providing safeguards for the weaker party; the individual consumer. It does so by protecting consumers against any “significant imbalance” or bad-faith term use in a contract of adhesion; the UCTD also provides a non-exhaustive list of presumptively unfair contractual conditions.

Counter to the requirements of the UCTD, NSCs create a “significant imbalance” between the consumer and the airline.¹⁵ This is further demonstrated by their close resemblance to many of the terms listed in the Directive's Annex as “indicative of... the terms which may be regarded as unfair.”¹⁶ In the following two sections we will explore each of these points.

1. No-show clauses are unfair because they create a “significant imbalance” between the consumer and the airline

Article 3 of the UCTD provides that:

1. A contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer.

¹² Specifically, Article 6(1) of Council Directive 93/13/EEC of 5 April 1993 on Unfair Terms in Consumer Contracts, OJ L 095, 21/04/1993 [hereinafter UCTD] states as follows, with regard to the legal effect of unfair terms: “Member States shall lay down that unfair terms used in a contract concluded with a consumer by a seller or supplier shall, as provided for under their national law, not be binding on the consumer [...]” UCTD.

¹³ The reason this has not been universally enforced thus far may be more due to a lack of uniform, effective enforcement mechanisms rather than any substantive reason. See, e.g., I. Koning, ‘The Enforcement of Air Passenger Rights in Europe’, REDC 2011/2, pp. 359-82. See also H. Micklitz & N. Reich, ‘The Court and Sleeping Beauty: The Revival of the UCTD’, Common Market Law Review, vol.51, 2014, pp. 771, 780; Communication from the Commission to the European Parliament and the Council on the application of Regulation 261/2004 on air passenger rights, with explicit reference to “no show” clauses, COM (2011) 174, pp. 3, 10-11.

¹⁴ *Id.* p.3.

¹⁵ Article 3, UCTD.

¹⁶ *Id.* at Art. 3(3).

2. A term shall always be regarded as not individually negotiated where it has been drafted in advance and the consumer has therefore not been able to influence the substance of the term, particularly in the context of a pre-formulated standard contract.

It is for the CJEU to articulate a harmonized, EU-wide standard for unfair contract terms.¹⁷ A recent opportunity to elaborate the definitions of “significant imbalance” and “good faith” came in 2013, when the Court ruled on a referral from a Spanish court, *Aziz*.¹⁸ The CJEU ruled that¹⁹

- “The concept of ‘**significant imbalance**’ to the detriment of the consumer *must be assessed in the light of an analysis of the rules of national law applicable in the absence of any agreement between the parties*, in order to determine whether, and if so to what extent, the contract places the consumer in *a less favourable legal situation than that provided for by the national law in force*. [...]”
- [I]n order to assess whether the imbalance arises ‘contrary to the **requirement of good faith**’, it must be determined whether the seller or supplier, dealing fairly and equitably with the consumer, could *reasonably assume that the consumer would have agreed to the term concerned in individual contract negotiations*.” [emphasis added]²⁰

The Court’s definition of significant imbalance is thus inherently comparative. In the context of NSCs, this means that the fairness of the airline’s unilateral power to cancel part of the contract would be scrutinized against background contract principles. A simple contractual analysis would suggest that the consumer’s obligation is to pay the price of the air ticket while the airline is obliged to provide the air transport. However, the airline (through the NSC) reserves a right to breach the contract (by refusing boarding to no-show passengers on their return leg). General principles of contract law (all across Europe) would dictate that compensation is due to the injured party (the consumer) for the loss suffered as a result of this breach of contract. However, the airlines offer no such compensation. This is clearly a significant imbalance contrary to the requirement of good faith. Failing empirical evidence to the contrary, it seems fair to assume that the average consumer would not voluntarily agree to such a term in individual contract negotiations.

The airlines would of course argue that the consumer’s obligation is not merely to pay the price, but also to use the tickets *fully and sequentially*. This however seems contrived, as the airline incurs no extra cost when the passenger fails to use one leg of a round-trip flight for example. The flight has already been paid for in full. The airline may lose potential revenue from possible *additional* passengers (drawn from a reserve list) but this has no bearing whatsoever on the contractual relationship between the airline and the original no-show passenger.

The CJEU has further clarified in *Constructora Principado v. Álvarez* that “significant imbalance” may entail *either* a significant economic impact with respect to the value of the transaction in question; *or* a restriction on the rights that the buyer would otherwise have under applicable laws; or both.²¹ In the case of NSCs, there is both a significant economic impact *and* a restriction on the rights of passengers. Our opening example illustrates the costs

¹⁷ See Case C-137/08, VB Pénzügyi Lízing Zrt. v. Ferenc Schneider, (EU:C:2010:659), para. 36.

¹⁸ Case C-415/11, *Aziz v Catalunya Caixa* (EU:C:2013:164).

¹⁹ For an in-depth discussion of *Aziz*, see Micklitz & Reich, *supra* note 3, at 798–99.

²⁰ Case C-415/11, paras. 69, 76 (with regard to a term in a home mortgage contract).

²¹ Case C-226/12, *Constructora Principado v. José Ignacio Menéndez Álvarez*, (EU:C:2014:10), para. 30.

imposed by a no show clause, which include having to pay for additional flight tickets and possibly an extra night stay in a hotel. NSCs also clearly curtail the rights consumers would normally be entitled to under contract law: the consumers right to travel (for which consideration has been paid) is entirely excluded when the airline refuses boarding to no-show passengers.

Significantly, *Constructora Principado* **also precludes the airlines from arguing that the discount offered on certain fares constitutes consideration for the curtailment of a passenger's right (not) to use a purchased seat.** In *Constructora Principado*, the CJEU asserted that, “[i]n order to ensure that the scrutiny of unfair terms is to be effective, proof of a reduction of the price in consideration for the consumer accepting additional obligations cannot be provided by the seller or supplier including a simple statement to that effect in a contractual term which has not been individually negotiated.”²² A term's unfairness should therefore be determined solely by comparing the consumer's normal rights to his rights under the disputed clause. For NSCs, this means that the discounted price given for a round trip ticket cannot in itself justify the costs that the NSC imposes on the consumer. Instead, the cost must be justified by a comparable loss to the airline, in accordance with normal expectations of good faith in contract.

In sum, ***NSCs significantly curtail the rights of consumers to benefit from the air travel contract without any demonstrable consideration on the part of the airline, they create a “significant imbalance” and are contrary to the “good faith” requirement under the UCTD.***

2. No-show clauses closely resemble many of the contract terms presumed to be unfair in the Annex to the Unfair Contract Terms Directive

Reasoning by analogy with the categories of unfair terms described in the UCTD Annex's “indicative and non-exhaustive list” may be particularly persuasive to the CJEU.

