



The Scheduling of Television Advertising: Approaches to enforcement

Response from Viacom International Media Networks UK and Ireland

Viacom International Media Networks UK & Ireland (Viacom) is an international supplier of pay TV channels to the UK, with more than 20 owned and operated TV channels offering music, comedy, kids and general entertainment programming through its MTV, Comedy Central and Nickelodeon brands. Channel 5 became part of the Viacom family in September 2014.

Summary

Viacom does not believe that any of the enforcement options presented in the consultation document are in the best interests of the UK broadcasting sector as a whole, or UK children's channels' specifically. It continues to believe that it is within Ofcom's powers to find a solution that avoids economic and operational harm to any broadcaster while maintaining the UK's current compliance with the AVMS Directive. In summary:

- The EU AVMS Directive contains two distinct regulatory provisions relating to breaks inside children's programmes and breaks inside news and film. At the same time it provides no guidance on the meaning or measurement of 'scheduled duration'.
- These legal circumstances provide adequate justification for Ofcom to adopt different approaches to the compliance of breaks inside children's programmes and to the compliance of breaks inside news and film. Different regulatory circumstances described by the Directive place different operational obligations and impacts on each type of channel, and applying a single compliance approach to both would lead to disproportionate impacts on one or the other.
- The impact of an approach that favours Electronic Programme Guide (EPG) as a measure for scheduled duration will be significant for children's channels. After exhaustive mitigation through the splitting of longer form programming and the use of 31 and 29 minute EPG slots, we estimate the revenue impact to Nickelodeon's group of channels would be 3%.
- An 'EPG only' approach would inhibit Nickelodeon's ability to invest in UK originated children's content. The rough cost of a half hour pilot for a live action children's show, for any broadcaster, is around 3%. This is a significant and risky expenditure the like of which will be less likely should there be a reduction in revenues.
- Should Ofcom remain committed to changing the way it enforces COSTA rules it should phase in any changes over a two year period, for which there is precedent, to inhibit any negative impact on the market.

The AVMS Directive and its transposition into COSTA

It is clear that there are two separate regulatory provisions within the AVMS Directive (Article 20) relating to breaks inside particular genres of programming. One, which allows a centre break inside children's programmes 'greater than 30 minutes', forces children's channels to schedule programmes exceeding 30 minutes in order to accommodate such a break. The other allows a centre break inside films and news programmes which are scheduled for 'at least 30 minutes', meaning that a break is permitted in programmes with a schedule of exactly 30 minutes.

It is also clear that there is presently no guidance within the Directive or its recitals that provide a clear meaning of 'scheduled duration' and that, in these circumstances, EU law requires a 'de minimis' interpretation and implementation.

VIMN believes that these two principles provide adequate justification for Ofcom to adopt different approaches to the compliance of breaks inside children's programmes and to the compliance of breaks inside news and films. This is because the different regulatory circumstances described by the Directive place different operational obligations and impacts on each type of channel. Applying a single compliance approach to both would lead to a disproportionate impact on one or the other.

Specifically, in the case of children's channels, there is no guidance available as to how long a programme must be (beyond 30 minutes and 1 second) before a break can be included. In the light of the specific treatment of children's channels by the Directive, it therefore seems a proportionate and reasonable solution to allow logs to be used to determine compliance accurately and to provide the channels with regulatory certainty that they are compliant with COSTA. The alternative use of EPGs will in effect force children's channels to adopt an arbitrary threshold beyond 30 minutes determined by the specific EPG capabilities and the policy of the EPG operator, as opposed to the regulator or as set out in EU law.

In the case of non-children's channels, it is clear that the use of EPGs to comply the use of centre breaks achieves an equitable balance which they do not wish to alter, and Ofcom should therefore continue to use this approach on non-children's channels.

Alternative approaches to enforcement

The four approaches laid out by Ofcom present a stark choice between the use of EPGs as a proxy for scheduled duration, and the use of TX logs to measure scheduled duration. While Ofcom has a desire to have one rule that fits all channels, this is not practicable if Ofcom also intends to limit harm caused by any rule changes and to ensure its regulatory approach is proportionate and consistent with the specific provisions of the AVMS Directive. Further, Viacom do not feel the AVMS Directive necessitates Ofcom to have one enforcement methodology for all channels.

The EPG approach outlined by Ofcom is likely to satisfy most of the industry as it is the approach already used by the majority of broadcasters for their compliance with COSTA. Indeed, the enhanced flexibility which the EPG approach provides to Channel 5 and other mixed genre channels is greatly valued and should not be abandoned in the interests of regulatory neatness. If a TX log approach was imposed on Channel 5, it would have a negative impact on the way it manages its airtime and on viewers' experience, which would lead to loss of revenues. While an approach based on TX logs would satisfy the needs of

children's channels and protect their investment in content, it would have a disruptive impact on the rest of the market.

