

# The Office of the Adjudicator Annual Report

April 2014

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 Office of Fair Trading (“OFT”), which has now merged with the Competition Commission (“CC”) to become the Competition and Markets Authority (“CMA”). **This is the Annual Report for the fiscal period up to the end of March 2014.** 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 and Donovan Data Systems. 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

## **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)**

In August 2004 the Office formalised a Memorandum of Understanding (“MoU”) with ITV. This standardised a 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.

In November 2012 the Office, ITV and Ofcom agreed a new MoU. The new MoU has been created to update and refresh the original MoU, and to reflect revisions to the Undertakings.

The new MoU, like the original, facilitates 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 2013/14;
- reports on the trading balance by ITV region; and
- reports on the treatment of all bookings made after the ABD (advance booking deadline).

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; meetings 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 Director of TV Sales.

### **1.2.4 Interim reports process**

The Undertakings state that the Adjudicator shall bring to the attention of Ofcom and the OFT, now the CMA, 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 CMA.

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

Since the last Periodic Report in October 2013, and in addition to the regular meetings with senior ITV staff (as laid out in the (new) MoU), the Adjudicator has 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.

Ahead of the negotiation season for 2014 airtime, the Adjudicator met with the ITV Director of TV Sales where discussions included, ITV sales policy, the TV market, developments within the market place and ITV compliance.

### **1.4 Adjudicator research project**

In October 2013, the Adjudicator released an online research survey. The aim of the survey, which has been rolled out to different groups in waves, is to supplement the Adjudicator's face-to-face meetings and to gather wide ranging views on the current TV landscape, its evolution and catalysts for change. The Office would like to thank those who have taken part to date.

## 2.0 Disputes and guidance

### 2.1 Disputes

The Office received two Notices of Adjudication since the last Annual Report in April 2013. Both arose out of one set of negotiations.

The first Notice was formally accepted as a dispute and resulted in an adjudicated dispute which was determined in favour of ITV.

The second Notice was withdrawn to allow the parties to negotiate further.

### 2.2 Informal guidance

The Office received three guidance enquiries from advertisers/media agencies since the last Annual Report in April 2013. The number of guidance enquiries received by the Office fluctuates from year to year. In the twelve months leading up to 31 March 2013, fifteen enquiries were brought, whereas only four enquiries were brought in the preceding year. This simply reflects the *ad hoc* nature of enquiries, the number of which remains far lower than when CRR was in its infancy.

The Adjudicator continues to believe that both ITV and advertisers/media buyers have:

- a) good general awareness of their obligations and rights within the Undertakings; and
- b) a 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>. Since the last Annual Report in April 2013 no new guidance has been posted.

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.

As part of the new MoU, and in the interests of transparency, the Office has agreed to provide anonymised copies of individual guidance to ITV. This ensures that, in the event of a dispute, all parties (including ITV) are aware of any advice previously given by the Office on the issue in question. In order to protect the identity of the enquiring party, these copies are appropriately redacted and are provided at any time up to six months after the initial enquiry.



## 3.0 Reporting on ITV's compliance

### 3.1 General considerations

Since the April 2013 Annual 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 efficient and satisfactory during this period.

### 3.3 ITV Micro region changes

On 11 April 2014, as a consequence of geographical changes to licence areas (resulting from the Channel 3 licence renewals (mentioned at 4.1 below) from 1 January 2015, ITV announced that it would need to alter its sales micro map to reflect the licence area changes. N.B. Some licence areas (or regions) are, for the purpose of purchasing advertising airtime, subdivided into micro regions. For example, the ITV Central region is further divided into ITV Central West, ITV Central East and ITV Central South, where airtime can be purchased on an individual micro region basis.

A copy of ITV's announcement is copied below:

"ITV has recently accepted Ofcom's decision to renew its Channel 3 licences for a full ten year term.

The new licences, which commence on 1 January 2015, incorporate two key changes to geographic licence areas. In summary:

- West homes (previously part of the Wales & West licence and West sales micro) will be migrated to a new licence (West & South West of England) which also incorporates the current Westcountry licence thus creating a new standalone Wales Channel 3 licence; and
- Homes served by the Oxford transmitter (previously part of the Central licence and Central South sales micro) have been migrated to the Meridian licence to reflect the Meridian Thames Valley News provision to these homes.

The changes mean that ITV will need to restructure its sales micro map accordingly. We confirm that ITV has no current intention to further alter its sales micro map beyond what is set out below.

The West homes migration will not necessitate ITV to make any material changes as ITV will continue to offer West as a separate sales micro as part of the new West & South West of England licence.