²³ NSCs share key features with the following four categories of grey-listed clauses:

- (d) permitting the seller or supplier to retain sums paid by the consumer where the latter decides not to conclude or perform the contract, without providing for the consumer to receive compensation of an equivalent amount from the seller or supplier where the latter is the party cancelling the contract;
- (e) requiring any consumer who fails to fulfil his obligation to pay a disproportionately high sum in compensation;
- (f) [...] permitting the seller or supplier to retain the sums paid for services not yet supplied by him where it is the seller or supplier himself who dissolves the contract;
- (o) obliging the consumer to fulfil all his obligations where the seller or supplier does not perform his.²⁴

Analysis of these categories of unfair clauses suggests a variety of possible approaches for showing the negative effects of NSCs on consumers. Considering the range of possible configurations for NSCs, it is instructive to consider how these might apply to particular NSCs currently used by major airlines [**for a fuller list of example NSCs, see Annex**].

²² *Id.* at para. 29.

²³ See Micklitz & Reich, pp. 771, 780 (asserting that the ruling in *Pénzügyi Lízing*, left little flexibility for national courts when the disputed clause fell within a category described in the indicative list). Micklitz and Reich argue that the indicative list has come to be understood as an “essential element” or “benchmark” in determining the (un)fairness of a term, and is thus more powerful than the plain language might suggest. *Id.* at 786.

²⁴ Annex Para. 1, UCTD.

The NSC used by British Airways is relatively simple, and illustrates how a number of the UCTD categories could apply. The clause states that:

“[i]f the Passenger fails to cancel his/her Flight reservation before the Check-in Deadline and does not show up for boarding, the Carrier may decide to cancel his/her return Ticket and/or his/her onward reservations.”²⁵

Application to Clause (d)

“(d) permitting the seller or supplier to retain sums paid by the consumer where the latter decides not to conclude or perform the contract, without providing for the consumer to receive compensation of an equivalent amount from the seller or supplier where the latter is the party cancelling the contract”

To see how Clause d) applies, it is helpful to take the airlines point of view as a starting point and assume that boarding a flight which has been paid for constitutes a contractual obligation of the consumer (rather than a right). If so, when a consumer decides not to perform the contract (by not appearing for boarding on the first leg), the contract permits the airline to retain the sum paid for that seat. If British Airways cancels a later leg of the reservation, the airline is not required to render any equivalent compensation to the consumer.

In other words, even if one reads the NSC under the airlines own preferred construction, it is unfair as it falls within the scope of Clause (d) above, in which the seller is permitted “to retain sums paid by the consumer where the latter decides not to [...] perform the contract, without providing for the consumer to receive compensation of an equivalent amount from the seller or supplier where the latter is the party cancelling the contract.”

Application to Clause (e)

“(e) requiring any consumer who fails to fulfil his obligation to pay a disproportionately high sum in compensation”

The application of Clause (e) would depend on a finding that: 1) as assumed above, actually taking flights paid for is a contractual obligation on the consumer and not a contractual right; and 2) the cancellation of the return ticket and/or onward reservations are disproportionate penalty clauses for missing the first leg. This means that the penalty imposed on the passenger by the airline must be found disproportionate to the cost imposed on the airline by the passenger’s not using her purchased seat in a previous flight. This seems rather obvious in the case where the penalty consists in the invalidation of a coupon: the cost imposed on passengers by denied boarding is certain and can be substantial while the cost imposed on the airline by an absent passenger is at best hard to identify (if anything, the absence of a passenger probably marginally *lessens* costs because there is less luggage to handle and less weight to transport). It is equally straightforward that Clause (e) applied to NSCs such as the one used by Air France/KLM [**See Annex**], which formally requires “the payment of an additional fare” if the customer “does not use the first Coupon [for the first leg of the itinerary] or does not use all the Coupons.”²⁶ Here, the penalty consists in an additional

²⁵ British Airways Terms and Conditions of Travel, see Annex for examples of NSCs from various airlines.

²⁶ As pertains specifically to Air France/KLM, it should be noted that, in addition to requiring the passenger to pay an additional fare in certain cases, their contract also provides that the passenger may be “entitled to a refund [...] equating to the difference between the Gross Fare initially paid and the Gross Fare that the Passenger should have paid when the Ticket was issued, for the journey actually

payment. Whether it is proportionate will presumably depend on the relative value of the penalty payment (which typically amount to the price of another flight) and the price paid for the ticket.

Application to Clause (f)

“(f) [...] permitting the seller or supplier to retain the sums paid for services not yet supplied by him where it is the seller or supplier himself who dissolves the contract”

NSCs allow airlines to rescind a contract without having performed the promised service (flying the passenger from B to A), and yet keep the payment which was rendered in exchange. This matches precisely Clause (f): “permitting the [airline] to retain the sums paid for services not yet supplied...where it is the [airline] who dissolves the contract.

Application to Clause (o)

“(o) obliging the consumer to fulfil all his obligations where the seller or supplier does not perform his.”

The consumer has paid for the round-trip flight in full, yet the airline retains the right to not fully perform its obligations. In other words, the airline “oblig[es] the consumer to fulfil all his obligations where the [airline] does not perform [its own].”

NSCs are therefore analogous to several types of clauses listed in the annex of UCTD. This is a very strong indication that they are themselves unfair within the meaning of UCTD. This is moreover in line with the case law of national courts in several member states.

b. Several EU Member State Courts Have Already Declared No-Show Clauses to be Illegal

Courts in several Member States (notably Spain and Germany) have already found that NSCs are unfair within the meaning of the UCTD.²⁷ A Spanish case, brought by the Spanish consumer organisation, OCU (member of BEUC) against Iberia Airlines, will be discussed in detail as an illustration of some of the ways courts have found NSCs to violate unfair contract legislation. We will then also briefly review the German case law.

1. Spain

made by the Passenger.” As demonstrated later on in the discussion of the case against Iberia Airlines, this type of arrangement may make the clause fair in the eyes of a court. However, it should be noted that Air France further states that, “[i]n the event of a change, Administration Fees will be applied, where applicable.” In a concrete case, it would be important to closely scrutinize the way in which these administration fees are calculated and applied, to ensure that they may fairly be attributed to real costs to the airlines.

