



Broadcasting Notice of Consultation 2023-140

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Call for comments – Review of exemption orders and transition from conditions of exemption to conditions of service for broadcasting online undertakings

Summary

On 27 April 2023, the *Online Streaming Act* came into force. This Act includes, among other things, amendments to the former *Broadcasting Act* that account for the impact that Internet audio and video services have had on the Canadian broadcasting system. The current *Broadcasting Act* provides the Commission with clear powers and tools to, among other things, regulate online audio or video undertakings operating in whole or in part in Canada, regardless of their country of origin.

Pursuant to the former *Broadcasting Act*, in order to operate in whole or in part in Canada, a broadcasting undertaking needed to either be licensed or be exempted from the requirement to hold a licence. Online audio and video undertakings were able to operate in Canada pursuant to an exemption order. Pursuant to the current *Broadcasting Act*, online audio and video undertakings can operate in Canada without a licence or pursuant to an exemption.

In this public proceeding, the Commission is examining whether there is a need to amend, replace or repeal the current exemption orders for online audio and video undertakings. It is also examining whether there is a need to transition to new regulatory requirements (conditions of service) that would replace certain of the conditions of exemption that were previously set out in those exemption orders and to whom those conditions of service should apply.

The Commission is calling for comments on these questions, as set out in the present notice of consultation. The Commission will accept comments that it receives on or before **12 June 2023**. Only parties who file comments may file a reply to matters raised during the comment period. Replies must address only the issues raised during the comment period. The deadline for the filing of replies is **27 June 2023**. All parties who file comments will also have the opportunity to file a final reply to any replies received. The deadline for the filing of final replies is **12 July 2023**.

Today, the Commission has also launched a proceeding in regard to proposed *Online Undertakings Registration Regulations* and a related proposed exemption order (Broadcasting Notice of Consultation 2023-139). Interested persons should note that each of these notices of consultation initiates a separate proceeding, and that they must file comments on the record of each proceeding in which they would like to participate. Given certain common elements between the various proceedings, interested persons should monitor the developments of each proceeding.

Background

1. On 27 April 2023, the *Online Streaming Act* came into force.¹ This Act includes, among other things, amendments to the former *Broadcasting Act* that account for the impact that Internet audio and video² services have had on the Canadian broadcasting system. The current *Broadcasting Act* provides the Commission with clear powers and tools to, among other things, regulate online audio and video undertakings (online undertakings) operating in whole or in part in Canada, regardless of their country of origin. As set out in the current *Broadcasting Act*, “online undertaking” means “an undertaking for the transmission or retransmission of programs over the Internet for reception by the public by means of broadcasting receiving apparatus.”
2. Pursuant to subsection 2(1) of the current *Broadcasting Act*, the definition of “broadcasting undertaking” now includes an online undertaking.
3. Pursuant to subsection 32(1) of the former *Broadcasting Act*, in order to legally operate in whole or in part in Canada, a broadcasting undertaking was required to either be licensed by the Commission or be exempted from the obligation to hold a licence by way of an applicable exemption order. However, subsection 31.1(2) of the current *Broadcasting Act* provides that a person may carry on an online undertaking without a licence and without being so exempted.
4. While online undertakings may now lawfully operate in Canada without being licensed or exempt, the Commission is able to regulate such undertakings via regulations or via a new order-making power, set out in section 9.1 of the current *Broadcasting Act*. Conditions of service constitute a flexible tool that can be imposed following a public proceeding. They can apply to a particular undertaking, a class of undertakings, or all undertakings.
5. Prior to the amendments to the current *Broadcasting Act* coming into force, digital media broadcasting undertakings (DMBU), which include online undertakings, operated in accordance with the Exemption order for digital media broadcasting undertakings (the DMEO), set out in the appendix to Broadcasting Order 2012-409. In addition, certain video-on-demand (VOD) undertakings operated pursuant to the exemption order for VOD undertakings (VODEO) (Broadcasting Order 2015-356, set out in Appendix 1 to Broadcasting Regulatory Policy 2015-355). In both cases, the Commission issued these orders pursuant to subsection 9(4) of the former *Broadcasting Act* and exempted these undertakings from all requirements, including licensing obligations, of Part II of the former *Broadcasting Act*, provided that they complied with all applicable conditions of exemption. However, given that online undertakings do not require a licence to operate in Canada, the DMEO and VODEO no longer appear to be the appropriate tools for regulating these undertakings.

¹ *An Act to amend the Broadcasting Act and to make related and consequential amendments to other Acts*, SC 2023, c 8.

² The term “video” is used in this notice of consultation, whereas the term “audio-visual” is used in the amended *Broadcasting Act*.

Maintaining oversight over relevant online undertakings

6. It is the Commission's view that some basic regulatory oversight for online undertakings should be maintained until the numerous issues that will need to be dealt with in the transition to the current *Broadcasting Act* can be more fully addressed. Such oversight would serve to ensure symmetry between online undertakings and licensed broadcasters in respect of requirements set out in the current exemption orders, such as the prohibition on giving an undue preference, and the requirement to provide basic information to the Commission.
7. In light of the above, the Commission is seeking comments on the following issues:
 - the need to amend, replace or repeal current exemption orders for undertakings that would count as online undertakings under the current *Broadcasting Act*; and
 - the need for an order, pursuant to subsection 9.1(1) of the current *Broadcasting Act*, to impose certain conditions on online undertakings, and the content of the order.

