

# The Office of the Adjudicator Periodic Report

April 2011

The following Report to Ofcom and the Office of Fair Trading sets out the Adjudicator's dispute determinations, his views about the operation of the Undertakings, the CRR scheme and CRR rules together with any recommendations, his views about the performance of Carlton and Granada (ITV plc) in complying with the Undertakings, his opinion about the evolution of the airtime sales market, and other relevant matters and information that he considers appropriate.

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## Background

In November 2003, Undertakings were accepted by the Secretary of State for Trade and Industry pursuant to the Fair Trading Act 1973, section 88(2), from the Channel 3 Broadcasters Carlton Communications Plc (“Carlton”) and Granada Plc (“Granada”), as required of them by the Secretary of State as a condition of approval of the agreed merger of those Broadcasters to form ITV plc (“ITV”). These Undertakings required the appointment of an Adjudicator to adjudicate on any dispute between ITV and advertisers/media agencies that arise out of the interpretation or exercise of the rights or obligations set out under the Contracts Rights Renewal (“CRR”) remedy.

Paragraph 22 of the Contracts Rights Renewal Adjudication Scheme (“the CRRA Scheme”) provides that every 3 months (or as otherwise agreed with Ofcom) the Adjudicator shall make a written Periodic Report to Ofcom and the OFT. **This is the Annual Report for the fiscal period up to March 2011.** The Annual Report and the Report published in October each year are made available to the public.

Pursuant to paragraph 22 of the CRRA Scheme, this report sets out:

- the Adjudicator’s determinations in relation to disputes;
- the Adjudicator’s views about the performance of Carlton and Granada in complying with the Undertakings (in relation to CRR);
- the Adjudicator’s views about the operation of the Undertakings (in relation to CRR), the CRRA scheme and the CRRA rules together with any recommendations;
- other relevant matters and information that the Adjudicator considers it appropriate to include.

In addition, it has been agreed with Ofcom that these Reports will also contain information on the use of the Adjudicator’s budget to date. This information will not be placed in the public domain.

The level of information contained in this Report is sufficient as to inform Ofcom and the Office of Fair Trading adequately on each of these areas.

*All confidential information contained within this Report is redacted from the public version.*

## **1.0 Office of the Adjudicator**

### **1.1 Core operating functions**

#### **1.1.1 The Adjudicator**

In May 2006 Robert Ditcham was appointed as the Adjudicator.

#### **1.1.2 The Office of the Adjudicator's staff**

Richard Baker joined in December 2006 as deputy Adjudicator. In addition the Office of the Adjudicator ("Office") has an executive assistant, Claire Gilmour. Julian Gregory, a barrister at Monckton Chambers specialising in competition law, continues as consultant legal advisor.

#### **1.1.3 Maintaining a secure office environment and procedures**

Given the confidential nature of the information that the Office handles, security is a high priority. Access to Riverside House, where the Office is situated, can be gained only with the use of security cards. Furthermore, the Adjudicator has put in place additional procedures to ensure that the confidential information is fully protected. In particular, the Office:

- uses heavy duty safes to store all confidential information. These are kept locked at all times, and only members of staff at the Office have access to the safes;
- operates a clear desk policy;
- has a policy that generally no confidential documents should leave the building.

#### **1.1.4 Access to appropriate information systems**

The Office has online access to all of the industry data it requires, including data supplied by BARB, Donovan Data Systems and Nielsen Media Research. BARB, Donovan Data Systems and Nielsen Media Research have all been very helpful to the Office in setting these systems up and providing ongoing support. In addition, the Office has developed its own systems and processes for analysing key information.

#### **1.1.5 Financial procedures**

These are set in accordance with Annex 3 of the Undertakings. Ofcom has set a budget for the total costs of the Adjudicator and his Office for each year in advance, after having consulted with ITV. Ofcom make payments in the first instance, but it invoices ITV on a quarterly basis for the actual costs incurred up to the maximum of the relevant budget.

