

**Ofcom Consultation**  
**Review of Television Advertising and Teleshopping Rules**  
**Submission by SBS Broadcasting Networks Limited**

**1. Introduction**

- 1.1 SBS Broadcasting Networks Limited operates 8 channels from the UK. The channels are broadcast throughout Scandinavia. SBS is part of the ProSiebenSat.1 broadcasting group. The ProSiebenSat.1 Group broadcasts 26 commercial TV stations, 24 premium Pay TV channels and 22 radio networks in 13 European countries and consequently is one of Europe's leading pan-European broadcasting groups.
- 1.2 As a result of our pan European broadcast experience, we support almost all of the proposals put forward by Ofcom in its review of the television advertising and teleshopping rules. Almost universally the changes suggested by Ofcom are both sensible and timely. They reflect the liberalisation and simplification of the advertising rules adopted at a European level as part of the Audiovisual Media Services Directive ("AVMS Directive").
- 1.3 However, we are concerned that in certain key areas (such as the revision of the break rules) Ofcom is contemplating a more restrictive approach that we consider is neither appropriate nor necessary.
- 1.4 The UK government and Ofcom in particular were "key influences" in the extensive debates held in 2006 and 2007 over the content of the AVMS Directive. For obvious and compelling reasons, other member states relied extensively on the experience and expertise of Ofcom in the formulation of the changes to the TWF Directive which were implemented as part of the AVMS Directive. One of the key recommendations was the removal of the "20 minute rule". As Recital 57 of the AVMS Directive says "... this Directive ... should give flexibility to broadcasters with regard to its (i.e. advertising) insertion where this does not unduly impair the integrity of programmes.
- 1.5 In our view, the existing and ever increasing competition amongst broadcasters (especially from the powerful public service broadcasters and their satellite channels) alone means that there is unlikely to be an abuse of the scheduling of advertising breaks as trailed by Ofcom in its consultation document. Ofcom's fear that broadcasters would revert to American-type scheduling of advertising, we believe is unjustified. In our view, the adoption of such scheduling would have an immediate and deleterious effect on the audience shares that are critical for our revenues. Advertising is still the primary source of revenues for our channels. The adoption of any break pattern that would harm our audience share is simply not in our commercial interest where advertising revenues still amount to over 80 % of our total revenues.

**2. Specific Comments**

- 2.1 In response to the questions raised in Section 6 of the consultation document, we strongly support the proposed changes suggested by Ofcom set out in questions 2, 3, 4, 5, 8, 9, 13 and 14. The proposed changes suggested in questions 10, 11, and 13 are not relevant to us but in principle we cannot see why anyone would not support them. They are sensible.

## Question 5 – Advertising Breaks

- 2.2 We believe there are a number of reasons why the imposition of limits on advertising breaks is unnecessary and will amount to overregulation. One of the primary concerns identified by Ofcom was that if there were no regulation on breaks UK licensed broadcasters may ape their counterparts in the US where advertising breaks are more frequent due to a different regulatory environment. Whilst we can understand the concern, we do not share it nor do we think that it is likely to come to fruition if there was a relaxation of the break rules.
- 2.3 The reach of advertising spots or breaks depends on how satisfied the viewers are both with the program and the spots themselves and with the break pattern. We are constantly looking at our scheduling to find the best way to optimise break patterns so that we minimise to the greatest extent viewers switching channels during a break. Our in-house research departments analyse in great detail how the audience share changes during a break. This information is complemented by studies on the viewer's reaction to specific break patterns or advertisements. The dynamic of audience shares is one of the key elements for TV broadcasters to evaluate where an ad break can best be placed. The aim is to find the delicate balance between the interests of the viewers and those of the advertisers. A good viewing experience is absolutely key for the success of our programs and the effectiveness of the advertising that is shown on our channels.
- 2.4 The stark reality is that for most non-psb channels (other than the spin-offs from the UK psb channels or Sky One) in the UK, such channels rarely if ever can attract audiences in excess of 500,000 for any programme. For the majority of such channels, audience levels are well below 250,000 (and often substantially less) for each programme. Therefore such channels are to a large extent "marginal" content distribution businesses and will remain so. If the scheduling of advertising breaks on such channels is not appropriate and designed to meet the interests of its audience then the likelihood is that all that will happen is such channels will annoy their viewers and in all probability lose them. We do not underestimate the choice open to viewers in the digital environment and their ability to use this freedom by switching channels or switching off. The remote control is a strong regulator of such television services. Therefore we do not believe that other than certain channels which attract large audiences (the UK psbs and in the multi-platform environment, ITV 2, 3, and 4 and Sky One, etc) such non-psb channels will have the ability to schedule advertising breaks to the detriment of the viewers without harming themselves.
- 2.5 Furthermore, one factor that has been overlooked in this analysis is that the copyright holders (the programme distributors and producers) may well impose restrictions on when advertising breaks can be scheduled. Such programme copyright holders aim to ensure that the integrity of their programmes is not distorted; for example, all the Hollywood studios are very keen to protect the integrity of their programmes when they are licensed to third parties and insert appropriate contractual protections.
- 2.6 Whilst Ofcom takes the view that Internet and television are currently separate advertising markets, we assume that the rules that are being promulgated will be in force for a significant period of time. Markets change, as do viewers' viewing habits. Whilst no one can predict with any certainty what is going to happen to the television advertising market, what is certain is that it will change. We are concerned that the existing RADA rules have been in force largely unamended for over ten years. Whilst we can not anticipate what will be the shelf life of the proposed advertising regulations, we have to believe that it will be operating for a significant of time and may well be in force for at least 5-7 years. What the television advertising market will look like in 7 years' time is a matter from which we can only speculate. However, we think it is axiomatic that the rules should be as flexible as possible so as to meet the challenges of the future as well as the present.