However, the loss of revenues to children's channels and associated lack of investment in UK originated content would be disadvantageous if those channels were obliged to accept the EPG approach. Further, it would be disruptive to viewers of children's channels who would be required to endure extended advertising breaks and an unfamiliar scheduling of programmes across the clock hour.

Thus if only one option is permitted as viable for COSTA compliance, the outcome from this consultation is certain to have a detrimental impact to one part of the broadcasting community or another. In light of the negative repercussions of both options currently presented, Ofcom should codify the current reality whereby Ofcom enforces COSTA through the EPG approach for channels generally, but where greater granularity is required, such as for children's channels, TX logs are used.

There is a clear division within the industry between the children's channels and the other broadcasters. To afford consistency for the channels themselves it is Viacom's assessment that it is within Ofcom's powers to enforce the COSTA rules on children's channels using TX logs, whilst enforcing COSTA rules for non-children's channels using the EPG approach. It is recognised that this is not an option presented in the consultation paper, but it is felt strongly that further consideration should be given to it. This approach would adhere to Ofcom's own assessment criteria of 'Consumer interests', 'Practicality of enforcement', and 'Regulatory certainty'.

The impact of an 'EPG only' on kid's channels

As Ofcom is aware, currently Nickelodeon UK broadcasts programmes in slots of just over 30 minutes of duration to enable centre-breaks to be retained under a definition of scheduled duration that refers to TX logs. Enforcement of the regulations through EPGs by Ofcom would prevent this scheduling strategy so that Nickelodeon would need to change its scheduled break structure (or lose commercial minutes).

Viacom has assessed the best possible use of mitigation measures available, including those outlined within the consultation. For Viacom's group of channels the most impactful methodologies for mitigating revenue losses are the splitting of longer form programming into two halves (where possible) and the use of 31 and 29 minute EPG slots.

Splitting programmes is only possible for genres of children's programming that have a suitable storyline allowing them to be split into two halves without confusing the audience, as each 15 minute programme must contain its own narrative arc. This is generally animated programming. Using the EPG approach allows the full broadcast of a 31 minute show with a centre break in the first part of the clock hour. The second half of the clock hour may then contain a 29 minute programme with no centre break, or potentially two short programmes if possible.

Using both these methodologies for mitigation would allow Nickelodeon to maintain 12 minutes of advertising within the clock hour, however, but it does not assuage all losses of revenue due to the potential removal of one centre break within the clock hour and the subsequent drop-off of commercial impacts due to more commercial minutes being within end breaks (where viewing is lower) and the average break duration increasing (causing more viewers to switch). It is estimated Viacom would lose

3% per annum in revenues if Ofcom were to adopt an 'EPG only' approach; this is a robust and conservative estimate and Viacom would be happy to share its methodology.

Whilst Viacom is a keen supporter of investment in UK originated content and passionate about making local content that can then be distributed globally through the Viacom network, the business reality is that expenditure must be reduced, as a consequence of reduced revenues. The use of the EPG approach on children's channels will therefore result in a reduction in investment in UK originated children's programming in all genres' (pre-school, live action, and animation). The impact will be particularly felt within genres for older children, as the majority for pre-school programming is already of shorter length and broadcast within an EPG slot of 10 or 15 minutes. This is particularly pertinent given the current decline in UK originated live action children's programming¹.

As an example, Nickelodeon has just commissioned a pilot for a live action children's series to be tested in research with UK and US audiences. The rough cost of a half hour pilot for a live action children's show, for any broadcaster, is around 3%. This is a significant and risky expenditure the like of which will be less likely should there be a reduction in revenues.

Conclusions

The UK broadcasting sector is enjoying a positive recovery following the UK recession, with a buoyant advertising market and significant investment in UK originated content from both PSB and commercial broadcasters. Yet, as the consultation document acknowledges, any of its proposed options will have negative consequences for one group of channels or another, thus undermining the sector's current performance. Viacom suggest that Ofcom considers this issue further and works with industry to identify an approach to enforcement, should it feel committed to change, that satisfies all of its stakeholders. As stated, Ofcom has the ability to enforce COSTA on children's channels using TX logs, whilst enforcing COSTA for non-children's channels using the EPG.

It is appreciated that, despite the concerns raised by Viacom and its industry colleagues, Ofcom may choose to amend the COSTA regime in a way that directly impacts the operations of children's channels. Should this be the case then Ofcom should consider phasing-in any proposed changes over a two-year period to allow affected channels to adjust their business operations to absorb the impact. A precedent for this approach exists in the phasing in over two years of the HFSS restrictions for children's channels, which came in between April 2007 and January 2009, in order to avoid a disproportionate impact on the sector.

¹ Pact, 'Give the Kids a Break: the Economic Case for a Children's Tax Credit', 1st July 2014