²⁷ These states include Austria, Germany and Spain, in cases against airlines such as Lufthansa, British Airways and Iberia. See, e.g., OCU v Spanair 31 July 2012 (Juzgado Mercantil n 1 Barcelona; OCU v Iberia 11 September 2012 (Juzgado Mercantil n 12, Madrid); AG of Köln (Germany), 05/01/2005; AG of Frankfurt (Germany), 21/02/2006; Langericht Frankfurt Am Aim (Germany), 14/12/2007; Commercial Court n. 2 Barcelona (Spain), 22 March 2010; Audiencia Provincial (Court of appeal) of Madrid (Spain) 27/11/2009; Commercial court of Bilbao (Spain), 7 July 2008; Commercial court of Bilbao (Spain), 25 July 2008; Commercial court of Bilbao (Spain), 3 July 2009; Oberlandesgericht (Higher Regional Court) of Frankfurt (Germany), 18 December 2008; BGH (Federal Court of Justice, Germany), 29 April 2010; Handelsgericht of Vienna (Austria), March 2010; VKI v Lufthansa, Oberster Gerichtshof (Austria), 24 January 2013.

The Spanish commercial court's injunction against the use and enforcement of NSCs by *Iberia Airlines* illustrates the potential strength of the case against NSCs under the UCTD.²⁸ This case is particularly clear because the language of Spanish consumer protection laws closely tracks that of the UCTD.²⁹ Indeed, the Spanish ruling follows the CJEU's reasoning on unfair terms.

The Spanish decision points out three interrelated injustices imposed on consumers by NSCs. First, the court found that the loss of the entire ticket as a result of the choice not to use part of it—when that choice has been recognized as a right under Spanish law³⁰—is disproportionate and lacks plausible justification.³¹ Put another way, the clause creates a disproportionate obstacle to the exercise of the consumer's rights to travel on using the return ticket.³² Although it is perfectly acceptable to price round-trip tickets lower than two one-way tickets as a pricing incentive, the court reasoned that failing to use one leg of the journey should, at most, deprive the consumer of the round-trip discount.³³ This finding derives from Spanish law, but much of the logic also applies under the UCTD.

The court then turned to the language of the UCTD itself, and again confirmed the reasonableness of limiting, for example, the passenger's ability to cancel or change an itinerary in exchange for a discounted price.³⁴ However, NSCs create a significant imbalance between the consumer and the airline in that the consumer does not receive any proportionate or additional benefit, beyond the discounted price, in exchange for the curtailment of their right to not travel.³⁵ Meanwhile, the consumer's choice to not use the purchased seat generates no additional cost to the airline – and, if the airline was able to resell or reallocate the space to another customer, potentially allows the airline to be paid twice for the same seat.³⁶

Finally, the court's opinion points out that NSCs allow airlines to rescind a contract without having performed the promised service, and yet keep the payment which was provided in exchange.³⁷ This reading automatically renders the clause unenforceable, as it matches precisely Clause (f) in the Annex of the UCTD, already discussed above. Clause (f) declares unfair terms which “have the object or effect of... authorizing the seller or supplier to dissolve the contract on a discretionary basis where the same facility is not granted to the

²⁸ Juzgado de lo Mercantil Nº12 de Madrid, sentencia 254/2012 against *Iberia Airlines*, [hereinafter *Iberia Airlines*].

²⁹ This can be seen, for example, by a quick examination of the applicable EU and Spanish law in each of the CJEU cases discussed above (Cases C-226/12 and C-415/11).

³⁰ *Iberia Airlines* at Fourth Part, para. 8. This finding, in turn, hinges on the court's determination that the outward and return journeys of a round-trip itinerary constitute two separate paths. *Id.* at Fourth Part, para. 14. The airlines' arguments to the contrary are dealt with in Section 5.28, below.

³¹ *Id.* at Fourth Part, para. 9. The court went on to find that this was also unjustifiable under the UCTD. *Id.* at Fourth Part, para. 12.

³² K. Lyczkowska, ‘El Presente y el Futuro de la Cláusula ‘No Show’ en los Billetes de Avión’, Centro de Estudios de Consumo, 2014, p. 4..

³³ *Id.* at Fourth Part, para. 9.

³⁴ *Id.* at Fourth Part, para. 10–11.

³⁵ *Id.* at Fourth Part, para. 12–14. An analysis by the Centro de Estudios de Consumo interpreted this as converting the consumer's right to (not) travel into an obligation, while the airline gains the right to dissolve the contract while retaining the payment. Lyczkowska, p. 4.

³⁶ The court seemed to imply that the airline's offered justification were legally insufficient: “Puede que la tenga, pero no se ha ofrecido, porque a falta de explicaciones que pueden barruntarse, no se ha argumentado en qué beneficia a la compañía no usar el vuelo de ida cuando está pagado.” (“Although [the airline] may have [a justification for this practice], it has not offered it, because in the absence of a cognizable explanation, it has not been argued how it benefits the company to not use the outbound flight when it is paid.”) This might also be an oblique reference to the profit motive to resell the seat, although the court does not say as much. *Id.* at Fourth Part, para. 9.

³⁷ *Id.* at Fourth Part, para. 13.

consumer, or permitting the seller or supplier to retain the sums paid for services not yet supplied by him where it is the seller or supplier himself who dissolves the contract.”³⁸ Later analyses of the court’s decision emphasize that the nullity of the clause rests on the unilateral and arbitrary dissolution of the contract by the airline, rather than from the failure of the airline to reimburse the consumer.³⁹ Earlier judgments from other Spanish commercial courts emphasized that the clause permits double sale of the ticket for the airline, while increasing the difficulties for the consumer to use the purchased seats.⁴⁰

2. Germany

Although it is true that the Spanish courts have been particularly progressive on consumer rights in recent years,⁴¹ similar trends (unfavourable judicial reaction to NSCs) have been observed in other Member States. For example, German courts have repeatedly found that NSCs constitute a disproportionate disadvantage to the consumer.⁴² While the language differs somewhat from that of the *Aziz* judgment discussed above, the test seems substantially the same. In *Aziz*, the test for bad faith is that whether it can reasonably be presumed that, if asked, a consumer would have consented to the contractual clause. The test applied by the German court is whether the term is surprising to consumers. Both versions of the test revolve around the same idea: namely that the consumer does not imagine the clause being part of the contract. Applying this test, German courts have found that the NSC constitutes an impermissible (bad) “surprise” for consumers, since no justification for denied boarding would exist absent the clause. Some courts went further and struck out NSCs in cases where there was no element of surprise. In a case where the plaintiffs knowingly disregarded the NSC, a German court held that a NSC was in itself unfair even when transparently disclosed.⁴³

German courts have often invalidated NSCs on multiple grounds, which can overlap with, but are not limited to, the grounds used by the Spanish court as discussed above. For example, the German Supreme Court found in its 2010 case against British Airways that, in addition to creating a significant imbalance and a violation of good faith, the clause used by the airline also constituted an unjust penalty under the German law on unfair contract terms, which uses similar language to the UCTD (prohibiting clauses which create an unfair disadvantage contrary to the requirement of good faith).⁴⁴ Finally, the Court also appeared to dismiss the possibility that the airline could legally charge an extra fee for taking only one leg of the flight, citing Article 23 of European Union Regulation (EC) No 1008/2008.⁴⁵

As such, ***these national court decisions, while they have no EU wide force, do constitute persuasive authority that NSCs are indeed unfair within the meaning of the UCTD. A ban***

³⁸ Annex para. 1(a), UCTD,.

