Canadian Radio-television and Telecommunications Commission
Conseil de la radiodiffusion et des télécommunications canadiennes

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Ottawa, 24 September 2015

Interpretation of the Wholesale Code

In this information bulletin, the Commission provides general guidance on the interpretation of the new Wholesale Code (the Code), set out in the appendix to Broadcasting Regulatory Policy 2015-438.

The information contained in this bulletin should be treated as a non-binding set of interpretive guidelines that complement the sections of the Code. In particular, this bulletin sets out the intent behind the sections of the Code, and in areas that are more interpretive, the factors that may be taken into account in the resolution of a dispute.

This bulletin aims to bring clarity and certainty for broadcasting distribution undertakings and programming services negotiating affiliation agreements, to ensure that such negotiations at the wholesale level are conducted fairly. A vigorous wholesale market is essential to fostering a retail market that favours greater subscriber choice. Further, a healthy wholesale market also serves to support the creation of a diverse range of programming made by Canadians, including that provided by independently owned Canadian programming services.

Introduction

1. This information bulletin serves to provide general guidance on the interpretation of the new Wholesale Code (the Code), announced in Broadcasting Regulatory Policy 2015-438 and set out in the appendix to that policy. The information contained in this bulletin should be treated as a non-binding set of interpretive guidelines that complement the sections of the Code. In particular, this bulletin sets out the intent behind the sections of the Code, and in areas that are more interpretive, the factors that may be taken into account in the resolution of a dispute.
2. To better understand the Code's policy underpinnings, this bulletin should be read in conjunction with Broadcasting Regulatory Policy 2015-438 and the Commission's Let's Talk TV choice determinations set out in Broadcasting Regulatory Policy 2015-96.
3. The Code governs certain aspects of the commercial arrangements between broadcasting distribution undertakings (BDUs), programming undertakings and exempt digital media undertakings. It establishes a common set of principles upon which parties must rely in their negotiations at the wholesale level and that the Commission will apply in any dispute resolution process pursuant to the Code.

4. In Broadcasting Regulatory Policy 2015-96, the Commission noted that a vigorous wholesale market is essential to fostering a retail market that favours greater subscriber choice. It also noted that a healthy wholesale market will serve to support the creation of a diverse range of programming made by Canadians, including that provided by independently owned Canadian programming services. The Commission added 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;

    - BDUs have the flexibility to package and set retail prices for discretionary services in the manner that they consider will best respond to customer demand and enable them to compete on an equitable basis with other BDUs;

    - programming services are discoverable and able to make their programming available to Canadians on multiple platforms in order to foster continued diversity and innovation within the system; and

    - appropriate wholesale fees and other terms of distribution are negotiated based on the fair market value of the service, regardless of the ownership or other interests of either the BDU or programming service.

Application (sections 1-3)

5. The Code is binding on licensed distribution and programming undertakings by means of an order (Broadcasting Order 2015-439) issued pursuant to section 9(1)(*h*) of the *Broadcasting Act* (the Act), and applies as a guideline to all other undertakings. For clarity, it is binding on licensed video-on-demand (VOD) and pay audio services, as these services are carried by BDUs and operate similarly to pay and specialty television services. The Code does not apply to radio programming undertakings.

6. The Commission expects parties to which the Code applies as a guideline to engage in negotiations in a manner that respects the spirit and intent of the Code's provisions. In disputes involving such parties, the Commission will generally apply the Code's principles in the same manner as it would when assessing a dispute involving licensed undertakings.

Prohibitions (section 4)

7. This section explicitly prohibits undertakings from including in executed affiliation agreements specific types of clauses that a) prevent BDUs from responding to subscriber demands for increased choice and flexibility, or b) are inconsistent with a fair and competitive marketplace.

