

The Office of the Adjudicator Annual Report

April 2012

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 2012.** 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:

1. the Adjudicator’s determinations in relation to disputes;
2. the Adjudicator’s views about the performance of Carlton and Granada in complying with the Undertakings (in relation to CRR);
3. 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;
4. 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:

1. 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;
2. operates a clear desk policy;
3. 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 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

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:

1. copies of final sales contracts 2011/12. 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;
2. a fortnightly report on the past, present and future position of the trading balance by ITV region;
3. a full report on the treatment of all bookings made after the ABD (advance booking deadline); and
4. 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 in October 2011, 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 2011.

The Adjudicator is pleased to observe that, consistent with his view at the time of the last Annual Report in April 2011, the guidance published on the Adjudicator website following the conclusion to the Competition Commissions review of CRR appears to have facilitated a consistent understanding on the revised Undertakings by both ITV and advertisers/media buyers, and more generally maintained a high level of awareness and understanding of parties rights and obligations under CRR.

2.2 Informal guidance

Four guidance enquiries have been brought to the Office by advertisers and media agencies since the last Annual Report in April 2011. One of these came in the first half of the year (April-September '11) with three in the second half (October '11-March '12). The number of guidance enquiries received by the Office has fallen in recent times. This is likely to be the result of:

- a) the general awareness that ITV and advertisers/media buyers have of their obligations and rights within the Undertakings;
- b) clear understanding of the revisions to the Undertakings that resulted from the Competition Commission review of CRR (aided by the publication by this Office of additional guidance).

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>.

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 2011 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.

3.3 ITV's airtime Terms and Conditions

In its views on the Undertakings and CRR, the IPA (below in section 5) raises the issue of changes that ITV have made to their ratecard Terms and Conditions - specifically clause 3 of the deal conditions contained within the 2012 ITV Airtime Terms and Conditions.

The Office has previously published the following guidance on this subject on its website.

3. If ITV amends its ratecard terms and conditions in the middle of a deal period, am I necessarily bound by them for the purposes of my current deal?

No. ITV's ratecard terms and conditions are contractual terms and conditions in the same way as the terms and conditions in the main body of your contract with ITV (e.g. such as any SOB commitment). Contractual terms and conditions cannot generally be introduced or amended unilaterally by one party. The ratecard terms and conditions governing your contract with ITV will generally be those that were in place at the time of the deal season when your contract was agreed. If ITV purports to introduce new or amended ratecard terms and conditions in the middle of a contract period, they will form part of your contract with ITV only if you have agreed to the changes.

4. If ITV amends its ratecard terms and conditions, do I have to accept the changes in my next deal agreement?

No. As with other terms and conditions, ITV's ratecard terms and conditions will form part of your contract with ITV only if you agree to them. If you are unable to reach agreement with ITV in relation to one or more of the ratecard terms and conditions, it would be open to you to agree with ITV that the ratecard terms and conditions should form part of your contract except for the contested provisions. If you considered that one or more of the ratecard terms and conditions were not 'fair and reasonable', and ITV insisted that the relevant provisions must be incorporated into your contract, you would be entitled to bring a dispute to the Adjudicator.

4.0 Regulatory developments relating to the sale of TV advertising

4.1 Ofcom review of the advertising market

On 17 March 2011, Ofcom announced a review of the way TV advertising is traded.

On 10 June 2011, Ofcom published a consultation on competition issues in the UK advertising trading mechanism. Ofcom were “consulting on whether or not to refer the UK market for TV advertising to the Competition Commission (CC) for market investigation.”

On the 15th December 2011, Ofcom announced that it had decided not to refer the TV advertising trading market to the Competition Commission.

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



2nd April 2012

Robert Ditcham
Adjudicator CRR
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2a Southwark Bridge Road
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Dear Robert

ISBA RESPONSE TO YOUR REQUEST FOR COMMENT FOR YOUR 2011-12 ANNUAL REPORT TO OFCOM

Thank you for your letter of March 30th requesting our comments for your next annual report to Ofcom.

When Granada and Carlton merged to form ITV plc, advertisers and media agencies alike feared the merged entity would aggressively leverage its highly-dominant position in order to drive its prices. This was the basis of our representations to Ofcom, the OFT and the Competition Commission. The Contract Rights Renewal price intervention very effectively created a direct commercial disincentive for ITV to be able to continue to leverage financial success from programme failure.