³⁹ Lyczkowska, p.4.

⁴⁰ *Id.* At pp. 4-5.

⁴¹ See Micklitz & Reich, pp. 771, 780.

⁴² See Bischoff, pp. 9-12.

⁴³ *Id.* at 11.

⁴⁴ Case against *British Airways*, BGH judgment of 29 April 2010 (Reference Xa ZR 5/09), paras. 12-13 and 32-34.

⁴⁵ Regulation (EC) No 1008/2008 of the European Parliament and of the Council of 24 September 2008 on common rules for the operation of air services in the Community, OJ L 293, 31/10/2008, Article 23(1) (“Air fares and air rates available to the general public shall include the applicable conditions... 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... 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.”).

on NSCs would therefore not change the law. It would merely - but importantly - make it clearer that NSCs are banned.

Such clarification is all the more necessary given that airlines argue that it would be harmful to ban NSCs and, in any event, impermissible under the Open Sky Agreement (OSA). The following section explains why this is not the case.

III. The weak case against an EU ban on No Show Clauses

As noted above, airlines essentially put forward two arguments: a) that NSCs are commercially necessary for them and b) that it would in any event be impermissible for the EU legislator to ban NSCs because it would contradict the Open Sky Agreement (OSA). Below we argue and explain that both claims are false; thus there is in reality no obstacle to a legislative ban of the no-show clause

a. No-Show Clauses Are Not Commercially Necessary

Airlines argue that NSCs are an essential mechanism of their pricing policies, without which their pricing models would have to be completely restructured. ***To ban NSCs would therefore be commercially unfeasible.*** Upon investigation, this argument turns out to be weak and unsubstantiated.

To understand their argument, and why it is not valid, we need to understand more about the way that airlines set fares.

NSCs are typically contained in a provision of standardized air transport contracts requiring passengers to use tickets *fully and sequentially* [See **Annex for examples**]. As noted, we are primarily concerned with the *full use of* (round-trip) *tickets* (Scenario B). Therefore, in this section we will dedicate our analysis to investigating airline arguments in relation to the necessity for the full use of tickets rather than the sequential use of tickets.

The first point to note is that different kinds of airlines use different pricing models and ***many very profitable airlines actually make no use of NSCs***. Full service carriers (FSCs) including legacy airlines like British Airways, Alitalia and Lufthansa can be distinguished from low cost carriers (LCCs) like Ryanair, Easyjet or Wizzair. While FSCs tend to make use of NSCs LCCs do not. So ***why do FSCs claim that NSCs are crucial to their pricing policies?***

Firstly, as briefly discussed in the introduction, FSCs claim that NSCs are necessary to deal with “directional imbalances” (the “**Directional Imbalances Argument**”). For instance, in the summer, there may be huge demand for Frankfurt-Florence but very low demand for Florence-Frankfurt. Therefore, airlines may want to charge higher rates for Frankfurt-Florence and lower rates for Florence-Frankfurt so as to better match supply with demand and maximise profit. FSCs claim that if passengers requiring one-way flights were permitted to buy cheaper return flights (e.g. Florence-Frankfurt-Florence) but only use the high demand segment (Frankfurt-Florence) this would undermine the entire system.⁴⁶ Why? Because inability to sell tickets at a rate that matches market demand would either force airlines to raise prices (to the higher Frankfurt-Florence rate) for all passengers or otherwise withdraw from certain markets (in this case the Frankfurt-Florence one-way market) and so reduce competition on that market.

Secondly, FSCs claim that NSCs are necessary to fence-off their one-way ticket sales from their round-trip ticket sales (the “**Different Products Argument**”).⁴⁷ Why? FSCs have historically priced round-trip or return tickets as one product (e.g. Dusseldorf-Madrid-Dusseldorf). However, LCCs price each segment of a round-trip as an individual product (e.g. Dusseldorf-Madrid (product 1) AND Madrid-Dusseldorf (product 2)). In the view of FSCs round-trip tickets are entirely different products from one-way tickets, typically offered with

⁴⁶ IATA Position Paper: Coupon Sequence and Use, 2013, p.3.

⁴⁷ Ibid.

less flexibility allowing the buyer less convenience. For instance round-trip tickets may require advance purchase (i.e. purchase before a given date to secure a discounted rate) or minimum/maximum stay requirements (e.g. requiring passengers to spend a Saturday night at their destination – effectively disincentivizing business travelers who want to spend the weekend at home). Consequently, to allow one-way consumers to take advantage of discounted round-trip prices would undermine pricing strategy and require airlines either to raise prices for all tickets or force them to withdraw from relevant markets and thus reduce competition.

Upon further investigation, these arguments turn out to be unsubstantiated. Both arguments turn on three major claims: 1. NSCs are *commercially essential* because they are crucial to airline pricing strategy and thus to profitability within certain markets; 2. Eliminating NSCs might *force airlines to withdraw from certain markets*; and 3. Eliminating NSCs would therefore *reduce competition*. These claims are all inaccurate.

Here is why:

1. No-show clauses are not commercially essential

In reality NSCs are one small element in a multi-pronged pricing strategy implemented by FSCs. ***To suggest that the entire pricing strategy would collapse by removing this one element is a complete fallacy.***

FSCs cater to both business travellers and holidaymakers. Holidaymakers tend to travel on round-trip journeys, only travel at certain times of the year (typically during the summer, winter and during public holiday periods), certain times of the week (e.g. on a Friday so as to reduce the amount of leave from work) and they have lower willingness to pay (higher prices) than business travellers. Meanwhile, business travellers have a greater willingness to pay, travel virtually all year round but usually not during public holidays, typically travel mid-week (to spend the weekend at home) and often make last-minute (one-way) purchases.

FSCs have been able to distinguish between these two types of travellers, offering different pricing models to each. This is referred to as yield management which can result in “**price discrimination**”. In this context, price discrimination means that airlines place groups of consumers into separate categories and different prices and contract conditions are then applied to each group for the same product.

For instance:

- Holidaymakers, who can predict the date of their travel well in advance, are offered *discounted prices for booking in advance*.
- To ensure that business travellers do not buy cheaper round-trips designed for holidaymakers, *discounted pre-weekend round-trips are offered* to them.
- The cheapest range of tickets is subjected to *stricter re-booking and cancellation policies* to disincentivize business travellers (who may need more flexibility) from buying tickets meant for holidaymakers.
- Business travelers (who prefer shorter and more direct flights) are required to pay a *surcharge for non-stop flights*.
- *Airlines raise their prices in holiday periods* (based on the itinerary chosen) so that they maximise their profits from holidaymakers who do not have flexibility with respect to time off work.

