

BRIEFING NOTE FOR EERSTE KAMER COMMISSIONS FOR ECONOMIC AFFAIRS AND JUSTICE

31461 - INITIATIEFVOORSTEL-JASPER VAN DIJK EN VAN TOORENBURG DOORVERKOOP TOEGANGSKAARTEN

Introduction

eBay is the world's largest online marketplace. eBay does not sell tickets, but provides a platform whereby buyers and sellers may trade such items (whether by auction format or by fixed price). Marktplaats – the number one online classifieds site in the Netherlands - is also part of the eBay group. Like eBay, Marktplaats does not sell tickets, but provides the platform where buyers and sellers can meet. The transaction takes place offline between buyer and seller and they determine the final price.

The Initiative from Mr Jasper Van Dijk and Ms Madeleine Van Toorenburg seeks to regulate the sale of tickets by businesses in the secondary market. As such, it applies an absolute price cap of no more than 20% on top of the original 'face value' of a ticket. Only business to consumer' (B2C) sales are regulated, and the Bill only applies to events in the Netherlands. For ticket sales below the 20% price cap, resale prices which are 'manifestly unfair' are not allowed.

While neither eBay nor Marktplaats sell tickets, we will be expected to respond to reports from third parties alleging illegal resales of tickets. As such, we have an interest in ensuring that any legislation in this area is clear and enforceable. More generally, we believe that secondary markets provide clear benefits to the consumer and should be regulated only where clear consumer harm is demonstrated. We are therefore opposed to price caps in principle.

Summary

We believe that the proposal offered by Mr Van Dijk and Ms Van Toorenburg is unclear, unfair and unworkable in practice. We are particularly concerned that a number of important amendments to the Bill (added only shortly before its final stages in the Tweede Kamer) have not been considered carefully. In short, we believe the Bill will have a number of important and negative consequences:

- *It will establish not just one price cap (20% above face value) but multiple price caps, depending on whether a court judges that the resale price was 'manifestly unfair'. This makes the Bill both unclear and unworkable in practice, since it will not be clear to buyers, sellers or third parties what constitutes a 'manifestly unfair' price. *This provision also appears to conflict with the terms of Article 4(2) of the EU Unfair Contract Terms Directive which states clearly that unfair contract terms should not relate to price.**

- The test of ‘manifest unfairness’ and price cap of 20% applies not only to the price of the ticket but also the total price of the ticket and *any item or service* with which it is sold. *This dramatically extends the scope of the original Bill and puts at risk the legitimate market in travel and hospitality packages, upon which the events industry, including the legitimate secondary market, depends. It also undermines attempts by resellers and online marketplaces to provide customer guarantees and payment intermediation services in relation to ticket sales.*
- The secondary market in tickets will simply be pushed either on to other parts of the Internet – or, as seems more likely – on to the streets. Considerable academic evidence from the US – based on similar regulation in US states - suggests that this will lead to higher prices as supply is then concentrated amongst a smaller number of ‘black market’ suppliers. Evidence from the UK in relation to football tickets suggests that even where unauthorised resale is prohibited by criminal law, enforcement remains weak and considerable black market activity will remain.
- As a result, consumers will no longer be able to benefit from the consumer protection offered by various websites such as eBay, Seatwave, Viagogo and others.

Policy Issues

eBay believes that a secondary market in tickets offers consumers a range of benefits. It enables fans with unwanted or spare tickets to resell their ticket in the absence of a refund from event organisers. And it also enables consumers to obtain last minute tickets to events which they would not otherwise have been able to attend. This is because the primary allocation mechanisms are often broken – e.g. websites crashing, phone lines jammed, sales windows at inconvenient times.

eBay further believes that prices in the secondary market should be determined by supply and demand. We are concerned that price regulation in such a competitive market would be a backward step in public policy terms and would in many cases lead to consumer detriment. *We believe that is important to defend the principle that the price of any item should be determined by what someone is prepared to pay for it, not by Government and not by the courts.* After all, government does not cap the price at which you can resell your car or your house. We see no sound economic reason why a ticket should be any different and we believe that a price cap of 20% may itself be unfair (see cost illustration below). In other areas, price caps may be justified in economic terms where the potential exists for monopoly providers to extract economic rent from consumers. However, by any standard, the secondary ticket market is highly competitive and should not be subject to price regulation any more than the primary market.