Grandfathering (section 4.(c))

8. This section is intended to prevent a party from unilaterally requiring historical packaging, which would preclude a BDU from changing its offering in response to consumer choice. The grandfathering prohibition does not preclude parties from agreeing to the same terms and conditions negotiated under a previous agreement, so long as the negotiated provision in the affiliation agreement is not contrary to the Code, does not prevent the BDU from responding to consumer choice and does not otherwise prevent any party from fulfilling its obligations under Broadcasting Regulatory Policy 2015-96.
9. Greater flexibility in this regard will enable BDUs to provide their subscribers with programming continuity, while respecting the sections of the Code and the determinations set out in Broadcasting Regulatory Policy 2015-96.

Veto rights (section 4.(d))

10. This section serves to prevent programming services from imposing clauses in affiliation agreements that would allow them to reject packaging changes sought by BDUs. These types of clauses limit the flexibility of BDUs to repackage discretionary services in response to subscriber demand and other market conditions.
11. Generally speaking, packaging should be a matter of negotiation between BDUs and programming services, which involves shared risk and reward. Allowing programming services to exercise veto rights would be inconsistent with this principle.
12. That said, BDUs must provide adequate written notice of upcoming packaging changes to programming services, consistent with the Commission's determination on the mandatory notice period set out in Broadcasting Public Notice 2005-35.

Most favoured nation provisions (section 4.(f))

13. Most favoured nation (MFN) provisions seek to ensure that terms and conditions that apply to one party, such as the lowest wholesale rate, will be at least as favourable as those applied to another. In practice, such provisions have generally been imposed by larger players, to the disadvantage of smaller players who do not have the leverage to negotiate similar provisions.
14. These types of provisions are expressly prohibited given that, in practice, they have been unfair and anti-competitive. The Code's prohibition on MFN provisions aims to ensure that terms in affiliation agreements are commercially reasonable and, in particular, that wholesale rates reflect the fair market value of a service.

Minimum penetration, revenue or subscription levels (section 4.(g))

15. The purpose of this section is to prevent programming services from dictating minimum penetration, revenue or subscription levels, and thus insulating themselves from the effects of consumer choice. Set minimum penetration, revenue or subscription levels effectively represent a guaranteed revenue floor for the programming service, irrespective of consumer demand for the service. Programming services, except as discussed below, are prohibited from including such provisions in their affiliation agreements.

16. Independent programming services, however, are authorized to negotiate minimum penetration, revenue or subscription levels (negotiated minimums) as long as the negotiated minimums are commercially reasonable. Because independent programming services are likely more vulnerable to the upcoming loss of genre protection and access rights, they will benefit from being able to secure a measure of stability or reliability in their revenues to help them meet their programming requirements. This in turn aims to ensure that a broad range of Canadian programming is available within the broadcasting system.

Commercially unreasonable practices (section 5)

17. This section contains a list of practices that, *prima facie*, would be considered commercially unreasonable, but that rely on a case-by-case assessment of the specific actions taken by an undertaking, including the terms or conditions imposed.

Unreasonable rates (section 5.(a))

18. The question of whether a proposed rate is unreasonable will be assessed in light of the fair market value factors set out in section 6. These factors serve as the framework for determining whether a given monetary term, which applies to rates and rate cards, for instance, is reasonable.

Unreasonable volume-based rate cards (section 5.(b))

19. Volume-based rate cards (VBRCs) set out a percentage discount or sliding scale rate based on the number of subscribers that a BDU delivers to a programming service. In general, the greater the number of subscribers delivered, the lower the rate. Volume discounts are a legitimate commercial practice. When used appropriately, VBRCs allow programming services to make their offer more attractive to BDUs by giving discounts for the delivery of more subscribers.
20. On that basis, while VBRCs are generally acceptable, they may be deemed unreasonable in cases where they cannot be justified on a commercial basis or are anti-competitive.

Unreasonable penetration-based rate cards (section 5.(c))

21. Penetration-based rate cards (PBRCs) set out varying wholesale rates based on a programming service's share of a BDU's subscriber base. In general, wholesale rates increase when penetration decreases. When used appropriately, PBRCs provide BDUs with more flexibility in their packaging of programming services, while ensuring a degree of revenue predictability for programming services.
22. The Commission will generally consider PBRCs to be unreasonable in circumstances where they

    - cannot be justified on a commercial basis or are anti-competitive;
    - force distribution of a service on the basic tier or in a package that is inconsistent with the service's theme or price point; or
    - insulate a programming service from the effects of consumer choice.