### **1.1.6 The Office of the Adjudicator website**

The Office's website is at [www.adjudicator-crr.org.uk](http://www.adjudicator-crr.org.uk) and houses all documentation relating to the Undertakings and the Office, including;

- the Undertakings;
- a 'technical guide to the CRR remedy';
- the process for disputes including any documentation needed to submit a dispute;
- the Adjudicator's Periodic Reports;
- updated guidance enquiries; and
- other news, in particular of the Competition Commission's review of CRR, the HoL's enquiry into the regulation of the Television market, and Ofcom's impending review of Television trading

## **1.2 Core process**

### **1.2.1 Procedure for submitting disputes**

The procedure for disputes is set out in the CRR Rules (Annex 3 of the Undertakings). For the purposes of clarification, the "Process for disputes" section on the Adjudicator's website explains key aspects of the procedure, such as the distinction between a dispute and a complaint, the importance of making a case clearly, and the need to include evidence and relevant documentation in the Notice of Adjudication (dispute form) ("NoA"). Prior to submitting a formal dispute, the Adjudicator recommends that potential complainants read this guidance as it will help them in formulating their case.

When a party wishes to submit a dispute, a NoA has to be completed. The NoA is a standardised form designed to minimise the administrative burden on all parties. It asks for details of the key facts and supporting evidence relating to the case. The submitted form should include a brief summary of the dispute, the number of discussions between both parties in relation to the dispute, details of the areas of change in the offer and the aspect of the offer to which the advertiser or media buyer objects along with the nature of the redress which is sought. ITV must also be sent a copy of this NoA. If the Adjudicator decides to act on the dispute, ITV must send a Notice of Reply setting out its response to the NoA.

The Office took the decision that it would give a detailed explanation for its decisions. Any confidential information provided by either party in support of its case is redacted in the explanation. The Office will make decisions on disputes using evidence supplied by the parties which is supplemented by other information to which the Office has access. Decisions will take into account, in particular, historical data, prevailing market conditions, the current contract between the parties and other contracts in the market. The decision by the Office is final and binding on ITV.

### **1.2.2 Confidentiality process**

Confidentiality is of paramount importance to the operation of the Office. Confidentiality is maintained through the general office procedures set out at section 1.1.3 above and the way in which the Adjudicator deals with disputes. A limited number of people are

involved in the dispute process. Confidentiality clauses are inserted on all documentation sent out to external parties involved in the dispute.

### **1.2.3 Maintaining information flows with ITV (Memorandum of Understanding)**

A Memorandum of Understanding (“MoU”) was formalised with ITV in August 2004. This is a standardised process for the provision to the Office of certain general information and documents, i.e. information and documents that do not relate to specific disputes.

The MoU has facilitated the effective processing of information requests made by the Adjudicator, under paragraph 21 of the Scheme, ensuring that there is full and timely compliance by the provision of up-to-date information within a specified deadline, without over-burdening ITV. The MoU covers the provision of a number of different categories of information and documents, including in particular the following:

- copies of final sales contracts 2010/11. Where contracts are not available the Office will be supplied with a summary of the key terms on which media agencies/ advertisers are trading with ITV;
- a fortnightly report on the past, present and future position of the trading balance by ITV region;
- a full report on the treatment of all bookings made after the ABD (advance booking deadline); and
- a monthly summary of all DRTV (Direct Response Television) campaigns by region.

The MoU also puts in place regular status meetings between the Office and ITV, in which both parties are able to discuss any concerns that they might have in relation to the operation of the Undertakings. This includes a monthly meeting between the Office and ITV; a monthly meeting between a member of the Office and ITV’s sales operation controller and sales operation planning controller to discuss any issues arising from ITV’s trading balance figures; and a quarterly meeting between the Adjudicator and the ITV commercial sales director.

When considered necessary, to enhance the efficiency and effectiveness of the Office, the Adjudicator will propose any amendments deemed necessary to the MoU to ITV, either in relation to the provision of data or the timetable of such provision.

### **1.2.4 Interim reports process**

The Undertakings state that the Adjudicator shall bring to the attention of Ofcom and the OFT any matter that gives rise to a reasonable suspicion on his part that ITV is not complying with the Undertakings. If such a matter arises the Adjudicator can submit a ‘Process and Interim’ report to Ofcom and the OFT.

### **1.3 Relationships with key stakeholders**

Since the last Periodic Report of October 2010, and in addition to the regular meetings with senior ITV staff (as laid out in the MoU), the Adjudicator has attended industry conferences and held meetings with a number of representatives of the UK's advertising community. These meetings are held to allow the Adjudicator to seek views on the workings of the Undertakings and on the operation of the television marketplace more generally. It is important for the Adjudicator to seek a broad range of opinions to understand fully the state of the market. The Adjudicator appreciates the time that these organisations provide the Office.