We note the critical comments which have already been expressed by the Dutch Council of State, the Dutch Consumer Authority, and both the Minister for Economic Affairs and the Minister for Justice, all of whom have questioned the need for such legislation.

The focus for legislators should be on consumer protection and ensuring that fans are protected from fraudulent ticket agents selling tickets which are not in their possession.

Finally, we believe that there are other ways of meeting the objectives of the Bill's sponsors in terms of promoting access to sporting and cultural events without recourse to legislation – by for example, improving the allocation process for tickets in the primary market (see below).

The 'Manifest Unfairness' Test

As a result of a late amendment in the Tweede Kamer, the Bill now establishes the test of 'manifest unfairness' in relation to ticket resale prices. As the Bill makes clear, in all cases a price of more than 20% above face value shall be considered to be 'manifestly unfair'. But the explanatory memorandum to the Bill also suggests that, in some circumstances, a mark-up of 10% or 12% over face value may also be considered to be manifestly unfair.

The Sponsors of the Bill suggest that this is based on the test of 'manifest unfairness' contained in Article 6:233 of the Dutch Civil Code. However, we would submit that Article 6:233 is concerned principally with unfair or onerous contract terms and should not be applied to the price of an item. *By replacing the price mechanism of free and competitive markets with the determination of a judge, we would argue that this Bill is setting a very dangerous precedent for other markets.*

The concept of 'unfair contract terms' may be reasonably applied to non-price related contractual terms where there is a significant imbalance of power between businesses and consumers. However, it is hard to see how any court could reasonably judge whether a price was fair or unfair, given that a consumer is free to decide whether or not to buy the ticket at the price offered. After all, a price which may seem 'manifestly unfair' to one consumer may appear perfectly reasonable to another.

Moreover, we note that there is no similar test applied either to the resale of tickets by consumers (as opposed to businesses), nor to prices in the primary market. For example, why should it be considered fair for an event organiser to charge €50 face value for one ticket, but unfair for a reseller to charge €20 for a ticket with €15 face value? In both cases, prices should be determined by what a consumer is prepared to pay for the ticket.

Compatibility with EU law?

Ministers have rightly questioned whether the Bill is consistent with EU law. We note for example, that Article 4(2) of the EU Unfair Contract Terms Directive is very clear that unfair contract terms should *not* relate to price:

“Assessment of the unfair nature of the terms shall relate neither to the definition of the main subject matter of the contract nor to the adequacy of the price and remuneration, on the one hand, as against the services or goods supplied in exchange, on the other, in so far as these terms are in plain intelligible language.” [Emphasis added]¹

We therefore believe there is a strong case for arguing that the application of the ‘manifest unfairness’ test to ticket prices is incompatible with EU law.

Moreover, Article 15(2)(g) of the EU Services Directive obliges Member States to examine “whether their legal system makes access to a service activity or the exercise of it subject to compliance” with “fixed minimum and/or maximum tariffs with which the provider must comply” [Emphasis added]².

Article 15(3) goes on to say:

3. Member States shall verify that the requirements referred to in paragraph 2 satisfy the following conditions:

(a) non-discrimination: requirements must be neither directly nor indirectly discriminatory according to nationality nor, with regard to companies, according to the location of the registered office;

(b) necessity: requirements must be justified by an overriding reason relating to the public interest;

(c) proportionality: requirements must be suitable for securing the attainment of the objective pursued; they must not go beyond what is necessary to attain that objective and it must not be possible to replace those requirements with other, less restrictive measures which attain the same result³.

We believe that price caps potentially fail all three tests required by the Services Directive to justify maximum tariffs: firstly, by discriminating unfairly against resellers in other countries who may face higher administrative costs (e.g. shipping) associated with both with the original purchase and ultimate resale of tickets; secondly, because both the Ministers of Economic Affairs and Justice and the Dutch Council of State have strongly questioned the necessity of legislation as opposed to self-regulation; and thirdly because we believe that the academic evidence from the University of Groningen suggests that the scale of the so-called problem is much lower than implied by the Bill’s sponsors (see below), and there are other less restrictive ways of promoting access to sporting and cultural events in the Netherlands.

