

The Scheduling of Television Advertising: Approaches to Enforcement

Response from the Commercial Broadcasters Association to Ofcom

October 2014



A VOICE FOR COMMERCIAL BROADCASTERS IN THE UK

Executive Summary

1. COBA welcomes the detailed work Ofcom has undertaken in the run up to and as part of this consultation. The process of scheduling is a complex matter, but it is at the heart of the efficient operation of channels. As such, changes to enforcement in this area can potentially have a highly disruptive impact on the running of broadcasters' businesses. This is of course quite apart from the potential harm to advertising revenues and, as a result, investment in content, which is directly dependent on those revenues.
2. In this submission, we set out a detailed description of the technical process of scheduling, based on extensive consultation with COBA members, including children's and non-children's channels. In summary, it is not the case that channels base their scheduling on the EPG schedule; rather, they employ internal scheduling systems that gradually build up a schedule. EPGs are the public-facing output created from these schedules, and are typically created two weeks prior to transmission. At this point it is not necessarily always possible to schedule to the second (this precision comes later in the scheduling process), even if it were desirable in terms of providing audiences with clarity and simplicity, which it may well not be. In the subsequent two weeks, other elements, such as advertising and promotions, are added to the schedule, and ultimately the schedule is able to provide timings to the second. This may result in changes to the final schedule – usually of a few seconds, occasionally more significant – that are not reflected in the EPG.
3. We agree with Ofcom that the EPG is a useful enforcement tool for measuring scheduled duration in the first instance, but it is not necessarily the definitive version of the schedule. It is in effect a proxy for the schedule. Were Ofcom to rely solely on the EPG for enforcing duration, we believe it would face a number of challenges, not just in the children's genre. It is unclear to us how Ofcom would measure over-runs (from, for example, live programming) that do not appear in the EPG, or how it would ensure it had ready access to EPGs managed by third parties in overseas markets (when enforcement is required for non-domestic licence holders).
4. In some cases, it is in our view entirely appropriate – indeed, necessary - for Ofcom to refer to more detailed data, in addition to using the EPG. We see two options for this. Firstly, Ofcom might refer to the actual, final schedule held by broadcasters, which would provide timings that are accurate to the second. Under this approach, Ofcom would be enforcing scheduled duration solely on the basis of the schedule – primarily, in the majority of cases, using only the

EPG, but where necessary for practical purposes also the actual schedule itself.

5. Alternatively, Ofcom might use As-Run Logs to provide data to the second, in addition to the EPG. Again, in the majority of cases this level of detail would not be necessary. We understand Ofcom may have concerns about whether using EPGs and a different tool, such as the As-Run Log, provides consistency. We appreciate the need for consistency but believe that the key point here is that the same approach should be applied to all licensed broadcasters, not that this approach should necessarily limit itself to one tool.
6. We must also stress that some proposals in the consultation paper, particularly the suggestion of including only editorial in the definition of scheduled duration, would have a significant and widespread negative impact across the entire broadcasting sector, disrupting businesses, materially damaging revenues, and putting substantial levels of investment in content at risk. The impact analysis conducted by Ofcom so far has focused on children's channels. We do not support any significant change to the current practice – as we outline, we support an approach based primarily on the EPG, along with reference to additional data where needed. However, were Ofcom to favour a radically different approach to enforcement, such as determining that scheduled duration should only include editorial content, we would be highly concerned. In these circumstances, we would consider that before any decision could be finalised Ofcom would need to undertake a detailed assessment of the impact on the wider broadcasting sector.
7. As we have raised previously with Ofcom, our view is that it is absolutely clear that the “gross principle” – i.e. including advertising and other elements within the scheduled duration - is widely accepted across Europe. Legal opinion from Professor Mark Cole, provided to Ofcom separately, noted that the gross principle is established in calculating duration in EU Member States. We see no reason for Ofcom not to continue its application.