23. PBRCs that seek compensation for advertising revenue losses (advertising make-whole) exemplify PBRCs that are considered unreasonable, as this type of rate card insulates a programming service from the effects of consumer choice.

24. Conversely, PBRCs that seek compensation for subscription revenue losses (subscription make-whole) may be reasonable under limited circumstances. This type of rate card may be justified where it provides a programming service with a degree of revenue stability, thereby supporting its ability to meet its programming obligations. The Commission may balance the public policy objective of ensuring that programming services have predictable and reasonable revenues to be able to invest in their services and meet their programming commitments against that of ensuring that BDUs can respond to consumer choice and otherwise exercise packaging flexibility.

25. In assessing the reasonableness of PBRCs in any dispute, and of subscription make-whole PBRCs in particular, the Commission will take into consideration, where applicable, the Competition Bureau's following five factors, namely:

    - whether the PBRC allows BDUs and programming services to share the potential risks and costs associated with lower penetration levels of programming services in a world of increased choice and flexibility;
    - whether the PBRC applies to an independent programming service or to a vertically integrated (VI) programming service;
    - whether a PBRC applied to a VI programming service raises rival BDUs' costs above those of its related VI BDU;
    - whether the PBRC applies to a programming service that is considered a "must-have"; and
    - whether the PBRC applies to a programming service that is newly licensed, and, if so, the duration of that PBRC.

Tied-selling (section 5.(d))

26. The intent of this section is to prevent programming services from requiring BDUs to acquire one or more additional services in order to obtain a particular service (e.g., for the BDU to acquire service X, it must also acquire service Y). In such instances, BDUs may be prevented from acquiring services in response to consumer demand. This section is not intended to prevent programming services from offering discounts for the carriage of multiple services.

27. Providing a discount at the wholesale level in circumstances where multiple services are being offered is a legitimate commercial practice that can be valuable to both parties and ultimately beneficial to subscribers in the form of lower retail rates. All wholesale rates, however, must correspond to fair market value, whether they are negotiated as part of a bundle or on an individual basis. In keeping with this principle, the Commission expects that in cases where a service is no longer distributed, the wholesale rates for the remaining services will continue to reflect fair market value.

28. The packaging prohibitions set out under section 4, taken with section 5.(e), will ensure that programming services cannot force the bundling of their services in a way that is detrimental to the ability of BDUs to deliver consumer choice. In regard to concerns over the possibility that a programming service sets the price of its services in a way that forces a BDU to purchase another service (which may be referred to as induced tied-selling), the Commission could examine such practices on a case-by-case basis, under the consumer choice provision outlined in section 5.(e).

Consumer choice (section 5.(e))

29. The purpose of section 5.(e) is to address other clauses in affiliation agreements that might have the effect of impeding the ability of BDUs to provide choice to subscribers, but that have not been captured under the list of prohibitions contained in section 4 or under the list of unreasonable commercial practices otherwise set out in section 5. Section 5.(e) allows parties to dispute potential packaging constraints imposed by programming services. Given its broad nature, the Commission intends to interpret and apply this section on a case-by-case basis.

30. For example, the use of renegotiation triggers may be examined on a complaint basis under section 5.(e). Generally, the Commission considers that in cases where a PBRC or VBRC is in place, a programming service should not be allowed to trigger a renegotiation of rates when its penetration or volume changes (i.e., as a means by which to demand higher rates to recover the losses associated with consumers exercising greater choice). Requiring the renegotiation of an agreement under such circumstances could constitute an unreasonable term that restricts the ability of a BDU to provide consumer choice in contravention of section 5.(e). Under a fixed pricing model, however, it would generally be reasonable for a programming service to negotiate a provision that allows for the renegotiation of a rate or terms associated with a rate, since fixed pricing arrangements are generally negotiated based on certain packaging assumptions.