Amending, replacing or repealing current exemption orders

Exemption order for digital media broadcasting undertakings

8. The DMEO covers undertakings that provide broadcasting services that are either delivered and accessed over the Internet, or that are delivered using point-to-point technology³ and received by way of mobile devices. Undertakings that wish to operate pursuant to the DMEO must comply with the following conditions of exemption:

General

- Provision 3: The undertaking does not give an undue preference to any person, including itself, or subject any person to an undue disadvantage. In any proceeding before the Commission, the burden of establishing that any preference or disadvantage is not undue is on the party that gives the preference or subjects the person to the disadvantage.
- Provision 4: The undertaking submits such information regarding the undertaking's activities in broadcasting in digital media, and such other information that is required by the Commission in order to monitor the development of broadcasting in digital media, at such time and in such form, as requested by the Commission from time to time.

³ "Point-to-point" is a broad term that encompasses multiple types of technologies. It could refer to a wireless data link, connectivity through a local network, or a client-server connection. The reference to point-to-point technology was meant to cover older, now largely defunct technology.

Exclusivity

- Provision 5: Subject to paragraph 6, the undertaking does not offer television programming on an exclusive or otherwise preferential basis in a manner that is dependent on the subscription to a specific mobile or retail Internet access service.
- Provision 6: The undertaking does not acquire, exercise, renew or otherwise extend rights to television programming on an exclusive or otherwise preferential basis unless:
 - a) the undertaking is not prevented, directly or indirectly, from making that television programming available to subscribers of all service providers providing access to the same platform over which the undertaking broadcasts the programming; or
 - b) such rights were acquired prior to 8 March 2011 and such rights are not exercised further to an extension of contractual term, by renewal or otherwise, taking effect after 7 March 2011.

Anti-competitive head start

- Provision 7: An undertaking that has acquired exclusive rights to television programming from a new programming service shall, when ready to provide access to that programming in a manner that restricts access based on a consumer's subscription to a specific mobile or retail Internet access service, make all television programming from that new programming service to which it itself provides access available to all other undertakings operating over the same broadcasting platform that have communicated an intent to provide access to the television programming, notwithstanding the absence of a commercial agreement.
- Provision 8: For the purposes of paragraph 7, if the television programming is provided by one undertaking to another in the absence of a commercial agreement, it is subject to the terms of carriage determined by the former until a commercial agreement is reached between the parties or the Commission renders a decision concerning any unresolved matter.

Obligation during dispute

- Provision 9: If there is a dispute concerning the carriage or terms of carriage of programming or concerning any other right or obligation under the *Broadcasting Act*, the undertaking shall continue to provide access to the programming services on the same terms of carriage as it did before the dispute [the standstill rule].
- Provision 10: For purposes of paragraph 9, a dispute exists from the moment that written notice of the dispute is provided to the Commission and served on the other undertaking that is party to the dispute and ends when an agreement settling the dispute is reached by the undertakings or, if no such agreement is reached, when the Commission renders a decision concerning any unresolved matter.

Dispute resolution

- Provision 11: If there is a dispute concerning any aspect of the terms of carriage, one or both of the undertakings to the dispute may refer the matter to the Commission for dispute resolution and the undertakings to the dispute submit to any decision that may result therefrom.
- Provision 12: If the Commission accepts a referral of a matter for dispute resolution, the undertaking submits to participation in a mediation before a person appointed by the Commission
- Provision 13: Where the undertaking provides another undertaking with access to television programming in the absence of a commercial agreement and the matter proceeds before the Commission for dispute resolution, the undertaking submits to:
 - a) having the dispute resolved as provided for in *Practices and procedures for staff-assisted mediation, final offer arbitration, and expedited hearings*, Broadcasting and Telecom Information Bulletin CRTC 2009-38, 29 January 2009, as amended from time to time; and
 - b) the terms of carriage established by the Commission as of the date the programming was first made available to the relevant undertaking absent a commercial agreement and on a going-forward basis for the contractual term established by the Commission.
- Provision 14: For greater certainty, nothing in paragraphs 11 or 13 prevents parties from reaching an agreement with respect to rates, terms or conditions that differ from those established by the Commission.
- Provision 15: During dispute resolution, the undertaking submits to produce and file such additional information as may be requested by the Commission or any individual named by the Commission to act as a mediator in a given dispute.

Exemption order for video-on-demand undertakings

9. As noted in Broadcasting Regulatory Policy 2015-355, VOD undertakings had historically (i.e., prior to 2015) been offered as broadcasting distribution undertaking (BDU)-specific undertakings operating under a VOD licence; as undertakings operated by smaller, independently owned BDUs under the exemption order for small VOD undertakings (Broadcasting Order 2011-60); or as online video undertakings operating under the DMEQ.
10. BDU-operated VOD undertakings are subject to specific requirements relating to the provision of Canadian programming that are similar to those for licensed programming services, as well as requirements regarding the availability of exclusive content. The intent of such requirements is to avoid situations where consumers must subscribe to a particular BDU or to more than one BDU to access exclusive programming.

