



Broadcasting Decision CRTC 2017-59

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Reference: Part 1 application posted on 26 October 2016

Ottawa, 3 March 2017

MusiquePlus inc.
Across Canada

Application 2016-1116-1

Complaint by MusiquePlus inc. against Bell Canada, Bell ExpressVu Limited Partnership and Câblevision du Nord de Québec inc., pursuant to the Wholesale Code

MusiquePlus inc. filed a complaint against Bell Canada, Bell ExpressVu Limited Partnership and Câblevision du Nord de Québec inc. (collectively, Bell), pursuant to sections 7 and 9 of the Wholesale Code (the Code), regarding Bell's proposed repackaging of the independent discretionary services MusiquePlus and Max.

The Commission finds that the proposed repackaging for MusiquePlus violates section 7 of the Code, and that the proposed repackaging for Max violates section 9 of the Code. However, the Commission finds that the proposed repackaging for MusiquePlus does not violate section 9 of the Code.

*Consequently, the Commission **accepts in part** the complaint by MusiquePlus inc. The Commission **requires** that all Bell's repackaging reflect the Commission's decisions set out below. With this decision, the Commission settles the dispute between the parties and **lifts** the standstill in place in the present proceeding.*

Parties

1. MusiquePlus inc. (MPI) operates the French-language independent discretionary services MusiquePlus and Max (collectively, the services), which are wholly owned subsidiaries of Groupe V Média inc.
2. Bell Canada is one of the main operators of broadcasting distribution undertakings (BDUs) in Canada. Bell ExpressVu Limited Partnership is a national satellite BDU. Câblevision du Nord de Québec inc. operates BDUs in Quebec and northern Ontario.

Background

3. MPI filed with the Commission a notice of a dispute with Bell Canada, Bell ExpressVu Limited Partnership and Câblevision du Nord de Québec inc. (collectively, Bell), pursuant to sections 12 to 15 of the *Broadcasting Distribution Regulations* (the Regulations).

4. In the present case, the standstill rule applies pursuant to section 15.01(1) of the Regulations, which specifies the following:

During any dispute between a licensee and a person licensed to carry on a programming undertaking or the operator of an exempt programming undertaking concerning the carriage or terms of carriage of programming services or concerning any right or obligation under the [Broadcasting] Act, the licensee shall continue to distribute those programming services at the same rates and on the same terms and conditions as it did before the dispute.

5. On 25 October 2016, MPI, on behalf of the services, filed with the Commission a Part 1 application in order to resolve the dispute with Bell, pursuant to the Wholesale Code (the Code), set out in the appendix to Broadcasting Regulatory Policy 2015-438.

Complaint

6. MPI's principal allegation is that the repackaging of the independent discretionary services MusiquePlus and Max, as proposed by Bell, violates sections 7 and 9 of the Code. These sections, respectively, require that the services:
 - be offered in at least one package in addition to being offered on a stand-alone basis; and
 - be included in the best available pre-assembled or theme package that is consistent with its theme, programming and language.
7. MPI argued that implementation of the repackaging would cause it substantial harm as this would detract from its ability to offer independent and viable programming services to subscribers at a reasonable price.
8. The Commission did not receive any interventions regarding this complaint.

Packaging of services

9. According to the information on the record of this proceeding, *Echelon* is Bell's current distribution platform. It includes the new packages, and is offered to all new subscribers or to those migrating from previous platforms. *Genesis* is a legacy distribution platform. It includes legacy packages and applies to grandfathered subscribers.
10. In Quebec, the services are currently offered in the three pre-assembled packages, "Good," "Better" and "Best," on Bell's *Echelon* platform. Nationally, they are offered in the "Family" package on the *Genesis* platform.
11. According to the repackaging proposed by Bell in Quebec, the services would be withdrawn from the "Good" and "Better" packages and be offered only in the "Best" package. Nationally, they would be withdrawn from the "Family" package and be offered only on a pick-and-pay basis for those who subscribe to the *Genesis* platform.

