



**BRITISH SKY BROADCASTING LIMITED'S (SKY) RESPONSE TO
OFCOM'S CONSULTATION ON APPROACHES TO ENFORCEMENT OF THE SCHEDULING OF
TELEVISION ADVERTISING OF 18 JULY 2014**

1. Executive Summary

- 1.1 The primary focus of Ofcom's consultation on approaches to the enforcement of the scheduling of television advertising (the "Consultation") is to decide on the most appropriate enforcement methodology for Ofcom to adopt when determining a programme's "scheduled duration" for the purpose of applying the COSTA rules that restrict internal breaks in programmes.
- 1.2 We understand that Ofcom has traditionally used 'EPG slots' as a proxy for a programme's "scheduled duration" and has taken a pragmatic approach to enforcement, contacting broadcasters on an individual basis for evidence of compliance.
- 1.3 The present system is settled, has been proven to work well for years and is understood by broadcasters. Since the current system works well for the majority of industry, Sky does not believe that there is a case for intervention and has a strong preference for maintenance of the status quo.
- 1.4 Of the options put forward by Ofcom in the Consultation, however, Sky's preferred option is a variant of the EPG approach, since we consider that this to be the closest to status quo. This would involve taking the EPG slot as the starting point for enforcement but using either the information contained in the 'now and next' banner on the channel or in broadcasters internal scheduling systems¹ (from which the EPG schedules are created) to determine the exact length of the slot if required.
- 1.5 We believe that this approach would provide an adequate compromise that enables Ofcom to meet its objective of ensuring a consistent enforcement methodology, whilst enabling broadcasters to continue to effectively schedule programmes and adequately monetise their content, to the ultimate benefit of consumers.
- 1.6 Separately, Sky notes that Ofcom has suggested revisions to COSTA in section 6 of the Consultation, including defining television advertising, a clock hour, television films and teleshopping, waiving minutage rules for local services, waiving break restrictions for films on PSB's and changing the layout of COSTA. Sky has not commented further on these changes.

2. Background to the Consultation

- 2.1 The Consultation seeks to determine the most appropriate enforcement methodology for Ofcom to adopt for the purpose of applying the COSTA rules that restrict internal breaks in programmes depending on a programme's "scheduled duration". There is a particular

¹ The Sky specific system is the Broadcast Support System ("BSS"). Sky understands that other broadcasters use similar systems.

focus on the rule that children's programmes may only include an internal advertising break where the "scheduled duration" is more than 30 minutes.

2.2 Ofcom puts forward four possible options for measuring "scheduled duration":

- (i) The electronic programme guide ("EPG") approach – under which the "scheduled duration" of a programme equates to the EPG slot in which it is scheduled ("**Option 1**"); or
- (ii) Using transmission ("TX") logs, with the "scheduled duration" calculated according to:
 - (a) the slot in which the programme is broadcast, i.e. including all editorial, advertising and promotional material transmitted between the start of one programme and until the start of the next ("**Option 2**");
 - (b) the duration of editorial content start to end, including all internal breaks i.e. excluding advertising or promotional material shown between programmes ("**Option 3**"); or
 - (c) the duration of editorial content alone i.e. excluding all advertising and promotional material ("**Option 4**").

2.3 Ofcom sets out, at Table 1², the criteria against which it has assessed each of these options. Sky notes that, in particular, these include:

2.3.1 Consumer interests, including the frequency of advertising interruptions in children's programmes and the risk to advertising revenues resulting in reduced incentives for investment in a wide range of good quality programmes;

2.3.2 Practicality of enforcement, including ensuring that the enforcement methodology is consistent, transparent, does not impose unnecessary burdens on industry and can be readily accessed by Ofcom; and

2.3.3 The extent to which the options provide regulatory certainty.

3. The current system works well

3.1 We understand that Ofcom has traditionally used EPG slots as a proxy for a programme's "scheduled duration"³ and has taken a pragmatic approach to enforcement, contacting broadcasters on an individual basis for evidence of compliance (which may be published EPG schedules or TX logs) where it considers a breach may have occurred.

