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Don’t Log Out in Anger: Dynamic Pricing of Oasis Tickets as an Exploitative Abuse?

Adam Brown (One Essex Court) · Friday, September 6th, 2024

The UK Competition and Market Authority has launched an investigation into Ticketmaster over its dynamic pricing of concert tickets. This follows widespread complaints about Ticketmaster increasing ticket prices in response to large demand for band Oasis’s reunion tour. Dynamic pricing is not a new practice. Airlines and ride-hailing companies like Uber are particularly well-known for using AI to adjust prices in response to changing market conditions, such as demand. But the public outrage in response to Ticketmaster’s behaviour seems to have been the prompt needed for consideration of dynamic pricing’s compliance with competition law. This post seeks to briefly explore why dynamic pricing ought to be of concern to competition authorities, and why Ticketmaster’s practices might be the perfect opportunity to develop jurisprudence on exploitative abuses.

The Investigation

The CMA are not the first authority to investigate Ticketmaster. Earlier this year, the US Justice Department launched proceedings against Live Nation (the owners of Ticketmaster) for purported infringements of Section 2 of the Sherman Act. Like Article 102 TFEU under EU law, and Chapter II of the UK Competition Act, Section 2 of the Sherman Act restricts monopolists’ ability to abuse their market power and increase their market share. Notably, the US proceedings focus heavily on exclusionary abuses. The Justice Department alleges that Live Nation uses it monopoly position to pressure both artists and venues into exclusivity deals, among other abuses. This emphasis on exclusionary abuse is perhaps unsurprising given Section 2 of the Sherman Act’s focus on restricting *attempts* to monopolise, rather than primarily the abuse of a pre-existing monopoly position.

In contrast, the CMA’s investigation focuses on exploitative abuses. Much of the CMA press release emphasises ‘consumer protection law’ rather than competition law, with the investigation considering whether “Ticketmaster has engaged in unfair commercial practices which are prohibited under the Consumer Protection from Unfair Trading Regulations 2008”. However, the CMA also notes that dynamic pricing may breach competition law, suggesting that the scope of its investigation will be wide. The remainder of this post looks to this last point and whether Ticketmaster’s practice might prove to be an exploitative abuse under Part II of the UK Competition Act.

Ticketmaster's Dominance:

UK competition law is modelled closely on EU law. Chapter II of the UK Competition Act prohibits conduct which amounts to an abuse of a dominant position. The first question for the CMA, then, will be whether Ticketmaster occupies a dominant position in the concert ticketing market. As with EU law, the test for dominance focuses on market power. If an undertaking enjoys enough economic strength to act independently of its competitors, customers, and consumers, thereby preventing effective competition being maintained on the market, it is a dominant undertaking (United Brands v Commission). Where an undertaking has a market share above 50%, it is usually presumed to possess such market power. In Ticketmaster's case, this 50% threshold is likely reached; when Live Nation and Ticketmaster merged in 2009, Ticketmaster enjoyed a share of between 40-50% of the UK market, and a brief examination suggests this share has only grown since. Barriers to entry to the ticketing market are also high with frequent agreement from venues to use the same ticketing provider for all their shows. With a high market share and barriers to entry, it is difficult to see how the CMA could conclude that Ticketmaster is not dominant.

Abuse

Section 18(2) of the Act provides a non-exhaustive list of conduct that may constitute abuse by a dominant undertaking. Again, this is closely modelled on the list of abusive practices under Article 102 TFEU. Both provisions make clear that an abuse of dominance may be either exclusionary – whereby the negative effect is on the competitiveness of the market itself – or exploitative – whereby the negative effect is more directly felt by the consumer. Of most relevance to dynamic pricing is the text at s18(2)(a) of the UK Act, which notes "directly or indirectly imposing unfair purchase or selling prices on other unfair trading conditions" as an example of abuse. Such behaviour is clearly exploitative rather than exclusionary, with unfair prices immediately affecting purchasing consumers.

Dynamic pricing itself is not listed under s18(2)(a). Where dynamic pricing leads to an "unfair purchase or selling price", there is clearly an abuse under s18. But this does not mean that dynamic pricing itself is necessarily exploitative. It is worth illustrating the point. Standing tickets for some of Oasis's shows were initially listed for £148 but sold for £355 after dynamic pricing. If the CMA concluded £355 to be "unfair(ly)" high, it would be an abuse of dominance. Importantly, the high price would be an abuse regardless of the increase, not because of it. However, if the CMA concluded that £355 was not itself an unfairly high price, but that it was unfair to respond to high demand with a price increase to that amount, then we could say that it is the dynamic pricing that is an abuse.

Therefore, there are at least two potential abuses for the CMA to explore: unfair pricing and dynamic pricing.

Unfair Pricing

Unfair pricing can be dealt with quickly in this post. As far back as 1975, the European Court of Justice held that pricing "excessive in relation to the economic value of the service provided" will be an abuse (*General Motors Continental NV v. Commission*). The position is the same in the UK, with the UK Court of Appeal holding that an abuse of dominance can be based entirely on a price-cost comparison (*CMA v. Flynn Pharma Ltd.* (paragraph 97)). Without detailed economic analysis of records not publicly available – though one would imagine Ticketmaster would submit such evidence to the CMA – it is impossible to conclude whether £355 for a standing ticket really is excessive for the purpose of the Chapter II prohibition. However, one might speculate that if Ticketmaster had initially been able to offer tickets at £148 and would have continued to do so had it not been for unexpected demand, then £148 would constitute a fair price. It follows that £355, being 139.865 percent more than the initial fair price, may be unfair.