11. In Broadcasting Regulatory Policy 2015-355, as more and more VOD undertakings were seeking to offer their services online, the Commission expanded the exemption order for small VOD undertakings to authorize a third category of VOD undertakings (in addition to licensed and exempt VOD undertakings) based on a more flexible, hybrid approach. What makes these VOD undertakings “hybrid” is that, in addition to being offered through a BDU, all of the programs for which the rights are held on an exclusive basis are also delivered over the Internet. The intent in authorizing this third category of undertakings was to allow hybrid VOD (HVOD) undertakings to benefit from the same flexibility as undertakings operating under the DMEO, including the ability to offer exclusive programming (as long as it is offered in a manner that is not dependent on a subscription to a specific mobile or retail Internet access service). HVOD undertakings also have the ability to provide their programming on a closed BDU network, similar to traditional VOD undertakings, without having to meet the specific regulatory requirements relating to financial contributions and the availability of Canadian programming that are applicable to traditional VOD undertakings.
12. In regard to HVOD undertakings, the specific paragraphs of the VODEO that apply to them are as follows:
- Provision 12. [T]he undertaking offers its service over a broadcasting distribution undertaking provided that all of the programs for which the rights are held on an exclusive basis are also delivered and accessed over the Internet.
 - Provision 13. Where the service is delivered and accessed over the Internet as described in paragraph 12 above, it shall not be offered in a way that is dependent on a subscription to any specific broadcasting distribution undertaking, mobile service or retail Internet access service.
 - Provision 14. An undertaking of the type described in paragraphs 12 and 13 shall submit such information regarding the undertaking’s activities in broadcasting in digital media, and such other information that is required by the Commission to monitor the development of broadcasting in digital media, at such time and in such form as requested by the Commission from time to time.
 - Provision 15. In regard to the filing of information with the Commission:
 - a) The undertaking files information with the Commission specifying: the name of the service provider and the owner or owners (i.e., the person who controls the service provider, if different from the service provider), the name under which the service operates, the service’s contact information, including mailing address, telephone number, fax number, email address, website, the name of any broadcasting distribution undertaking to which the service is related and the operating language(s) of the service. In the case of a new undertaking, the above information is filed with the Commission at least 30 days before the service is first distributed.
 - b) The undertaking updates with the Commission the information required under (a) above prior to making any change.

- c) By 30 November of each year, the undertaking submits to the Commission all information required as part of the simplified annual return for such undertakings.

13. HVOD undertakings may offer programs through a BDU on an exclusive basis provided that all of the programs for which the rights are held on an exclusive basis are also delivered and can be accessed over the Internet.⁴ Further, access to programs delivered and accessed over the Internet cannot be dependent on a subscription to a particular BDU, Internet Service Provider (ISP), or mobile service.

14. In addition, HVOD undertakings, like other VOD undertakings, must register with the Commission and must not distribute programming that is against the law, abusive, obscene or profane, or contains false or misleading news. Further, the operators of such undertakings must adhere to industry codes of conduct.⁵ As is the case for undertakings governed by the DMEO, HVOD undertakings must also abide by the following provisions:

- Provision 3: The undertaking does not give an undue preference to any person, including itself, or subject any person to an undue disadvantage. In any proceeding before the Commission, the burden of establishing that any preference or disadvantage is not undue is on the party that gives the preference or subjects the person to the disadvantage.
- Provision 16: If there is a dispute concerning the carriage or terms of carriage of programming or concerning any other right or obligation under the [*Broadcasting Act*], the undertaking shall continue to provide access to the programming services on the same terms of carriage as it did before the dispute.
- Provision 19: If the Commission accepts a referral of a matter for dispute resolution, the undertaking submits to participation in a mediation before a person appointed by the Commission.
- Provision 22: During dispute resolution, the undertaking submits to produce and file such additional information as may be requested by the Commission or any individual named by the Commission to act as a mediator in a given dispute.

Process to amend, replace or repeal the exemption orders

15. Under the current *Broadcasting Act*, the DMEO is no longer the appropriate tool for regulating online undertakings. It is also unclear whether the DMEO remains relevant for any other broadcasting undertakings. The Commission is not aware of any broadcasting undertakings providing broadcasting services that are using point-to-point technology and

⁴ VOD undertakings operating in the traditional system are prohibited from acquiring exclusive rights for any of the programming offered on their programming services.

⁵ Specifically, the *Equitable Portrayal Code*, the *Pay television and pay-per-view programming code regarding violence*, and the *Industry code of programming standards and practices governing pay, pay-per-view and video-on-demand services*.

that are received by way of mobile devices since the reference to point-to-point technology was meant to cover older, now largely defunct technology.