Multiplatform access (section 5.(f))

31. The intent of this section is to ensure that programming services and BDUs work cooperatively so that Canadians have access to programming on multiple platforms and so that neither programming services nor BDUs are prevented from pursuing such strategies.

32. Section 5.(f) should be read in conjunction with the more specific policies in place regarding programming exclusivity, such as in the digital media exemption order (DMEO) or in the hybrid video-on-demand (HVOD) policy. That policy provides that exclusive content can be offered both on a closed network and over the Internet, so long as the programs for which exclusive rights are held are available to all Canadians over the Internet in a manner that is not dependent upon a subscription to a specific BDU, mobile service or retail Internet access service.

33. Any concerns regarding the terms and conditions for non-linear program rights and multiplatform distribution, including questions regarding access or authentification fees, or compensation, may be referred to the Commission, to be evaluated on a case-by-case basis.

Commercially reasonable practices (sections 6-12)

34. These sections constitute a list of practices that, *prima facie*, would be considered commercially reasonable, but that rely on a case-by-case assessment of the specific actions of the parties involved, including the terms or conditions that each party is seeking to impose.

Fair market value factors (section 6)

35. Parties must negotiate the wholesale rates (whether under a fixed rate, a PBRC, a VBRC or any other pricing model) of a given service based on fair market value. The Commission has established a number of factors that, where applicable, must be taken into consideration when determining the fair market value of a service.

36. In final offer arbitration (FOA) or any other dispute resolution process where monetary terms are in dispute, the Commission will determine which fair market value factors are applicable in a given case and assess proposed rates or final offers in relation to those factors. In addition, the Commission will apply, where appropriate, a public interest test that examines whether the proposed wholesale rates are consistent with the relevant public policy objectives.

37. In a dispute resolution process, parties have the opportunity to make submissions regarding which fair market value factors should apply, how such factors should be interpreted and how much weight should be accorded to a given factor. Parties can also make submissions on which public policy objectives are relevant to a given case.

38. For example, viewership may be difficult to assess and weigh given that this factor can be a function of packaging and marketing decisions by a BDU. On the other hand, viewership can be a useful method for determining the value of a service.

39. Further, historical rates can often be a relevant consideration in establishing a new rate by examining the current circumstances against the previous negotiated rates. However, historical rates would be less relevant or not relevant at all in cases where, for instance, the historical rate was based on an entirely different packaging model or on a legacy regulatory rate.

40. With respect to the public policy component of an FOA or other dispute resolution process, the Commission could examine

    - the impact on the BDU's ability to deliver choice and flexibility to consumers;
    - the impact on the ability of a programming service to create Canadian programming, contribute to the diversity of such programming and otherwise contribute to the achievement of the policy objectives set out in the Act;
    - the programming service's historical and current commitments to Canadian programming;

- a programming service's or BDU's business plans and operating costs, which could include the cost of acquiring programming rights; and
- the impact on the ability of a BDU to provide a competitive offering to consumers, where:
    - certain services may be considered "must have" in the BDU's offering as a result of brand equity and of exclusive and/or highly popular content; and
    - the value of the service may be enhanced or diminished as a result of the availability of programming on other non-linear and/or ancillary platforms.

Packaging and marketing (sections 7-10)

41. These sections serve to provide a degree of support to independent programming services so that they are discoverable and able to make their programming available to Canadians, thereby fostering greater diversity within the broadcasting system and ultimately providing greater choice for Canadians.

42. The packaging sections (7-9) are designed to ensure that independent programming services continue to benefit from attractive packaging, which in turn provides them with the opportunity to contribute to a greater diversity of voices. These sections also provide independent programming services with the support they require to ensure fair negotiations of terms and conditions with VI BDUs.

43. The purpose of the marketing section (10) is to ensure that independent programming services benefit from a level of promotion that will help in their discoverability. In promoting independent programming services, BDUs must make use of the various marketing tools in a manner that is comparable to that enjoyed by similar or related services, such as through the use of websites, electronic programming guides (EPGs), barker channels and printed materials.

