



Broadcasting Decision CRTC 2022-31

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Reference: Part 1 application posted on 24 July 2020

Ottawa, 11 February 2022

TELUS Communications Inc.

Various locations across Canada

Public record for this application: 2020-0428-2

Complaint by TELUS Communications Inc. against TLN Media Group alleging undue preference and disadvantage

The Commission finds that the dispute between TELUS Communications Inc. (TELUS) and TLN Media Group (TMG) relates primarily to an impasse in contractual negotiations. The Commission considers that the undue preference framework is not the appropriate vehicle through which to address such an impasse. Accordingly, the Commission **dismisses** TELUS's undue preference and undue disadvantage complaint regarding the negotiations for the distribution of TMG's third-language service Mediaset Italia.

The Commission also finds that TMG is not in breach of sections 5(a), 5(d) or 5(e) of the Wholesale Code. Accordingly, the Commission **dismisses** the complaint by TELUS regarding TMG's purported breaches of the Wholesale Code.

Parties

1. TELUS Communications Inc. (TELUS) operates broadcasting distribution undertakings (BDUs) serving various locations in Alberta, British Columbia and Quebec.
2. TLN Media Group (TMG) is the licensee of a number of licensed national, discretionary television programming services. This includes the English-language ethnic service TLN (formerly Telelatino) and third-language services EuroWorld Sport, Mediaset Italia (Mediaset) and Univision Canada. TMG also operates exempt third-language discretionary television services TGCOM24 Canada, Telebimbi and TeleNiños.

Background

3. Under section 27 of the *Broadcasting Distribution Regulations* (BDU Regulations), for each non-Canadian third-language service that it offers, a BDU is required to offer at least one Canadian third-language service in the same principal language, if one is available (1:1 rule).
4. For many years, TELUS met its obligations under the 1:1 rule by distributing RAI Italia alongside TMG's TLN programming service, which included Italian-language programming. Over time, TLN became an English-language service and its distribution no longer contributed to TELUS meeting the 1:1 rule requirements. Subsequently, TELUS sought to

cease distributing TLN and filed a request to lift the standstill in respect of the distribution of TLN, which was approved by the Commission on 25 October 2019. On 30 October 2019, TELUS sent a letter to TMG terminating the agreement for carriage of TLN, and ceased to distribute the service shortly after.

5. Following the termination of the agreement for the carriage of the TLN service, TELUS sought to distribute some of TMG's third-language services, including the Italian-language programming service Mediaset. TELUS has since been trying to secure carriage of Mediaset, in part, to fulfill its obligations under the 1:1 rule.
6. However, since then, the parties have been engaging in challenging negotiations. TELUS is dissatisfied with TMG's proposals for a wholesale rate for the programming service Mediaset and TMG is pursuing a relaunch by TELUS of its flagship programming service TLN by making rate offers for Mediaset that would incent the carriage of TLN.

Complaint

Undue preference

7. On 17 July 2020, TELUS filed an application alleging undue preference and disadvantage against TMG, pursuant to section 11 of the *Discretionary Services Regulations* (DS Regulations), which reads as follows:

11(1) A licensee shall not give an undue preference to any person, including itself, or subject any person to an undue disadvantage.

(2) In a proceeding before the Commission, the burden of establishing that any preference or disadvantage is not undue is on the licensee that gives the preference or subjects the person to the disadvantage.

8. In its application, TELUS stated that it has faced significant difficulties negotiating with TMG to carry Mediaset in a package subsequent to the termination of the agreement to carry TLN.
9. TELUS stated that TMG originally encouraged the acquisition of multiple of its services, including its primary service TLN, as part of a third-language package, but when TELUS sought to obtain a packaged rate for Mediaset alone, TMG demanded a rate that TELUS considered unreasonable. As such, TELUS alleged that TMG is preferring its own programming services over those of other broadcasters by offering an unreasonable packaged rate for its Mediaset service that limits TELUS's ability to provide a package of Italian-language services in a commercially viable manner.
10. TELUS noted that, as the primary operator of Canadian-owned Italian-language programming services in the Canadian market, TMG is in a privileged position as its services allow BDUs to meet regulatory requirements with regard to third-language programming (including the 1:1 rule). Consequently, TELUS alleged that TMG subjected it to an undue disadvantage and impaired its ability to comply with the 1:1 rule by demanding an unreasonable rate for its Mediaset service.