Introduction

1. The Commercial Broadcasters Association (COBA) is the industry body for multichannel broadcasters in the digital, cable and satellite television sector.
2. COBA members play a vital role in the success of the UK broadcasting sector. The multichannel sector is one of the fastest growing parts of the television landscape. In the last decade, the sector has increased its turnover by 30% to more than £5 billion a year. This is rapidly approaching half of the UK broadcasting sector's total annual turnover, and has helped establish the UK broadcasting sector as the largest in Europe by turnover.¹
3. As part of this growth, the multichannel sector has doubled direct employment over the last decade.² In addition, it has increased investment in UK television production to a record £725m per annum, up nearly 50% on 2009 levels.³
4. **For further information please contact Adam Minns, COBA's Executive Director, at adam@coba.org.uk or 0203 327 4101**

¹ Ofcom International Broadcasting Market Report 2013

² Skillset, Television Sector – Labour Market Intelligence Profile

³ COBA 2014 Census, Oliver & Ohlbaum Associates for COBA

Response to consultation questions

Question 1: Do you agree with our assessment criteria as set out in Section 5?

We appreciate the importance of a clear and consistent approach, but caution that enforcement must be based on a thorough understanding of how industry operates in this area in order to avoid creating significant operational problems for channels, as well as having substantial negative impacts on advertising revenues and, by extension, investment in content. We agree with the headline criteria for assessment but wish to elaborate on certain points.

Imposing unnecessary burdens on industry

Scheduling is a highly technical area that is fundamental to the efficient operation of licence holders, as we outline in more detail in response to Question 2. Ofcom should therefore be particularly mindful that its enforcement in this area does not impose an unnecessary burden on industry by introducing requirements that disrupt the efficient operating of broadcasters, or by applying a blunt approach to enforcement.

Regulatory certainty

As Ofcom's consultation paper notes, there is no consensus across Europe in how scheduled duration is enforced. This supports previous legal research commissioned by COBA. Opinions from Monica Carss-Frisk QC and Professor Mark Cole, provided to Ofcom separately, agreed that there is a lack of clarity in this area and a range of interpretations across Europe. Cole concluded in regard to the AVMS Directive and its predecessors:

“One point is undoubtedly clear from the legislative history: there was no consideration with regards to the introduction of a specific requirement on the calculation method of establishing the length of 30 minutes.”

Cole went on to argue that where there is a degree of uncertainty about specific provisions within the AVMS Directive, the interpretation of such provisions must follow the “in dubio pro libertate” principle.

In addition, what in our view is absolutely clear is that the “gross principle” – i.e. including advertising and other elements within the duration - is widely accepted. Cole noted that the gross principle is established in calculating duration in EU

Member States. We cannot see how anyone would reasonably question Ofcom's continued application of the gross principle.

Incentives for investment in high quality children's content

Multichannel broadcasters have increased their investment in overall (UK) originations by 50% over the last five years, and last year spent a record £723m on UK production (excluding sports rights and inward investment productions).⁴ In 2011, the last year where data is available specifically for children's, COBA channels invested nearly £30m in UK children's and animations commissions.⁵ This investment supports a range of high quality shows, often with strong 'public service' credentials, as illustrated by the case studies below, and is particularly important at a time when investment in children's by commercial PSBs has fallen.

However, we strongly caution that the economics of investment in originations, with their high cost per hour compared to acquisitions and repeats, remain highly challenging, and investment in new children's originations cannot be taken for granted. As we have outlined to Ofcom, the loss of centre breaks in the relevant children's shows could have a significant negative impact on the advertising revenues that are crucial to supporting this investment in production.

Based on Ofcom's market impact assessment there would indeed be a substantial impact on advertising revenues and, by extension, content investment if children's broadcasters lost relevant internal breaks. Ofcom estimates, post mitigation, that losses might represent 13-14% of total advertising revenues, and 5-6% of all revenues for children's channels. While broadcasters might consider cuts to other areas as well, this would be likely to be mitigated in part at least by reductions in content budgets.

Case studies of high quality UK children's shows from COBA members:

Evermoor:

The UK as a global hub

Described by Variety as Disney's "most ambitious production yet in Europe," Evermoor testifies to the UK's growing status as global production hub. Commissioned from Liverpool-based independent producer Lime Pictures, the large-scale children's drama is the first long-form, live-action show to be made in the UK for Disney's US channel, and is the first time Disney's UK commissioning hub has

⁴ COBA 2014 Census, Oliver & Ohlbaum Associates for COBA

⁵ COBA 2012 Census, Oliver & Ohlbaum Associates for COBA

collaborated to such a major extent with the company's international channels, meaning that it will be broadcast in 160 countries. Filming started this year on location in Cheshire and at facilities in the North West.

