



Webinar Recap: Drip Pricing & Junk Fees: All Wet, or a Serious Antitrust & Consumer Protection Issue?

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Introduction

Junk fees and drip pricing have drawn concerns from regulatory agencies in different countries, including the United States, Canada, and the United Kingdom. “Junk fees,” commonly referred to as hidden fees, are defined by the Federal Trade Commission (FTC) as “unfair or deceptive fees that are charged for goods or services that have little or no added value to the consumer, including goods or services that consumers would reasonably assume to be included within the overall advertised price.”¹ Relatedly, “drip pricing” commonly refers to situations in which the total price of a good or service is revealed at the end of the buying journey, with fees being deceptively added along each stage of the journey.² With the advent of e-commerce, allegations based on junk fees and drip pricing have increased, including in industries such as airlines, live events, hospitality, and food delivery.

On December 7, 2023, the Pricing Conduct Committee of the American Bar Association (ABA) Antitrust Law Section sponsored a webinar titled “Drip Pricing & Junk Fees: All Wet, or a Serious Antitrust & Consumer Protection Issue?” Moderated by Kathleen Kim, the lively presentation was led by the following panelists: lawyers James Musgrove (McMillan), Maureen Ohlhausen (now at Wilson Sonsini), Amy Mudge

(BakerHostetler), Brinsley Dresden (Lewis Silkin), and economist Steve Tadelis (UC Berkeley Haas School of Business). The panelists addressed the question of how drip pricing can be harmful to consumers and discussed related policies and actions by regulators in the US, the UK, and Canada.

The Economics of How Drip Pricing Harms Consumers

Professor Tadelis began the discussion by offering a real-life example of drip pricing, demonstrating the process from the perspective of a consumer who is purchasing a ticket for a Rolling Stones concert on an online pricing platform. On the first screen, the consumer picks two tickets with an advertised price of \$2,104 each. Once the consumer clicks to go onto the following screen, a “fulfillment and service fee” of \$634 per ticket shows up, increasing the total price by about 30%. Basic economic theory may predict that a rational individual would internalize the additional 30% and go back to the initial screen to reevaluate their options. However, Professor Tadelis pointed to real-life experimental studies that have shown that compared to upfront fees, the subsequent addition of fees can lead consumers to (i) buy tickets that are otherwise out of budget, and (ii) purchase more expensive tickets.³ In addition, most people

¹ Unfair or Deceptive Fees Trade Regulation Rule, 87 Fed. Reg. 67413, 67413 (Nov. 8, 2022) (to be codified at 16 C.F.R. pt. 464).

² The White House Council of Economic Advisors, “How Junk Fees Distort Competition,” (Mar. 21, 2023),

<https://www.whitehouse.gov/cea/written-materials/2023/03/21/how-junk-fees-distort-competition/>.

³ See Tom Blake, Sarah Moshary, Kane Sweeney, and Steve Tadelis, “Price Salience and Product Choice,” 40 (4) J. MKTG. Sci. 619-636 (2021): (discussing a large scale experiment on

do not click back to the initial screen due to a behavioral phenomenon known as “loss aversion.” As a result, drip pricing can induce people to make choices that they may not have made otherwise had they seen the total price of the product up front.

Professor Tadelis also referenced Ticketmaster’s CAN\$4.5 million payment to the Canadian Competition Bureau to settle a misleading pricing case in 2019.⁴ The Competition Bureau’s investigation found that the prices advertised by Ticketmaster, which sells live event tickets, were not attainable because of mandatory fees added during later stages of the purchasing process.

UK, Canada, and US Regulatory Perspectives

The discussion then transitioned into an overview of the perspectives of regulatory authorities in different jurisdictions.

1. UK

Mr. Dresden provided an overview of relevant UK regulatory authorities. He explained that UK regulators are mostly concerned about drip pricing involving mandatory fixed fees (such as service and booking fees), mandatory variable fees (such as delivery fees), and optional add-on fees (such as seat selection on flights). Mr. Dresden discussed the example of low-cost airlines that advertise a low unbundled fare (£72.99 in his example) with the option to add seat selection and other ancillary benefits for a fee. The key to determining whether drip pricing is misleading, according to Mr. Dresden, is whether it is possible for a passenger to fly for £72.99 if they forego seat selection and do not carry any luggage. If the answer is yes, the price cannot be deemed misleading because the fees are not mandatory.