16. However, in the absence of a public record on this issue, the Commission cannot conclude with certainty that all undertakings currently operating under the DMEO are “online undertakings” as that term is defined in the current *Broadcasting Act*. There may be certain undertakings that will need to continue to rely on this exemption order to legally operate in Canada.
17. The Commission considers that it would also be useful to examine paragraphs 12 through 15 of the VODEO and to consider whether they should be repealed or amended. HVOD undertakings are unique in that they offer their services both over the Internet and on a closed BDU network. As such, it is not entirely clear that HVOD undertakings fall within the definition of “online undertaking” set out in the current *Broadcasting Act*. Regardless of the decision taken in regard to paragraphs 12 through 15 of the VODEO, it is the Commission’s view that there will be a continued need for a VODEO, and the conditions of exemption found in the VODEO would continue to apply to any undertakings operating in Canada that would normally require a broadcasting licence to operate.
18. In light of the above, the Commission seeks comments on the following:
 - Q1. Why should the DMEO be repealed or not be repealed? Please explain.
 - Q2. If the DMEO should not be repealed, how should it be amended?
 - Q3. Are there broadcasting undertakings, other than online undertakings, using (or intending to use) technologies or other means of telecommunication that are still covered, or could be covered, by the DMEO? Is there an ongoing need to include such undertakings in this or another exemption order? Why?
 - Q4. Should paragraphs 12 through 15 of the VODEO be repealed, insofar as they apply to online undertakings? If yes, why? If no, why not?
 - Q5. If the above paragraphs in the VODEO are repealed, should HVOD undertakings be treated in the same manner as other online undertakings? If yes, what impact will such measures have on existing licensed or exempt on-demand or other linear broadcasting services? What are your suggestions for addressing those impacts?

Transition to conditions of service orders for online undertakings

19. As noted above, the current *Broadcasting Act* contemplates that online undertakings may now lawfully operate in Canada without being licensed or exempt. However, section 9.1 of the current *Broadcasting Act* permits the Commission to issue orders setting out conditions of service that may apply to any undertaking, including online undertakings.

Threshold

20. There is currently no minimum threshold to establish conditions of service on online undertakings. The Commission notes, however, that the definition of “online undertaking” is very broad, and likely includes undertakings whose activities do not contribute in a material manner to the implementation of the broadcasting policy set out in subsection 3(1) of the current *Broadcasting Act*—an essential condition to be met in order for a class of undertakings to qualify for exemption from requirements under subsection 9(4) of the Act.
21. The Commission considers that there may be many smaller online audio and video services that might meet the definition of “online undertaking.” However, imposing conditions of service on these undertakings may put a significant burden on them, and would not contribute in a material way to achieving the objectives of the current *Broadcasting Act*. Accordingly, the Commission considers that a minimum threshold should be set for the application of conditions of service.
22. The Commission proposes, as a starting point, that the same thresholds and exemption criteria as those being proposed in the proceeding to make the *Online Undertakings Registration Regulations* and the associated exemption order (see Broadcasting Notice of Consultation 2023-139) be applied. The Commission considers that this would be appropriate given that these proceedings both contemplate the lightest form of regulatory obligations for online undertakings. As such, the Commission proposes that persons carrying on broadcasting undertakings defined by any of the following four classes be exempted from the conditions of service being contemplated as part of the present proceeding (as set out in the appendix to this notice of consultation):
 - online undertakings whose single activity and purpose consists of providing video games services;⁶
 - online undertakings whose single activity and purpose consists of providing unique transactions;
 - online undertakings affiliated with a broadcasting ownership group⁷ that has, after deducting any excluded revenue⁸, gross annual revenues of less than \$10 million; or
 - online undertakings that have no affiliation whatsoever with a broadcasting ownership group, if they have, after deducting any excluded revenue, gross annual revenues of less than \$10 million.

⁶ While the Commission has historically held the view that video games are not broadcasting, the Commission is proposing to explicitly exempt them to avoid any ambiguity.

⁷ The Commission is proposing to define “broadcasting ownership group” as a person that controls one or more persons that carry on one or more affiliated broadcasting undertakings to which the *Broadcasting Act* applies and includes all persons that carry on those broadcasting undertakings.

⁸ The Commission is proposing to define “excluded revenue” as revenue that originates from providing video games services or unique transactions.

23. In light of the above, the Commission seeks comments on the following:

Q6. Is the approach of exempting certain online undertakings from the application of conditions of service appropriate? Why or why not? If yes, are the above-mentioned classes of online undertakings appropriate to exempt from the conditions of service being contemplated by this proceeding? Should other classes be considered?

Q7. Is a broadcasting ownership group's gross revenues from broadcasting activities the appropriate metric for establishing exemption thresholds?

Q8. Is a threshold of at least \$10 million in total gross annual Canadian broadcasting revenues an appropriate threshold to apply to online undertakings in regard to the application of conditions of service on such undertakings? If no, what threshold (in terms of type and the amount) would be appropriate to apply, and why?

Q9. If the proposed exemptions are adopted by the Commission, how should the Commission address situations where an undertaking's total gross annual Canadian broadcasting revenues moves above or below the threshold from year to year? And, in such cases, at which moment should the proposed exemptions begin or cease to apply?

Conditions of service

24. In terms of the specific conditions of service that should be applied to online undertakings, the Commission is of the view that, as far as appropriate and practical, the conditions of exemption with which such undertakings must currently comply under the DMEO or VODEO should continue, with some adjustments to reflect amendments to the *Broadcasting Act*. This is intended to be a transitional step until such time as the Commission can determine, through separate public proceedings, if other conditions of service or regulatory measures ought to be applied to online undertakings. Continuing with requirements that the Commission has previously determined to be adaptable to technological change ensures that these conditions will also meet the objectives of the current *Broadcasting Act*. Doing so should also require minimal adjustments for undertakings being regulated given that they should already be operating in compliance with these obligations.

25. In light of the above, the Commission is proposing to apply conditions of service that continue conditions of exemption relating to **information gathering, undue preference/undue disadvantage, and making content available over the Internet**. It is also proposing to apply a condition of service to impose a new requirement on online undertakings to file financial information for use for fee purposes. The rationale for such conditions is described in the paragraphs below, and the specific wording of these conditions is set out in the appendix to this notice of consultation.