11. Furthermore, TELUS alleged that efforts to engage in mediation with TMG have proven ineffective, despite requests from TELUS and repeated expressions of willingness and desire from TMG to engage in such a process.
12. Therefore, TELUS requested the Commission find that TMG is subjecting it to an undue preference and disadvantage under section 11 of the DS Regulations and that the Commission order TMG to comply with the regulations in its negotiations with TELUS.

Non-compliance with the Wholesale Code

13. The Wholesale Code, as set out in the appendix to Broadcasting Regulatory Policy 2015-438, governs certain aspects of the commercial arrangements between BDUs, programming undertakings, and exempt digital media undertakings. It ensures that subscribers have greater choice and flexibility in the programming services they receive, that programming services are diverse, available and discoverable on multiple platforms, and that negotiations between programming services and BDUs are conducted in a fair manner.
14. In its application, TELUS also alleged that TMG has breached sections 5(a), 5(d) and 5(e) of the Wholesale Code. Specifically, TELUS alleged that TMG has breached:
 - Section 5(a) by demanding a rate that restricts TELUS's ability to package Mediaset with other programming services;
 - Section 5(d) by attempting to impose on TELUS the tied-selling of Mediaset and other TMG-owned services; and
 - Section 5(e) by restricting TELUS's ability to provide more choice in third-language programming to its subscribers.
15. Therefore, TELUS requested that the Commission order TMG to comply with the requirements of the Wholesale Code in its negotiations with TELUS.

TMG's answer

16. In its answer, TMG noted the relative size, power and financial strength of the parties involved and the extreme financial pressure it is experiencing, especially since the COVID-19 pandemic, which resulted in a decline of over 30% of its advertising revenues.
17. TMG also stated that TELUS's claims of breaches of certain sections of the Wholesale Code are without merit and that the rate card provides for standalone and packaged rates that include both TLN and other TMG third-language services.
18. TMG further argued that the rates proposed for Mediaset since 2017 are lower than what TELUS pays for both TLN and Univision Canada. TMG also considered that the rates proposed are commercially reasonable, with the reference point consisting of TELUS's retail rates for a dozen foreign-language services that it offers, which are higher than TMG's proposed rates.

19. TMG further stated that TELUS has failed to provide transparency as to the subscriber levels on proposed packages, the channels forming any package, and the relative strength of those channels compared to TMG's channels.

Interventions

20. The Commission received two interventions in opposition to TELUS's complaint and one joint intervention in opposition to the complaint.

Intervention by the Public Interest Advocacy Centre

21. In its intervention, the Public Interest Advocacy Centre (PIAC) noted the financial profiles of both involved parties, depicting TELUS as a dominant entity and TMG as a small, independent player.
22. The intervener also argued that there are deficiencies in the evidence submitted by TELUS and considered that TELUS's inability to force TMG to accept terms that TMG considered unreasonable should not permit TELUS to use the Commission as its enforcer.
23. In PIAC's view, if the Commission finds that TMG has conferred an undue preference and disadvantage, it will set a precedent, in that any BDU will not be prevented from declining to renew affiliation agreements with programming services on the alleged ground of the programming services' unreasonable terms and asking the Commission to order the programming service to provide more advantageous terms to the BDU.

Intervention by Iristel Inc.

24. In its intervention, Iristel Inc., on behalf of itself and its affiliate, Iristel TV Inc. (hereafter Iristel¹), argued that it appears that TELUS is attempting to use a regulatory mechanism to obtain an outcome that it should be able to achieve through a commercial negotiation.
25. Iristel noted the parallel with another dispute between Ebox Inc. and Bell Media Inc. set out in Broadcasting Decision 2018-56, where, in its view, the Commission determined that unfavourable results stemming from commercial negotiations did not meet the threshold of undue preference or undue disadvantage.
26. Iristel also noted that TELUS claimed that TMG is the primary operator of Canadian-owned Italian-language programming, but did not state that it is the only operator of such programming. In Iristel's view, TELUS must demonstrate that it has been unable to obtain Canadian-owned Italian-language programming from any other content provider in order to demonstrate that it has been subject to undue disadvantage.
27. It further stated that even if TMG was the only service that can provide Canadian-owned Italian-language programming, TMG has not denied TELUS its service, but simply set a rate

¹ Iristel operates exempt BDUs in Quebec and Ontario.

that TELUS does not agree with. Therefore, Iristel considered that TELUS cannot claim that TMG's conduct constitutes undue disadvantage.