As a result of the Oxford homes licence migration, ITV will be making the following changes:

- Homes served by the Oxford transmitter will now constitute part of the Meridian Thames Valley sales micro;
- The Central South sales micro will be closed following the departure of Oxford homes to the Meridian licence;

ITV will also be making the following complimenting changes together with the migration of the Oxford homes; this is to ensure Regional News content marries up with micro regional advertising breaks:

- Homes served by the Ridge Hill transmitter will migrate to the Central West sales micro which will mean the Ridge Hill homes sales micro region is aligned to the new licence News sub-region Central West which serves these homes; and
- Midhurst DTT and DSAT homes will be moved to the Meridian South Coast sales micro so that they are aligned to the new licence News sub-region they fall in to, Meridian South News.

We are announcing this now to give our customers the greatest degree of notice we can; this is to ensure our sales team can assist affected customers with any alterations they may need to make to their buying patterns as a result of the changes set out above.

The changes noted above will be implemented at the end of January 2015 to ensure 2014/15 sales advertising which straddles the turn of the year is not impacted.”

At the end of 2011, ITV closed their split area functions or certain areas. This followed the OFT’s decision that the changes at that time would not materially alter the basis on which ITV offered Commercial Airtime for sale. As part of that decision, the OFT did not regard the changes at that time as constituting a material alteration to the Current Airtime Sales System (CASS). The OFT considered that ITV’s commercial plans in this regard were compatible with the Undertakings.

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

### **4.1 Licence renewals**

On 11 February 2014, Ofcom confirmed that it would renew the licences for Channel 3 (ITV, STV and Ulster) and Channel 5 for another 10 years from 1 January 2015, subject to the proviso that “Licensees need to accept the financial terms determined by Ofcom in order for the licence renewal to take effect.”

On 20 February 2014, Ofcom announced that, following acceptance of those terms by the licensees, it had renewed the broadcasting licences as described.

### **4.2 Variation of undertakings review**

On 12 February 2014, the OFT, which has subsequently become the CMA, announced an ‘invitation to comment’ in response to a request by ITV plc, supported by STV and Ulster, that two paragraphs of the Undertakings, be reviewed.

ITV’s application related to paragraph 2 of the Undertakings. This paragraph concerns the networking arrangements between the region Channel 3 licensees.

The focus of ITV’s request (paragraph 2) has no bearing on CRR in relation to the sale of commercial airtime by ITV1 or the key substantive obligations placed upon ITV1 via clauses 5-10 (inclusive) of the Undertakings for the sale of ITV1 airtime to advertisers and media buyers.

## 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



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7 April 2014

Robert Ditcham  
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Dear Robert

**Re: The Office of the Adjudicator Annual Report**

Thank you for your letter inviting comments for your periodic review on the ITV Undertakings to Ofcom and the OFT.

Given our necessary ignorance of any specific confidential details which might have come before you, and consistent with our previous mid-year submissions, we have no issues to raise.

Whilst writing, I would however confirm that we responded to the recent OFT's March 2014 consultation on its Variation to the ITV Undertakings in the light changes in new networking arrangements and in the supply of programme hours, value and genre data.

We confirmed our understanding, kindly informed by your and my exchange at the time, that the variations in question had no bearing on the operation of CRR.

We also took that opportunity to reiterate our continued commitment to the CRR remedy itself. Not only does it remain one of the most effective competition interventions ever, but as long as ITV plc dominates the market for commercial advertising airtime, which it continues to do, it also remains a necessary protection for ITV's business customers.


Please don't hesitate to let me know if you require further any comment or input.

With best wishes

Yours sincerely

**Bob Wootton**  
Director

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

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Robert Ditcham

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22 April 2014

Dear Robert

### Adjudicator's Report: October 2013 – March 2014

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 2013 to March 2014.

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

With a decade of operation, all parties are well versed in the above provisions.

Such familiarity, together with ITV's move away from its earlier confrontational approach to its customers, has meant that breaches of the undertakings have become increasingly rare.

That said, one respondent strongly considered making a formal complaint to the Adjudicator. Relating to a new client, they felt ITV were unfairly leveraging their market position, and were seeking to manipulate the CRR rules for their benefit. The matter was eventually resolved satisfactorily through negotiation.

#### 2. How has CRR operated?

Respondents continue to describe commercial negotiations with ITV over this period as 'customarily robust'.

The broadcaster remains focused on taking as much money as possible across all platforms. As evidenced by the instance described above, the need for CRR to deter the temptation for it unfairly to exploit its market strength remains as important as ever.

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### **3. Office of the Adjudicator**

All members continue to value the presence of the Adjudicator.

While none reported the need to raise substantive issues across this period, the possibility of referring matters to the Adjudicator was specifically raised as a factor in the resolution through negotiation of the aforementioned instance.

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

Yours sincerely

Nigel Gwilliam  
Consultant Head of Media & Emerging Technology

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