3.2 Sky considers that this system works well for all stakeholders:

- The use of the EPG as the starting point for enforcement provides certainty for broadcasters, enabling them to determine how many internal breaks they can schedule in advance of transmission. This helps broadcasters deal with the variation in running length of programmes, especially in acquired (and in particular non-UK) programming, and plan broadcast schedules effectively. The current system also provides broadcasters with sufficient flexibility to accommodate unexpected changes to a programmes duration (e.g. because of an over or under-running live programme) without having to alter the number of internal breaks scheduled.
- The EPG is the most intuitive and transparent means for Ofcom to monitor compliance with the rules in COSTA in the first instance. Where Ofcom needs more granular

² Table 1, paragraph 5.23
³ Paragraph 2.11

information than the EPG can accommodate, it is able to request this from broadcasters. Consistent with Ofcom's assessment criteria the information is therefore readily accessible by Ofcom. Sky notes that this system has allowed Ofcom to enforce COSTA effectively and efficiently to date.⁴

- EPG's also enable viewers to see clearly what the scheduled duration of a specified programme is and enforcement on this basis is therefore in-line with viewer expectations.

3.3 Since the present system has been proven to work well for years, Sky does not consider there to be a case for intervention and has a strong preference for maintenance of the status quo. This would cause the least disruption and cost to all licensed channels and EPG operators, something which is particularly important at a time when the market is evolving and linear television channels are increasingly losing viewing share to on-demand and over the top ("OTT") services⁵, and where there is no evidence of a specific problem.

4. The options put forward by Ofcom in the Consultation

4.1 Notwithstanding its views set out above, if Ofcom is minded to adopt one of the methodologies proposed in the Consultation, Sky believes that Option 1 is the most appropriate methodology, for the reasons explained below.

A. Option 1

4.2 Option 1 appears to Sky to be the most akin to status quo⁶ and consequently is the least disruptive and most proportionate option. There are a number of advantages in using EPG's as the starting point for enforcement, as Ofcom recognises in the Consultation and as set out in paragraph 3.2 above, including transparency for Ofcom and viewers and certainty and clarity for broadcasters.

4.3 Sky recognises, however, that there are certain practical difficulties associated with the use of published EPG schedules for enforcement purposes which stem from the fact that published EPG schedules are the public-facing output of broadcasters internal scheduling systems.

4.4 EPG schedules are created to be user friendly for viewers and are not designed to display detailed information. Scheduling is in fact done at a more granular level than published EPG schedules can accommodate. For example, the BSS scheduling system used by Sky can be programmed to the second yet when the BSS schedule is converted to become the EPG schedule, seconds are rounded up or down to the nearest minute. Equally, where a programme ends at 7.01pm, this is not reflected in the EPG grid on the Sky EPG (which only shows the duration to the nearest 5 minute interval), only on the 'now and next' banner.

4.5 Moreover, since EPG schedules have been designed to be as user-friendly and clutter-free as possible, the EPG schedule does not always mirror exactly what is on the channel. For example, for the Sky EPG, programme events of less than two minutes cannot be shown on the EPG and those between two and five minutes cannot display a title within the grid (an "i" icon is displayed) - the programme title is only displayed within the programme synopsis area when the event is highlighted on the EPG or 'now and next' banner when the channel

⁴ The Broadcast Bulletin contains multiple Ofcom decisions relation to the Costa rules on internal breaks. See, for example, Ofcom Broadcast Bulletin, Issue 186, 18 July 2011, page 28, In Breach decision on advertising break patterns in CBS Action, CBS Drama, CBS Reality, Horror Channel and Extreme Sports, 16 February to 15 April 2011.

⁵ Ofcom notes in its Communications Market Report 2013, published August 2014, that "*the subscription model for online audio-visual content access saw continued growth in 2013, as its revenue grew 76% to reach £62m, an indication that services such as Netflix and Amazon Prime Instant Video (formerly LoveFilm) may be gaining traction in the UK market.*" Page 130, http://stakeholders.ofcom.org.uk/binaries/research/cmr/cmr14/2014_UK_CMR.pdf

⁶ Sky notes that, at paragraph 5.34 of the Consultation, Ofcom suggests that this approach would be tantamount to status quo for the majority of broadcasters

is selected. Using the published EPG schedules in isolation could therefore affect the number of breaks that broadcasters can have, for example when there is a short programme event that cannot be displayed by the EPG.

