



Independent Broadcast Group/
Le Groupe de diffuseurs indépendants

Submitted Electronically

June 12, 2023

Mr. Claude Doucet
Secretary General
Canadian Radio-television and
Telecommunications Commission
Ottawa, Ontario
K1A 0N2

Dear Mr. Doucet:

Re: *Broadcasting Notice of Consultation CRTC 2023-139*
Call for comments – Proposed Regulations for the Registration of Online Streaming Services and Proposed Exemption Order regarding those Regulations

1. Independent Broadcast Group/Le groupe de diffuseurs indépendants ("IBG/GDI") is an association of Canadian independent broadcasters.¹ IBG/GDI is pleased to have the opportunity to participate in this series of consultations to integrate online undertakings into the Canadian broadcasting system. *Broadcasting Notice of Consultation CRTC 2023-139* ("NOC 2023-139") relates to proposed regulations to be made under the amended *Broadcasting Act* to implement the registration of online undertakings.
2. IBG/GDI appreciates the Commission's commentary on the proposed regulations to the effect that the registration requirement is meant to be light. Under the Commission's proposed approach, the proposed regulations would be broadly framed, but otherwise captured undertakings would be exempted from the registration requirement.
3. IBG/GDI is concerned that the registration threshold proposed by the Commission does not reflect the full range of services that do or will make a material contribution to broadcasting policy. A purely monetary threshold excludes, for example, many non-profit community services, Indigenous services, third-language services and smaller independent French- or English-language services.

¹ IBG/GDI's members are: Aboriginal Peoples Television Network, Channel Zero, Ethnic Channels Group, Groupe Média TFO, Knowledge Network, Hollywood Suite, OUTtv Network, Pelmorex Communications, Sportsman Channel Canada, Stingray Group, Superchannel, Telelatino Network, TV5 Québec Canada and Zoomer Media.

4. IBG/GDI does not view registration with the Commission necessarily as a significant regulatory burden to be avoided. Registration does not, on its own, presuppose that a regulated financial or other contribution must be made to the broadcasting system (the topic for discussion under *Notice of Consultation CRTC 2023-138*). But registration itself is poised to become a significant first step to recognition as a full-fledged participant in the broadcasting system. For that reason, it is important that services that do make a material contribution to the system – or that have a material impact on the system – are recognized through the registration process.

Thresholds – Material Contribution to the Broadcasting System

5. IBG/GDI's primary concern regarding the proposed approach relates to the thresholds for exemption from registration. This raises a larger question than the mere act of registration itself. Registration – i.e. being recognized as an online undertaking within the Canadian broadcasting system – may well be the precursor to *recognition* as an undertaking with a material contribution to make within the regulated environment as a whole.
6. It is early days in the development of a new regulatory framework, but IBG/GDI believes that it is likely that registration may become a proxy for whether an undertaking is considered to have a material role in the system. For example, the draft Direction to the CRTC recently published for public comment (the "Draft Direction")² includes an important reference regarding whether an undertaking is licensed or registered under the Act.³ We do not wish to comment on the substantive issue as to whether that reference is appropriate or not. We simply wish to point out that, already, the question of whether an entity is registered, or required to register, is becoming a threshold question in relation to other policy matters.
7. A similar policy issue, the Commission may recall, arose several years ago regarding the eligibility of certain broadcasters to trigger funding under the Canada Media Fund ("CMF"). Due to certain language used by the CMF and in related materials, broadcasters that were "exempted" from licensing by the Commission were ineligible to trigger CMF funding. The language in the related criteria referred solely to "licensed" broadcasters. As a result, when the Commission streamlined its licensing processes and exempted many third-language, ethnic television discretionary services and all discretionary services serving fewer than 200,000 subscribers⁴, eligibility for CMF funding was affected. It had a similar impact on certain tax credit eligibility requirements, which also

² *Canada Gazette*, Part I, Volume 157, Number 23: *Order Issuing Directions to the CRTC (Sustainable and Equitable Broadcasting Regulatory Framework)*.

³ Section 11 of the Draft Direction reads, "In exercising its powers under section 4.2 of the Act, the Commission is directed to set out clear, objective and readily ascertainable criteria, including criteria that ensure that the Act only applies in respect of programs that have been broadcast, in whole or in significant part, by a broadcasting undertaking that is required to be carried on under a licence or that is required to be registered with the Commission but does not provide a social media service." [emphasis added]

⁴ *Broadcasting Order CRTC 2015-88*.

referred to "licensed" broadcasters.⁵ Ultimately, that issue was partially resolved. However, it points to a perceived hierarchy of importance between services that are "licensed" and services that are "exempted" from licensing – even though a large number of exempt services play a highly material role in the broadcasting system. This is especially true in creating and exhibiting Canadian programming in third-languages.