Section 7 of the Code

12. MPI alleged that the proposed repackaging violates section 7 of the Code, as it would exclude the services from all pre-assembled packages offered to clients on the *Genesis* legacy platform.
13. MPI stated that Bell's grandfathered customers must be considered independently of its other customers. MPI argued that by withdrawing services from one of its legacy packages, Bell is not offering those particular customers an alternative and is thereby depriving them of their grandfathered protection. MPI submitted that Bell is therefore trying to transfer its customers to its *Echelon* platform, without their consent or input.
14. MPI indicated that although the number of customers on the *Genesis* platform will naturally drop as they migrate to Bell's new package structure or cancel their Bell subscriptions, customers on this platform still represent a significant number of customers for MPI.

Section 9 of the Code

15. MPI expressed the view that, pursuant to section 9 of the Code, Bell should be required to include the services in the "Good" package. MPI argued that this package is the best pre-assembled package, not only because it has the highest penetration, but also because it includes the main French-language general interest channels, including RDS. MPI specified that its complaint is based on the importance of content and format diversity, to which it contributes through its independent programming services, as well as on the language of programming.
16. According to MPI, French-speaking subscribers do not want to subscribe to an expensive package that includes mostly English-language channels (the "Best" package). It stated that language is the main consideration for Quebec subscribers when selecting a package.
17. MPI indicated that Bell's withdrawal of the services from its "Good" and "Better" packages will have negative short-, medium- and long-term effects on MPI and its services. In this regard, MPI noted that the loss of subscribers to the services will increase as Bell's customers migrate from legacy platforms to the current platform. It added that a large majority of subscribers who select a pre-assembled package on the *Echelon* platform select the "Good" package.
18. Lastly, MPI argued that contrary to Bell's claim, MPI's services are not music video broadcast services whose diminishing popularity would justify their exclusion from the "Good" package. MPI added that market share shows that the services' popularity and viewing are on the rise.

Bell's response

19. In Bell's view, the proposed repackaging is in line with the obligations and requirements set out in the Code and therefore MPI's complaint should be dismissed.

20. According to Bell, section 7 of the Code is not meant to apply to all of the platforms and subscription offers of a same BDU. In its view, a BDU should be authorized to make changes to any legacy packages.
21. Bell considered that the requirement pursuant to section 7 of the Code is satisfied by the availability of packages on the *Echelon* platform. In its view, since customers on the *Genesis* platform are Bell customers, their choice of packages is not limited to those on that platform alone. Bell noted that these customers have access to packages offered on the *Echelon* platform, without having to change BDUs.
22. In regard to the allegation pursuant to section 9 of the Code, Bell stated that the “Good” package does not include any other discretionary service whose theme or programming falls under such areas as music, the arts, lifestyle, entertainment or dramatic series. Bell noted that French-language discretionary services offering programs of this type are included in the “Better” and “Best” packages.
23. Bell stated that the “Good” package focuses principally on local television stations and services with mandatory distribution. It specified that RDS, ICI RDI and LCN would remain grouped together in this higher penetration package as they are among the most popular French-language services and generate a great deal of interest among subscribers.
24. As for its repackaging strategy, Bell indicated that it wishes to limit the number of services available in the “Good” package in order to offer customers the greatest flexibility and choice possible, following decisions stemming from the Let’s Talk TV proceeding and in response to its customers’ expectations.
25. Lastly, Bell stated that MPI has exaggerated the potential impact of the proposed repackaging. Among other things, Bell expressed the view that MPI is not taking into account the majority of subscribers who select build-your-own packages rather than subscribe to a pre-assembled package. Moreover, Bell noted that the services are still available in the basic package for several grandfathered subscribers.

MPI’s reply

26. In its reply, MPI alleged that Bell is attempting to give the “Good” pre-assembled package characteristics that are different than those of the “Better” and “Best” pre-assembled packages. MPI stated that the “Good” package is, in fact, a pre-assembled package just like the “Better” and “Best” packages, and that none of them are theme packages.
27. MPI argued that, contrary to Bell’s claim, the “Good” pre-assembled package does not have any additional discretionary services with mandatory distribution. It noted that services with mandatory distribution are offered on the basic service.
28. MPI also objected to Bell’s argument that the services in the “Good” package reflect the interests of subscribers in the French-language market. Among other things, MPI stated that there are three English-language services whose reach and

audience are nearly nonexistent among Quebec’s francophone clientele, but are nevertheless included in the “Good” package.