The Adjudicator has met with media representatives at the IPA and ISBA, the two main industry trade bodies, to seek their views of the operation of the CRR remedy. Comments from these bodies can be found in Section 5 of this Report.

## 2.0 Disputes and guidance

### 2.1 Disputes

The Office received no Notices of Adjudication in relation to disputes between media agencies/advertisers and ITV since the last Annual Report in April 2010.

In our last Annual Report in April 2010 we observed then that “the Undertakings have been in force for six deal seasons and both ITV and agencies/advertisers are now generally aware of their rights and obligations under the Undertakings. Where clarification is needed agencies/advertisers have sought guidance from the Office - as discussed below.”

Following revised undertakings resulting from the conclusion of the Competition Commissions review of CRR, the Office questioned in our Periodic Report in October 2010 whether the revisions would alter the previous equilibrium of awareness and understanding of rights and obligations under CRR. We suggested that given the minor nature of the amendments we would not anticipate any significant change and that we intended to issue new guidance to “facilitate a consistent understanding on the revised Undertakings for ITV and advertisers/media buyers.”

This guidance was issued and published on our website in November 2011.

Based on the level of guidance enquiries relating to the CRR amendments and following meetings with media buyers post the negotiation season, the Adjudicator is pleased to observe that our expectations at the time of our Periodic Report seem to have been met.

### 2.2 Informal guidance

16 guidance enquiries have been brought to the Office by advertisers and media agencies since the last Annual Report in April 2010. 11 of these came in the first half of the year (April-September '10) with 5 in the second half (October '10-March '11).

This pattern of more guidance enquiries during the earlier part of the year is unusual as historically more guidance enquiries occurred in the second half of the year when most contracts are negotiated. This unusual pattern would seem to support the Adjudicator's view that there is now a good level of awareness and understanding of rights and obligations under CRR and that the Office's additional published guidance on the revised undertakings has satisfactorily informed the industry.

Guidance enquiries received since the last Annual Report have related, amongst other things, to the following issues.

- Line by line deals
- Advertisers with line by line deals moving to agency deals
- Micro-region changes
- The ARM mechanic
- The inclusion of ITV1 HD impacts in the ARM mechanic

- Burst deals
- Protected contracts
- Contract variations
- Accepting CRR as a fallback position

When relevant the Office will from time to time post general guidance on to the Adjudicator website: <http://www.adjudicator-crr.org.uk/enquiries.htm>.

Since the last Annual Report in April 2010 the Office published guidance in November 2010 relating to changes to the undertakings as a result of the Competition Commission's review of CRR.

In responding to guidance enquiries, the Office cannot advise on individual contracts and negotiations. Nonetheless, where an enquiry falls within the remit of the Office, it is able to provide guidance by directing the parties to the relevant sections of the Undertakings and the technical guide. Any guidance provided is without prejudice to the view that may be taken by the Adjudicator if and when the issue is brought as a formal dispute, when further information relating to the issue may be available and may need to be taken into account (for example, details of historical precedents showing how the parties have dealt with similar issues in the past). The Office has adopted the practice of confirming any guidance in writing where appropriate.

## **3.0 Reporting on ITV's compliance**

### **3.1 General considerations**

Since the October 2010 Periodic Report ITV has continued to cooperate within the rules of the Undertakings.

### **3.2 Contracts**

The Adjudicator is pleased to report that the provision of contractual information to the Office from ITV has been good during this period.

## 4.0 Regulatory developments relating to the sale of TV advertising

A number of regulatory or related developments regarding the sale of TV advertising have occurred since the last Annual Report in April 2010, including the following.

- The Competition Commission's conclusion of its review of CRR
- The House of Lords enquiry into the regulation of TV advertising
- The Government response to the House of Lords enquiry
- The announcement by Ofcom that it will review the way TV airtime is traded
- The removal of the Airtime Sales Rules

### 4.1 Competition Commission conclusion of its review of CRR

On 12 May 2010, in its review of CRR the CC concluded that ITV would not be released from the CRR Undertakings.

On 16 July 2010, the CC published ITV's proposed variations to the Undertakings. These account for a changed definition of ITV1 so as to include ITV1+1 and ITV1 HD services.

On 17 September 2010, Notice of Acceptance of these undertakings was given to the Secretary of State of Trade and Industry and accepted by the CC.