Dynamic pricing

If a price of £355 is not itself unfair, what about the use of dynamic pricing to reach that price after a much lower initial listing price? Again, dynamic pricing is not explicitly listed as an abuse under either the EU treaties or UK legislation, but those lists are not exhaustive.

On the one hand, the Oasis situation appears to be a clear example of harm to consumer welfare that, crucially, would be unlikely to result from effective competition. In an open market, consumers would simply switch from Ticketmaster to an alternative platform that had not increased prices. Under Ticketmaster's monopoly, then, consumers are forced to pay whatever price is dictated to them when they reach the front of the digital ticketing queue.

This also raises a secondary issue of transparency. Initially advertised prices become inaccurate when dynamic pricing kicks in. A primary focus of the CMA investigation is whether "people were given clear and timely information to explain that the tickets could be subject to so-called 'dynamic pricing'", and whether consumers were aware of the prices tickets might reach. In a competitive market, consumers are likely to move away from undertakings whose prices change at checkout. Further, through its inherent absence of transparency, dynamic pricing risks pushing consumers to decisions they would not otherwise make. As the CMA notes, it is possible that "people were put under pressure to buy tickets within a short period of time – at a higher price than they understood they would have to pay, potentially impacting their purchasing decisions". In this way, dynamic pricing can have the effect of unfairly pressuring consumers into purchasing from the monopolist. Arguably, this transparency issue is larger than the price rise issue. Prices rising under dynamic pricing does not necessarily mean that prices reach a level that is harmful to the consumer; prices may, for example, increase by just £1. But consumers not being made aware of this possibility in advance is worrying.

Dynamic pricing, then, raises issues over excessive pricing and transparency. As a result, it may be the perfect opportunity for the CMA to follow through on trends in recent years of relying on abuse of dominance prohibitions to end exploitative practices. However, the CMA (in its press release) and the EU Commission (here) both appear at least a little hesitant to do so. Both have suggested that that these concerns do not lead to dynamic pricing being unlawful in and of itself. As is to be predicted following the CJEU's decision in *Intel* – although it seems the Commission may now be withdrawing slightly from the effects-based approach in *Intel* following its recent Draft Guidelines on Article 102 (see *Peeperkorn*'s recent analysis of the Guidelines here) – the authorities are likely

to adopt a case-by-case analysis of dynamic pricing.

This is sensible and there a few reasons why dynamic pricing ought not to be considered abusive *per se*.

First, and perhaps most obvious, is the fact that dynamic pricing can work to the benefit of the consumer. Just as prices increase during peak periods of demand, they can decrease during low periods of demand. Consumers, then, can enjoy lower prices on their flights and hotels during school term times, alongside discounts on chocolates and toys when the winter holidays have come to an end.

Second, the absence of transparency is not a necessary part of dynamic pricing. Just because one undertaking implements dynamic pricing without transparency, does not mean that all dynamic pricing must be done in the same way. Again, it is common knowledge that airlines and hotels rely on dynamic pricing. If dynamic pricing is transparent, consumers can make informed decisions and choose when to purchase based on price fluctuations. If Ticketmaster had advertised in advance the dynamic ticket prices and the likelihood of them being offered, consumers could decide in advance whether they would be comfortable paying the increased price, rather than being forced to decide with little time and notice.

Third, certain markets may be able to offer dynamic pricing in a way that is less detrimental to the consumer. The hotels market serves as a useful example. If a consumer is unhappy with a hotel being more expensive on a Saturday because of dynamic pricing, they might simply choose to go on a Wednesday instead. Likewise, they might choose to holiday in June rather than July. The availability of choice is less prevalent on other markets. With concert tickets there are often few dates to choose from, with many venues offering only one performance. In markets where consumers are already stripped of choice about what they are buying, potentially exploitative practices might be less tolerated.

Finally, it should be remembered that dynamic pricing can lead to price changes in response to factors other than demand. Admittedly, this is a bit of a strawman argument as far as the CMA investigation is concerned, because the issue with Ticketmaster's price increases is that they are allegedly based solely on demand. That noted, dynamic pricing can also be used to respond to increased costs. For example, raw materials might fluctuate in price, especially volatile commodities like oil. Dynamic pricing is less questionable when it merely reflects the increased costs of producing a good or providing a service.

Conclusion

A case-by-case approach to dynamic pricing appears to be the most sensible course of action. It is difficult to see how the specific pricing practices in relation to Ticketmaster and Oasis can be justified other than by arguing that we should respect free market forces entirely. Naturally, such an argument, if followed, removes the need for competition law at all. But with an increased emphasis on exploitative abuse in recent years, the CMA should take the opportunity to protect consumers from undertakings seeking maximum profit from their monopoly position. With increased enforcement powers due later this year via the Digital Markets, Competition and Consumers Act 2024 – including the possibility of fines of up to 10% of global turnover without court involvement – the CMA may indeed be looking to 'flex its muscles' in relation to

exploitative abuses. They should be slow, however, to make sweeping statements in relation to all dynamic pricing, recognising that its benefits may trump the cons in particular markets and under certain conditions.

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