¹ Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts

² <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32006L0123:EN:HTML>

³ *ibid*

Is the 20% Price Cap 'Manifestly Unfair'?

The Bill states clearly that *in all cases* a price of more than 20% above face value shall be considered to be 'manifestly unfair'. This price cap is not only arbitrary. It also fails its own test of 'manifest unfairness'. For example, one might frequently pay more than 20% in fees on top of the original face value in the primary market.

The attached cost illustration in Annex A shows how a consumer buying an €18 ticket via Ticket Service (a Ticketmaster company) may pay 27% in fees alone on a single ticket for a concert. It is worth stressing that these are just the fees incurred in the original purchase of the ticket. If someone then wants to sell these tickets on the secondary market, they may pay further fees (e.g. the costs of selling on an online marketplace, or selling on their own website) as well as shipping fees.

Indeed, in order to simply cover costs of purchase and onward sale, it is easy to see by means of this example how a mark-up of 38% would be perfectly reasonable and how a price cap of 20% would be 'manifestly unfair' since it would not even allow a reseller to recoup costs, never mind make a reasonable profit.

It is worth noting that shipping fees increase for international sellers. For this reason, a price cap arguably discriminates against international sellers, thereby failing the non-discrimination test.

Proportionality

We also believe that the Bill fails the test of 'proportionality' (i.e. the remedy is disproportionate to the scale of perceived problem). The Bill's Sponsors have claimed that as much as 20% of tickets are resold on the secondary market. However, a study by the University of Groningen dismisses such a claim and suggests that only 3.7% of tickets are resold⁴. This would suggest that the secondary market does not materially foreclose access to sporting and cultural events.

Enforcement Issues

Our experience from other jurisdictions has shown that bans or price caps do not work in practice. Attempts to drive the secondary market off one particular website simply push it on to other parts of the Internet, often outside the jurisdiction of the regulating authority. And any attempt to push it off the Internet as a whole simply forces fans to buy tickets from street scalpers, where there is no consumer protection if things go wrong.

While neither eBay nor Marktplaats sell tickets, we will be expected to respond to reports from third parties alleging illegal resales of tickets. As such, we have an interest in ensuring that legislation is clear and enforceable.

⁴ <http://www.rug.nl/feb/nieuws/archief/2009/091123CIC?lang=en>

It is worth emphasising that at any given time there may be over 800 million listings live to site on eBay worldwide. All of this content is user-generated and we do not create, edit or approve any listings.

eBay therefore cannot be an expert in all the items bought and sold on our site and we do not monitor for all listings on the site. eBay mainly depends on the reports of third parties – including our Community, Law Enforcement Agencies and Rights Owners to identify illegal listings.

Even with the help of third parties, enforcing the law in this instance would be virtually impossible given that the law is so unclear. We would invite Senators to consider the judgement that would need to be applied in the case of each and every report to online intermediaries like eBay or Marktplaats:

- First of all, our customer support teams would first have to assess whether the event was in the Netherlands. This is relatively straightforward to determine.
- However, they would then need to determine whether the seller was a consumer or a business (since there are no price caps in respect of 'consumer to consumer' sales). This is much harder in practice since there is no simple or straightforward definition as to what constitutes a business. In practice, simply making a profit or a capital gain is not sufficient to qualify a seller as a business. There are no clear rules under Dutch law as to what constitutes a business. Nor is it a simple task to look at volumes. Many fans may sell spare or unwanted tickets on a regular basis given that refunds are generally not offered by event organisers.
- Even if one has managed to establish whether or not a seller is a consumer or business, one then has to determine the face value. However, online intermediaries like eBay.nl and Marktplaats are unable to easily determine and verify the correct face value of a ticket.
- Ticket prices vary enormously not just between different events but also within the same event – e.g. Tickets in the 'Stalls' are usually more expensive than the 'Upper Circle'. Prices may vary over time depending on the tournament - e.g. prices for the final are more expensive than the group stages.
- Where tickets are sold directly in the primary market by auction (as is increasingly the case), or are subject to other forms of dynamic pricing (i.e. the price of a ticket varies over time), there may be no such thing as a fixed face value. Tickets for the Michael Jackson concerts at the London O2 (now cancelled due to the singer's untimely and tragic death) were for example sold by the event promoter, AEG, through www.viagogo.com at 'market prices' i.e. by auction.