26. In regard to **information gathering**, online undertakings bound by the DMEO are required, pursuant to paragraph 4 of the DMEO, to submit "such information regarding the undertaking's activities in broadcasting in digital media, and such other information that is required by the Commission in order to monitor the development of broadcasting in digital media, at such time in such form, as requested by the Commission from time to time." This requirement was introduced in Broadcasting Order 2009-660 in order to measure and monitor

Canadian broadcasting content on online services as well as those services' growing importance and significance in the Canadian broadcasting system.

27. The current *Broadcasting Act* empowers the Commission to impose conditions on broadcasting undertakings, including online undertakings, regarding the collection of information that the Commission considers necessary for the administration of the *Broadcasting Act*, including financial information and information related to programming, expenditures or audience measurement. This is a broader scope than the information gathering provision found in paragraph 4 of the DMEO, which is limited to monitoring “the development of broadcasting in digital media.” The proposed condition of service related to information gathering reflects this broader scope.
28. With this in mind, the Commission considers it appropriate to impose a broadened information gathering condition on online undertakings meeting the thresholds proposed at paragraph 22 of this notice of consultation. Given the more explicit recognition of online undertakings under the current *Broadcasting Act* and the Commission’s mandate to integrate online undertakings into the regulatory framework, it is necessary for the Commission to have the ability in the future to collect this type of information in order to understand the revenues and expenditures of online undertakings, including with respect to Canadian programs, as well as the habits and preferences of online viewers.
29. In addition, the Commission intends to rely on this condition of service as its authority to continue administering its Annual Digital Media Survey. (The Commission currently relies on paragraph 4 of the DMEO as its authority to collect this data.) As such, the determinations that the Commission made in Broadcasting Regulatory Policy 2022-47 remain in effect. In the future, the Commission may expand or modify the requirement to participate in the Annual Digital Media Survey, or the content of that survey.
30. Prior to the enactment of the current *Broadcasting Act*, undertakings operating under the DMEO or the VODEO were subject to a condition of exemption prohibiting them from giving an **undue preference** to any person, including itself, or subjecting any person to an **undue disadvantage**. In the Commission’s view, continuation of an undue preference obligation as a condition of service, or otherwise, would be appropriate as it would further a broadcasting objective of ensuring that undertakings contribute to the objectives of the current *Broadcasting Act* in an appropriate manner. In the Commission’s view, such a condition would contribute to achieving a number of policy objectives set out in the current

Broadcasting Act, in particular subparagraphs 3(1)(d)(ii),⁹ 3(1)(d)(iii),¹⁰ 3(1)(d)(iii.5),¹¹ 3(1)(d)(v),¹² 3(1)(u)(ii)¹³ and 3(1)(u)(iii).¹⁴

31. Finally, in regard to **making content available over the Internet**, HVOD undertakings are permitted to exercise exclusive rights to programming, provided that all of the programs for which rights are held on an exclusive basis were delivered and accessed over the Internet in a way that was not dependent on a subscription to any specific BDU, mobile service or retail Internet access service. Similarly, online undertakings bound by the DMEQ were not permitted to offer television programming on an exclusive basis where access to such programming is restricted based on a subscription to a specific mobile or retail Internet access service. In the Commission's view, it would be appropriate to maintain a similar obligation going forward by applying a condition of service to require that all of the programming of online undertakings be offered over the Internet to all Canadians in a way that is not dependent on a subscription to a specific BDU, mobile service or ISP, i.e., Canadians could not be forced to pay for a separate additional service in order to receive the one they want.

32. In light of the above, the Commission seeks comment on the following:

Q10. Should a condition of service in regard to information gathering be imposed as drafted in the proposed order appended to this notice of consultation? If yes, why? If no, what changes would be appropriate?

Q11. Should the condition of exemption specified above in regard to undue preference/undue disadvantage be continued as a condition of service for online undertakings as drafted in the proposed order appended to this notice of consultation? If yes, why? If no, why not?

⁹ The Canadian broadcasting system should encourage the development of Canadian expression by providing a wide range of programming that reflects Canadian attitudes, opinions, ideas, values and artistic creativity, by displaying Canadian talent in entertainment programming and by offering information and analysis concerning Canada and other countries from a Canadian point of view, and foster an environment that encourages the development and export of Canadian programs globally.

¹⁰ The Canadian broadcasting system should through its programming and the employment opportunities arising out of its operations, serve the needs and interests of all Canadians — including Canadians from Black or other racialized communities and Canadians of diverse ethnocultural backgrounds, socio-economic statuses, abilities and disabilities, sexual orientations, gender identities and expressions, and ages — and reflect their circumstances and aspirations, including equal rights, the linguistic duality and multicultural and multiracial nature of Canadian society and the special place of Indigenous peoples and languages within that society.

¹¹ The Canadian broadcasting system should ensure that Canadian independent broadcasting undertakings continue to be able to play a vital role within that system.

¹² The Canadian broadcasting system should reflect and be responsive to the preferences and interests of various audiences.

¹³ Distribution undertakings should provide efficient delivery of programming at affordable rates, using the most effective technologies available at reasonable cost.