Collectively these measures, and other similar measures, are used to separate (or fence off) one group of consumers from another so that larger than average profits can be extracted from both. NSCs are just one such fencing mechanism, preventing one-way travellers (typically

business travellers willing to pay more) from taking advantage of incentives designed to attract round-trip travellers (usually holidaymakers inclined to pay less).

To be clear, price discrimination is a legitimate business practice, but **to suggest that NSCs, as one element of this larger pricing policy, are commercially essential is false.** Why?

Because if NSCs were prohibited, airlines would be left with a range of other forms of price discrimination that may compensate for this alleged loss.

A 2009 study carried out by a group of academics into the necessity of full and sequential ticket use policies found that permitting passengers to skip the inbound or outbound leg of a return journey (Scenario B) would not be commercially strenuous for airlines. Their paper concluded, “we believe it would not in the least be impossible for airlines to price discriminate if... the usage of throw-away coupons became illegal”.⁴⁸ In other words, even were NSCs to be prohibited, airlines would remain free to make use of other forms of price discrimination (as described above) to achieve the same result (i.e. above average profits from different groups of consumers).

Indeed airlines can and have adopted different pricing strategies (not requiring the use of NSCs) that have proved to be even more profitable. For example, large LLCs like Ryanair and Easyjet make no use of NSCs and are typically much more profitable than FSCs. Like FSCs, these days (although perhaps not historically) LLCs cater to *both* business travellers and holidaymakers. They employ a range of price discrimination measures (e.g. surcharges for last-minute booking, surcharges for speedy boarding, extra-legroom, on-board services, seat allocation, advance booking discounts etc.). As will be discussed more below, FSCs should not be required to wholly transform themselves into LLCs, however, clearly there is no reason why FSCs cannot eliminate their use of NSCs and remain profitable.

In sum, returning to the Directional Imbalances Argument first, if airlines want to ensure that one-way travellers flying Frankfurt-Florence do not take advantage of discounted round-trip tickets intended for holidaymakers, they do not need to use NSCs. They can make use of other forms of price discrimination to incentivise them to book one-way tickets (e.g. greater ticket flexibility, discounts for travelling on certain days of the week, on-board and off-board bonuses, advance booking discounts for one-way travel etc.). Or they might make use of other forms of price discrimination to disincentivise them from buying round-trip tickets (e.g. requirements to travel on certain days of the week or at certain times etc.).

In relation to the Different Products Argument, if the real aim is not to distinguish between two types of products (round-trip tickets v one-way tickets) but between *different types of consumers*, then other forms of price discrimination strategies are available to airlines. As noted, LLCs sell round-trip tickets as two separate products rather than as one distinct product and remain highly profitable doing so by making use of a range of price discrimination strategies.

2. Eliminating no-show clauses would not force airlines to withdraw from certain markets...

Both the Directional Imbalances Argument and the Different Products Argument seem to be premised on the idea that forcing airlines to reduce the price of one-way travel (as a result of prohibiting NSCs) would make it economically unfeasible for the airlines to compete and thus force them to withdraw from the market. This claim implies that airlines would have to stop serving certain markets because serving these markets would be too expensive.

⁴⁸ Bischoff, p. 13.

Here we need to briefly note some broader dynamics of the European airline market to give context to this claim. Over the past 15 years or so, LCCs have been rapidly and aggressively expanding their share of the European airline market. Their total number of seats (as a percentage of all available seats on the European market) has risen from 10% in 2000 to 34% in 2010.⁴⁹ Meanwhile, their total market share is up from 20% in 2008 to 26% in 2013.⁵⁰ Such strong competition from LCCs has forced FSCs to either respond or fail. As LCCs have first eaten into the FSCs share of the holidaymaker market and then also into the business traveller market, FSCs have been forced to rapidly revise their business models.

This all goes to show that there may be some merit to the claim that FSCs are facing enormous competition on certain markets. However, this does not imply that prohibiting the NSC would force airlines to withdraw from those markets. Why not?

- *Firstly, given the relatively small cost of individual flights, airlines will not reduce the number of flights as long as there is demand for those flights.*

An airline's costs are often quite difficult to calculate for a specific flight because they are composed of relatively high fixed costs and relatively low marginal costs (the costs for the plane, and the salaries of the crew far outweigh the costs for fuel and passenger meals for example). Because airline costs are largely predetermined, after schedules have been set, airlines prioritise maximising revenue from each passenger in each market rather than trying to cover these costs.⁵¹ Therefore it is logical to assume that an airline will not reduce the number of flights as long as there is demand for those flights. Prohibiting NSCs might therefore force airlines to come up with new ways to maximise passenger revenue (as already outlined in the section above), but it would be unlikely to force airlines to withdraw from markets where there is proven demand.

- *Secondly, if serving certain markets is becoming too expensive, FSCs should cut costs to compete with LCCs and other FSCs rather than unfairly penalizing passengers.*

Importantly, it should be abundantly clear that we are in no way endorsing the practices of LCCs, which adopt some commercial practices that are of questionable legality. Here we are merely pointing to the ability of FSCs, should they be so inclined, to remain competitive without unfairly penalising passengers. The central advantage that LCCs have over FSCs is a much lower cost base. They typically fly from regional or secondary airports (reducing infrastructure costs), maintain newer and more homogenous fleets (reducing aircraft maintenance costs and fuel costs), economise on passenger services, make extensive use of on-line booking (reducing sale-distribution costs), have a higher seat density and lower staff costs.⁵²

However, without needing to radically alter their business models or withdraw from markets altogether, FSCs can cut costs to better compete and this is exactly what they have been doing. The cost gap between LCCs and FSCs has been reducing over the past several years as FSCs have taken steps to aggressively streamline and

⁴⁹ See, M. Smyth & B. Pearce, 'Airline Cost Performance: An analysis of the cost base of leading network airlines versus no-frills, low-cost airlines (LCCs)', IATA Economics Briefing No.5, 2006, at p. 14; and RDC Aviation, 'Capacity and Frequency Analysis for Intra-European Operations', 2010.

⁵⁰ Eurocontrol, 'Market Segments in European Air Traffic 2013', 2013, p. 5.

⁵¹ Unites States General Accounting Office, 'Aviation Competition Restricting Airline Ticketing Rules Unlikely to Help Consumers', Report to Congressional Committees, July 2001.