Joint intervention from multiple organizations

28. The Commission received a joint intervention in opposition to the present application consisting of multiple letters from the National Congress of Italian-Canadians, Latincover, ITAL PRESS LTD. and Violet Chronicle Entertainment Inc.
29. In this joint intervention, the interveners stated their opposition to the present application as well as TELUS's request to have the standstill rule relating to TELUS's carriage of the TLN service lifted by the Commission.

TELUS's reply

30. In its reply, TELUS noted that Iristel only provided high-level speculative comments that TELUS is attempting to use a regulatory mechanism to obtain an outcome that should have been achievable through a commercial negotiation. TELUS is of the view that the public record along with the comments in its reply is sufficient to rebut all arguments raised by both PIAC's and Iristel's interventions.
31. TELUS also noted that none of the letters filed by the various organizations in support of TMG addressed issues relevant to the present application, and instead focused on the standstill rule relating to TELUS's carriage of the TLN service.
32. In response to TMG's answer, TELUS argued that the relative size of the parties is not a relevant factor in this situation and that the Commission's undue preference rules and the Wholesale Code do not cease to apply when one party is larger than the other. It also added that TMG's conduct, which gave rise to the present application, occurred prior to the pandemic, a situation that has since affected all broadcasters.
33. TELUS also argued that TMG's answer contains a misleading assertion that the rate card that it sent provided standalone and packaged rates for its services, when in fact, the rate card provided packaged rates for pre-assembled packages consisting of TMG's services only. While it's permissible for TMG to use these pre-assembled packages as incentives, it is not permissible for TMG to refuse to provide packaged rates for each service on its own.
34. Furthermore, TELUS argued that TMG's comment on its retail rates for foreign-language services it offers is irrelevant as the unreasonable rate that is the core of the present application is the packaged wholesale rate for Mediaset demanded by TMG.
35. TELUS also submitted that TMG failed to provide any explanation or justification on the breach of sections 5(a), 5(d), and 5(e) of the Wholesale Code.
36. TELUS reiterated that it considers that TMG enjoys the leverage of being, as it itself claimed, "the main entertainment source for multicultural audiences looking for Italian and/or Spanish themed programming" in Canada, and therefore exercises significant market power in connection with Canadian third-language services, which enables it to act as a gate-keeper for

carriage of foreign third-language services in Canada, to extract unreasonable rates from BDUs and to confer an undue preference on its own services.

37. In TELUS's view, such behaviour undermines the Commission's policy objectives behind the linkage rules for third-language services, which have always been to expand the diversity and choice available to under-served third-language communities, while also providing a measure of support for Canadian third-language services.

Commission's analysis and decision

Undue preference and disadvantage

38. Subsection 11(1) of the DS Regulations provides that a licensee shall not give an undue preference to any person, including itself, or subject any person to an undue disadvantage. This provision was put in place to address situations where one party uses its position to provide an advantage to itself or another party at the expense of another. Initially, the purpose of the undue preference framework, as applied to distributors, was to address the possibility that a dominant or incumbent distributor could acquire access to a programming service under terms and conditions that were significantly advantageous to itself, or with a price differential that is not reasonably cost-justified. However, the Commission also acknowledged that a difference in the costs of providing programming does not in and of itself constitute an undue preference. This framework was also extended to programming services, as such services could also be in a position to unduly benefit from their market position.
39. Using one's dominant position to disadvantage another player by preventing it from getting access to programming or, in the inverse, limiting its ability to get its programming distributed unless it accepts unfavourable terms or conditions could be regarded as conferring an undue preference or disadvantage. However, an undue preference complaint is not a mechanism by which tough negotiating positions related to rates or terms of carriage may be addressed during ongoing negotiations, absent any indication of dissimilar treatment of comparable services. The Commission has indicated on many occasions that parties should do everything possible to reach a resolution to their contractual disputes prior to seeking the Commission's intervention, including prior to filing an undue preference complaint.
40. In the Commission's view, the present dispute is primarily contractual in nature (relating to an impasse in negotiations) and, while the parties may be entrenched in their positions, there is nothing that suggests these positions are intractable or that elevates the situation to one in which TELUS would be unduly disadvantaged by TMG's bargaining position.
41. TELUS's claim regarding undue preference and disadvantage is based on the premise that TMG is insisting on unreasonable rates for the distribution of Mediaset as TELUS considers that TMG's proposed rate structure for Mediaset restricts TELUS's ability to package it with other programming services. TELUS submitted that TMG's bargaining position therefore prevents TELUS from complying with its 1:1 rule obligations as set out in the BDU Regulations.
42. The fact that TELUS has a regulatory requirement which carrying Mediaset would fulfill does strengthen TMG's bargaining position, but it does not in and of itself put TMG in a position