¹⁴ Distribution undertakings should, where programming services are supplied to them by broadcasting undertakings pursuant to contractual arrangements, provide reasonable terms for the carriage, packaging and retailing of those programming services.

Q12. Should the condition of exemption specified above in regard to offering content over the Internet be continued as a condition of service for online undertakings as drafted in the proposed order appended to this notice of consultation? If yes, why? If no, why not?

33. The current *Broadcasting Act* allows the Commission, with Treasury Board approval, to make regulations establishing the fees to be paid by persons carrying on a broadcasting undertaking and to provide for the payment of fees payable, including the time and manner of payment. In order for the Commission to determine the most equitable and appropriate way to integrate online undertakings into a new or restructured broadcasting fee regime, the Commission requires timely access to financial information from online undertakings. The Commission will also require timely access to up-to-date financial information consistent with existing fee return provisions to allow it to calculate the fees payable in the period in which any new or restructured broadcasting fee regulations may come into force in the future.
34. As such, the Commission considers that it would be appropriate to require online undertakings to file financial information for use for fee purposes by the same 30 November filing date that applies for fee returns for current feepayers and would be filed in conjunction with the Annual Digital Media Survey, to prevent online undertakings from having to submit similar financial information twice for the same period. This would also provide transparency and ensure that there is an enforceable manner to collect financial information from online undertakings. This provision would expire once amendments to the *Broadcasting Licence Fee Regulations, 1997*, or new regulations, come into effect. For clarity, the thresholds proposed above in paragraph 22 would apply for this condition of service. In this regard, the Commission acknowledges that some online undertakings may not track data based on the broadcast year (i.e., 1 September to 31 August) and considers that those undertakings should be permitted to file data based on the closest quarter of their respective reporting years.
35. In light of the above, the Commission seeks comment on the following:

Q13. Should a condition of service for online undertakings in regard to filing financial information be imposed as proposed in the draft order, which is appended to this notice of consultation? If yes, why? If no, what changes would be appropriate?

36. Further to the above, the Commission considers that conditions of exemption relating to the **anti-competitive head start rule** and **dispute resolution provisions** should not be continued as conditions of service.
37. In regard to the **anti-competitive head start rule**, the Commission notes that this rule applied only to DMBUs. It provided that “an undertaking that has acquired exclusive rights to television programming from a new programming service shall, when ready to provide access to that programming in a manner that restricts access based on a consumer’s subscription to a specific mobile or retail Internet access service, make all television programming from that new programming service to which it itself provides access available to all other undertakings operating over the same broadcasting platform that have communicated an intent to provide access to the television programming, notwithstanding the absence of a commercial agreement.” In the Commission’s view, the head start provision

appears to be inappropriate as a condition of service for online undertakings, as it seems to be incompatible with the way many online undertakings operate. In addition, undertakings that rely on the Internet generally strive to seek the widest distribution possible. As many of them offer their services directly to consumers, they are likely not to restrict access.

38. In regard to **dispute resolution provisions**, the Commission notes that their continued application on online undertakings would be inappropriate as the current *Broadcasting Act* limits the Commission's dispute resolution authority to resolving disputes between programming undertakings and distribution undertakings. More specifically, while online undertakings were previously treated as subsets of programming and distribution undertakings, the current *Broadcasting Act* redefines programming undertakings and distribution undertakings to expressly exclude online undertakings.

39. In light of the above, the Commission seeks comment on the following:

Q14. Should the condition of exemption related to the anti-competitive head start rule be continued as a condition of service for online undertakings? If yes, why? If no, why not?

Q15. In light of the Commission's limited dispute resolution powers, should the Commission discontinue the conditions of exemption related to dispute resolution?

40. In fulfillment of the Commission's obligation under subsection 9.1(4) of the current *Broadcasting Act*,¹⁵ the Commission has set out in the appendix to the present notice of consultation a draft order regarding the conditions for the carrying on of certain online undertakings that specifies the conditions of service as proposed by the Commission as well as the online undertakings to which such conditions should apply. The Commission also invites comments on this draft order.

Procedure

41. The *Canadian Radio-television and Telecommunications Commission Rules of Practice and Procedure* (the Rules of Procedure) apply to the present proceeding. The Rules of Procedure set out, among other things, the rules for content, format, filing and service of interventions, answers, replies and requests for information; the procedure for filing confidential information and requesting its disclosure; and the conduct of public hearings. Accordingly, the procedure set out below must be read in conjunction with the Rules of Procedure and related documents, which can be found on the Commission's website under "[Statutes and Regulations](#)." The guidelines set out in Broadcasting and Telecom Information Bulletin 2010-959 provide information to help interested persons and parties understand the Rules of Procedure so that they can more effectively participate in Commission proceedings.

42. The Commission invites comments that address the issues and questions set out above. The Commission will accept comments that it receives on or before **12 June 2023**. Only parties who file comments may file a reply to matters raised during the comment period. The

¹⁵ 9.1(4): "A copy of each order that the Commission proposes to make under this section shall be published on the Commission's website and a reasonable opportunity shall be given to persons carrying on broadcasting undertakings and other interested persons to make representations to the Commission with respect to the proposed order."

deadline for the filing of replies is **27 June 2023**. All parties who file comments will also have the opportunity to file a final reply to any replies received. The deadline for the filing of final replies is **12 July 2023**.