The full final report is on the Competition Commission's website:

[http://www.competition-commission.org.uk/inquiries/ref2009/itv/pdf/final\\_report.pdf](http://www.competition-commission.org.uk/inquiries/ref2009/itv/pdf/final_report.pdf)

The Notice of acceptance of undertakings to vary the CRR Undertakings and the CRR Undertakings showing the changes is at:

[http://www.competition-commission.org.uk/inquiries/ref2009/itv/pdf/itv\\_crr\\_undertakings\\_160710.pdf](http://www.competition-commission.org.uk/inquiries/ref2009/itv/pdf/itv_crr_undertakings_160710.pdf)

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#### 4.1.1 New guidance on the Undertakings

In the light of the conclusion of the CRR review and the introduction of amended Undertakings, the Office published guidance on these revised undertakings in November to ensure media buyers were aware of the effects of these revisions.

## 4.2 House of Lords enquiry into the regulation of Television advertising

A House of Lords (“HoL”) select committee inquiry was launched on 27 July 2010. At launch the committee issued a call for evidence into the regulation of television advertising with “particular reference to the Contract Rights Renewal Mechanism.”

The HoL Communications committee enquiry published its findings on 17 February 2011. With specific reference to CRR the committee’s recommendation was

*“We are persuaded that in the light of changes in the market for television advertising the CRR undertakings appear to be overly detrimental to ITV plc. They should be abolished. However, although ITV1’s competitive advantage has reduced since 2003 as a result of the increase in the number of broadcasters within the industry, it has not reduced to the extent that the CRR undertakings could be abolished without the provision of alternative binding undertakings (para 101)”*

## 4.3 The Government response to the House of Lords enquiry

During April 2011 the Government has issued a response to these findings. With reference to CRR, the Government’s response in their paper on page 4 concluded:

*“There are a range of opinions about the CRR undertakings. On the one hand Ofcom have stated that if CRR were relaxed and ITV took advantage of the situation, it would probably be able to increase its revenues, but that there was no guarantee this ‘additional income’ would be used for investments and programming. The advertisers cited in their evidence that they would be concerned about an increase in advertising costs should CRR be removed. It was argued that this is likely to be at the expense of other broadcasters since advertisers remain reliant on ITV1 as a means of reaching large audiences quickly. The Committee itself recognises in recommendation 184 that there has to be a “curb” on ITV’s ability to exploit its competitive advantage. On the other hand ITV complained that CRR has artificially suppressed its ability to gain advertising revenue, and that this had had a highly distorting impact on the UK media market.*

*We note this range of views and agree with the Competition Commission (CC) and the Committee that a wider review of the advertising market is required. We further note the CC says that the way in which television airtime is currently sold has a significant influence on the need to retain CRR. We therefore welcome the announcement by Ofcom on 17 March that it intends to undertake a review of the way TV advertising is traded. If Ofcom find a cause for concern during the course of the review, they may make a market investigation reference to the Competition Commission, or they could also accept remedies in lieu of a reference. It is a highly likely outcome of this analysis that Ofcom will pass the matter to the CC which will carry out a more formal review of competition in TV advertising market as part of a market investigation. In instigating this review Ofcom hope to complete their assessment as quickly as possible.”*

#### **4.4 Ofcom announces a wider review of the advertising market**

On 17 March 2011, Ofcom announced a review of the way TV advertising is traded. As announced by Ed Richards at the ISBA conference the review will consider “whether there are reasonable grounds for suspecting that the trading mechanism prevents, restricts or distorts competition in the sale of TV advertising airtime.”. The Office will continue to liaise closely with Ofcom, as the Office has done with past reviews.

#### **4.5 Airtime Sales Rules**

On 1 September 2010, Ofcom removed the Airtime Sales Rules. Two pre-existing rules were lifted.

1. The prohibition against conditional selling across a portfolio of channels.

However, ITV will remain obligated under CRR to offer an ITV1 only deal, should media buyers and advertisers request it.

2. The requirement on PSB broadcasters to sell all of their advertising minutage.

## 5.0 Stakeholders views of the operation of the Undertakings and the CRR scheme

### 5.1

*This section details the verbatim replies received by the office of the adjudicator, following his request to the stakeholders for their views of the operation of the Undertakings and the CRR scheme. The views contained within each stakeholder response are the views of that stakeholder. They should not in any way be construed as the views or the opinions of the adjudicator.*

### 5.1.1 ISBA view of the operation of the Undertakings and the CRR scheme



7<sup>th</sup> April, 2011  
Robert Ditcham  
Adjudicator CRR  
Ofcom  
The Office of the Adjudicator (CRR)  
Riverside House  
2a Southwark Bridge Road  
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Dear Robert

#### **Office of the Adjudicator Annual Report**

Thank you for your letter of April 1<sup>st</sup>. As with our previous responses, we are detached from the detail of any issues of adjudication as it is typically delegated to our members' media agencies. For that reason, and because the process is confidential, we are therefore as always rightly unaware of any specific current issues.