According to Mr. Dresden, the UK’s Advertising Standards Authority (ASA) requires that pricing:

(1) is not misleading, (2) does not use “from” and “up to” to exaggerate potential savings, and (3) includes all nonoptional fees. As an example, the ASA banned Megabus ads promising seats “from £1” because the company did not have seats available at that price.⁵ Mr. Dresden commented that a core part of UK consumer law, called the Consumer Protection from Unfair Trading Regulations (CPRs), prohibits sellers from engaging in “misleading” commercial practices. The CPRs are enforced by the Competition and Markets Authority (CMA). Mr. Dresden also referred to a study by the Department for Business and Trade that calculated that consumers spend an additional £1.6 billion per year due to drip pricing,⁶ which emphasizes the need for additional scrutiny on the matter. Finally, he discussed the Digital Markets, Competition and Consumers (DMCC) bill introduced in April 2023, which seeks to expand the price transparency mandate of the CPRs.⁷ If stricter price transparency laws are enacted, Mr. Dresden opined, companies will face the challenge of communicating all pricing information up front in the relatively limited space available on smartphone screens and social media portals.

2. Canada

Mr. Musgrove provided an account of the relevant Canadian perspective. He noted that the Competition Bureau considers drip pricing to fall under the misleading advertising provision of “representations to the public which are false or misleading in a material respect.” Mr. Musgrove covered some notable Competition Bureau cases involving several companies in the telecommunications, car rental, events, and travel industries, all of which agreed to settle their cases for over CAN\$28 million collectively. Importantly, in 2022, the Competition Bureau obtained an amendment to the Competition Act, which deems drip pricing to be misleading.⁸ Two cases have been brought up under the new provision: (1)

Stubhub that found that compared to upfront fees, showing fees on a second screen made customers 14.1% more likely to buy a ticket and that, conditional on buying, they would buy a 5.4% more expensive ticket).

⁴ Press Release, CAN. COMP. BUREAU, “Ticketmaster to pay \$4.5 million to settle misleading pricing case,” (June 27, 2019), <https://www.canada.ca/en/competition-bureau/news/2019/06/ticketmaster-to-pay-45-million-to-settle-misleading-pricing-case.html>.

⁵ BBC, “Megabus Ads Promising £1 Seats Banned,” (Mar. 27, 2018), <https://www.bbc.com/news/business-43562112>.

⁶ U.K. DEPT. FOR BUS. & TRADE, “Estimating The Prevalence and Impact of Online Drip Pricing,” (Sept. 2023), <https://assets.publishing.service.gov.uk/media/64f1ebd7a78c5f000dc6f448/estimating-the-prevalence-and-impact-of-online-drip-pricing.pdf>.

⁷ U.K. PARLIAMENT, *Digital Markets, Competition and Consumers Bill*, HL Bill 53 (Feb. 1, 2024), <https://bills.parliament.uk/bills/3453>.

⁸ The relevant passage reads: “For greater certainty, the making of a representation of a price that is not attainable due to fixed obligatory charges or fees constitutes a false or

TicketNetwork (in the live events industry), which was settled for CAN\$825,000, and (2) Cineplex (in the movie theaters industry) with a hearing held most recently in February 2024.⁹ On the one hand, the Competition Bureau argued that additional fees are misleading under the law unless imposed by the government, and the competition commissioner claims that “fees are deceptive because moviegoers are not presented with the full price of a movie ticket on the very first page they see when buying tickets.”¹⁰ On the other hand, Cineplex’s lawyer argued that “the case is meritless” because “the prices as shown on the website are ‘attainable’ to consumers” and the company shows “two total prices on its website, one for in-person purchasing and the other for online tickets.”¹¹ To close, Mr. Musgrove commented on the prevalence of class action activity in Canada and noted that it is particularly difficult to certify class actions for misleading advertising due to individual issues of reliance. For example, in a case involving Air Canada,¹² the Quebec Court found that even though the price was improperly and not fully disclosed, there were no damages because by the time the consumer bought the ticket, they knew what they were paying and got what they were expecting to get. The case, however, is still on appeal.

