

Fixing the Leak: Discount Fined \$700,000 for Drip Pricing

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Discount Car & Truck Rentals Ltd. recently became the fourth car rental company to reach an agreement with the Competition Bureau to settle allegations that they were advertising unattainable prices, a practice known as drip pricing. Discount agreed to update its policies to address Bureau concerns and pay \$700,000 in administrative monetary penalties. The Bureau's position is clear: advertised prices must include all mandatory fees. Businesses that do not follow this rule can expect the Bureau to investigate them and seek fines that can reach \$10 million.

Drip pricing is the practice of advertising or offering low prices at first instance, but slowly increasing the overall price through additional non-optional charges. The charges keep coming, like drips out of a leaky faucet. Drip pricing is not a new concept; but the continuing shift towards e-commerce means that consumers are more exposed to it, and businesses that advertise this way face increased regulatory risk. For the past several years, the Bureau has prioritized enforcing cases against deceptive marketing practices in the e-commerce space. The Bureau's position is that drip pricing means consumers ultimately pay more for goods or services. The low, but unattainable, advertised price draws in consumers who are then less likely to shop around even as the price rises.

The Bureau has investigated drip pricing and other unattainable advertised prices in several industries, and collected a total of \$5.95 million in administrative monetary penalties from four car rental companies: Discount, Avis/Budget, Enterprise and Hertz/Dollar Thrifty. The Bureau alleged that the car rental companies were advertising prices that were unattainable because of mandatory fees added later on in the rental process. Discount, Avis/Budget and Hertz/Dollar Thrifty were also penalized for describing fees used to recover operating costs as government-mandated taxes or surcharges.

Another area of concern is ticketing and sporting events. In 2017, the Bureau issued a warning to ticket vendors that the final total cost of the product must be displayed upfront. In 2018, the Bureau filed an application with the Competition Tribunal against Ticketmaster and its parent company, Live Nation, alleging that they did not disclose mandatory fees in the advertised prices.

Furniture companies Leon's and The Brick faced Bureau allegations that their "buy now pay later" promotions violated misleading advertisement provisions, as there were mandatory upfront fees despite the pay later promise. These fees resulted in a higher overall price for consumers who chose to defer their payment than the price advertised and paid by those who paid the entire price upfront. Leon's and the Brick reached an agreement with the Bureau to donate goods to charities and to update their use of disclaimers and fee disclosure for their financing plans.

Cassels

Drip pricing is not unique to Canada; regulatory bodies in other jurisdictions have also taken actions to prevent it. The Australian Competition and Consumer Commission launched proceedings to stop incremental fee disclosure in advertisements, particularly in the travel industry. In the EU, the practice is being addressed through various directives and regulations, such as the Air Service Regulation, which mandates that airlines must include all “unavoidable and foreseeable charges” including taxes, surcharges, and fees in the initial price displayed. In the US, the Federal Trade Commission has focused on the hospitality industry and issued a warning letter to 22 hotel operators cautioning that online reservation sites may violate the law by misrepresenting the price consumers ultimately pay through failing to properly identify resort fees.

The Bureau is trying to establish a rule that any advertised price must be attainable. Disclosing the fees in the “small print” may not be enough to avoid an investigation. The Bureau contends that consumers often do not scroll through fine print, particularly if shopping on a mobile phone. Using names for mandatory fees that suggest they relate to another service, are also unlikely to prevent an investigation. For example, in the hotel context, regulators will not be swayed by a nightly rate for a room and a separate hidden mandatory “resort fee” for use of amenities. Both fees must be disclosed upfront.

Businesses selling to Canadian consumers must include all mandatory fees in prices they advertise. If they do not, they risk a Bureau investigation and fines of up to \$10 million. Sales taxes are not considered to be part of the price and generally do not need to be included. Fees for optional services also do not need to be included.

If you have questions about misleading advertisements, or other competition law concerns please contact a member of our Competition, International Trade & Foreign Investment Group.

This publication is a general summary of the law. It does not replace legal advice tailored to your specific circumstances.