- While we can ask sellers to specify face value and make this a mandatory field, we have no simple (or cost free) means of verifying the data provided to us.
- Even assuming one can establish the face value of the ticket, one then needs to add 20% manually to determine whether the price of the ticket was within the law. This is a time consuming and costly process: every time an eBay customer support representative has to review a listing, there is a cost associated with this. Other online intermediaries which do not have as much in the way of Customer Support would face more significant challenges.
- But this is not the end of the complexity. *In effect, there is not just one price cap but many.* This is because the new law establishes a principle of 'manifest unfairness'. While ticket prices of more than 20% in excess of face value are deemed to be always 'manifestly unfair', the Bill's sponsors clearly envisage that a court might find a mark-up of 10% or 12% to be manifestly unfair. *In short, the price caps vary on a case-by-case basis, depending on the judgement of a court. Under such a system, it becomes impossible for businesses to know how to enforce the terms of the proposed law.*
- Importantly, the price now cap also applies not just to the ticket but to any item or service sold in combination since the price increase must not be 'directly or indirectly manifestly unreasonable'. *This has the unintended consequence of making it impossible for legitimate operators to offer travel or hospitality packages.* For example, if a reseller bought a ticket for €50 face value, the maximum resale price allowed would be €60. That would allow an absolute maximum of €10 to cover not only the reseller's original costs (e.g. booking fees, shipping charges from the original event organiser), but also any further costs associated with resale. *It is therefore completely unrealistic to expect any reseller to offer corporate, travel or other hospitality packages. This is despite the fact that such hospitality generates considerable revenue for the events industry.*
- More generally, the Sponsors of the Bill ignore the fact that resellers increasingly offer buyer protection and other guarantees which may constitute a service sold in combination with a ticket. For example, consumers buying from a business seller on eBay and paying via PayPal are eligible for eBay Buyer Protection. Whilst the protection is provided by eBay rather than the seller, the seller pays for this (and other services such as traffic) via their eBay fees. If they cannot price the cost of these services into the overall resale price, consumers will lose these potential benefits. Other online ticket marketplaces like Seatwave or Viagogo offer their own services and ticket 'guarantees'. We believe that sellers should be allowed to incorporate the cost of offering these guarantees in their final sale price – yet the Bill as currently drafted prevents this.

Consumer Redress

Following strong criticisms from Ministers Van Der Hoeven and Ballin, the Sponsors of the Bill amended their original legislation. Yet they continue to propose statutory regulation without explaining properly how this will be enforced.

The original bill had proposed a role for the Consumer Authority. When the Consumer Authority and Ministers complained that this would require extra headcount of 3 full-time equivalents, the Sponsors seized on a proposal by EUSTA to establish a dispute resolution process via De Geschillencommissie. However, the original EUSTA proposal was based on a clear understanding that secondary ticket agents would only submit to the dispute arbitration process if there was no price cap involved. Given the Sponsors' insistence on a price cap, it seems inevitable that neither EUSTA nor secondary ticket agents will wish to proceed with the dispute resolution process. This means that consumers will only be able to pursue claims via the district courts. This will be a long and costly process for many consumers. While consumers may also resort to class actions, this is hardly a cost free route either.

Even in countries where resale of certain tickets is the subject of criminal law – e.g. in the UK where the unauthorised sale of football tickets is a criminal offence – enforcement is necessarily weak, given that law enforcement inevitably has higher priorities. UK Home Office statistics show that there are fewer than 30 prosecutions a year. As such, we believe it is inevitable that the trade in tickets will simply move to the streets where enforcement is necessarily weaker and consumer protection is absent.