3. US

Ms. Ohlhausen provided an overview of the legal framework surrounding drip pricing in the US. She

misleading representation, unless the obligatory charges or fees represent only an amount imposed by or under an Act of Parliament or the legislature of a province.” CAN. COMP. BUREAU, “Guide to the 2022 Amendments to the Competition Act,” (June 24, 2022), <https://ised-isde.canada.ca/site/competition-bureau-canada/en/how-we-foster-competition/education-and-outreach/publications/guide-2022-amendments-competition-act#sec04>.

⁹ Anja Karadeglija, “Arguments Begin at Competition Body in Case Against Cineplex Over Online Booking Fees,” *CityNews* (Feb. 28, 2024), <https://toronto.citynews.ca/2024/02/28/arguments-begin-at-competition-body-in-case-against-cineplex-over-online-booking-fees/>; Anja Karadeglija, “Cineplex engaging in harmful ‘drip pricing’ with online booking fees: competition czar,” *Financial Times* (Feb. 28, 2024), <https://financialpost.com/news/retail-marketing/cineplex-drip-pricing-online-booking-fees-competition>.

¹⁰ Anja Karadeglija, “Arguments Begin at Competition Body in Case Against Cineplex Over Online Booking Fees,” *CityNews* (Feb. 28, 2024), <https://toronto.citynews.ca/2024/02/28/arguments-begin-at-competition-body-in-case-against-cineplex-over-online-booking-fees/>.

¹¹ *Id.*

started by noting that the core authority to address these kinds of issues is the FTC Act.¹³ The FTC has relied on case-by-case enforcement under its unfair or deceptive acts or practices (UDAP) authority,¹⁴ bringing several cases on allegations that it is unfair and/or deceptive to charge consumers fees without their explicit consent. As Ms. Ohlhausen explained, in evaluating unfairness, the FTC uses a three-part test, namely whether: (1) there is substantial injury to the consumer, (2) the consumer cannot reasonably avoid such injury, and (3) there are countervailing benefits to competition or consumers in general.¹⁵ Some examples where this test was applied include *FTC v. Inc21.com Corp.*, 688 F. Supp. 2d 927 (N.D. Cal. 2010) and *Apple, Inc.*, 112 F.T.C. 3108 (2014).

FTC v. Inc21.com Corp. related to cell phone billing – specifically, fees that were not phone service charges and that allegedly appeared on bills without consumers’ knowledge.¹⁶ The FTC considered whether consumers knew about the fees, whether they could reasonably avoid them, and whether the effect of the fees was outweighed by countervailing benefits to competition or consumers from including such fees on the bills. The FTC found none of this to be true.¹⁷ In the

¹² See *Union des consommateurs et Silas c. Air Canada*, No 500-06-000513-107, 2022 QCCS 4254 (Canada Québec Cour Supérieure Nov. 10, 2022), <https://t.soquij.ca/Zb7t4>.

¹³ See Section 5(a) of the FTC Act stating that “[u]nfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful.” 15 U.S.C. § 45.

¹⁴ See “Federal Trade Commission Act Section 5: Unfair or Deceptive Acts or Practices,” *Consumer Compliance Handbook*, FED. RESERVE (2017), <https://www.federalreserve.gov/boarddocs/supmanual/cch/ftca.pdf>.

¹⁵ 15 U.S.C. § 45(n).

¹⁶ *FTC v. Inc21.com Corp.*, 688 F. Supp. 2d 927 (N.D. Cal. 2010).

¹⁷ Press Release, FED. TRADE COMM’N, “FTC Returns More Than \$5.4 Million to Victims of Massive Cramming Scam” (Sept. 30, 2013), <https://www.ftc.gov/news-events/news/press-releases/2013/09/ftc-returns-more-54-million-victims-massive-cramming-scam>; Press Release, FED. TRADE COMM’N, “FTC Returns More Than \$2.9 Million to Inc21 Cramming Victims In Second Round of Refunds to Consumers” (Mar. 13, 2015), <https://www.ftc.gov/news-events/news/press-releases/2015/03/ftc-returns-more-29-million-inc21-cramming-victims-second-round-refunds-consumers>.