That said, there is a general sense that the continued presence of the CRR remedy and the oversight of your Office has once again had a stabilising effect on the market, and ITV in particular, across the autumn 2010 deal season for 2011 airtime.

Since we last wrote, there have been a number of developments which also merit mention in this response : Ofcom's sudden removal of the Airtime Sales Rules; The House of Lords Communications Committee's late-2010 Inquiry into the regulation of television advertising; Government's April 6<sup>th</sup> response to the their report; and Ofcom's March 17<sup>th</sup> announcement of a review of the airtime market, which we expect to commence soon.

Our submissions to the HoL and our responses to their findings and to Government's response are a matter of public record. In summary, we consider a pricing intervention - whether CRR or some evolution of it - absolutely necessary as long as ITV remains so clearly dominant. At the same time we are not at all swayed by ITV's claims that CRR prevents it from investing in quality content, which claims are not supported by market data.

Since we see no such direct connection between CRR and investment in content, we are mystified by suggestions that the current undertakings might be replaced by undertakings somehow governing investment in content, themselves effectively unenforceable and therefore most likely meaningless.

We were disappointed by the removal of the airtime sales rules, and welcome but are not at all surprised by suggestions that they might have to be reinstated if other changes were wrought on the market as a result of or in parallel with a market review. We understand harmonisation of amounts of advertising also remains in play.

Please let me know if there is anything else you think we might be able to contribute as we go forwards. Best wishes meanwhile.

Yours sincerely

**Bob Wootton**  
*Director of Media & Advertising*

## 5.1.2 IPA view of the operation of the Undertakings and the CRR scheme



Institute of Practitioners in Advertising

Mr Robert Ditcham  
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12th April 2011

Dear Richard

### Adjudicator's Report: October 2010 – March 2011

As requested, this letter draws together the views of a cross-section of IPA media agencies on the operation of the ITV Undertakings, the CRR mechanism and the Adjudicator's Office for the period from October 2010 to March 2011.

As such, it follows the pattern of the IPA's periodic reports submitted since the Office of the Adjudicator was set up in 2003/2004.

#### 1. Operation of the Undertakings

It is now almost 8 years since the above provisions were first imposed and all parties are thoroughly acquainted with their terms and how they operate.

While senior management at ITV changed during the period under consideration, agency negotiations had been completed by the time of Gary Digby's departure in January 2011 – and so were unaffected by the new regime.

#### 2. How has CRR operated?

As ITV impacts did not fall last year, CRR did not really come into play during this negotiation period.

Reflecting this, deals tended to be concluded quite rapidly, with discussion less focused on the retention of ITV's share than historically.

Having said this, ITV's behaviour on a day-to-day basis has continued to be intransigent with regard to late money/campaign date changes and/or the pricing of highly demanded programmes. Indeed, following the

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decision by the Competition Commission in May 2010 to retain CRR, some members felt that ITV renewed its determination to maximise revenues by all means not covered by the restrictions of CRR, eg non-contracted penalties/pricing.

Playback regarding the sales stance of the new management regime indicates little change in on-going trading, possibly due to an unwillingness to initiate anything significantly different until the new sales head is in position, underpinned by an understandable concern that a less combative approach might carry with it the risk of eroding revenues.

At high level conversations, the language has been about "partnerships" and how these might look. However, what might eventually emerge in this context, only time will tell.

### 3. The Adjudicator's Office

None of the agencies questioned for this paper had made a referral to the Adjudicator's Office during the period.

However, as stressed in the IPA responses to the competition authorities and the House of Lords Select Committee On Communications in recent times – all respondents remain convinced that CRR and the Office of the Adjudicator are vital brakes on potential cavalier behaviour by an ITV, which remains the dominant player in the UK television market.

I hope this is useful. If you should have any queries or require additional information, please do not hesitate to let me know.



Geoffrey Russell  
Secretary and Director for Media Affairs