We have latterly reiterated these continuing concerns to consultations undertaken by the three regulators as well as Select committees of both houses of Parliament, and were heartened that the most recent, Ofcom's 2011 review of the airtime sales market, did not propose significant changes which might have destabilised the market or overturned CRR.

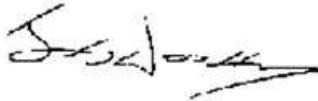
Critically, in each of our responses, we dismissed ITV's lobbying that CRR was preventing it from delivering the kind of audience performance its advertiser customers sought. It emerges that we were right - ITV's new(ish) management seems to be doing what its predecessors should have done and what ISBA, on behalf of its advertiser clients, has long called for – commissioning and scheduling great shows and marketing them more effectively to viewers. As a result, we have seen ITV posting some welcome year-on-year audience increases over the past two years.

While CRR was designed to prevent ITV from leveraging the same or more revenue for a declining audience, so it also 'becomes silent' when ITV posts increased audiences, the commercial fruits of which it should rightly be allowed to capitalise on. However, CRR continues to exist in the background to re-emerge if ITV's audience performance fails and leverage of undue dominance becomes an issue once again. We are therefore not surprised to understand that CRR continues to be regarded both domestically and internationally as one of the most effective interventions in the history of competition policy.

Our understanding is that recent negotiations between advertisers, their media agencies and ITV have been characterised by a mixture of application of CRR and of market forces when each is relevant. Apart from a well-publicised spat between one broadcaster and media agency, the autumn 2011 trading season for 2012 airtime appears to have proceeded in a relatively orderly manner. The confidentiality surrounding any appeals to your Office means that we are unlikely to be aware of any specific issues, and indeed this continues to be the case.

As ever, I would be happy to provide further comment or information as required.

Best wishes

A handwritten signature in black ink, appearing to read 'Bob Wootton', with a long horizontal flourish extending to the right.

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

Robert Ditcham
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4th April 2012

Dear Richard

Adjudicator's Report: October 2011 – March 2012

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 2011 to March 2012.

As such, it repeats 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

After almost 9 years of operation, all parties are thoroughly well versed in the above provisions.

It therefore came as something of a surprise when one member highlighted an unannounced change to ITV's ratecard terms and conditions, relating to the calculation of buyer commitments (Clause 3).

Reference to the Adjudicator's website confirms that "contractual terms and conditions cannot generally be introduced or amended unilaterally by one party" and that "if ITV purports to introduce new or amended ratecard terms and conditions in the middle of a contract period, they will form part of your contract, only if you have agreed to the changes".

While there was no suggestion that ITV was seeking to impose these changes mid-term (and it is recognised that agencies have the right to reject these changes in their next deal agreements) – unannounced, potentially significant, alterations to rate cards are of concern, given that not all buyers will be as attentive to detail as the agency in

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question - and thus could find themselves inadvertently bound by new provisions of which they were unaware.

2. How has CRR operated?

ITV had a strong finish to 2011, outperforming its commercial PSB competitors with a good audience performance and a relatively flat CRR position. This, in turn, protected the broadcaster's "spot" advertising revenue for 2012 - which may have granted it permission to adopt a less "robust" stance towards its customers across this period than previously.

Having said this, it is clear from respondents that the arrival of Fru Hazlitt and her new sales team has seen a genuine shift from the "old ITV" toward a more customer-centric and collaborative approach.

This is not, of course, to say that ITV has relaxed late money penalties etc but it is more open to negotiation, rather than the intransigence experienced in the past. Understandably, the broadcaster remains focused on taking as much money as possible across all platforms - really pushing to maximise its revenues, particularly across VOD and digital.

If therefore remains the case that, while ITV's tone may have changed, the pressures for it to achieve its revenue goals have not - and, in consequence, the need for CRR to deter the temptation for it unfairly to exploit its market strength remains as important as ever.

3. The Adjudicator's Office

All members continue to value the presence of the Adjudicator, and while none reported the need to raise substantive issues across this period, they commented favourably on the efficiency with which the operation and its processes run.

Last year at this time, I reported the comment of one respondent, who stated "Although CRR was not really mentioned during this year's negotiations - it and the Adjudicator's Office still serve to keep ITV on a leash, of that I am certain".

Even with experience of the new, more user-friendly version ITV Sales, our members continue to believe this sentiment holds true.

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

date: 4th April 2012

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A handwritten signature in black ink, appearing to read 'Geoff', with a stylized flourish underneath.

Geoff Russell
Company Secretary/Director for Media Affairs