The Amazing World of Gumball: International kudos for UK animation

Turner's The Amazing World of Gumball has raised the UK's profile globally as a centre of excellence for animation. The show, featuring a ground-breaking combination of live action, 2D, and 3D animation, has an exceptional track record in winning international awards, collecting 18 prizes in six countries, including four BAFTAs and an Emmy. In addition, the global hit has been viewed by around 77m people worldwide. This year, Turner made the 100th episode of Gumball, illustrating how multichannel broadcasters can commit to high volume production.

Olive The Ostrich: Working with UK schools

Nick Jr.'s Olive The Ostrich is a British animation made in partnership with The Princes Trust. The creators, independent British animation studio Blue-Zoo Productions, worked with 52 schools in deprived areas in an initiative to engage children with the arts. During production, Blue-Zoo held workshops in schools and the artwork created by children was incorporated into each episode. The producers then helped the school organise a premier screening of their episode, inviting the parents to help foster community relations.

Question 2: What are your views on the enforcement approaches set out in Section 5?

We think it would be helpful to first set out how COBA members approach the process of scheduling. We have based this on extensive consultation with COBA members, including children's and non-children's channels. In summary, it is not the case that channels base their scheduling on the EPG schedule; rather, they employ internal scheduling systems that gradually build up a schedule. The EPG is the public-facing output created from these schedules, and may be a useful enforcement tool in the first instance, but is not necessarily the definitive version of the schedule, as we outline below.

The process of scheduling

At the heart of the process of building up a schedule are channels' internal scheduling systems – such as BSS, Vision or IBMS, amongst others. These are used

to gradually create a schedule over a period starting up to six weeks before transmission, with programmes and other elements such as commercials, sponsorship credits and cross-promotion references, being layered in at different stages in advance of transmissions, with the final schedule possibly being finalised one or two days prior to transmission.

At a point in this process, typically two weeks before transmission, a schedule is given to the respective platform and used to create an EPG, which is a simplified, public-facing expression of the actual schedule. Where the schedule is programmed to the second when it is provided to platforms, the public-facing EPG will typically round any seconds up or down to the nearest minute. However, scheduling systems may not allow channels to provide information to the second at this point, as they are in effect incomplete.

In the remaining two weeks or so before transmission, broadcasters will complete their schedules by adding in further components, including advertising and promotional campaigns. At this point, all scheduling systems (to our knowledge) have the ability to break down duration by the second, and broadcasters frequently do so. Where there are major changes, the schedule may be re-submitted to the platform and other listings publishers, and these changes incorporated into the EPG. However, this is unusual and minor changes – such as a few seconds – would not normally entail the schedule being re-submitted to listings publishers or to a platform to be represented in the public EPG.

The EPG approach

As we outlined above, it is vital to understand that the EPG schedule is very much the public-facing output of broadcasters' internal scheduling systems. There may be subsequent changes to the internal schedule, once advertising campaigns are inserted for example, that are not reflected in the EPG schedule, as indeed Ofcom's consultation paper observes.

This is not to say that the EPG schedule is not a useful tool for enforcement, and it may indeed be used as a proxy for the schedule in most cases. However, it does not provide a definitive version of the schedule and should not necessarily be taken as such when a greater level of detail is required, such as in the case of determining whether duration is more than 30 minutes.

Indeed, were Ofcom to rely solely on the EPG for enforcing duration, we believe it would face a number of challenges, not just in the children's genre. It is unclear to us how Ofcom would measure over-runs (from, for example, live programming) that do

not appear in the EPG, or how it would ensure it had ready access to EPGs from third-party platforms in overseas markets (when enforcement is required for non-domestic licence holders).

As we outline in response to Question 3, we suggest Ofcom consider an approach to enforcement that is based on the EPG schedule as a proxy for the actual schedule, but refers to the actual schedule (or alternatively As-Run Logs) where appropriate.

