

Ofcom  
Riverside House  
2a Southwark Bridge Road  
London  
SE1 9HA

The Danish Radio and Television  
Board

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Ulrike Clade Christensen  
Fuldmægtig, cand.jur.

ucc@bibliotekogmedier.dk  
Direkte tlf.: 3373 3334

Att.: Chris Owen, Licensing Executive, TV Broadcast Licensing

Dear Chris Owen

### **Questions of jurisdiction / Compliance with Danish advertising rules by Danish-speaking TV-stations owned by SBS and Viasat**

Referring to the correspondence between The Danish Radio- and Television Board and Ofcom and the meeting held between Ofcom and the Board on 9 September 2010, the Board hereby returns to the matters specified above.

#### **A. Questions of jurisdiction**

As for the matter of the questions of jurisdiction, The Radio and Television Board wishes to state the following:

In light of Ofcom's assessment of the case and the information provided during the meeting, the Radio and Television Board takes note of the following:

- Viasat Broadcasting UK Ltd. is the Media Service Provider as defined in the Audiovisual Media Service Directive for the Ofcom licensed Danish-speaking TV-channels TV3, TV3+ and TV3 Puls with Head Office in London, UK, where the editorial decisions are made.
- SBS Broadcasting Networks Ltd. is the Media Service Provider as defined in the Audiovisual Media Service Directive for the Ofcom licensed Danish-speaking TV channels Kanal 4, Kanal 5 and The Voice DK with Head Office in London, UK, where the editorial decisions are made.

Also, the Board has noted that both British parent companies exercise effective control over the selection of the programmes and their organisation by using a chronological schedule regarding the Danish-speaking TV channels according to Article 1(c) and (d) of the Audiovisual Media Services Directive.

Since, according to Ofcom's assessment, both British companies have their Head Offices in London, the Radio and Television Board has also noted Of-

com's conclusion to the effect that the Danish-speaking TV channels TV3, TV3+ and TV3 Puls under Viasat Broadcasting UK Ltd., and Kanal 4, Kanal 5, and The Voice DK under SBS Broadcasting Networks Ltd. are subject to British jurisdiction according to Articles 4(2), 4(3) and 4(4) of the AVMSD.

Furthermore, the Board refers to the discussion at the meeting on 9 September 2010 concerning SBS' motivation to move their Danish-speaking TV channels to the UK. For Ofcom's information, the Board's decisions concerning SBS' breaches of the Danish rules on advertisement blocks rendered just before SBS' relocation of the Danish-speaking channels to UK are enclosed as well as an article published 29 March 2006 at TVnyt.com.

## **B. Request according to Article 4(2)**

The specified TV channels are subject to British jurisdiction as described above.

In accordance with article 4(2) of the Audiovisual Media Services Directive, the Radio and Television Board therefore issues the following request:

The Board requests that Ofcom request

- the Danish-speaking TV channels TV3, TV3+ and TV3 Puls, licensed by Ofcom under Viasat Broadcasting UK Ltd., and
- the Danish-speaking TV channels Kanal 4, Kanal 5 and The Voice DK licensed by Ofcom under SBS Broadcasting Networks Ltd.

to comply with the following Danish rules of general public interest, as set out in the Danish Radio and Television Broadcasting Act, § 73 (1) and (2)<sup>1</sup>:

**73.** Advertisements on television shall be transmitted only in blocks to be inserted between the programmes. This does not apply to teletext advertisements.

(2) Advertisement blocks may, however, interrupt sports programmes where breaks occur, or programmes that are transmissions of performances or events where there are intervals for the audience. Scheduling of such advertisement blocks shall take into account the programme's natural breaks, duration and nature in such a way that the integrity and value of the programme shall not be compromised nor the owner's rights infringed.

As a rule, insertion of advertisement blocks during programmes is not allowed according to Danish law. Only sports programmes where breaks occur and other live or displaced transmissions of shows or events with breaks for the audience are exempted from the rule.

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<sup>1</sup> Act. no. 477 of 06/05/2010

## **1. Background of the request**

The fact that the above specified Danish-speaking TV channels owned by SBS UK and Viasat UK are not subject to Danish jurisdiction, has been an issue of considerable public attention during the past years. The fact that these stations have a high quantity of advertisement blocks during programmes such as films and series is in strong contrast to the Danish rules mentioned and has given rise to criticism from both Danish viewers and different voices in the public. These circumstances have raised great discussion in the public press, critical statements by prominent Danish media scholars and questions to the Danish Minister of Culture from MPs.