43. Today, the Commission has also launched a proceeding in regard to proposed *Online Undertakings Registration Regulations* and a related proposed exemption order (Broadcasting Notice of Consultation 2023-139). Interested persons should note that each of these notices of consultation initiates a separate proceeding, and that they must file comments on the record of each proceeding in which they would like to participate. Given certain common elements between the various proceedings, interested persons should monitor the developments of each proceeding.
44. Interested persons are permitted to coordinate, organize, and file, in a single submission, interventions by other interested persons who share their position. Information on how to file this type of submission, known as a joint supporting intervention, as well as a template for the covering letter to be filed by the parties, can be found in Broadcasting Information Bulletin 2010-28-1.
45. The Commission encourages interested persons and parties to monitor the record of the proceeding, available on the Commission's website, for additional information that they may find useful when preparing their submissions.
46. Submissions longer than five pages should include a summary. Each paragraph of all submissions should be numbered, and the line *****End of document***** should follow the last paragraph. This will help the Commission verify that the document has not been damaged during electronic transmission.
47. Pursuant to Broadcasting and Telecom Information Bulletin 2015-242, the Commission expects incorporated entities and associations, and encourages all Canadians, to file submissions for Commission proceedings in accessible formats (for example, text-based file formats that allow text to be enlarged or modified, or read by screen readers). To provide assistance in this regard, the Commission has posted on its website [guidelines](#) for preparing documents in accessible formats.
48. Submissions must be filed by sending them to the Secretary General of the Commission using **only one** of the following means:

by completing the
[\[Intervention/comment/answer form\]](#)

or

by mail to
CRTC, Ottawa, Ontario K1A 0N2

or

by fax at
819-994-0218

49. Parties who send documents electronically must ensure that they will be able to prove, upon Commission request, that filing, or where required, service of a particular document was completed. Accordingly, parties must keep proof of the sending and receipt of each document for 180 days after the date on which the document is filed or served. The Commission advises parties who file or serve documents by electronic means to exercise caution when using email for the service of documents, as it may be difficult to establish that service has occurred.
50. In accordance with the Rules of Procedure, a document must be received by the Commission and all relevant parties by 5 p.m. Vancouver time (8 p.m. Ottawa time) on the date it is due. Parties are responsible for ensuring the timely delivery of their submissions and will not be notified if their submissions are received after the deadline. Late submissions, including those due to postal delays, will not be considered by the Commission and will not be made part of the public record.
51. The Commission will not formally acknowledge submissions. It will, however, fully consider all submissions, which will form part of the public record of the proceeding, provided that the procedure for filing set out above has been followed.

Important notice

52. All information that parties provide as part of this public process, except information designated confidential, whether sent by postal mail, fax, email or through the Commission's website at www.crtc.gc.ca, becomes part of a publicly accessible file and will be posted on the Commission's website. This information includes personal information, such as full names, email addresses, postal/street addresses, and telephone and fax numbers.
53. The personal information that parties provide will be used and may be disclosed for the purpose for which the information was obtained or compiled by the Commission, or for a use consistent with that purpose.
54. Documents received electronically or otherwise will be put on the Commission's website in their entirety exactly as received, including any personal information contained therein, in the official language and format in which they are received. Documents not received electronically will be available in PDF format.
55. The information that parties provide to the Commission as part of this public process is entered into an unsearchable database dedicated to this specific public process. This database is accessible only from the web page of this particular public process. As a result, a general search of the Commission's website with the help of either its own search engine or a third-party search engine will not provide access to the information that was provided as part of this public process.

Availability of documents

56. Links to interventions, replies and final replies filed for this proceeding, as well as other documents referred to in this notice, are available on the Commission's "[Consultations and hearings: have your say](#)" page.

57. Documents are available upon request during normal business hours by contacting:

Documentation Centre
Examinationroom@crtc.gc.ca
Tel.: 819-997-4389
Fax: 819-994-0218

Client Services
Toll-free telephone: 1-877-249-2782
Toll-free TTY: 1-877-909-2782

Secretary General

Related documents

- *Call for comments – Proposed Regulations for the Registration of Online Streaming Services and Proposed Exemption Order regarding those Regulations*, Broadcasting Notice of Consultation CRTC 2023-139, 12 May 2023
- *Annual Digital Media Survey*, Broadcasting Regulatory Policy CRTC 2022-47, 23 February 2022
- *Revised exemption order for certain classes of video-on-demand (VOD) undertakings and updated standard conditions of licence for licensed VOD undertakings*, Broadcasting Regulatory Policy CRTC 2015-355 and Broadcasting Order CRTC 2015-356, 6 August 2015
- *Filing submissions for Commission proceedings in accessible formats*, Broadcasting and Telecom Information Bulletin CRTC 2015-242, 8 June 2015
- *Amendments to the Exemption order for new media broadcasting undertakings (now known as the Exemption order for digital medial broadcasting undertakings)*, Broadcasting Order CRTC 2012-409, 26 July 2012
- *Exemption order for small video-on-demand undertakings*, Broadcasting Order CRTC 2011-60, 31 January 2011
- *Guidelines on the CRTC Rules of Practice and Procedure*, Broadcasting and Telecom Information Bulletin CRTC 2010-959, 23 December 2010

- *Changes to certain practices for filing interventions – Expansion of filing practices to include the filing of joint supporting comments for broadcasting policy proceedings, Broadcasting Information Bulletin CRTC 2010-28-1, 10 December 2010*
- *Amendments to the Exemption order for new media broadcasting undertakings (Appendix A to Public Notice CRTC 1999-197); Revocation of the Exemption order for mobile television broadcasting undertakings, Broadcasting Order CRTC 2009-660, 22 October 2009*

Appendix to Broadcasting Notice of Consultation CRTC 2023-140

Proposed conditions for carrying on certain online undertakings

The Commission hereby proposes, pursuant to subsections 9.1(1) and (4) of the *Broadcasting Act* (the Act), to impose the following conditions on certain persons carrying on online undertakings, as defined in the Act.