The TX approach

We agree that requiring a wholesale move exclusively to TX logs would be unnecessarily disruptive for industry.

However, we believe TX logs may have a role as part of enforcement, as we outline in response to the next question. Ofcom questions whether using TX logs will provide robust and consistent data. In our view, TX logs are not necessarily any more or less robust or consistent than public-facing EPGs. It should be borne in mind that such EPGs are not the definitive version of the schedule and may vary considerably in how they are created from platform to platform. This is all the more possible when Ofcom considers platforms in other EU markets where channels with non-domestic licences from Ofcom are operating. Indeed, in such cases it may be more practicable and more effective for Ofcom to require data from licence holders themselves rather than rely on third parties, which would suggest that TX logs, internal schedules or other records created by licence holders have a role as part of an overall enforcement approach.

Scheduled duration includes internal breaks only

Both this option and the next would be likely to have a serious negative impact on broadcasters' advertising revenues as they significantly reduce the amount of internal breaks they are able to schedule. We agree with the consultation paper that this would be likely to have a negative impact on content investment as a result, and strongly believe this approach would not be proportionate.

We note from Ofcom's research for this consultation that absolutely no consensus was apparent in the approach used by other Member States and do not believe there is any justification for Ofcom adopting such a methodology.

Scheduled duration includes only editorial

This option would have the most serious negative impact on broadcasters' revenues and their ability to invest in content right across the sector. Broadcasters have either

commissioned programming to be produced or licensed programming on terms covering 3-5 years or more. Any changes to the “gross principle” would require substantial changes to the programming they are able to use. As well as the resulting negative impact on production, it is also a clear possibility that the range of content and channels on offer to audiences would be reduced if this went ahead.

As we have mentioned, our view is that it is absolutely clear that the “gross principle” – i.e. including advertising and other elements within the duration - is widely accepted across Europe. Legal opinions from Professor Mark Cole, provided to Ofcom separately, noted that the gross principle is established in calculating duration in EU Member States. We see no reason for Ofcom not to continue its application.

Overall, we must stress that the impact analysis conducted by Ofcom so far has focused on children’s channels. We do not support any significant change to the current practice – as we outline in the next question, we support an approach based primarily on the EPG, along with reference to additional data where needed. However, were Ofcom to favour a radically different approach to enforcement, such as determining that scheduled duration should only include editorial content, this would be highly likely to materially impact on a wide range of channels and genres beyond children’s. We are strongly opposed to such a change and would be highly concerned that Ofcom has not carried out a detailed assessment of the impact on the wider broadcasting sector, which we would assume would have to be undertaken as an additional piece of work before any decision could be finalised.

Question 3: What enforcement approach should Ofcom adopt for the purpose of enforcing COSTA rules on the scheduling of advertising during programmes? If you consider that Ofcom should use an approach other than the EPG approach or one of the TX approaches described in this document, please explain your preferred approach in detail.

We believe that the EPG schedule is a useful proxy for the actual schedule and therefore an important tool for determining scheduled duration in the first instance. However, as we have outlined in response to question 2, the EPG schedule is not the actual schedule, but rather the output created from broadcasters’ own scheduling systems that is designed primarily for audience navigation. We therefore see the EPG schedule as a starting point for compliance purposes. In many cases, Ofcom will not require a greater level of precision than that offered by the EPG schedule in order to ensure licence holders are compliant, and the EPG schedule alone will suffice as an enforcement tool.

However, while we support the public EPG schedule serving as a proxy in the first instance, Ofcom should also refer to more precise data where appropriate when there is a need to establish a more precise level of detail. As we have noted in response to the preceding question, were Ofcom to rely solely on the EPG for enforcing duration, we believe it would face a number of challenges - in the children's genre, but also in measuring over-runs that do not appear in the EPG or, when enforcing non domestic licences, ensuring it had ready access to EPGs managed by third-parties in overseas markets.

In cases where this is difficult, referring to data held by a licensed channel – either the actual internal schedule or As-Run Logs - means that Ofcom will be able to require information from the licence holder rather than relying on third parties. Ultimately, we would expect the burden to be on licence holders to provide reliable data when requested.

We see two options for this second step, which we outline below.