to unduly disadvantage TELUS. Should TELUS be concerned with its ability to comply with the 1:1 rule due to an inability to conclude an agreement, it could seek an agreement with another programming service if one is available, cease distribution of the non-Canadian third-language service that it offers, or it could apply for a condition of licence exempting it from its regulatory obligations related to the 1:1 rule in respect of the particular non-Canadian third-language service. Accordingly, the Commission is of the view that TELUS has other options at its disposal to address its concerns regarding compliance with the 1:1 rule.

43. The Commission considers that undue preference is not the appropriate mechanism by which to raise issues related to a party's inability to fulfill a regulatory obligation due to difficulty reaching a commercial arrangement, nor is it the appropriate mechanism by which to break an impasse in negotiations.
44. Furthermore, the Commission notes that TMG has participated in negotiations with TELUS since the beginning of this dispute. This reflects a willingness on the part of TMG to negotiate with TELUS. Should the parties need assistance in resolving a negotiation dispute related to carriage of programming, the Commission reminds the parties that Commission dispute resolution mechanisms, such as staff-assisted mediation and final-offer arbitration, are available to the parties.
45. In light of the above, although TELUS has framed this application in undue preference, the Commission finds that the core of TELUS's complaint reflects difficulties in reaching a commercial agreement in the course of an ongoing negotiation. Fundamentally, TELUS wishes to distribute certain TMG services, but the two parties cannot agree on the rate and terms for the service. The Commission finds that the issues raised are contractual in nature and are typical of this type of negotiation. Parties should not be permitted to use the undue preference framework to further their position in negotiations. Accordingly, the Commission finds that this application is not an appropriate use of the undue preference framework. Consequently, the Commission **dismisses** TELUS's complaint.

Non-compliance with the Wholesale Code

Non-compliance with section 5(a) of the Wholesale Code

46. TELUS argued that TMG is demanding a rate that restricts its ability to package Mediaset with other programming services, which it claimed to be contrary to section 5(a) of the Wholesale Code.
47. Section 5(a) of the Wholesale Code reads as follows:

A programming undertaking, BDU, or exempt digital media undertaking shall not require that a party accept terms or conditions for the distribution of programming that are commercially unreasonable, such as:

requiring an unreasonable rate (e.g., not based on fair market value)

48. While section 5(a) of the Wholesale Code clarifies "unreasonable" as not being based on fair market value, the Commission notes that it would be difficult for the Commission to assess

whether the packaged rate proposed by TMG for the Mediaset service is in fact unreasonable based on the information provided.

49. TELUS's argument hinged largely on the fact that, should it agree to TMG's proposal, it would only have a restricted margin to both pay for other programming services included in the package and make a profit, thus not making it viable.
50. The Commission notes that there is insufficient evidence on the record of this proceeding to determine that TMG's proposal was unreasonable based on what should be commonly understood as the fair market value of Mediaset.
51. In light of the above, the Commission finds that TMG has not violated section 5(a) of the Wholesale Code in the context of its negotiations with TELUS for the distribution of Mediaset in a package of programming services.

Non-compliance with section 5(d) of the Wholesale Code

52. TELUS argued that TMG is attempting to impose on TELUS the tied-selling of Mediaset and two other TMG-owned Italian-language services, which it claimed to be contrary to section 5(d) of the Wholesale Code.