The two complaints against the fact that the stations mentioned are subject to British jurisdiction, which have been elucidated in collaboration between Ofcom and the Radio and Television Board, should also be seen in this context.

The difference between legal advertisement blocks for stations under Danish jurisdiction, on the one hand, and those under British jurisdiction and licensed by Ofcom, on the other hand, also leads to a significant imbalance in the broadcasters' options for advertising revenue.

Clearly, the channels owned by SBS and Viasat, registered in the UK, but only or mostly directed towards Denmark, are given the possibility of advertisement breaks in many more programme types than it is the case as regards Danish broadcasters, which creates an unfair competition in the Danish market.

On this basis the Radio and Television Board has decided to initiate the cooperation procedure as set out in Article 4(2) in the AVMSD, with a view to achieving a mutual satisfying solution to the above mentioned problems.

## **2. Other prerequisites according to the AVMS**

### **a) Cross border element**

The aforementioned TV channels owned by Viasat and SBS are, as concluded, subject to British jurisdiction.

However, all of these TV channels are directed wholly or mostly towards Denmark meeting the conditions in Article 4(2)(b).

This assumption is based on the following aspects which are all met by the channels mentioned:

- The programs are broadcasted either in Danish or with Danish subtitles
- Advertisement spots on the channels are targeted specially at the Danish audience in Denmark
- Advertising revenues from these channels are originated from Denmark, the same are cable distribution revenues regarding the Viasat owned stations

With respect to revenues from television advertising, etc., reference is made to the statement from Viasat Broadcasting UK Ltd. of 9 August 2009 in the matter, where it is specified that advertising revenues, cable distribution and other revenue generated by TV3 is derived from the territory of Denmark. Furthermore, Viasat has stated in the letter to Ofcom of 5 March 2010 that TV3 A/S, which is established in Denmark, provides services to Viasat UK for all of the earlier mentioned Danish-speaking channels owned by Viasat. Marketing services are specially mentioned, emphasizing the large number of personnel at TV 3 A/S working within that area.

According to the statement from SBS Broadcasting Networks Ltd. of 23 February 2010, SBS TV A/S, which is established in Denmark, is responsible for advertising sales for the above mentioned channels belonging owned by SBS.

#### **b. More detailed / stricter rules of general public interest**

In carrying out the above mentioned prohibition against advertisement blocks in most types of TV programmes, Denmark has exercised its freedom to adopt more detailed or stricter rules in the fields coordinated by the Directive as set out in Article 2(1) and (2)(a).

Furthermore, the Danish prohibition against the inserting of advertisement blocks during most types of programmes such as cinematographic works, films, series and light entertainment programmes should be considered as a rule of general public interest, meeting the requirement according to Article 2(2) (a) and no. 41 of the directive's preamble, which specifies, that the concept of rules of general public interest includes, inter alia, rules on the protection of consumers and cultural policy.

As mentioned, according to the wording of the Danish Act on Radio and Television, Section 73, the integrity and value of the programme shall be taken into account when scheduling advertisement blocks during programmes, in addition to the criteria mentioned in Article 20 of the AVMSD. The Danish legislation places greater emphasis on cultural and esthetical concerns regarding the programmes and the viewers than on commercial interests regarding the need of inserting of commercials during programs.

The Radio and Television Board would like to point out the following considerations and purposes regarding consumers' rights and cultural policy, which underlie the Danish regulation on the scheduling of advertisements:

- High protection of the integrity and value of programmes (e.g. cinematographic works)
- High protection of the right holders' interests in broadcasting (e.g. cinematographic) works without breaks taking into account the undisturbed artistic whole
- Protection of consumers/viewers interest in the possibility to enjoy programmes/works without degradation of the cultural/esthetical experience by breaks.

The Radio and Television Board is of the opinion that compliance with the Danish rules is objectively necessary in order to secure the aimed high protection of the value of e.g. film works, and the rights of right holders and viewers against the degradation, which is a consequence of inserting advertisement blocks during programmes.

The Board should also like to point out, that equal access to advertising revenues for both Danish and the Danish-speaking TV channels specified above is important to maintain the Danish public service television model.

