

November 2019

## FlightHub Experiences Some Turbulence Courtesy of the Competition Bureau

On October 28, 2019, the Competition Bureau [announced](#) the registration of a “temporary consent agreement”<sup>1</sup> with the Competition Tribunal in order to protect consumers from what it views as false or misleading representations related to hidden fees for flights offered by the FlightHub Group Inc. (“**FlightHub**”). FlightHub is an online travel company that provides consumers with access to wholesalers, airlines and hotel suppliers in Canada. Using FlightHub’s online interface, consumers can search for a variety of flight, hotel and cruise offers from a number of different providers, compare prices, and then book travel directly through the site.

The Bureau’s press release notes that its investigation into FlightHub is ongoing, including a review of “FlightHub’s representations for flight-related services, such as seat selection and flight cancellation”, which are alleged to have resulted in hidden fees from which FlightHub generated millions of dollars in revenues. As well, the Bureau is investigating allegations that listed prices for flights increased after consumers selected their flights. While the Bureau notes that it has already reviewed “thousands of consumer complaints” about FlightHub’s marketing practices, the Bureau’s press release encourages consumers who believe they were misled

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<sup>1</sup> *The Commissioner of Competition and FlightHub Group Inc. / Groupe Flighthub Inc., formerly 7513283 Canada Inc., Consent Agreement (2019-10-28).*

while shopping for flights to submit additional complaints with the Bureau.

This development is notable for a number of reasons, including the use of a “temporary consent agreement” as an interim remedy and the use of search warrants to gain access to FlightHub’s records. It also signals the Bureau’s ongoing enforcement efforts in the digital economy. Each of these elements is discussed further below.

### The Temporary Consent Agreement

To the best of these authors’ knowledge, the Competition Bureau has never entered into a “temporary consent agreement” of this nature before.<sup>2</sup> As a “temporary consent agreement”, the agreement is binding on FlightHub until the Commissioner of Competition’s inquiry into FlightHub’s practices is resolved either through (i) a final consent agreement, (ii) a decision of the Tribunal, or (iii) at such further time agreed to between FlightHub and the Commissioner. In the “temporary consent agreement”, FlightHub agrees to refrain from engaging in a number of practices that the Commissioner considers to be misleading in connection with consumers booking flights and related purchases through its website. This includes FlightHub committing to:

1. not make any representations giving a materially false or misleading general impression with respect to seat selection on flights, including making any false or misleading representation giving the impression that a consumer can select a specific seat or make a seat preference selection without having to pay additional fees or that FlightHub will be securing a specific seat or seat preference on a flight (when it will not be doing so); and
2. not making any representations giving a materially false or misleading general impression with respect to a consumers’ cancellation or rebooking rights, including making any false or

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<sup>2</sup> The Commissioner has entered into “interim” consent orders and “interim” consent agreements in connection with proposed mergers that required parties involved in the proposed mergers to hold assets or information separate, to maintain the viability of possible divestiture businesses or to refrain from certain investments while the Bureau’s merger review remained ongoing.

misleading representation giving the impression that consumers can cancel or rebook flights without paying additional fees or making any false or misleading representation that FlightHub is offering consumers extended or more flexible cancellation and/or rebooking rights on flights (when it will not be doing so).

There is, we submit, an open question as to whether the “temporary consent agreement”, as drafted, is indeed a valid consent agreement, given that it does not contain a definitive statement that the Commissioner has concluded that the alleged inappropriate conduct has been engaged in.<sup>3</sup> However, given that it is unlikely that there is an impacted person likely to challenge the validity of a temporary consent agreement, that might explain why the Bureau and FlightHub would choose such a mechanism.

From the recitals in the temporary consent agreement, we learn that it appears to the Commissioner that FlightHub’s alleged misleading conduct is causing serious harm and that such harm is likely to continue unless the Commissioner were to seek an injunction under section 74.11(1) the *Competition Act* or unless the temporary consent agreement in which FlightHub agrees to stop the offending conduct is registered. In other words, if not for the temporary consent agreement, the Commissioner would have sought a formal injunction under the Act, and the purpose of the consent agreement is to stand in for an injunction.

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<sup>3</sup> In the Competition Tribunal’s September 2014 decision in *Kobo Inc. v. the Commissioner of Competition*, which we described in a previous [bulletin](#), the Tribunal noted that it may review three items if a party were to challenge a consent agreement’s validity. In connection with the FlightHub case, the most relevant of these required items is that the consent agreement must contain an explicit agreement between the Commissioner and the respondent(s) that each of the required elements of the reviewable conduct in issue has been met, or a statement by the Commissioner concluding that each of those elements have been met together with a statement that the respondent(s) do not contest the Commissioner’s conclusion(s). In the recitals to the FlightHub temporary consent agreement, every one of the Commissioner’s conclusions is preceded by the words “it appears to the Commissioner that...”, rather than “the Commissioner has concluded that...” In fact, the recitals to the temporary consent agreement specifically provide that the Commissioner’s review remains ongoing. This “it appears to the Commissioner” language seems to be taken from section 74.11(1) of the *Competition Act*. That is the specific injunction provision. The temporary consent agreement provides that the Commissioner would have sought an injunction under section 74.11(1) of the Act. In order to succeed on such an application for an injunction, the court must conclude that “it appears” that a person is engaging in reviewable conduct and the court must conclude that “it appears” that serious harm is likely to ensue and that the balance of convenience favours issuing the injunction. It is unclear if the Commissioner concluding that it met the standard for obtaining an injunction, with FlightHub not contesting this assertion for the purpose of entering into the temporary consent agreement, is sufficient to satisfy the Kobo requirements for a consent agreement.

