[FR] Broadcaster can force distributor to make viewers pay for its DTT channels

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In a decision of 28 September, the commercial chamber of the Court of Cassation settled a dispute between Métropole télévision and the Molotov distribution platform.

Métropole télévision, parent company of the M6 group, together with its subsidiaries EDI-TV and M6 génération, operate the television channels M6, W9 and 6TER, which they broadcast free-to-air and free of charge via digital terrestrial television (DTT) and the open Internet (OTT). They allow distributors to include their channels in their pay-TV packages, which are accessible through various distribution networks. Molotov, via an Internet-based platform, distributes television services, some under a free-to-view model and others on a paid subscription basis. In 2015, Molotov and Métropole signed an 'OTT' distribution contract covering the free-to-air broadcast of M6, W9 and 6TER and their specialist channels, as well as the catch-up services of other channels. When this contract expired, Métropole proposed new distribution conditions and, following negotiations, the parties renewed the existing agreement until 31 March 2018, when the new contract was set to enter into force.

On 5 March 2018, Métropole asked Molotov to accept new remuneration conditions, to distribute the channels M6, W9 and 6TER and associated bonus content exclusively as part of pay-TV packages, and to make its customers pay for these channels. However, the parties could not agree on distribution conditions for the free DTT channels. Molotov accused Métropole of making the conclusion of a new distribution contract conditional on it changing its business model by forcing it to offer a basic pay-TV package including the free DTT channels (M6, W9 and 6TER). It filed an action for damages on the grounds that the so-called 'paywall clause' contained in the company's general distribution conditions, a measure used by broadcasters to prevent non-subscribers accessing certain content on a website or application, was illegal and discriminatory.

Molotov claimed, firstly, that the 'paywall clause' forced it to set a minimum price, which was prohibited by Article L. 442-5 of the Commercial Code. After the appeal court had rejected all its requests, Molotov appealed to the Court of Cassation, whose economic and financial chamber pointed out that the disputed clause prevented the distributor distributing the free-to-air DTT channels free of charge

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via the Internet. However, since there was no evidence that Métropole was trying to set a minimum price for the Molotov pay-TV service in which it was demanding its channels be included, the Court of Cassation decided that the appeal court had been right to rule that the practice could not be deemed to be the unlawful imposition of a minimum price.

Secondly, Molotov considered that the M6 group's ownership of a neighbouring right did not give it the right to impose such obligations. However, according to the Court of Cassation, the appeal court had been right to state that, since it held a neighbouring right over its channels under Article L. 216-1 of the Intellectual Property Code, Métropole was entitled to lay down the economic conditions for their distribution, although such a right could be abused if it led to a significant imbalance. In this case, such an abuse, which Molotov would have to prove and which could not be the result of Métropole using its right to parallel self-distribution or of the alleged harm to Molotov's business model, had not been established.

Finally, the decision stated that the provisions of the law of 30 September 1986 did not oblige the private provider of the free M6 service to make its signal available to a di

stributor by any means other than terrestrial broadcasting, whether via satellite or, as in this case, over the Internet. Moreover, Molotov had failed to prove that it had been discriminated against by Métropole in its implementation of the disputed clause.

Given these findings, which suggest that M6's decision to only allow its free-to-air DTT channels to be distributed as part of a pay-TV package did not, in itself, infringe the cited provisions of the law of 30 September 1986, the Court of Cassation ruled that the appeal court, which had also found that the decision had not been incorrectly implemented, had legally justified its decision.

Cour de cassation (com.), 28 septembre 2022, n° 20-22447, Molotov c. Métropole

https://www.courdecassation.fr/decision/6333e9d1e5004d05dab7c05e

Court of Cassation (commercial chamber), 28 September 2022, no. 20-22447, Molotov v Métropole

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