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Ticket fees--a fair price?

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Commercial analysis: Will ticket companies play fair? James Ross, a barrister at Gough Square, discusses the Which? investigation into ticket fees and advises that a fine commercial balance needs to be achieved between avoiding regulatory enforcement action with associated negative publicity and remaining competitive in the market.

What are the key issues raised by the Which? campaign, 'Play Fair on Ticket Fees'?

Which? have carried out an investigation which they say reveals that ticket companies charge a wide range of high compulsory fees. Which? say that they went through 85 online bookings and found that compulsory fees added 18% on average to face value ticket prices and, in some cases, compulsory fees increased the ticket price by more than a third. Over 50,000 people have signed the Which? online petition to 'make ticket fees fair'.

Which? called on ticket companies to show all compulsory charges up front and several major ticket companies have committed to doing this. Which? remain concerned that the market is not working well, so they are giving ticket companies one month from 16 June 2014 to justify their practices or Which? will refer their findings to the Competition and Markets Authority (CMA). Which? want companies to give a clear explanation of all additional compulsory charges, such as booking and delivery fees, and to set them at a fair level.

What is the current law in this area? And is there any regulatory guidance?

The Unfair Terms in Consumer Contracts Regulations 1999, SI 1999/2083 (the 1999 Regulations) are potentially applicable to unfair fees but reg 6 provides that, so long as a term is expressed in plain intelligible language, the assessment of fairness of a term under the regulations cannot relate to 'the adequacy of the price or remuneration as against the goods or services supplied in exchange'. There is therefore limited scope to challenge the fairness of high ticket fees under the 1999 Regulations.

The Consumer Protection from Unfair Trading Regulations 2008, SI 2008/1277 (CPRs) contain broad provisions prohibiting unfair commercial practices and clearly potentially apply to the ticketing market place. The Electronic Commerce (EC Directive) Regulations 2002, SI 2002/2013 (the 2002 Regulations) also govern the provision of 'information society services' which are any services normally provided on request for payment at a distance by means of electronic equipment. The 2002 Regulations require traders who are providing an information society service to supply certain information about their business and the prices they charge when they advertise or sell online.

The Department for Business Innovation and Skills (BIS) issued guidance for traders on good practice in giving information about prices in November 2010. General guidance in relation to the CPRs was given by the Office of Fair Trading in May 2008.

Is there currently sufficient protection for the consumer in this area of trading?

As a general proposition, UK consumer law aims to give the consumer an informed choice rather than to protect the consumer from an unwise choice. The 1999 Regulations therefore probably strike the right balance in terms of giving consumers relief from unfair terms while not allowing the court to go so far as to interfere with the level of price or fees, so long as these are clearly set out.

However, there remains the problem of unfair practices which may cause the consumer to enter into the transaction in the first place. The CPRs potentially provide a high degree of protection to consumers. Regulation 3 sets out a general prohibition of unfair commercial practices, including misleading actions and omissions. Schedule 1 to the CPRs sets out 31 commercial practices which are in all circumstances deemed to be unfair without reference to the impact of the practice on the transactional decision of the average consumer.

Contravention of the CPRs is a criminal offence and the CMA is empowered by the Enterprise Act 2002, ss 215 and 217 (EA 2002) to apply to the court for an enforcement order against a person who is likely to or has engaged in conduct which infringes the CPRs.

The CPRs were introduced to implement the Unfair Commercial Practices Directive 2005/29/EC. This is a maximum harmonisation directive and the UK is therefore prevented from implementing any provisions which are more prescriptive or restrictive than the requirements of the Directive.

Do you envisage any practical difficulties or unintended consequences arising from the Which? campaign?

Many online ticket companies are based outside the UK and practical issues therefore arise in terms of enforcement action taken against such entities. Ticket companies also rely upon the fact that they merely facilitate consumer-to-consumer ticket sales and are not themselves a party to the ticket sale contract in order to argue that some of the consumer protection regulations are not applicable. Ultimately, it is in the interests of consumers to be able to resell tickets which they no longer require and to be able to purchase such tickets where, for example, the event has otherwise 'sold out'. The total price paid by the consumer for a ticket will always be clearly shown before payment is made and ticket companies would therefore say that there is little risk of prejudice to consumers in this area. If ticket companies are too heavily regulated, they may cease to operate and consumer access to the market in tickets for resale will be reduced.

If Which? do refer to the CMA, do you think that the Authority will take action against ticket companies, and if so what?

If the matter is referred to the CMA, it is likely that the Authority would first make contact with the traders seeking an undertaking under EA 2002, s 219 that the trader will cease any infringements of the CPRs which have been identified. If the trader is not willing to enter into an undertaking, the CMA may proceed to seek an enforcement order as set out above against the ticket company and perhaps against officers of the company under the 'consent and connivance' provisions in EA 2002, s 222.

What are the implications for practitioners?

Practitioners will need to remain aware of the potential practical difficulties of enforcement where the ticket company is based overseas as well as the detailed requirements of the relevant regulations. A fine commercial balance needs to be achieved between avoiding regulatory enforcement action with associated negative publicity and remaining competitive in the market.

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Interviewed by Kate Beaumont.

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