EPG as proxy for schedule (+ actual schedule)

This proposal is based solely on the schedule itself. It uses the public EPG schedule as a proxy in the first instance, but refers to broadcasters' final schedules where more detail is required, such as to determine whether duration is more than 30 minutes.

As explained in response to Question 2, broadcasters provide a schedule to platforms and listings providers around two weeks before transmission, and this is used to create a public EPG schedule. After that, broadcasters will add in further components to the internal version of the schedule, including layering in advertising campaigns for example, which may result in changes to the schedule.

Resubmitting this schedule to platforms is technically possible but in our view not practical, creating a significant operational burden on channels and platforms for little if any actual effect. Typically, any subsequent changes to schedules once they have been provided to platforms in the first instance will be small – perhaps a second or two – and this difference would often not be picked up by the public EPG, which usually rounds slot timings up or down to the nearest minute anyway.

However, it would be relatively straightforward for channels to retain a file of the final schedule, i.e. one that includes any subsequent changes to the schedule after it has been submitted to the platforms, and to provide this to Ofcom on request. This file would contain accurate, to the second timings.

This would, in our view, provide Ofcom with a clear and consistent approach that used only one tool (the schedule itself). It would be practical to enforce, since Ofcom

would ultimately be able to hold a licence holder directly to account, and would not place a disproportionate burden on industry. Indeed, this approach would be based on current industry practice.

EPG as proxy for schedule (+ As-Run Logs)

Alternatively, using this approach, the public EPG schedule would again serve as a proxy for enforcing scheduled duration in the first instance. However, where there is a need for greater precision, Ofcom would refer to As-Run Logs.

Ofcom has raised concerns that such logs may not always be reliable, but we do not believe they are any more or less reliable than public EPG schedules themselves. The principle of using As-Run Logs, or equivalent, in order to permit industry an appropriate level of flexibility seems well established under Section 10 (Transfer of Minutage) of the COSTA code. This enables broadcasters to ask Ofcom to allow them to re-schedule additional advertising minutes that they have not been able to use for certain reasons. In evidencing this, we assume the regulator examines As-Run Logs or equivalent precise records.

We also understand that Ofcom may consider that using both EPG schedules and As-Run-Logs does not provide consistency. We agree that consistency is important but, in our view, this does not preclude using a combination of enforcement tools where appropriate.. What ultimately matters in providing consistency is that the same approach is applied to all licence holders. Both EPG schedules and As-Run Logs are used to enforce different parts of the COSTA rules and are therefore established as regulatory tools. Providing the same approach is applied to all licence holders, we believe a system using EPG schedules in the first instance and As-Run logs where more detail is required would be consistent, clear and, above all, practical and effective.

For broadcasters that transmit children's programmes:

Question 4: If enforcement is based on the EPG approach, what EPG slots (that are greater than 30 minutes) are you likely to use when scheduling internal breaks in children's programmes (e.g. slots that show timing to the nearest one minute junction or those displayed to the nearest five minutes)?

COBA understands that for many children's channels this is not an option as slots that are a few seconds over 30 minutes will be rounded down to 30 minutes when the public-facing EPG is created. Where slots are rounded up, both 31 minutes and 35 minutes are being considered. Even then, however, there is concern that such an

approach may, in fact, not always be practicable for technological reasons, and, where it is possible, that it may in some cases create audience confusion.

Question 5: Do you agree that the clarification relating to the definition of advertising appropriately transposes the requirements of the AVMS Directive? If not, please explain why. Please identify any areas of this proposal which, if it is accepted, you consider Ofcom should issue guidance on.

We are content with this change.

Question 6: Do you agree with the proposed clarification and definition of a clock hour? If not, please explain why.

In our view a clock hour is a full 60 minute period, but one that does not necessarily need to start on the hour. It is conceivable that some channels' schedules may not start on the hour and they may wish to organise advertising on that basis. Ofcom does not provide details in the consultation paper as to why this presents compliance problems. We would like to understand more about these problems before any steps are taken that might preclude broadcasters from legitimate practices, and ask Ofcom to provide more clarity.