- 2.7 What is also discounted is that giving broadcasters the flexibility to determine when to break programmes may well be a benefit to viewers. It may well be that given the nature of a programme that to maintain or build the viewers' interest that it is not appropriate to schedule an advertising break for over 20 minutes from the start of a programme as the programme builds audience interest. However having built the interest, it may well be appropriate for there to be more frequent breaks in the second part of a programme. Perhaps more pertinently, music videos shown on a channel like The Voice are likely to suit smaller, more frequent breaks. The nature of the programming itself dictates that such a break pattern may be in the best interests of both the channel and its viewers. A greater flexibility with respect to the number of breaks would also be helpful to establish further the use of single spots. Single spots may be used on an exceptional basis and have been used very successfully deployed in other markets such as Germany. ProSieben's research showed that viewers in Germany liked this new form of short single advertising spots. According to a study by Synovate/SevenOne Media 74% of viewers preferred single spots over a classical spot (22%; 4 % abstentions; Study with 300 interviewed viewers). The majority of viewers also considered single spots "innovative", "enjoyable", "modern", "not boring" and "entertaining".
- 2.8 It also seems counter-intuitive to us for Ofcom to scrap the 20-minute rule but reinstate it through the back door. Our view is that these issues were debated extensively as part of the date on the AVMS Directive. The arguments that convinced the European Commission and Parliament as well as the 27 Member states not to insert a maximum amount of advertising breaks remain valid and we see no reason to revisit them. The liberal approach in the AVMS Directive simply to delete the 20-minute rule has been largely followed by those member states that have already prepared some draft implementing legislation at national level, such as Belgium, The Netherlands, Portugal and Romania. Ensuring the flexibility and liberalisation provided for under the AVMS Directive into the UK rules allows for UK licensed broadcasters who operate on a transfrontier basis to continue to compete throughout Europe for audiences and so continues to foster the UK television industry. We also believe that as the advertising market becomes more competitive and fragmented Ofcom needs to ensure that there is both a range of television services available in the UK and a plurality of providers of such services. The continuation of the existing break rules may well serve only to hinder rather than advance either goal. The decision to continue to regulate break patterns also seem to be taken on anecdotal evidence rather than on any substantive basis.
- 2.9 There is US evidence cited that advertisers will be unwilling to pay a premium for the opportunity to advertise in a less cluttered environment. This does not surprise us. Why should they – US viewers' experience has been conditioned by the US approach to television advertising. We urge Ofcom to act cautiously in translating evidence from the US across to the UK. Viewers in Europe are much more critical and TV consumption is much more selective than in the US and viewers react to programming and/or scheduling that they perceive is not in their interest, they will switch over or off. European broadcasting markets also differ substantially from the US market; as a multi-platform operator we are operating in competition with well funded public service broadcasters who carry either no advertising or restricted amounts of advertising. In Europe viewers can realistically avoid inappropriate break patterns, thereby influencing their long-term use by commercial broadcasters. The presence of the BBC means that this always applies equally to the UK as any other market.
- 2.10 We also believe that if we were to schedule an inappropriate or irritating break patterns on our channels, it will also have a detrimental effect on the channel brand. The established brand of a successful channel is what drives consumers also to use other offerings in neighbouring markets such as VoD or online services. A well functioning and popular brand is too valuable to risk by inserting inappropriate ads.