⁵² Pearce and Smyth, p. 25 to 29.

restructure. A 2013 global study revealed that, to move one seat through the air for one kilometre, a FSC now spends only 2.5 cents more than an LCC, down from a 3.6 cents cost differential in 2006.⁵³ FSCs have managed to achieve large savings by, for example, moving more and more ticket sales online, updating the fleets and reducing staff costs.⁵⁴ In short, FSCs do not need to become LCCs in order to compete, but they can learn from them by sensibly and selectively reducing overall costs. This would seem to be a much more sensible way to compete than by making use of NSCs which penalise passengers and likely result in very little overall improvement in profitability or competitiveness.

In sum, given the broader context of competition between FSCs and LCCs within the European airline market and the relatively small cost of individual flights, airlines seem highly unlikely to be forced out of markets by a prohibition on the NSCs and to the extent that they are facing competition, an array of measures are open to them to tackle this.

3. Rather than reducing competition, eliminating NSCs might actually increase competition

As noted above, FSCs tend to sell round-trip tickets as one single product (Dusseldorf-Madrid-Dusseldorf) rather than two separate products (Dusseldorf-Madrid AND Madrid Dusseldorf). In addition to helping airlines to discriminate between business travellers and holidaymakers (as discussed above), this practice also enables airlines to compel consumers to purchase both the outbound and inbound flights from the same airline in the same transaction. This allows airlines to aggregate the cost of flights so that they avoid competing for fare prices on every flight they make. Due to this practice, consumers are not aware of the price they are paying for each individual leg and are thus precluded from choosing a more personalized flight package that might provide them more value.

NSCs help to reinforce this practice by penalizing consumers who undermine airline-pricing strategy by buying cheaper round-trip tickets and then only using the high-value leg of the journey.

Imagine an internet service similar to the many services which search and aggregate flight prices, the difference being that this service also has the ability to build a flight package with legs of different trips being taken on different airlines and is able to find the combination that provides the most value to consumers. Such a service would greatly increase the amount of competition in the market by requiring airlines to compete for business on every leg of passenger's trip, but unfortunately this is currently impossible (except in relation to flights booked with LCCs) because of pricing policies that allow airlines to deny boarding.

In sum then, eliminating the NSCs, and thereby forcing FSCs to unbundle round-trip tickets might actually *increase*, rather than decrease, competition in the European air travel market.

b. Banning No-Show Clauses is Not Legally Impossible

In addition to the commercial arguments discussed above, airlines also make some legal arguments as to why banning the NSC would be impossible in the EU context. The central argument is that any such ban would be incompatible with the Open Skies Agreement (OSA). This argument is ultimately invalid and misconceived.

⁵³ KPMG, Global Aviation Group, '2013 Airline Disclosures Handbook: Financial reporting and management trends in the global aviation industry', 2013, at p. 16.

⁵⁴ Pearce and Smyth, p. 29.

The OSA, which is an agreement liberalizing the market for air transport between the EU and the US, was signed in April 2007 by the EU, its Member States, and the United States. ***Airlines claim that a ban on NSCs would contravene a provision of the OSA requiring the freedom to set prices without government interference.*** Thus, it is possible that, were the EU to prohibit (via legislation) the use of NSCs, international airlines may try to challenge the validity of the regulation by pointing to the OSA.⁵⁵

The relevant provision of the OSA is Article 13(1). This provision reads as follows:

“Prices for air transportation services operated pursuant to this Agreement shall be established freely and shall not be subject to approval, nor may they be required to be filed”.⁵⁶

Price is defined in Article 1(7), which explains that price includes the, “conditions governing the availability of such fare, rate, or charge”. Airlines argue, therefore, that NSCs are an essential aspect of the conditions governing the fares they can charge.

It is certainly true that, because international agreements have primacy over EU legislation (Article 216(2) TFEU), EU legislative acts must be interpreted in a manner that is consistent with such agreements.⁵⁷ Therefore, the OSA *would* be a valid basis for challenging any EU legislative acts which conflicted with rights and freedoms conferred by it.⁵⁸

However, on the substance, the airlines’ argument appears to rest on a misconstrued interpretation of the OSA. In the following sections we will explain why.

First, an obvious point should be made explicit. Even if the airline arguments turn out to be correct, and the OSA *does* prevent the EU from prohibiting NSCs, this would only apply in relation to US airlines flying to and within the EU and EU airlines flying to and within the US. The OSA does not apply to intra-EU flights by non-US airlines. Such flights would be governed by Regulation 1008/2008 on Common Rules for the Operation of Air Services in the Community.

Similarly to the OSA, Article 22 of Regulation 1008/2008 mandates that “Community air carriers... shall freely set air fares and air rates for intra-Community air services.”⁵⁹ Any suggestion that this provision might prevent the EU legislator from prohibiting NSCs is subject to the exact same criticism as the one which applies regarding OSA and to which we now turn.

1. The language of the Open Skies Agreement does not exclude the possibility of the EU banning no-show clauses

We should first note that, because the OSA is an instrument of international law, it must be read in light of the principles governing interpretation of treaties as codified in the Vienna

⁵⁵ Since it is extremely unlikely that an airline would have standing before the Court to bring an annulment action under article TFEU, any challenge to the regulation is likely to be started before one or several national courts. The airlines would seek a preliminary reference in order to have the ECJ invalidate the regulation.

⁵⁶ Open Skies Agreement, U.S. – EU, April 30, 2007.

⁵⁷ Case C-61/94 Commission of the European Communities v Federal Republic of Germany, (EU:C:1996:313).

⁵⁸ In determining whether an international agreement provides a basis for challenging EU secondary law, it must also be determined that the agreement provides for specific rights to individuals. It is these individuals that will then be able to challenge a regulation’s validity if it conflict’s with those rights. See Case C-366/10 *Air Transport Association of America a.o.* (EU:C:2011:864).

⁵⁹ Article 22 “Pricing freedom”, Regulation (EC) No 1008/2008.

Convention.⁶⁰ In particular it should be interpreted “[by giving] ordinary meaning to the terms of the [agreement] in their context and in the light of its object and purpose”.⁶¹

In construing the language from Article 13(1), “prices shall be established freely”, we should therefore consider the ordinary meaning of “price” as well as the context of the article.

Plainly, the provision makes two separate prohibitions: firstly, prices should not be subject to approval (by a regulator); and secondly, prices should not be required to be filed (with a regulator).

Recall, the provision states that: “*Prices for air transportation services operated pursuant to this Agreement shall be established freely **and** shall not be subject to approval, **nor** may they be required to be filed*”.