Apple case, which Apple settled for \$32.5 million,¹⁸ the issue related to the fact that after downloading an app, all subsequent in-app charges were automatically authorized for 15 minutes. According to the FTC, this case met the unfairness criteria because children were spending money on in-app purchases in kids' game apps without their parents' knowledge of and consent to such charges. Parents had no knowledge of or consent to such charges because there was no notice to account holders that there was a 15-minute window during which all charges would be authorized, even for games that were free to download and play. The FTC found no procompetitive justification to outweigh the harm imposed on consumers by Apple's failure to notify account holders of the 15-minute window for charges without additional authorization.

Relatedly, Ms. Ohlhausen observed that the FTC conducted an economic study of hotel resort fees,¹⁹ focusing on whether the consumer either initially or during the purchase funnel learned about those fees. More recently, the FTC issued a report on "dark patterns,"²⁰ which the FTC defines as practices built upon psychology that are used by online retailers to manipulate consumers. Ms. Ohlhausen emphasized that the FTC does not have authority over pricing *per se* but rather only authority regarding deception about costs and fees.

Finally, Ms. Ohlhausen noted that the Supreme Court ruled in 2021 that the FTC does not have the authority to seek monetary relief for consumers.²¹ She further elaborated that, in response, the FTC has recently shifted away from litigation toward a regulatory model (i.e., "rulemaking").²² The appeal of rulemaking for the FTC, according to Ms. Ohlhausen, is that it allows the FTC to collect civil penalties. The procedural requirements for the FTC's rulemaking are covered under the Magnuson-Moss Warranty Act.²³

Rulemaking

Ms. Mudge focused the discussion on rulemaking related to drip pricing more broadly. She discussed (1) the FTC's proposed rule,²⁴ (2) recently signed California legislation,²⁵ and (3) Massachusetts' proposed regulations.²⁶

The FTC announced a proposed rule in October 2023, and accepted comments until early January 2024. The rule has not yet become effective, and court challenges could delay any effective date.

The FTC's proposed rule prohibits both hidden and misleading fees. Misleading fees misrepresent the nature and purpose of a fee, while hidden fees advertise or display a price without clearly displaying the total price. Ms. Mudge gave an example of a misleading fee whereby customers

¹⁸ Press Release, FED. TRADE COMM'N, "Apple Inc. Will Provide Full Consumer Refunds of At Least \$32.5 Million to Settle FTC Complaint It Charged for Kids' In-App Purchases Without Parental Consent" (Jan. 15, 2014), <https://www.ftc.gov/news-events/news/press-releases/2014/01/apple-inc-will-provide-full-consumer-refunds-least-325-million-settle-ftc-complaint-it-charged-kids>.

¹⁹ Mary W. Sullivan, "Economic Analysis of Hotel Resort Fees," FED. TRADE COMM'N (Jan. 2017), <https://www.ftc.gov/reports/economic-analysis-hotel-resort-fees>.

²⁰ FED. TRADE COMM'N, "Bringing Dark Patterns to Light" (Sept. 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/P214800%20Dark%20Patterns%20Report%209.14.2022%20-%20FINAL.pdf.

²¹ *AMG Capital Mgmt., LLC v. FTC*, No. 19-508, 593 U.S. ____ (2021).

²² See "Learn About the Regulatory Process," REGULATIONS.GOV, <https://www.regulations.gov/learn> ("Rulemaking is the policy-making process for Executive and Independent agencies of the Federal government. Agencies use this process to develop and issue Rules (also referred to as 'regulations'). The process is governed by laws including but not limited to the Administrative Procedure Act (APA) (5 U.S.C. Chapter 5), Congressional Review Act, Paperwork Reduction

Act, Regulatory Flexibility Act and can lead to a new Rule, an amendment to an existing Rule, or the repeal of an existing Rule. Executive Orders such as 12866, 13563, and 13579 also establish principles and guidance for the rulemaking process.").

²³ 15 U.S.C. §§ 2301-2312.

²⁴ Trade Regulation Rule on Unfair or Deceptive Fees, 88 Fed. Reg. 77420-77485 (Nov. 9, 2023) (to be codified at 16 C.F.R. 464); Press Release, FED. TRADE COMM'N, "FTC Proposes Rule to Ban Junk Fees," (Oct. 11, 2023), <https://www.ftc.gov/news-events/news/press-releases/2023/10/ftc-proposes-rule-ban-junk-fees>.