29. Moreover, MPI alleged that Bell’s arguments regarding its packaging strategy are inconsistent with factual data. MPI considered that market share does not support Bell’s assertion that including the services in the “Better” and “Best” packages is based on consumer demand and success with audiences.
30. Lastly, in terms of the complaint pursuant to section 7 of the Code, MPI confirmed that the only possible alternative for *Genesis* subscribers who want to maintain access to the services in a package is to give up the legacy *Genesis* platform. MPI argued that beyond the letter of section 7 of the Code, its spirit is to allow a BDU’s subscribers to maintain their grandfathered legacy packages.
31. MPI is therefore asking that Bell continue packaging the services in the “Good” package for its *Echelon* platform customers in Quebec and in the “Family” package for its national *Genesis* platform customers.

Issues

32. The term “platform” as used by the parties is not defined in any Commission decision or regulation. “Platform” is used in the Code, but with a different meaning and refers to the method of distribution— analog, digital or multiplatform. In the context of this dispute, “platform” is used to describe two of Bell’s offerings to its subscribers: the current market offering (the *Echelon* platform) and the legacy offering for grandfathered subscribers (the *Genesis* platform).
33. After examining the record of this proceeding in light of the applicable regulations and policies, the Commission considers that the issues it must address in regard to the proposed repackaging are the following:
 - compliance with section 7 of the Code; and
 - compliance with section 9 of the Code.

Regulatory framework

34. Section 7 of the Code sets out the following:

Where a BDU offers pre-assembled or theme packages, independent programming services, with the exception of programming services identified in sections 25 and 26 of the *Broadcasting Distribution Regulations*, shall be offered in at least one package in addition to being offered on a stand-alone basis.

35. Section 9 of the Code sets out the following:

An independent programming service shall, unless the parties agree otherwise, be included in the best available pre-assembled or theme package consistent with its theme, programming and language.

36. As set out in paragraph 41 of Broadcasting Information Bulletin 2015-440, which provides general guidance on the interpretation of the Code, sections 7 and 9 of the Code 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.
37. In paragraph 44 of that same information bulletin, the Commission also indicated that it will generally interpret these sections in light of the balance that needs to be struck between diversity of voices and consumer choice, and that it will base any determination on the facts of a given dispute.
38. The Commission has considered this complaint taking into account the objectives of the diversity of voices and the provision of a wide range of Canadian programming, as set out in sections 3(1)(d)(ii) and 3(1)(d)(iii) of the *Broadcasting Act* (the Act), and those related to role of BDUs to provide reasonable terms to programming undertakings, in accordance with sections 3(1)(t)(ii) and 3(1)(t)(iii) of the Act.
39. Moreover, as a federal institution, the Commission must be concerned with the objectives set out in section 41(1) of the *Official Languages Act* when it examines and applies current policies.

Compliance with section 7 of the Code

40. The Commission considers it appropriate in the present case to determine whether section 7 of the Code should apply to Bell's legacy platform (*Genesis*). Should this be the case, following the proposed repackaging, it should be determined whether the services would be offered by the BDU in at least one package.
41. The Commission is of the view that Bell's argument, which would limit the application of the requirement set out in section 7 of the Code to the current platform, is an attempt to establish a new distinction that is not based on Commission regulations and previous decisions.
42. Moreover, the proposed repackaging would reduce access to and the visibility of the services on the legacy platform. According to the information on the record of this proceeding, after the proposed repackaging, a subscriber to the *Genesis* legacy platform would have to migrate to the *Echelon* platform to be able to select one or both of the services in a package. The proposed repackaging on the legacy platform would represent a loss of subscribers for both services, some of whom belong to official language minority communities.
43. In the present case, the BDU itself is modifying a legacy package on its own initiative by withdrawing the two independent discretionary services. In such circumstances, the Commission expects the BDU to fully comply with the spirit and letter of the Code.
44. The Commission is of the view that withdrawing the services from the legacy package is not consistent with the intent of section 7 of the Code, which aims to provide support to programming services in terms of packaging, and does not,

among other things, encourage the achievement of the objectives set out in sections 3(1)(d)(ii) and (iii) of the Act.

