

The Scheduling of Television – Approaches to Enforcement - Consultation

About Discovery

Discovery is the number one factual programming company in the world, with its European hub in the UK. Discovery licenses more than 70 channels from the UK which it distributes in all EU Member States and in the wider Europe. The Discovery family has grown and now encompasses SBS Discovery in the Nordics and Eurosport in France as well as production companies betty, Raw and All3Media.

This consultation is made on behalf of Discovery and SBS Discovery. Discovery is a member of the Commercial Broadcasters Association (COBA) and fully endorses its position regarding this consultation.

The Consultation – Discovery Response

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

Discovery appreciates the importance of a clear and consistent approach, paired with a clear understanding of the effect any changes in rules around scheduling might possibly have on the industry.

Discovery welcomes the clarification in some key areas but is concerned that some of the proposals put forward may go further than what is necessary to implement the legislation in this area and could have a negative effect on our business and by turn our ability to continue to invest in high-quality content. Discovery believes that the code should ensure compliance whilst at the same time not imposing operational burdens or restrict legitimate practices.

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

Discovery understands the legitimate concerns put forward by a specific section of the industry regarding the measurement of programme duration and welcomes Ofcom's intention to clarify the rules in this area.

We note that in some circumstances the level of detail required to prove duration may be excessively onerous for those channels which are not limited by rules relating to the scheduling of advertising breaks in programmes for children. For this reason we advocate a hybrid approach which minimises operational burdens for the majority of broadcasters and allows Ofcom the flexibility to ask for more detailed information where necessary.

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.

Discovery believes that in the majority of cases it is still appropriate to use the EPG as a first port of call for determining duration of a programme. However it has become apparent from discussions with other broadcasters that more detailed measurement is required for some programmes. For this reason Discovery suggests the following approach:

- The duration of a programme should comprise editorial content, internal breaks and external breaks. This description of duration best reflects the current practice of using the EPG as a means of measuring duration and is the most practicable of the options put forward in the consultation
- In most instances, where the calculation of minutage is fairly straightforward, the EPG description should be used as the means of measuring a programme's duration
- If further detail is required by Ofcom on a programme's duration, the TX log could be brought into play.

In this way broadcasters of children's programmes can use the additional information to prove the duration of their content without all broadcasters facing the obligation of providing a TX log when this may not be necessary.

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.

We agree that the clarification text proposed on the definition of advertising appropriately transposes the Directive.

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

Discovery is concerned that the clarification of the rules regarding the clock hour is likely to have a negative impact on business. It is our opinion that providing a broadcaster can prove that no additional minutes are being added to advertising time and can show that it has systems in place for the correct measurement and reporting of advertising minutage, the flexibility of starting a clock hour in a place other than at :00 should be allowed.

Flexibility in the interpretation of 'clock hour' does not allow the broadcaster more minutes of advertising, it simply allows flexibility around break patterns. Furthermore, this position is confirmed in implementation guidance from the EU Commission on this issue.

We believe the following factors should be taken into consideration by Ofcom in its deliberations:

- The Directive itself makes no stipulation as to where the clock hour must begin. Indeed in a further clarification on minutage in its interpretive communication, the EU Commission refers to both the 'given clock hour' and the 'overlapping clock hour' as being possible approaches to the calculation of commercial minutage. This guidance is confirmed as still relevant by reference to it at recital 54 of the current AVMS Directive
- The change proposed is likely to have a significant effect on broadcaster revenue if the overlapping clock approach can no longer be followed. Our calculations of potential losses are business sensitive and are included in a separate confidential response to this consultation
- There are strong technical solutions in place which put a 'hard stop' on any attempt to schedule more than the allowed advertising minutes where an overlapping clock hour is in use. Reports can be produced by the system rapidly in the event of an inquiry.

Discovery believes strongly that there is no intention at European level to limit the possibility for broadcasters to use an overlapping hour to calculate minutage. Whilst we are aware that it is entirely possible for Member States to take a more restrictive approach than the Directive, we do not believe that Ofcom should attempt to limit possibilities for broadcasters where they can prove that they are able to measure and control the number of minutes advertising they show, regardless of where in the hour they measure from.

It should also be borne in mind that in many markets outside the UK, Ofcom-licensed broadcasters have fewer possible impacts to sell than locally licensed broadcasters. Flexibility in the distribution of those impacts is one of the ways in which this disadvantage can be offset.

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 you consider Ofcom should issue guidance on.

Please see our answer to the question above. We believe that guidance on best practice for the use of an overlapping clock could be developed in conjunction with the industry.

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.

Discovery agrees with the proposed clarification regarding films, with the caveat that there should be a more detailed discussion around the definition of cinematographic release. If, for example, a feature length documentary film has been given limited release at a film festival, can this genuinely be described as a cinematographic release? Should there be a differentiation between general and limited releases?

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.

Discovery agrees with the proposed clarification regarding teleshopping. However, we believe that there should be further discussion around the issue of what constitutes a direct offer and what is meant by 'constant or nearly constant' in the context of duration of the offer. Whilst the guidance released thus far and referred to in the consultation document is helpful, there is still room for further clarification in this area.