This action by the Bureau corresponds with recent statements of the Commissioner and senior Bureau leadership in which they have made clear that the Bureau has planned to increase its enforcement efforts and use of injunctions. In particular, in May 2019, the Commissioner indicated that “active enforcement will be an area of primary focus”, that the Bureau will “use all of the tools at [its] disposal to address what [it] believe[s] to be problematic conduct ... include[ing] increased consideration of the use of tools such as injunction applications...” and that the Bureau will “use these tools more frequently, as resources permit, to interrupt or halt the conduct in question, pending a full hearing.”<sup>4</sup> Similarly, Josephine Palumbo, the Bureau’s Deputy Commissioner in charge of the Deceptive Marketing Practices Directorate, noted in an October 2019 presentation that “[y]ou can expect to see more injunctions, rigorous enforcement action, and cases being taken to the courts in order to protect Canadian consumers and promote a competitive digital economy”.<sup>5</sup> While the “temporary consent agreement” is not an injunction in name, it appears to have similar effects in practice and its use accords with the Commissioner’s recent statements.

There are a number of benefits to the Bureau and the party being investigated in using a temporary consent agreement in place of an injunction. First, as a matter of tone, it signals a willingness on behalf of the Bureau and the investigated party to work together to achieve a mutually acceptable solution. In this case, in connection with the concept of mutual cooperation, FlightHub issued a [press release](#) noting that it is working with the Bureau and that it “take[s] pride in leading the way across the online travel industry in Canada.” Correspondingly, the Bureau’s press release noted that “FlightHub is cooperating with the Bureau’s investigation”. Second, the use of a temporary consent agreement allows the parties to express the precise terms that they are agreeing to as opposed to taking the chance that the Tribunal might modify the terms. An injunction motion (even on consent) would permit the Competition Tribunal the

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<sup>4</sup> Commissioner Matthew Boswell, “[No River too Wide, No Mountain too High: Enforcing and Promoting Competition in the Digital Age](#)” (Remarks delivered at the Canadian Bar Association Competition Law Spring Conference 2019, Toronto, 7 May 2019).

<sup>5</sup> Josephine Palumbo, “[Update from the Competition Bureau](#)” (Presentation given at the Ontario Bar Association Advertising and Marketing Law 2019, Toronto, 3 October 2019) at p 5.

opportunity to modify the injunction order if it felt that to be appropriate, or refuse to issue the order which the parties proposed. Consent agreements, on the other hand, are simply registered with the Tribunal, and the Tribunal may make no modifications.

Going forward, parties should recognize that the Bureau appears intent to use injunctions or similar interim remedies.

### Use of a Search Warrant

The Bureau's press release notes that "[e]arlier this year, the Bureau executed search warrants at [FlightHub's] headquarters and seized relevant records." Except in cases where the Bureau is alleging outright fraud or scams, Bureau investigations into misleading advertising conduct do not typically involve the use of search warrants as an investigative technique. Historically, in these types of cases, the Bureau reaches out to parties and uses requests for information or section 11 production orders as the primary means of obtaining relevant information and documents from the parties that it is investigating. It is unclear why search warrants were used in this case, or whether this signals an increased use of search warrants going forward. It is also not clear at this time what information the Bureau sought to seize from FlightHub under the search warrant. Regardless, businesses should take note that the Bureau is willing to utilize all of its investigative techniques when appropriate, and that parties that are alleged to have engaged in misleading conduct might be at risk of the Bureau arriving unannounced at their doors to seize relevant documents and records.

### The Bureau's Commitment to Consumer Protection Efforts in the Digital Economy

This investigation parallels other recent Bureau investigations in the digital space, and its clear announcement that the digital economy will be an enforcement priority.<sup>6</sup> The Bureau's press release includes a quote from the Commissioner in which he notes that he "made a commitment that the Bureau would use all the tools at its disposal to address deceptive marketing practices in the online marketplace." As

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<sup>6</sup> Competition Bureau, "2019-20 Annual Plan: Safeguarding the Future of Competition" (25 July 2019).

well, the Bureau’s press release directly hyperlinks to a recent speech by the Commissioner titled “No river too wide, no mountain too high: enforcing and promoting competition in the digital age”. In that [speech](#), the Commissioner emphasized that the Bureau will “prioritize investigating misleading representations made online” and that it will “focus on improving trust in the digital economy”. The Bureau’s investigation into FlightHub appears to be, and be characterized as, evidence of the Bureau pursuing cases involving online and digital products.

## Conclusion

The Bureau’s investigation into FlightHub remains ongoing. It will be interesting to follow this case to see how it is ultimately resolved. In the meantime, businesses and consumers should take be aware that the Bureau is actively pursuing its mandate to protect consumers in the digital space and that it is open to using innovative investigative techniques and remedies in order to achieve its desired goals.

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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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