- 2.11 From our discussions with advertisers, media buyers and agencies in Europe, scheduled break patterns which reduce commercial impact will also be met with firm resistance from advertisers. Viewer irritation will not be accepted. Therefore, any scheduling of breaks will require careful management to optimise the attractiveness of the breaks to "buyers" of the airtime. If changes in break patterns meet resistance from viewers, there will be a speedy re-evaluation of how advertising is scheduled. Therefore, whilst a relaxation of the break rules brings flexibility to broadcasters, we do not believe it will lead to an across the board increase in breaks. What is more likely is that broadcasters will plan the breaks around expected audience flows and the nature of the programming being scheduled. As a result, an ancillary benefit may be more diverse range of programming being shown which reflects "naturally" different break patterns on different channels than may otherwise be the case.
- 2.12 As a result, we favour option 5. However, if Ofcom believes that UK psb channels should be subject to specific rules then we can understand this. Prior to digital switch over, psb channels enjoy a privileged position in the UK broadcasting market and the universality of their offering will mean that (albeit to an ever decreasing extent) there are viewers whose only choice is to watch those channels. Based on that premise, some of the arguments that we put forward for complete liberalisation may not apply to them until they have lost their privileged position. For example, these channels attract large audiences and we accept that they enjoy a significant market advantage over multi-channel competitors. If such channels were to continue post-switch off, to enjoy special "privileges" then it may be appropriate to continue such regulation. Although we believe that the position would need to be reviewed when Ofcom has made its decision on what will happen to the analogue frequencies post switch off.

### 3. Other Forms of Advertising

- 3.1 We wish to raise one further point of clarification on the draft code on the Amount and Distribution of Advertising set out in Annex 5 to the Review ("the Draft Code"). Our working assumption when reviewing the Draft Code was that it was intended to reflect the provisions of the AVMS Directive as they apply to the amount of television advertising and teleshopping. We note that Clause 4 of the Draft Code would accurately translate into UK law the provisions of Article 18 of the AVMS Directive by allowing up to 12 minutes per hour of advertising and teleshopping spots.
- 3.2 However, it is our contention that the Draft Code does not deal with the issue of "other forms of advertising". Under Article 18(1) of the TVWF Directive, it was clear that in effect there were three categories of advertising:
- Advertising/teleshopping spots;
  - Other forms of advertising;
  - Teleshopping windows.
- 3.3 As Ofcom will be aware "other forms of advertising" include telepromotions. In the RTI case (C-320/94), the European Court ruled that the 20% daily advertising limit in Article 18(1) of the TVWF Directive included advertising spots, teleshopping spots and other forms of promotion including telepromotions, whilst the hourly limit in Art. 18 (2) TVWF was only applicable to advertising and teleshopping spots, but not to "other forms of advertising". These forms of advertising could be used by operators within the 20% daily transmission time but outside of the hourly limit, as determined by the ECJ in the RTI case:

*34 It must therefore be concluded that the option introduced by the second sentence of Article 18(1) of raising the percentage of transmission time for advertising to 20% of the daily total may also be used for forms of publicity which, whilst not constituting 'offers to the public', nevertheless, **like***

***them and because of the way in which they are presented, require more time than spot advertisements.***

*35 Since it appears from the wording of the first question and the observations made before the Court that 'telepromotions' are forms of publicity which, by reason of their method of presentation, last longer than spot advertisements, they may, in principle, benefit from the option introduced by Article 18(1) of the directive of increasing the percentage of transmission time devoted to advertising.*

- 3.4 The European Commission in its 2004 Communication on certain aspects of the provisions advertising in the "Television Without Frontiers" Directive (2004/C 102/02) confirmed again that, based on the RTI case, other forms advertising such as telepromotions were outside of the 12-minute limitation under Article 18(2) TVWF (see paragraphs 28 and 29).
- 3.5 Since the adoption of the AVMS Directive, Ross Biggam, the Director General of the Association of Commercial Television in Europe, ACT, wrote to Mr Gregory Paulger the Director of the Audiovisual Media and Policy Unit within DG Information Society seeking confirmation that other forms of advertising such as the telepromotions remain outside the 12 minutes hourly limit. Mr Paulger has confirmed that the intention of the AVMS Directive is not to restrict broadcasters from continuing existing advertising formats which were permissible under the TVWF or from developing new formats for which there is inherent in the method of presentation a reason why commercial communication techniques normally last longer than a spot advertising.
- 3.6 It is therefore our view that based on the jurisprudence of the ECJ in the RTI case and the policy and official interpretation adopted by the European Commission in relation to both the TVWF and the AVMS Directives that for Ofcom to implement the AVMS Directives into UK law in a manner which is consistent with European jurisprudence and the pronouncements of the Commission that the Draft Code should make it clear that other forms of advertising such as telepromotion are not within the restrictions in section 4.