45. Therefore, in the circumstances of this proceeding, the Commission finds that Bell's proposed repackaging violates section 7 of the Code. The Commission requires that the BDU continue to offer the services in a package on the *Genesis* legacy platform.
46. Beyond this proceeding, the Commission does not expect BDUs to be obliged to make changes to their legacy packages to comply with the Code. As noted above, however, where a BDU modifies a legacy package on its own initiative, it should ensure that this is done such that the modifications fully respect the spirit and letter of the Code.

Compliance with section 9 of the Code

47. The Commission considers that it must determine which Bell package is the best pre-assembled package, consistent with the theme, programming and language of the services.
48. Historically a service focused on music, MusiquePlus now offers a wider variety of programming, notably, according to MPI, through its association with a news channel (Vice). According to the description submitted by the licensee, MusiquePlus is a [translation] "national specialized French-language service offering music and variety programs, magazine shows, reality television shows and fictional programs, focusing principally on the interests and concerns of young adults."
49. For its part, Max is described as offering [translation] "diversified and refined programming, from classic movies to blockbuster hits, and the most celebrated television series." Whereas Max (formerly Musimax) previously broadcast music videos and music programs, the service is now defined as a channel dedicated to broadcasting television series and movies.
50. The proposed repackaging on the *Echelon* platform would result in a loss of subscribers and revenues for both services due to, among other things, the loss of packaging in the highest penetration package, "Good." This loss of subscribers is likely to increase over the longer term, as subscribers migrate to Bell's new packaging structure.
51. Nevertheless, the Commission considers that requiring Bell to include the services in the "Good" package would be inconsistent with the programming and theme of the services included in that package. More specifically, the Commission considers that the services are not compatible with those in the "Good" package because the services are not comparable with either the French-language discretionary services offered in the package, namely, RDS, ICI RDI and LCN, or the English-language services that are included in the package, namely, The Weather Network (national service and Quebec signal), The Shopping Channel and MyTV Buffalo.

52. Moreover, this interpretation would unreasonably limit packaging flexibility and would be inconsistent with Commission decisions favouring consumer choice. The Commission therefore considers that this outcome would impede the achievement of the objectives set out in sections 3(1)(t)(ii) and 3(1)(t)(iii) of the Act.
53. The Commission considers that, in terms of programming and theme, MusiquePlus is more comparable with the services VRAK, ARTV and MuchMusic, which are all included in the “Best” package. Further, in terms of programming and theme, Max is more comparable with the services Cinépop, AddikTV and Séries+, which are all in the “Better” package. Finally, when considering the language criterion, both services are more suitable to the “Better” package given that this package is based more on language of service.
54. In summary, based on its analysis of the BDU’s packages, as presented in the context of this proceeding, the Commission is of the view that the requirements of section 9 of the Code would be met, in this case, by the BDU’s packaging of MusiquePlus in the “Best” package, and of Max in the “Better” package rather than the “Best” package as proposed by Bell.
55. In light of the above, the Commission determines that Bell’s proposed repackaging does not violate section 9 of the Code in terms of repackaging MusiquePlus, but does violate section 9 of the Code in terms of the proposed repackaging of Max.

Conclusion

56. The Commission finds that Bell’s proposed repackaging of the independent discretionary services MusiquePlus and Max violates section 7 of the Code. The Commission therefore **requires** that the BDU continue to provide the services in a package on the *Genesis* legacy platform.
57. The Commission also finds that the proposed repackaging for Max violates section 9 of the Code, but that the proposed repackaging for MusiquePlus does not. On this point, the Commission is of the view that the requirements set out in section 9 of the Code would be met, in this case, by the BDU’s packaging of MusiquePlus in the “Best” package and by its packaging of Max in the “Better” package on the current platform.
58. In making these findings, the Commission has taken into account the balance that needs to be maintained between the objectives relating to diversity of voices and providing BDUs the flexibility to meet consumer demand.
59. In light of the above, the Commission **accepts in part** the complaint by MusiquePlus inc. Consequently, the Commission **requires** all of Bell’s repackaging to reflect the decisions set out above. With this decision, the Commission settles the dispute between the parties and **lifts** the standstill in the present proceeding.

Secretary General

Related documents

- *Interpretation of the Wholesale Code*, Broadcasting Information Bulletin CRTC 2015-440, 24 September 2015
- *The Wholesale Code*, Broadcasting Regulatory Policy CRTC 2015-438, 24 September 2015

This decision is to be appended to each licence.