

# COMPETITION BUREAU GROUNDS FLIGHTHUB'S MISLEADING ADVERTISING

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On February 24, 2021, the Competition Bureau [announced](#) that it had concluded its multi-year investigation into allegations of misleading advertising by FlightHub and reached a consent agreement to resolve its concerns, which includes monetary penalties for FlightHub and two of its directors.

## Key Implications for Businesses

Even though this case has no precedential value since it was not a disputed matter, it still serves as a reminder that the Competition Bureau remains focused on conduct it believes to be deceptive, including drip pricing. It is also significant that the focus here is online advertising and the travel industry, where many consumer protection organizations internationally have focused particularly due to COVID-19 pandemic.

Finally, there is an important warning for directors and officers that the Bureau may try to hold them personally liable in some cases.

## Background

FlightHub was the subject of a large number of consumer complaints regarding its marketing practices both in Canada and in the U.S.

In 2017, the National Advertising Division of Council of Better Business Bureaus [found](#) FlightHub to have made false or misleading claims and recommended such practices be discontinued. At the time, FlightHub agreed to comply with those recommendations.

In 2019, the City Attorney of San Francisco [filed](#) suit against FlightHub alleging unlawful and deceptive business practices. That lawsuit remains pending.

Early in 2019, the Bureau executed search warrants at FlightHub's Montreal headquarters. The execution of a search warrant in a case of alleged misleading advertising challenged under the *Competition Act's* civil provisions is unusual, as we discussed in our prior [bulletin](#). The Bureau typically relies on voluntary information requests or production orders as the primary means of obtaining information. However, the Bureau may use

search warrants where it is concerned about document destruction or where the conduct raises potential criminal issues.

In October 2019, the Bureau also took the unusual step of entering into a “temporary consent agreement” with FlightHub, which required FlightHub to refrain from making any materially false or misleading representations regarding seat selection on flights and cancellation or rebooking rights while the Bureau continued its investigation. With FlightHub agreeing to temporarily halt some of the conduct at issue, the Bureau did not have to go to court to seek an interim injunction. FlightHub’s agreement to the temporary consent agreement resulted from the Bureau’s announced intention to seek an injunction. The Bureau had indicated that it intends to make greater use of injunction proceedings.

The Bureau had concerns with several marketing practices of FlightHub:

- **Drip Pricing:** Charging customers fees for selecting seats and for cancellation/rebooking after having made representations that conveyed the impression that such services would be at no cost.
- **Astrourfing:** Promoting positive online consumer reviews that gave the impression that they were made by independent and impartial customers, when the reviews were made by FlightHub.
- **Misleading Claims:** Representing that:
  - Customers booking a flight could reserve specific seats and FlightHub would secure those seats with the airline, when many customers’ selected seats were not in fact secured, even though they were charged a fee for their selected seats;
  - Customers were offered more extensive cancellation and/or rebooking rights than was actually the case;
  - Customers could cancel flights and obtain credits that could be used for future flights, without disclosing important restrictions and costs on the use of such credits, including reductions in the value of the credits in some cases; and
  - Customers could purchase flights at particular prices, when it at times increased the cost of flights after customers selected their flights.

## Penalties

FlightHub agreed to pay an administrative monetary penalty (AMP) of \$5 million, and two of its directors agreed to pay an AMP of \$400,000 each. The consent agreement also prohibits FlightHub and the two directors from making false or misleading claims for 10 years.

The fact that the consent agreement imposes penalties and obligations on FlightHub directors personally is notable. FlightHub is insolvent and under creditor protection. As the AMP is an unsecured claim, FlightHub

may not have the means to pay the \$5 million penalties following a restructuring proceeding. Recognizing FlightHub's limited ability to pay, the Bureau concluded that it is in the public interest to resolve this matter not only with an AMP for FlightHub, but also with specific obligations imposed on FlightHub's directors. In doing so, the Bureau relied on a rarely invoked provision of the *Competition Act*, subsection 52(1.2).

### **Key Takeaways**

- Online price advertising, especially "drip pricing" conduct where sellers charge additional fees that are not disclosed "up front", continues to be an enforcement priority for the Competition Bureau.
- The Bureau also remains interested in "astroturfing", i.e. false consumer reviews.
- The Bureau has several investigative and procedural options, such as search warrants and temporary injunctions, to address misleading advertising.
- The Bureau may sometimes seek to hold company directors and officers personally liable if they directed the advertising at issue.

If you have any questions about these developments or would like assistance in addressing a Competition Bureau complaint, please contact us or your usual McMillan contact.

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### **A Cautionary Note**

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.

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