Case Study: Football Tickets Legislation in UK

The case of the UEFA Champions League Final in 2007 demonstrates how restrictions on resale, even when backed up by the criminal law, simply push consumers in to the hands of black market street touts:

- The final was between Liverpool and AC Milan. Each club was given 17,000 tickets – in other words, just 34,000 tickets out of the 64,000 total ticket allocation went to fans from the two clubs.
- The unauthorised sale or resale of tickets is a criminal offence in England and Wales. eBay and other similar sites banned the sale of these tickets on their site. As a result, Liverpool fans found it hard to obtain legitimate tickets in the secondary market.
- We therefore saw Liverpool fans still turning up in Athens in huge numbers in the hope that they could buy them on the streets from locals, with reports suggesting that as many as 20,000 fans travelled without tickets. Press reports suggested that locals were selling tickets for over £1,700 and black-market prices for match tickets reached more than €5,000 for a single ticket.
- To feed this demand, fraudsters then created large numbers of fake tickets (with reports suggesting that as many as 5,000 circulating on the black market). Fans were then paying large

amounts of money for these tickets and obtaining entry to the ground. As a result, even fans with legitimate tickets were being denied entry to the ground because it was already full with fans who had entered with fake tickets.

- The end result was crowd trouble and genuine fans either paying over the odds for fake tickets, or being denied entry even if they had genuine tickets, and fans threatening legal action against UEFA after being turned away. For those fans who bought fake tickets and were denied entry, there was of course no consumer protection.
- So even where the full force of criminal law was in place to try and prevent resale of tickets, it proved unenforceable; fans were literally forced on to the streets to buy tickets, and were left with no consumer protection when they bought fakes. This is also a great example of where regulation made matters worse, and the solution to the problem lay in the hands of event organisers who could have ensured that demand from Liverpool and AC Milan fans was better matched with supply through more generous ticket allocations.

Reference:

<http://www.telegraph.co.uk/sport/football/2313927/Security-fears-over-fake-tickets.html>

<http://www.telegraph.co.uk/sport/football/2313898/Champions-League-final-Liverpool-v-AC-Milan.html>

<http://www.telegraph.co.uk/sport/columnists/henrywinter/2314316/Liverpool-fan-to-sue-Uefa-over-Athens-chaos.html>

<http://www.dailymail.co.uk/sport/football/article-453980/Liverpool-fury-Champions-League-final-ticket-freeze.html>

It is assumed that enforcement can work through partnership between online intermediaries like eBay and event organisers e.g. VVEM, VNPF. We have found from the UK that our interests are frequently divergent from those of promoters. Event organisers want to block the secondary market because (a) for events that are not sell outs, every sale on eBay equals less revenue for event organisers and (b) they want a world of authorised resale, whereby they would receive a revenue share for every ticket resold. We are therefore concerned that event organisers would over-reach in notifications. For eBay it is important that our users should have the right to resell spare tickets just as they are able to resell other unwanted items.

Unintended Consequences of Legislation

In addition to being unenforceable in practice, restrictions on the secondary market can be counter-productive. Experience from the US is instructive in this regard, with various academic studies finding that anti-scalping laws (preventing sales above face value) have actually led to increased prices in the secondary market:

“By focusing on penalties for those who engage in prohibited transactions, anti-ticket scalping regulations seem to lead to higher prices in the resale market. In states with resale regulations, competition in the resale market is reduced and is pushed towards out-of-state buyers whose costs of ticket acquisition are likely to be higher and are passed on to consumers in the resale market. The end result of this reduction in supply is higher ticket prices in the secondary market.”⁵

A study from the University of Texas found that anti-scalping laws increased prices in the primary market as well:

“Empirical analysis suggests that in cities with anti-scalping laws average per-game season ticket prices are approximately \$2 greater in baseball and \$10 greater in football. Anti-scalping laws actually increase team revenues, as the laws have no adverse effect on attendance. Thus event promoters might have sufficient pecuniary incentive to tacitly or explicitly support anti-scalping legislation.”⁶

Other academic studies have also heavily called into question the wisdom of anti-ticket scalping laws in the US⁷. Copies of these are attached.