53. Section 5(d) of the Wholesale Code reads as follows:

A programming undertaking, BDU, or exempt digital media undertaking shall not require that a party accept terms or conditions for the distribution of programming that are commercially unreasonable, such as:

requiring the acquisition of a program or service in order to obtain another program or service (tied-selling);

54. TELUS submitted that the rate card provided by TMG only provided packaged rates for pre-assembled packaging.
55. While the Commission considers it clear that TMG was creating an incentive for BDUs to opt for its preferred packaging model and that it has been strongly pushing for TELUS to carry its TLN service, the record indicates that TMG did offer a packaged rate for Mediaset outside of a pre-assembled package and therefore without tied-selling over the course of the negotiations.
56. The Commission also notes that there is no evidence on the record of this proceeding to demonstrate that TMG has required the acquisition of another service in order to obtain Mediaset and thus engaged in tied-selling practices.
57. In light of the above, the Commission finds that TMG has not violated section 5(d) of the Wholesale Code in the context of its negotiations with TELUS for the distribution of Mediaset in a package of programming services.

Non-compliance with section 5(e) of the Wholesale Code

58. TELUS argued that TMG is restricting its ability to provide more choice in third-language programming to its subscribers, which it claimed to be contrary to section 5(e) of the Wholesale Code.

59. Section 5(e) of the Wholesale Code reads as follows:

A programming undertaking, BDU, or exempt digital media undertaking shall not require that a party accept terms or conditions for the distribution of programming that are commercially unreasonable, such as:

imposing unreasonable terms and conditions that restrict the ability of a BDU to provide consumer choice

60. The Commission notes that the intention of this provision is to prevent programming services from insisting on terms to their own benefit that might be to the detriment of choice and flexibility. While TMG has persistently sought to get TELUS to package TLN in a manner that TMG would find satisfactory, it did offer a packaged rate for Mediaset that does not involve any other of its services. In the Commission's view, the information on the record does not demonstrate that TMG's offer is unreasonable nor that TMG's position was immovable. Based on the record of the proceeding, further negotiations or mediation could possibly lead to new proposals from TMG with a more balanced margin for TELUS.

61. As expressed in the Wholesale Code, the Commission considers that a healthy and dynamic wholesale market is one in which risk and reward are shared between BDUs and programming services, striking a fair balance between allowing BDUs to provide their subscribers with more choice and flexibility and ensuring reasonable and predictable levels of revenue for programming services. In the Commission's view, the information on the record relating to this dispute as a whole demonstrates that TMG's actions do not disrupt this balance. As such, the Commission considers that the evidence on the record does not support a finding that TMG is in breach of section 5(e) of the Wholesale Code.

62. In light of the above, the Commission finds that TMG is not in violation of section 5(e) of the Wholesale Code, given the specific circumstances in which TELUS is seeking to package Mediaset.

63. Despite the fact that the evidence does not support a finding that TMG is currently in breach of section 5(e) of the Wholesale Code or that its proposed rate structure is restrictive specifically in the circumstances of its negotiations with TELUS, the Commission expects both parties to negotiate fairly, in a manner that follows the Wholesale Code, including section 5(e).

Reminders on matters raised in the present application

64. The Commission considers that the matters raised in this application are of a commercial nature and would have been more appropriately dealt with in the context of the parties' ongoing negotiations, where the parties could have resolved the dispute bilaterally or with the

help of mediation. While parties can call on the Commission to facilitate the resolution of complaints, the Commission generally expects parties to make reasonable efforts to resolve their disputes before bringing such matters to the Commission for disposition.

65. The Commission notes that there are resources made available for the purpose of assisting parties in unsuccessful negotiations, which would have been more appropriate mechanisms in this instance. These resources include:
- Staff-assisted mediation, which is a confidential dispute resolution process, where the Commission staff helps parties come to a mutually acceptable resolution; and
 - Final offer arbitration, which is a public process, reserved exclusively for disputes that are monetary, and results in a binding decision.
66. Furthermore, the Commission notes that where parties wish to allege breaches of the Wholesale Code, it is incumbent on them to provide the necessary evidence to substantiate their claims.
67. In regard to the issue of tied-selling, the Commission considers it appropriate to provide a reminder that tied-selling is considered an unreasonable business practice in negotiations between broadcasters. However, as per the Wholesale Code, nothing prevents a programmer from offering bundled rates to incent the carriage of their services by BDUs.

Related documents

- *Complaint alleging Bell Media Inc's refusal to provide certain of its programming services*, Broadcasting Decision CRTC 2018-56, 12 February 2018
- *The Wholesale Code*, Broadcasting Regulatory Policy CRTC 2015-438, 24 September 2015
- *Interpretation of the Wholesale Code*, Broadcasting Information Bulletin CRTC 2015-440, 24 September 2015