- 4.6 Sky believes, however, that where the EPG slot as shown on the EPG grid does not provide sufficient information for enforcement purposes, Ofcom could use one of the following sources to determine the exact length of the slot:
- 4.6.1 the information shown in the 'now and next' banner on the Sky EPG/equivalent on non-Sky EPGs since this is capable of showing the exact start and finish time of a scheduled slot down to the nearest minute (giving further programme details over and above those shown in the published listings) for programmes with a duration of >5 minutes⁷; or
- 4.6.2 the schedules from broadcasters internal scheduling systems (i.e. the BSS scheduling system or equivalent) as these can be programmed to the second⁸.
- 4.7 Sky considers that these options provide an adequate compromise between Ofcom's objective to achieve a consistent enforcement methodology and the need to ensure a workable approach for broadcasters⁹.

B. Option 2

- 4.8 Sky does not support the use of TX logs as the primary means of determining "scheduled duration".
- 4.9 **First**, TX or "as-run" logs show, retrospectively, how long a programme ran for. They are not derived from the broadcast schedules. However, Sky considers that the use of the term "scheduled duration" in the Audio-Visual Media Services ("AVMS") Directive and COSTA evidences an intention that enforcement should be based around the intended duration of a programme, as determined by those schedules. To use these retrospective logs as a proxy for "scheduled duration" would, to Sky, seem to be inconsistent with that intention.
- 4.10 **Second**, while TX logs enable Ofcom to monitor compliance at a more granular level than published EPG schedules, the use of these logs for enforcement purposes could create scheduling difficulties for broadcasters. As Ofcom is aware, broadcasters use specialised scheduling systems for the scheduling of both programming and advertising and these systems are designed and automated to ensure compliance with the number of breaks and the amount of advertising based on the current system. Ofcom recognises that a move to a TX log approach would require "*disruptive and potentially far-reaching changes to internal planning and scheduling systems*", since schedules are created weeks in advance based on the anticipated duration of programmes, rather than "as-run" data as reflected in TX logs¹⁰.
- 4.11 Sky agrees that a move to TX logs would require major software changes to its internal systems, which have been designed to facilitate smooth and effective planning of broadcast schedules. The cost of these changes would be potentially significant and would fall disproportionately on the EPG providers.

⁷ Children's broadcasters could therefore use the now and next banner or the information button to show that their programme slot runs for 31 minutes or more, if they so choose, to allow them to place an internal break within their programme and ensure compliance with the rule in COSTA.

⁸ Therefore a children's show that was scheduled in the BSS system to be 30 minutes and two seconds would be seen in the EPG schedule as 30 minutes but would still be compliant with the AVMS/COSTA rule.

⁹ Sky notes that in the Consultation, Ofcom has indicated that it is interested to hear from stakeholders suggestions for alternative approaches to those set out in its Consultation.

¹⁰ Paragraph 5.63

- 4.12 **Third**, Sky considers that a move to a TX log based approach is impractical. As Ofcom recognises in the Consultation¹¹, broadcasters would be required to submit their logs, either to Ofcom or to a third party operator, presumably on a regular basis. Sky considers that any such regular reporting would create an administrative burden and entail significant compliance costs for both Ofcom and industry. This is contrary to Ofcom's objective to avoid imposing unnecessary burdens, or costs, on industry.¹²