44. The Commission will generally interpret sections 7-10 in light of the balance that needs to be struck between diversity of voices and consumer choice. It will also base any determination on the facts of a given dispute, such facts being assessed against the policy objectives set out in Broadcasting Regulatory Policies 2015-96 and 2015-438.

Multiplatform terms (sections 11-12)

45. These sections serve to ensure that independent parties are able to pursue multiplatform strategies on a fair and equitable basis as compared to VI entities.

46. Section 11 serves to ensure that independent programming services are provided similar opportunities as VI programming services to exploit their programming rights on multiple distribution platforms.

47. Section 12 serves to ensure that independent BDUs are given similar opportunities as VI BDUs to distribute content on a non-linear basis.

48. These sections include the negotiation of appropriate compensation and other terms and conditions to allow parties to pursue multiplatform strategies. If engaged in resolving a dispute over such terms, the Commission will generally assess a) the reasonableness of the monetary terms against the fair market value factors set out in section 6 and b) the impact of the terms and conditions in light of the consumer choice provision set out in section 5.(e).

49. The Commission will generally examine concerns over negotiations for access to non-linear programming in the context of sections 5.(f), 11 and 12, or via the undue preference regulations. However, these sections should be read in conjunction with the more specific policies in place regarding programming exclusivity. Specifically, they should not be construed as superseding the more specific determinations regarding programming exclusivity relating to undertakings operating under the DMEO or the HVOD policy.

Affiliation agreements (sections 13-15)

50. The intent of the 120-day rule (section 13) is to encourage the early renegotiation of affiliation agreements, which provides parties with predictability and stability, and reduces the likelihood of retroactive fees and payments. By removing their obligation to seek Commission assistance, the 120-day rule also provides a measure of support to smaller players who may be reluctant to do so in the event of an impasse. This in turn may lessen their concern of damaging existing business relationships with larger players.

51. So as not to provide any form of access right, the 120-day rule only applies when both parties agree to renew an affiliation agreement.

52. The filing requirements (sections 14-15) serve to provide the Commission with improved oversight over the wholesale market and better data in the context of dispute resolution proceedings.

53. While section 14 is triggered by the renewal of an affiliation agreement, section 15 becomes applicable with the launch of a new programming service and may therefore cover a broader scope of agreements (e.g., term sheets, memoranda of understanding or agreements in principle).

Dispute resolution

54. To understand the different mechanisms by which disputes regarding the Code's sections may be resolved, parties should refer to Broadcasting and Telecom Information Bulletin 2013-637 and to a web guide to dispute resolution that will soon be posted on the Commission's website.

55. In any dispute before the Commission, parties must abide by the *Canadian Radio-television and Telecommunications Commission Rules of Practice and Procedure* as they relate to the filing of confidential information.

56. As set out in Broadcasting and Telecom Information Bulletin 2013-637, parties are encouraged to exhaust all other means to resolve outstanding issues in an efficient and effective manner before applying to the Commission for dispute resolution. The

Commission generally expects that parties will have made reasonable efforts to resolve their dispute prior to requesting FOA or an expedited hearing and may require parties to engage in mediation before it accepts the matter for dispute resolution.

Secretary General

Related documents

- *Distribution of the programming of licensed programming undertakings by broadcasting distribution undertakings*, Broadcasting Order CRTC 2015-439, 24 September 2015

- *The Wholesale Code*, Broadcasting Regulatory Policy CRTC 2015-438, 24 September 2015

- *Let's Talk TV – A World of Choice – A roadmap to maximize choice for TV viewers and to foster a healthy, dynamic TV market*, Broadcasting Regulatory Policy CRTC 2015-96, 19 March 2015

- *Practices and procedures for staff-assisted mediation, final offer arbitration and expedited hearings*, Broadcasting and Telecom Information Bulletin CRTC 2013-637, 28 November 2013

- *Good commercial practices*, Broadcasting Public Notice CRTC 2005-35, 18 April 2005