It is important to pay attention to the two connecting words (in bold above – “and”/“nor”). The conjunctive, “and” clearly implies that the words, “prices...shall be established freely” should be read together with “shall not be subject to approval”. The drafters were not referring to two separate prohibitions here, but to one single prohibition. I.e. *insofar as they have not been subject to approval* (by a regulator) *prices shall have been set freely*. Had the drafters intended to provide for two separate prohibitions, they would have used the disjunctives “or” or “nor” (as indeed they do in relation to the requirement to be filed: “nor may they be required to be filed”).

On this plain reading, the word “freely” should be construed to mean “without the requirement of regulator approval”, and *not* “without being subject to any laws that might infringe upon the freedom of airlines to set prices”. *To construe “prices...shall be established freely” as a separate wide-ranging prohibition against any law that might impinge upon airline freedom to set prices (simply because it regulates terms and conditions), would be an enormous stretch of the scope of the provision.* Surely the signatories did not intend to exclude all possibility of passing, for instance, consumer protection law that might restrict the ability of airlines to attach punitive provisions (such as the NSC) to air transport contracts or anti-trust law preventing price-fixing. The OSA even provides (at Article 16) that the parties “affirm the importance of protecting consumers”. It is hard to believe that the EU and its Member States, with such strong traditions of consumer protection, could have intended to exclude *all* possibility of providing for consumer protection in the context of airline price setting.

2. An EU ban on the no-show clause would be compatible with the object and purpose of the Open Skies Agreement (OSA)

As already noted above, by virtue of the Vienna Convention, provisions of the OSA should also be read in light of the “object and purpose” of the agreement. In general, Open Skies agreements are designed to boost economic growth by increasing travel and trade between various markets. This is achieved by reducing government interference in the commercial decisions of airlines about routes, pricing and capacity. In particular, the OSA aimed:

- “to promote an international aviation system based on **competition among airlines in the marketplace with minimum government interference and regulation**”; and
- “to make it possible for airlines to **offer the travelling ... public competitive prices and services in open markets**”⁶²

⁶⁰ United Nations, *Vienna Convention on the Law of Treaties*, Art. 31(1), 23 May 1969, United Nations, Treaty Series, vol. 1155, p. 331.

⁶¹ Article 31, para. 1 of the Vienna Convention.

Given the purpose of the OSA (promoting increased competition and reduced regulation), to read, “prices...shall be set freely and shall not be subject to approval” as prohibiting *any and all* consumer protection legislation (indirectly) impinging on airline pricing policies seems unwarranted. This is especially so given that the agreement explicitly affirms the parties respect for consumer protection (at Article 16) and given the finding (in section a. above) that banning NSCs might actually *enhance* competition in the European air travel market.

An example may help to illustrate the point by analogy. In *IATA v. Department for Transport*, the CJEU ruled on whether a regulation imposing liabilities on air carriers for delays suffered by passengers was inconsistent with the Montreal Convention, an international agreement, which contained provisions limiting the liability of air carriers for passenger delays. The Court answered this question by saying that, since an international agreement must be read in light of the purpose of that agreement, and because, in the agreement at hand, the contracting parties had “recognized ‘the importance of ensuring protection of interests of consumers in international carriage by air and the need for equitable compensation based on the principle of restitution,’”⁶² the provisions in question had to be read with this purpose in mind. The Court found that a regulation which imposed greater liability on airlines and thus allowed for greater compensation of consumers was not at odds with the Montreal Convention.

In this same vein, the argument can be made that, since a central purpose of the OSA is to promote competitive prices for the open public, and since the OSA explicitly affirms the importance of consumer protection, a ban of NSCs would not violate OSA.

If airlines wanted to make an argument to the contrary, they would need to establish that a ban on NSC hampers competition and/or reduces consumer welfare. However, as already highlighted, such a ban would *prima facie* promote competition by requiring airlines to compete for all legs of flights. Moreover, it would improve consumer welfare by providing greater flexibility (allowing them to use purchased round-trip tickets in whatever fashion they see fit) and with more accurate and salient information about the true cost of their flights (by encouraging all airlines to sell round-trip tickets as two separately priced products). At any rate, even if it could be argued that the effects of a ban on NSCs are complex and affect several dimensions of competition and of consumer welfare in possibly different ways, it seems difficult to establish that a ban would be at odds with the purpose of OSA.

On proper construction, the OSA can therefore not be relied on to claim that it prohibits the EU to ban NSCs. On the contrary, EU legislative action to this effect would be in line with the objectives of OSA.

⁶² See the Recitals to the Open Skies Agreement.

⁶³ Case C-344/04 *International Air Transport Association* (EU:C:2006:10), para. 41.

Conclusion

As we have demonstrated, no-show clauses should be considered unfair under current EU law and *are* indeed *already* considered unfair under Member State laws transposing the Unfair Contract Term Directive. Yet, despite the fact that NSCs are prohibited under EU Law, they are still widely used in practice. There is therefore a demonstrable need for an explicit EU-wide ban to protect consumers. Such a ban is necessary to better enforce consumer rights and guaranty uniform protection across Europe.

It has also been shown that the EU legislator should not give up on plans to ban NSCs out of fear of financially harming European airlines because the claim that the ban would cause economic harm to the industry is wholly unsubstantiated.

Finally, such a ban would not contravene the provisions of the Open Skies Agreement. As we have illustrated, only an artificially narrow reading of the OSA would lead to this conclusion. On the contrary, a ban on NSCs would likely promote competition on the European airline market, enhance the broader consumer welfare and would thus be in line with the object and purpose of the agreement.

We therefore submit that no insurmountable hurdles stand in the way of a ban on NSCs as has been proposed by the European Commission and supported by the European Parliament.

Annex

List of no-show clauses used by various airlines:

Air France

Flight Coupon Order of Use

(a) The Fare applied on the Ticket issue date is only valid for a Ticket used fully and in the sequential order of Flight Coupons, for the specified journey and on the specified dates. Any non-compliant use may result in the payment of an additional fare under the conditions defined below.

(b) The Gross Fare established on the basis of the details, flight dates and routes mentioned on the Ticket corresponds to a departure point and an arrival point, via any Stopover scheduled when the Ticket was purchased, and forms an integral part of the Contract of Carriage.

(c) A change in the departure or arrival point for the journey by the Passenger (for example, if the Passenger does not use the first Coupon or does not use all the Coupons or if the Coupons are not used in their issue order), may result in a change in the Gross Fare initially paid by the Passenger. Many Fares are only valid on the dates and for the flights specified on the Ticket. In the event of a change as outlined above, the Passenger may be required to pay an additional fare [or be entitled to a refund, as the case may be] equating to the difference between the Gross Fare initially paid and the Gross Fare that the Passenger should have paid when the Ticket was issued, for the journey actually made by the Passenger.

In the event of a change, Administration Fees will be applied, where applicable.