Interpretation

The following definitions apply in this order.

Annual revenues means revenues attributable to the person or that person's subsidiaries and/or associates, if any, collected from the Canadian broadcasting system across all services during the previous broadcast year (i.e., the broadcast year ending on 31 August of the year that precedes the broadcast year for which the revenue calculation is being filed), whether the services consist of services offered by traditional broadcasting undertakings or by online undertakings. This includes online undertakings that operate in whole or in part in Canada and those that collect revenue from other online undertakings by offering bundled services on a subscription basis. The Commission will accommodate requests for alternative reporting periods and permit respondents to file data based on the closest quarter of their respective reporting years.

Broadcast year means the period beginning on September 1 and ending on August 31.

Broadcasting ownership group means a person that controls one or more persons that carry on one or more affiliated broadcasting undertakings to which the *Broadcasting Act* applies and includes all persons that carry on those broadcasting undertakings.

Excluded revenue means revenue that originates from providing video games services or unique transactions.

Unique transaction means a one-time rental or purchase of an individual program transmitted or retransmitted over the Internet.

Video game means an electronic game which involves the interaction of a user by means of an Internet connected device, where the user is primarily engaged in active interaction with, as opposed to the passive reception of, sounds or visual images, or a combination of sounds and visual images.

Video games service means the transmission or retransmission of video games over the Internet to enable users to select and play video games.

Application

This Order does not apply to persons carrying on broadcasting undertakings defined by any of the following four classes:

- i) online undertakings whose single activity and purpose consists of providing video games services;
- ii) online undertakings whose single activity and purpose consists of providing unique transactions;
- iii) online undertakings affiliated with a broadcasting ownership group that has, after deducting any excluded revenue, annual revenues of less than \$10 million; or
- iv) online undertakings that have no affiliation whatsoever with a broadcasting ownership group and have, after deducting any excluded revenue, annual revenues of less than \$10 million.

Condition of Service – Information Gathering

1. An online undertaking shall provide, in such form and at such time as requested by the Commission:
 - (a) information regarding the undertaking's online activities in Canada, and such other information that is required by the Commission in order to monitor the development of online broadcasting;¹⁶
 - (b) information regarding the programming that is originated by or is distributed by the undertaking, or regarding the undertaking's technical operations, subscribership or financial affairs in Canada;
 - (c) information regarding the undertaking's adherence to the conditions of service, the Act, any applicable Regulations, industry standards, practices or codes or any other self-regulatory mechanism of the industry; and
 - (d) a response to a complaint filed by a person.

Condition of Service – Undue Preference

2. The online undertaking shall not give an undue preference to any person, including itself, or subject any person to an undue disadvantage. In any proceeding before the Commission, the burden of establishing that any preference or disadvantage is not undue is on the party that gives the preference or subjects the person to the disadvantage.

Condition of Service – Availability of Content

3. All of the programming of the online undertaking that is made available in Canada must be offered over the Internet to all Canadians and not be offered in a way that is dependent

¹⁶ As described in paragraph 29 of this notice of consultation, the requirements of the Annual Digital Media Survey, as set out in detail in *Annual Digital Media Survey*, Broadcasting Regulatory Policy CRTC 2022-47, 23 February 2022, remain in effect.

on a subscription to a specific broadcasting distribution undertaking, or mobile service, or retail Internet access service.

Condition of Service – Fee Return

4. (a) An online undertaking shall, on or before 30 November each year, file a fee return, on the form provided by the Commission and containing the information required in the form for the broadcast year, for the one-year period beginning 1 September of the year preceding the calendar year in which the return is required to be filed.

(b) For the purposes of paragraph (a), fee revenue, in respect of an online undertaking, means the gross revenue derived during a broadcast year from the Canadian broadcasting activity of the online undertaking, or by an affiliate, and, without limiting the generality of the foregoing, includes

- (i) the gross annual Canadian broadcasting revenue, as reported by the online undertaking and validated by the Commission, where the undertaking has not filed a fee return covering 12 months of the most recently completed return year; or,
- (ii) if such information is not available, the gross annual Canadian broadcasting revenue that, based on the trends of the market in which the undertaking operates, its business plan and its previous financial performance, the Commission considers to be related to its broadcasting activity.

This definition does not include any amount received by an online undertaking from another broadcasting undertaking to which the *Broadcasting Licence Fee Regulations, 1997* apply, other than the amounts received from the Canadian Broadcasting Corporation for the sale of airtime.

(c) This condition will be of no force or effect 30 days after any amendments to the *Broadcasting Licence Fee Regulations, 1997*, or new regulations, come into effect.