**4. Question 8: Do stakeholders agree that the restrictions on advertising and films documentaries and religious and children's programming should be relaxed to the extent permitted by the AVMS Directive?**

- 4.1 We agree with Ofcom's position. Whilst we felt that when these issues were discussed during the negotiation of the AVMS Directive that the restrictions on breaks in these programming genres were unnecessarily restrictive, we accept that in the end this is a compromise position and may have benefits and drawbacks in roughly equal measure for all the interested stakeholders including viewers, broadcasters and content owners.
- 4.2 We agree with Ofcom that the adoption of these breaks rules for feature films will have commercial benefits for broadcasters without any significant detriment for viewers. Although Ofcom highlights dedicated movie channels as being the primary beneficiaries, we also see that all channels which feature in movies in their schedules will be net beneficiaries from this change. This can only be positive news for the whole broadcasting industry.
- 4.3 We remain more pessimistic about the effect of the adoption of these break patterns for documentaries and children's programmes. We suspect that the adoption of these rules will have a negative impact on the scheduling of such programmes on all channels where these programming genres are not core to the channel's profile. However, we acknowledge that this is not a matter upon which Ofcom has any discretion and therefore the European rules must be adopted as drafted.

## 5. Question 16: Teleshopping windows

- 5.1 We support the adoption of Option 4. As Ofcom has concluded, full liberalisation of teleshopping windows on all non-public service broadcasting channels is beneficial to advertisers, viewers and broadcasters alike. Such an approach we believe conforms most closely to several important policy objectives which Ofcom is required to consider in the carrying out of its functions. We consider that Option 4 avoids both the maintenance of unnecessary regulation and will promote competition in the broadcasting market. As Ofcom is aware, the European legislators agreed to a full liberalisation of the daily restriction for teleshopping windows as part of the AVMS Directive. As a result, we were surprised that Ofcom is even contemplating that full liberalisation for this advertising genre should not be implemented. The fact that the adoption of this policy may be potentially harmful to dedicated teleshopping channels if non-public service broadcasters develop their own home shopping services is not, in our view, a valid or compelling reason not to implement Option 4. It certainly does not out-weigh the perceived benefits to the viewers and to advertisers by implementing this option.
- 5.2 In addition to the benefits identified by Ofcom, we consider that the adoption of Option 4 for non-public service broadcasting channels will give those channels the opportunity to raise additional revenues during the day parts of the broadcasting day which attract light viewing (traditionally mornings and late night). For smaller multi-platform channels, the broadcast of spot advertising at these times is unlikely to deliver little and perhaps even negligible income. Therefore, the ability to broadcast home shopping may be vital. The additional revenues are likely to assist the ability of such channels to invest further in prime time editorial content which appeals to the channel's core audience and can be scheduled at a more appropriate part of the broadcast day. Consequently, this is likely to lead to improved advertising revenues from a greater commercial impacts when such content is broadcast. The creation of a virtuous circle.
- 5.3 Although a well trailed argument, we consider that Ofcom needs to be ever mindful that in framing the specific rules of the Draft Code, that all television channels face ever increasing competition from content available on other platforms that have little or no restrictions on the amount of advertising that they can display. IPTV channels are gaining wider acceptance and viewership as the uptake of broadband penetration makes the Internet a realistic competitor to deliver a range of audio-visual services to the consumer. In such a competitive environment and with consumers having such a wide choice of platforms upon which to access audio-visual content of their choosing, we believe that regulators such as Ofcom should not unnecessarily constrain broadcasters in the adoption of commercial strategies which may be in their best interest unless there is overwhelming evidence that such regulatory constraints are required. In relation to the liberalisation of teleshopping windows, no such evidence has been produced to date. We doubt in the responses to this review that any compelling counter-argument will be produced other than the obvious concerns from those stakeholders who fear greater competition and therefore wish to protect their existing commercial position within the broadcasting marketplace. An understandable desire but one which we believe Ofcom must discount.

SBS Broadcasting Networks Limited

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