C. Options 3 and 4

- 4.13 Options 3 and 4 would both involve a change from the way that "scheduled duration" has traditionally been measured, i.e. according to the 'slot' that the programme is broadcast in. Changing the way programme duration is measured from the present system is not appropriate for the reasons set out below and would have significant unintended consequences, resulting in profound impacts for Sky and the wider industry.
- 4.14 **First**, in line with our comments in para 4.9 above, Sky considers that Option 4 in particular would be contrary to the intention underlying the use of the term "scheduled duration" in AVMS and COSTA since, in the minds of audiences, editorial content alone would clearly not equate to the "scheduled duration" of a programme.
- 4.15 **Second**, since COSTA and AVMS use "scheduled duration" as the appropriate measure for the purpose of the COSTA rules that relate to internal breaks in all programming¹³, a decision by Ofcom to narrow the definition of "scheduled duration" would have an impact on other programme genres. Indeed, Ofcom recognises in the Consultation that *"the scheduled duration of the majority of programmes under this option would be shorter than under either of the approaches already addressed [i.e. Options 1 and 2], many would qualify for fewer internal breaks or, in some cases, not at all."*¹⁴ A reduction in the number of internal advertising breaks available would reduce the amount of advertising minutage available, to the detriment of broadcasters, television advertisers and advertising sales houses.
- 4.16 While it is difficult to precisely quantify the total amount of non-children's programming that would be affected across the industry as a whole by a move to either of these options, Sky believes that the effect on Sky as a broadcaster would be significant. In respect of Sky's wholly owned channels, Sky estimates that Option 4 could result in a loss of advertising revenue on Sky channels in the region of **[REDACTED]**¹⁵¹⁶.
- 4.17 Similarly, for Option 3, while the impact on advertising minutage in this option is harder to quantify than for Option 4 given the number of variable factors, Sky estimates that the total combined loss of revenue on Sky channels could be **[REDACTED]**
- 4.18 **[REDACTED]**
- 4.19 The decline in advertising revenues would impact upon the ability of broadcasters to monetise their content and would likely affect broadcasters' ability and incentives to invest in further quality content. Ofcom itself recognises in the Consultation that different enforcement approaches have potential implications for programme investment¹⁷ and, in particular, Option 4 may have *"a substantial negative impact on investment in programming."*¹⁸

¹¹ Paragraph 5.61
¹² Table 1
¹³ COSTA rule 17
¹⁴ Paragraph 5.69
¹⁵ **[REDACTED]**
¹⁶ **[REDACTED]**
¹⁷ Paragraph 1.13
¹⁸ Paragraph 5.78

- 4.20 In the Consultation, Ofcom's analysis primarily focusses on the effect on levels of investment in children's programming. However, Sky notes that these approaches would also be very damaging for other types of important content. In particular, Sky estimates that **[REDACTED]**
- 4.21 Ofcom recognises in the Consultation that it is under a duty, pursuant to section 3(2) of the Communications Act 2003 ("the Act"), to secure "*the maintenance of a sufficient plurality of providers of different television providers and radio services*"¹⁹. Sky News plays a vital role in meeting the public policy goal of keeping citizens informed and ensuring they are able to access and consumer a wide range of viewpoints across a variety of platforms²⁰. However, the UK news broadcasting sector is a notoriously difficult one for broadcasters to operate in, since its production is costly and the ability to earn a commercial return is undermined by the services offered by the BBC, funded through the licence fee. **[REDACTED]**
- 4.22 Moreover, as Ofcom acknowledges in the Consultation, it is possible that broadcasters may try and mitigate against this loss of advertising revenues and resulting effects in ways that could negatively impact consumers²¹. For example, broadcasters could seek to split programmes more and include more advertising at the start and end of programmes, to the detriment of the viewing experience.
- 4.23 **Third**, should Ofcom adopt a TX log based approach which defines "scheduled duration" as anything other than the 'programme slot', this would cause significant operational issues from a scheduling perspective. Schedules are planned and delivered to EPG provider's weeks in advance of broadcast. However, due to the wide variation in the running length of programmes (in particular US produced content often runs significantly shorter than one hour), internal breaks could not always be guaranteed until the content has been seen. This would make scheduling very difficult, particularly since content is sometimes delivered late. This greater uncertainty could result in many more breaches occurring.
- 4.24 In Sky's view, given that Ofcom has not identified any clear harm stemming from its current approach, the potential consequences listed above would be disproportionate. This is particularly so in circumstances where the specific issue Ofcom is seeking to address is the frequency of advertising in children's programming. In this context, Ofcom should be mindful of its duties under section 3 of the Act to ensure that regulation is proportionate and targeted only at cases in which action is needed. Further, as per its assessment criteria in the Consultation, Ofcom should be careful to avoid imposing unnecessary burdens on industry and ensure that it does not adopt an approach that would reduce advertising revenues, impacting upon investment in content.

Sky

17 October 2014

¹⁹

Paragraph 4.30

²⁰

In its 2012 advice to the Secretary of State on measuring plurality, Ofcom defined media plurality as a) ensuring there is a diversity of viewpoints available and consumed across and within media enterprises and b) preventing any one media owner or voice having too much influence over public opinion and the political agenda (<http://stakeholders.ofcom.org.uk/consultations/measuring-plurality/statement>).

²¹

Although in Sky's view no form of mitigation would be able to eliminate the financial impact in its entirety, if either of Option 3 or 4 are adopted.