The above specified rules apply to all TV channels under Danish jurisdiction which are allowed to include advertising in their schedule. Application of the same rules by the above specified TV channels directed to Denmark and owned by SBS UK and Viasat UK would establish a level playing field for all the main commercial TV channels on the Danish TV market. The Board emphasizes, that the present request only concerns the TV channels, subject to the two complaints which caused the Board to investigate questions of jurisdiction in cooperation with Ofcom. Only the advertising on these stations has been a public issue in both actual complaints and within the public debate of these issues. However, The Board reserves its right to issue additional requests concerning other TV channels, where similar circumstances might exist.

The Danish rules on the inserting of advertisement blocks have exceptions regarding sports programmes and programmes that are transmissions of performances or events where there are intervals for the audience concerned. Furthermore, 12 minutes of advertising per hour are allowed in accordance with the AVMSD minimum rules in Article 23 (20 %). The Danish rules therefore do not affect the quantity of legal advertising on TV channels like the above specified, but affect only the placement of the advertisement. On that basis The Board is of the view that these rules are

proportionate in order to achieve the Danish legislator's purposes regarding consumer/viewer interests and cultural policy.

Overall, the Board considers these rules as objectively necessary, applied in a non-discriminatory manner and proportional, thus meeting the prerequisites in the Directive's preamble no. 41.

### **C. Request to Ofcom regarding supervision of the stations' compliance with AVMSD rules on advertising minutes and amount of advertising breaks**

The Radio and Television Board is referring to the considerations during the meeting between the Board and Ofcom on 9 September 2010 regarding supervision of the stations licensed by Ofcom.

At that occasion the Board handed over a report on breaches of TV 3, TV 3 Puls and TV 3 of the AVMSD limit for advertising minutes per hour.

It was also mentioned that the Board had received a concrete complaint from a Danish viewer about exceeded advertising minutes on TV 3 in March 2010, as well as a complaint considering the number of advertising breaks during programmes on Kanal 4 and Kanal 5.

#### **1. Request regarding advertising minutes**

The mentioned report from August 2010 showed a considerable number of violations of the limit of 20 % advertising of per hour both by TV 3, TV 3 Puls and TV 3+, including exactly the hours mentioned in the specific complaint.

To follow up on this matter, the Radio and Television Board has prepared a new report on violations of the limit in September and October 2010 by these three stations. This new report also shows a large number of violations of the 20 % limit on all three stations. Please see the enclosed report, supplied by lists over advertising spots at the time of some of the major violations.

On this basis, the Radio and Television Board requests that Ofcom exercise a close supervision of the stations concerned regarding advertising minutes and deal with the concrete violations shown in the report.

#### **2. Request regarding the amount of advertising breaks**

Furthermore, the Radio and Television Board is referring to the mentioned complaint about the amount of advertising breaks on Kanal 4 and Kanal 5. The complainant has noticed advertising breaks every 10-11 minutes during series and about every 20 minutes in movies/films in June 2010. The

Board does not have access to the necessary data to determine whether the stations mentioned exceed the limits for the permitted amount of advertising breaks according to AVMSD Article 20. The specific complaint concerning stations owned by SBS combined with the significant number of violations of the limit of permitted advertising minutes on stations owned by Viasat UK, has however lead to a general concern of the Board about whether the Danish-speaking TV channels licensed by Ofcom actually do comply with AVMSD/British rules concerning the number of advertising breaks.

On this basis the Board hereby also requests Ofcom to exercise supervision, e.g. by means of random checks, regarding the compliance of the specified Danish-speaking TV channels owned by Viasat UK and SBS UK with AVMSD/British rules concerning the number of advertising breaks during programmes.

The Radio- and television Board looks forward to Ofcom's views concerning the requests listed above and is of course available for further questions.

Yours sincerely

Christian Scherfig  
President of the Board

Kaspar D. Lindhardt  
Head of the Board's Secretariat

Enclosures:

1. The Radio and Television Board's decisions concerning SBS breaches of the Danish rules about scheduling of advertisement blocks
2. Article published 29 March 2006 at TVnyt.com
3. The Danish Radio and Television Broadcasting Act no 477 of 06/05/2010
4. Report on violations of the limit in September and October 2010 on TV 3, TV 3 Puls and TV 3+