(d) If the Passenger does not use all their Flight Coupons and prematurely interrupts their journey, the Passenger may be required to pay a fixed amount, specified by the Carrier when the Reservation was made, in order to be able to retrieve their Checked Baggage.

Changes that the Passenger wishes to make are subject to the fare conditions attached to their Ticket and to payment of the applicable Administration Fees.

Air Malta

The Ticket you have purchased is valid only for the transportation as shown on the Ticket, from the place of departure via any Agreed Stopping Places to the final destination. The fare you have paid is based upon our Tariff and is for the transportation as shown on the Ticket. It forms an essential part of our contract with you. The Ticket will not be honoured and will lose its validity if all the Coupons are not used in the sequence provided in the Ticket

Alitalia

Should the passenger not show up without giving proper notice in due advance, ALITALIA may cancel reservations for connecting, prosecution or return flights.

British Airways

If the Passenger fails to cancel his/her Flight reservation before the Check-in Deadline and does not show up for boarding, the Carrier we may decide to cancel his/her return Ticket and/or his/her onward reservations.

Lufthansa

The Ticket you have purchased is valid and its calculation is based on the complete transportation as shown on the Ticket, from the place of departure as entered in the Ticket to the final destination as entered in the Ticket. You shall not be entitled to carriage under Ticket and the Ticket is no longer valid if you do not use its coupons completely and in order shown on the Ticket. Since calculation of the fare is owed will be based on the routing actually flown, usage of the complete routing shown on the Ticket forms an essential part of our contract with you. The contract excludes the cancellation of individual parts (coupons) of the journey. This rule does not apply if the original fare exceeds the service of transportation actually used.

Luxair

In the event that the Passenger does not use the return trip shown on the Ticket, Luxair shall recalculate and demand the price in accordance with the fare rules.

TAROM

Carrier will honor flight coupons only in sequence from the place of departure as shown on the ticket. The ticket will not be honored and will lose its validity if all the coupons are not used in the sequence provided in the ticket. In particular the ticket does not entitle the passenger to commence his journey at any of the specified stopover points if the first coupon for an international flight has not in fact been used for transportation.

Vueling

Conjunction Ticket

The contracted service of carriage includes the itinerary specified on the Conjunction Ticket, from the departure airport through to all scheduled stopovers until the final destination airport and is subject to the corresponding service charge.

The Conjunction Ticket shall be deemed invalid unless all segments specified on the Conjunction Ticket are completed.

The Passenger's entitlement to cancel one or more segments remains unaffected, except in the case of the Excellence Fare

Bibliography

Legal provisions and legislation referred to

Council Directive 93/13/EEC of 5 April 1993 on Unfair Terms in Consumer Contracts, OJ L 095, 21/04/1993

Open Skies Agreement, U.S. – EU, April 30, 2007

Regulation (EC) No 1008/2008 of the European Parliament and of the Council of 24 September 2008 on common rules for the operation of air services in the Community, OJ L 293, 31/10/2008

United Nations, Vienna Convention on the Law of Treaties, Art. 31(1), 23 May 1969, United Nations, Treaty Series, vol. 1155

Case law referred to

AG of Köln (Germany), 05/01/2005; AG of Frankfurt (Germany), 21/02/2006

BGH (Federal Court of Justice, Germany), 29 April 2010 (Reference Xa ZR 5/09)

Case C-366/10 Air Transport Association of America a.o. (EU:C:2011:864)

Case C-415/11, Aziz v Catalunyacaixa (EU:C:2013:164)

Case C-61/94 Commission of the European Communities v Federal Republic of Germany, (EU:C:1996:313)

Case C-226/12, Constructora Principado SA v. José Ignacio Menéndez Álvarez, (EU:C:2014:10)

Case C-344/04 *International Air Transport Association* (EU:C:2006:10)

Case C-137/08, VB Pénzügyi Lízing Zrt. v. Ferenc Schneider, (EU:C:2010:659)

Juzgado de lo Mercantil No12 de Madrid, sentencia 254/2012

Langericht Frankfurt Am Aim (Germany), 14/12/2007

OCU v Iberia 11 September 2012 (Juzgado Mercantil n 12, Madrid)

OCU v Spanair 31 July 2012 (Juzgado Mercantil n 1, Barcelona)

VKI v Lufthansa, Oberster Gerichtshof (Austria), 24 January 2013

Policy documents

Communication from the Commission to the European Parliament and the Council on the application of Regulation 261/2004 on air passenger rights, with explicit reference to “no show” clauses, COM (2011) 174

Eurocontrol, ‘Market Segments in European Air Traffic 2013’, 2013

European Commission Proposal for a Regulation amending Regulation 261/2004 on the rights of air passengers, COM(2013) 130 final, March 2013

European Parliament, Report 1st reading, on the proposal for a regulation of the European Parliament and of the Council amending Regulation (EC) No 261/2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long

delay of flights and Regulation (EC) No 2027/97 on air carrier liability in respect of the carriage of passengers and their baggage by air (COM(2013)0130 – C7-0066/2013 – 2013/0072(COD)), A7-0020/2014, January 2014

International Air Transport Association, General Conditions of Carriage Recommended Practice 1724

International Air Transport Association, Position Paper: Coupon Sequence and Use, 2013

KPMG, Global Aviation Group, '2013 Airline Disclosures Handbook: Financial reporting and management trends in the global aviation industry', 2013

Public consultation on the Possible revision of Regulation (EC) No 261/2004 on air passenger rights (19/12/2011 – 11/03/2012)

RDC Aviation, 'Capacity and Frequency Analysis for Intra-European Operations', 2010

M. Smyth & B. Pearce, 'Airline Cost Performance: An analysis of the cost base of leading network airlines versus no-frills, low-cost airlines (LCCs)', IATA Economics Briefing No.5, 2006

United States General Accounting Office, 'Aviation Competition Restricting Airline Ticketing Rules Unlikely to Help Consumers', Report to Congressional Committees, July 2001

Books and articles

G. Bischoff et al, "Airline Pricing Strategies Versus Consumer Rights – Is there a Need to Maintain the 'Full and Sequential Use of Flight Coupons' Rule?," 13th Air Transport Research Society (ATRS) World Conference, June 2009

I. Koning, 'The Enforcement of Air Passenger Rights in Europe', REDC 2011/2

K. Lyczkowska, 'El Presente y el Futuro de la Cláusula 'No Show' en los Billetes de Avión', Centro de Estudios de Consumo, 2014

H. Micklitz & N. Reich, 'The Court and Sleeping Beauty: The Revival of the UCTD', Common Market Law Review, vol.51, 2014

J. Prassl, 'Reforming air passenger rights in the European Union', Air and Space Law, vol. 39, 2014