Competition Bureau Cracks Down on Misleading Advertising in the Digital Economy

October 31, 2019

Commissioner of Competition, Matthew Boswell, (the Commissioner) has been vocal about his desire to crack down on misleading advertising in the digital economy using the false and misleading representations provisions of the *Competition Act* (the Act). Recent actions by the Competition Bureau (the Bureau) suggest that it is following through on the Commissioner's plan.

On October 28, 2019, the Bureau announced that it had entered into a temporary consent agreement with FlightHub Group Inc. (FlightHub), an online travel agency business that sells flights and flight-related services, prohibiting it from using false or misleading marketing practices on its website. This follows the execution of search warrants and seizure of relevant records from FlightHub's headquarters earlier this year.

The Bureau alleges that FlightHub has generated millions of dollars in revenue from fees that are incurred by customers on the basis of materially false or misleading general impressions created on FlightHub's websites, which the Bureau contends are not cured by contradictory disclaimers and fine print in the websites' terms and conditions. This demonstrates the Bureau's clear position that it will not allow parties who advertise online to escape misleading general impressions based on disclaimers and fine print that realistically are not read by many customers.

FlightHub's primary conduct at issue, which the Bureau says it has received thousands of complaints about, is:

1. Representations creating the general impression that customers can select a seat on a flight in advance for no additional fee, and/or that customers' seating choice would be provided to the airline by FlightHub;
2. Representations creating the general impression that customers can cancel and/or rebook their flights without paying any additional fees and/or that FlightHub's cancellation and rebooking options provide customers with cancellation and rebooking flexibility beyond that offered by the airline on which they purchased a ticket; and
3. Representations creating the general impression that customers can book flights for tax and fee-included prices, when in fact the flights cost a higher price with these charges added.

FlightHub's agreement to a pre-judgement consent agreement suggests that they concluded that they would be unlikely to defeat a motion for a temporary order that could have been brought by the Bureau to force FlightHub to implement these changes prior to a trial. Such an order would have required the Bureau to show that the representations at issue would lead to "serious harm" while a trial is pending.

The FlightHub investigation comes on the heels of another notable settlement in the digital economy by the Bureau over the summer, with Ticketmaster. In June, Ticketmaster and related companies agreed to pay a $4 million penalty and $500,000 in costs to resolve a proceeding involving misleading pricing claims in online ticket sales. The Bureau's investigation into Ticketmaster concluded that Ticketmaster's advertised prices were not actually attainable because they added mandatory fees during the later stages of the purchasing process. The online purchasing process shielded non-optional fees, such as "service fees" in fine print, or only revealed the total amount in the last steps of the purchasing process, after customers had invested time and effort to select seats and input purchasing information. As a result, this "drip pricing" resulted in consumers paying more than 20 per cent, and in some cases, 65 per cent more than the advertised price.

Both of these cases demonstrate the Bureau's increasingly stringent enforcement efforts regarding misleading advertising in online formats across multiple industries. In order to ensure compliance with the Act, and to avoid costly investigations and onerous fines, advertisers should be sure to implement the following practices:

- Prices should be advertised inclusive of all fees and taxes at the outset of the purchasing process. Non-optional fees should be clearly disclosed to customers prior to allowing the consumer to reach the 'check-out' page;
- Terms and Conditions, and disclaimers on website should be clear and easy to access on websites for consumers. It is important to remember that in determining whether a representation made to the public is misleading, the Bureau looks at the overall general impression conveyed by a representation, and that fine print disclaimers or reliance on literal meanings that are not likely to be understood by average consumers are not sufficient; and
- A corporate compliance program should be implemented in order to review advertising, and to ensure that any advertising of prices does not conflict with the *Competition Act*.

If you have any questions regarding the above, please feel free to contact us.

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