Question 7: Do you believe that there are potential impacts of the above proposal that Ofcom has not identified? If so, please provide details. Please identify any areas of this proposal that, if adopted, you consider Ofcom should issue guidance on.

We are not aware of any further impacts other than those identified, but have said that Ofcom should provide further clarity about why it considers starting clock hours at times other than on the hour to be an issue.

Question 8: Do you agree with the proposed clarification of the definition of films? If not, please explain why. Please identify any areas of this proposal that you consider Ofcom should issue guidance on.

We agree with this change.

However, more broadly, the principle of applying the same restrictions to films and dramas that are never intended for cinematic release to the ones that apply to, for example, Hollywood blockbusters, is potentially disproportionate.

Question 9: Do you agree that the proposed clarification of the definition of teleshopping is appropriate? If not, please explain why. Please identify any areas of this proposal that you consider Ofcom should issue guidance on.

We agree with the proposed change.

Question 10: Do you have any comments on the how the exemption for L-DTPS is reflected in the draft Code? Please identify any areas of this proposal that you consider Ofcom should issue guidance on.

We have no comments on the exemption.

Question 11: Do you have any comments on the proposal to update COSTA to reflect the changes to the rules on advertising break lengths on PSB channels? Please identify any areas of this proposal that you consider Ofcom should issue guidance on.

We ask Ofcom to clarify what analysis it has undertaken of the commercial benefit to PSBs of this change and whether this benefit has been reflected in its calculation of the value of the commercial PSB licences.

Question 12: Do you have any comments on the proposal to change the layout of COSTA or on the minor revisions proposed?

No.

Question 13: Do you believe that there are potential impacts of the above proposals that Ofcom has not identified? If so, please provide details.

We are not aware of any.

Questions from Annex 5

Question A1: Do you agree with our approach to mitigation strategy 1? If not, please explain any objections fully and please provide supporting evidence.

We have concerns on two grounds. Firstly, channels already include promotional material in their schedules and the addition of further promotion material will inevitably increase the risk of a loss of impacts. Ofcom acknowledges this principle but assumes a number of things will offset that loss – Ofcom states that audience loss will be mitigated by increased viewing for the promoted shows, or because audiences prefer promotional material to commercials. In our view, the number of assumptions involved in this argument makes any conclusions highly speculative, and we certainly do not believe that there is likely to be any significant level of mitigation from this approach

Furthermore, it may not always be the case that promotional material is included in the schedule at the point at which it is provided to platforms for the creation of an EPG schedule. Instead, it may be added to broadcasters' internal schedules at a later point before eventual transmission, and may therefore not be a mitigation option if Ofcom uses only the public EPG as an enforcement tool. In our view, this makes our proposal for an approach using an EPG schedule + actual schedule/As-Run Logs more appropriate.

Question A2: Do you agree with our approach to mitigation strategy 2? If not, please explain any objections fully and please provide supporting evidence.

Broadcasters may not have the right to break programmes into parts like this and, as Ofcom acknowledges, the narrative of the programming might make this approach impossible.

Question A3: Do you agree with our approach to mitigation strategy 3? If not, please explain any objections fully and please provide supporting evidence.

As above, this raises concerns about editorial integrity and whether broadcasters have the right to tamper with a programme in this way.

Question A4: Do you agree with our approach to mitigation strategy 4? If not, please explain any objections fully and please provide supporting evidence.

We agree with the consultation paper that reducing or losing internal breaks in the relevant slots and increasing the length of end breaks creates a risk of a loss of impacts and, as a result, revenues. Ofcom seems to argue that this will be mitigated by viewers who start watching during an end break in order to watch the next programme. However, broadcasters still face an increased risk of losing audiences who were watching the first programme if the end break is extended, reducing overall impacts, and as a result revenues, for that spot.

Also, the length to which end breaks can be reasonably extended is likely to be limited. Research by one of our members, based on BARB data, indicates that breaks of longer than five minutes lead to up to a 50% loss of audience, compared to an average audience loss of 29% across all commercial breaks (defined as % of viewers watching the channel in the 5 minutes before break compared to those who are watching in the 5 minutes after the break).⁶

⁶ Source: BARB, C+S Homes, Nickelodeon Channel, K4-15, Q2 2008