Restrictions in the secondary market will do nothing to control demand. Nor will they alter the number of tickets available in the primary market. Ultimately, this can only be controlled at the level of the primary distributor. Instead, restrictions on the secondary market only serve to constrain the number of suppliers in the secondary market, thereby driving up prices.

Alternatives To Price Caps

We believe the most effective means of promoting access to major events is to focus on giving fans a fair and reasonable access to these tickets in the primary market. Once tickets enter into general circulation, it becomes impossible to try and regulate their flow. Instead, we believe policymakers should focus on the issue of tougher enforcement against street sales and fraudsters selling fake or non-existent tickets. These practices harm consumers and undermine the operation of a legitimate secondary market.

Specifically, we would propose the following measures both to boost access in the primary market and to boost consumer protection in the secondary market:

⁵ “Do Anti-Ticket Scalping Laws Make a Difference Online? Evidence from Internet Sales of NFL Tickets”, Dan Elfenbein, September 2004, University of California, Berkeley

⁶ “Another Look at Anti-Scalping Laws: Theory and Evidence”, University of Texas, June 2006.

⁷ “The Folly of Anti-Scalping Laws”, Stephen K Happel and Marianne M Jennings, Arizona State University, 1996; “The Economics of Ticket Scalping”, James Atkinson, University of Notre Dame, May 2004

Primary Market Measures

- Primary event organisers could adopt a dynamic pricing model, charging more for a given ticket at different times – similar to an ‘airline ticket’ model. This is to some extent already happening with event organisers auctioning off tickets in the first 8-10 rows.
- Tougher controls on the number of tickets to be made available to each customer. Limits on the number of tickets which can be bought at the original point of sale are increasingly common. However, not all ticket distributors operate these controls, and they are of varying degrees of technical sophistication.
- Release tickets in tranches, rather than in single allocations. This would make it easier for fans to get hold of tickets in the first place.
- Release tickets at times which are more convenient to ordinary fans e.g. at lunchtime, or in the evenings or at weekends.
- Offer better refunds. It is standard industry practice not to offer guaranteed refunds. This makes it more likely that fans with unwanted tickets will look to sell on the secondary market.
- Fewer corporate allocations. Primary market distributors frequently block off tens of thousands of tickets for major sporting events for corporate sponsors, hospitality packages and VIPs. These do far more than the secondary market to restrict supply. Even where these are used to subsidise lower ticket prices for everyone else, organisers could sell fewer tickets but charge more, thereby increasing the supply of tickets available.
- Better matching of demand with supply. For concerts, it is to some extent in the hands of artists and promoters which venues they choose to play, how many dates they choose to perform etc. Yet increasingly, there is a trend in the music industry for major artists to play smaller, more intimate venues, thereby restricting supply.

Secondary Market Measures

- Tougher penalties/increased fines for street sales of tickets.
- Tougher enforcement against websites/agents claiming to be official ticket distributors. There are existing powers under the Unfair Commercial Practices Directive to deal with these issues.
- Tougher enforcement against websites/agents claiming to sell tickets for ‘sold out’ events which are not ‘sold out’. There are existing powers under the Unfair Commercial Practices Directive to deal with these issues.
- Tougher enforcement against websites/agents selling tickets they don’t have. eBay and other websites could work in partnership with promoters to remove listings for events where either the dates haven’t been announced, or the tickets have not been made available via public sale, fan clubs, debentures or any other means.

Conclusion

In conclusion, the secondary market existed long before the Internet and will still exist even post legislation. The issue for policy makers is therefore not whether the secondary market should exist. It is about what sort of secondary market they want. We believe that an open, competitive, transparent secondary market with consumer protection will serve consumers best.

We have serious concerns about the enforceability of the Bill as drafted and note that various academic studies from the US demonstrate that price caps lead to higher prices by concentrating the trade in tickets within a small number of recalcitrant street traders who are able to charge higher margins, with no protection for consumers.

In light of the concerns expressed above, we would urge the sponsors of the Bill to reconsider whether a legislative solution is the best means of achieving their objective of promoting access to sporting and cultural events, and stand ready to work with them to develop an alternative set of measures designed to improve access in the primary market and consumer protection in the secondary market.

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