²⁵ CAL. DEPT. OF JUSTICE, "Attorney General Bonta's Sponsored Bill to Ban Hidden Fees in California Signed into Law" (Oct. 7, 2023), <https://oag.ca.gov/news/press-releases/attorney-general-bonta%E2%80%99s-sponsored-bill-ban-hidden-fees-california-signed-law>; see also Cal. Sen. Bill 478 (text of bill, with effective date of July 1, 2024).

²⁶ MASS. ATT'Y GEN., "AG Campbell Proposes Regulations To Combat 'Junk Fees' And Bolster Transparency For Consumers" (Nov. 30, 2023), <https://www.mass.gov/news/ag-campbell-proposes-regulations-to-combat-junk-fees-and-bolster-transparency-for-consumers>; see also 940 C.M.R. 38.00 (text of proposed regulations).

were told by Amazon they could leave a tip for their driver, but the company was not paying those tips to drivers as tips and instead was using those tips to pay drivers' wages. The FTC alleged this fee to be misleading, and Amazon paid \$61.7 million in a settlement.²⁷ Another example of misleading fees discussed are "handling charges" that serve no other purpose than adding money to a company's pockets. As for hidden fees, the FTC's proposed rule deems it deceptive and unfair to display or advertise an amount a customer must pay without disclosing the total price more prominently. Total price must include all mandatory fees other than shipping and taxes.

Ms. Mudge explained that while the FTC has signaled potential flexibility around carveouts and whether the rule should be limited to live events and lodging, a key practical challenge in implementing the rule has to do with mandatory fees that are variable and dependent on a customer's specific choices, because those fees are difficult to include up front before the customer has made a choice. Specifically, whereas adding fees to item cost is presumably not difficult when the fee is a percentage of the total cost, it is probably not practical when the fee is variable or applies to the entire order. If a fee applies to the entire order, it would be challenging to include fees in the item prices shown because it would require knowing information about the entire order, and the item-level fees could change depending on the number of items in the order.

Turning to state regulation of drip pricing, Ms. Mudge described a California law going into effect in July 2024.²⁸ That law has language similar to the proposed FTC rule and prohibits advertising or displaying a price that does not include all mandatory fees or charges other than taxes or fees imposed by the government and postage or carrier charges. However, one of the authors of the bill has stated that restaurants can display mandatory gratuity separately so long as they do so prominently.²⁹ Ms. Mudge noted that this interpretation seems to be at odds with the actual language in the law, and thus further

developments are to be expected. Ms. Mudge also described Massachusetts proposed regulation that defines an unfair and deceptive practice as one that misrepresents or fails to disclose "clearly and conspicuously" the total price of a product, either at the time of the initial presentation of the price of a product or any subsequent presentation thereafter.³⁰ Since the panel discussion, the states of Virginia and New York have also passed drip pricing regulation.³¹

Further, Ms. Mudge noted that because the FTC allows states to be more stringent in their own proposed rules, even if the FTC ends up with a narrower rule and California allows for some exemptions, it is likely that in the near future, some states might pass an all-in pricing law. Therefore, Ms. Mudge noted that companies should be ready to adapt their pricing in response to such potential upcoming regulations.

About the Authors

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²⁷ Press Release, FED. TRADE COMM'N, "Amazon To Pay \$61.7 Million To Settle FTC Charges It Withheld Some Customer Tips From Amazon Flex Drivers" (Feb. 2, 2021), <https://www.ftc.gov/news-events/news/press-releases/2021/02/amazon-pay-617-million-settle-ftc-charges-it-withheld-some-customer-tips-amazon-flex-drivers>.

²⁸ Cal. Sen. Bill 478 (text of bill, with effective date of July 1, 2024).

²⁹ Lauren Saria, "The State Attorney General's Office Isn't Sure If Its Junk Fee Law Will Ban Restaurant Service Fees," *Eater San Francisco* (Oct. 18, 2023), <https://sf.eater.com/2023/10/18/23922950/california-restaurant-service-fee-ban-junk-fee-law-confusion-rob-bonta>.

³⁰ 940 C.M.R. 38.00 (text of proposed regulations).

³¹ See Va. Sen. Bill 388 (text of bill); see also N.Y. Sen. Bill S7783A (text of bill).