8. Moving to the online environment, a similar issue is at play here. There is a perceived hierarchy associated with the issue of whether an online service is registered or not. In NOC 2023-139, the Commission notes that it may exempt online undertakings from the registration requirement where the Commission is satisfied that compliance with those requirements will not contribute in a material manner to the implementation of broadcasting policy. However, the mere act of *registration* has little impact in and of itself – it is the larger regulatory framework relating to registration and how registration is treated that has the impact. Will registration become a pre-condition to accessing or triggering various funding tools, for example, as was the case with licensing? Will registration be required to seek other remedies under the Act, such as remedies that protect against undue preference or disadvantage?
9. The Commission also notes, and IBG/GDI agrees with this assessment, that it is important to consider whether particular categories of undertakings will contribute in a material manner to broadcasting policy objectives. However, the level of revenue generated by an undertaking is not a full proxy for the materiality of the contribution made to the broadcasting system.
10. Many existing Canadian services, licensed, exempted and online, operate under the \$10 million annual revenue threshold. This includes online third-language services, Indigenous services, community services and smaller English- or French-language independent broadcasters. Under the proposed \$10 million threshold (for broadcast ownership groups or individual undertakings), these services would not be included within the threshold. It seems problematic from a policy perspective to exclude these smaller undertakings from registration – not only due to the potential unintended consequences, discussed above, but also due to the fact that the Commission will then have very little ability to collect information or even to recognize their existence.
11. Looked at from another perspective, non-Canadian online services that have a large impact on Canadian broadcasting policy objectives – such as third-language services available online – would similarly not be required to register if their Canadian revenue is below \$10 million. Yet, by not registering and not providing the *de minimis* information requested by the Commission, they would be "out of sight" and "out of mind". This could become a concern, for example, in circumstances involving the Commission enforcing an "undue preference/disadvantage" procedure or determination. Moreover, if the Commission maintains its approach of requiring registration on a broadcast group basis, this could require Canadian online services with individual service revenues below

⁵ *Income Tax Act Regulations*, section 1106(1). See paragraph (a)(iv)(B) of the definition of "excluded production".

the applicable threshold reporting, but their competitors not even being known to the Commission. If, as many suspect, registration becomes the entry point to the assumption of regulatory obligations, then, similarly, Canadian services that are part of a broadcast group could become subject to regulation, but their direct non-Canadian competitors would not be.

12. For these reasons, we are concerned that the monetary threshold proposed by the Commission may not be adequate for the purpose. There are alternative approaches that could be considered (either on their own or in combination).

1. The threshold for registration, if a financial threshold is maintained, could be set at a lower level.

This would capture more services, presumably. However, at this point, there is insufficient data to propose a specific threshold. The \$10 million threshold is similarly problematic due to the lack of data and information about the market overall.

2. An additional analytical approach could be adopted for registration. For example, if an online undertaking itself accepts subscriptions from Canada; or if the online undertaking itself solicits advertising that is targeted at the Canadian market; then the undertaking would be subject to a registration requirement. (This would mirror a similar analytical approach adopted for DTH satellite services and non-Canadian satellite-to-cable services accessing the Canadian market, as discussed in *Public Notice CRTC 1993-74* and in Report of the Broadcasting and Telecommunications Legislative Review Panel.)⁶

This approach could be relevant in specialized markets – such as third-language broadcasting – where the Commission would wish to ensure that it has the necessary information and enforcement tools to support services that contribute to or have a material impact on broadcasting policy objectives.

3. Provision could be added for *optional* registration by online undertakings that fall below the financial or other threshold. This would enable services to register that *do* make a material contribution to Canadian broadcasting and that *do* wish to be recognized for that contribution within the regulated framework.

This third approach, should, we believe, be adopted by the Commission regardless of whether it chooses to maintain or lower the monetary threshold. This would enable the Commission to *encourage* smaller services that *do* make an important contribution to the broadcasting system to register, even though they might not be required to do so. In addition, it would assist the Commission

⁶ *Canada's Communications Future: Time to Act*. See the Discussion on "Does the *Broadcasting Act* apply to foreign-based Internet programming services".

to address another concern that has been expressed regarding the requirement that broadcast groups over the threshold on a group basis register all online undertakings (even those that are nascent and launching with minimal revenues). An "option in" approach would allow the Commission to set a threshold or other requirement to register undertakings on an individual – not group – basis, while leaving more flexibility for services that do not meet the threshold to be recognized as meaningful participants in the system.

13. It may be argued that the *Regulations* themselves are permissive and an entity may register even if it is exempt from the requirement to do so. However, in our experience, the Commission's practice with respect to licensing questions has been not to process licensing applications where an entity is exempted from the licensing requirement. Moreover, as the excerpt from the Draft Direction noted above indicates, care needs to be taken in considering various policy issues as to the relevance of "required" registration, or otherwise.

Conclusion

14. IBG/GDI appreciates this opportunity to present our initial comments in response to NOC 2023-139. Our comments relate principally to the threshold for registration under the proposed regulations and the related exemption process. We believe that the proposed threshold may exclude services that do make a material contribution to Canadian broadcasting policy or have a material impact on that policy. We wish to emphasize that, in our view, a registration requirement (or option, as we have proposed) is not the same as the imposition of a requirement to make financial or other regulated contributions to the broadcasting system. In that context, monetary thresholds may well be a more relevant factor.
15. We look forward to reviewing other submissions in this process.

Yours truly,

[Submitted electronically]

Joel R. Fortune
Legal Counsel