

# The Office of the Adjudicator Periodic Report

**October 2013**

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 Periodic Report for the period April - September 2013.** This Report and the Annual Report (published in April) 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 2012/13;
- 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 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 Annual Report of April 2013, and in addition to the regular meetings with senior ITV staff (as laid out in the (new) MoU), the Adjudicator has met 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 written to 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 forthcoming negotiation season the Adjudicator has also met with the ITV Director of TV Sales where discussions included, ITV sales policy, the TV market, developments within the TV market place and ITV compliance.

### **1.4 Adjudicator research**

In October, the Adjudicator released an online research survey. The Office would like to thank those who take part and provide responses. The aim of the survey is to supplement the face to face meetings that the Adjudicator undertakes during the year, and gather wide ranging views on the current TV landscape, how it might change and likely causes of any such change.

## 2.0 Disputes and guidance

### 2.1 Disputes

The Office has 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 one guidance enquiry from advertisers/media agencies since the last Annual Report in April 2013. This compares with five enquiries during the equivalent period last year (April-September 2012). It is usual for relatively few guidance enquiries to be received between April and September as most negotiations between advertisers/media buyers and ITV tend to take place between October and March. 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. In order to ensure that the identity of the enquiring party cannot be identified, these copies are appropriately redacted and are provided at any time up to six months after the initial enquiry. This system 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.



## **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.

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

There are currently no on-going regulatory developments relating to the sales of TV advertising.

## 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



15th October 2013

Robert Ditcham  
Adjudicator CRR  
The Office of the Adjudicator (CRR)  
Riverside House  
2a Southwark Bridge Road  
London SE1 9HA

Dear Robert

**ISBA RESPONSE TO YOUR REQUEST FOR COMMENT FOR YOUR PERIODIC REPORT TO OFCOM**  
(Non-confidential/public version)

Thank you for your letter of October 4<sup>th</sup> requesting our comments for your next periodic report to Ofcom.

As the current year is now approaching its conclusion and the trading round for the next year is still in its early days, we have few specific or detailed comments.

We are noting a continued blurring by all broadcasters of the line between spot and non-spot trades, which is in turn serving somewhat to obscure a once-clearer CRR picture with ITV. We are interested to understand how your office plans to deal with this, and you might want to consider coming into ISBA in the New Year to speak on this to our AudioVisual Action Group (AVAG), our leadership group on these and related matters.

Our investigations with ITV into the impact of their change to the way they calculate Station Average Price continue.

We also await the Competition Appeals Tribunal's ruling (scheduled for November) on the Competition Commission's decision to require Global to divest stations.

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I hope this is useful. As ever, please don't hesitate to contact me if you require further information or comment.

With best wishes

Yours sincerely

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

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## 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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11 October 2013

Dear Robert

### Adjudicator's Report: April – September 2013

As requested, this note provides an update on the workings of the ITV Undertakings, the CRR mechanism and the Adjudicator's Office for the period April-September 2013.

#### 1. Operation of the Undertakings

As you will be aware, April-September is a quiet trading period for media agencies and no concerns have been reported regarding the operation of the undertakings.

#### 2. How has CRR operated?

To quote one of my respondents "CRR has been going for so long now, a whole generation of buyers and sales people have grown up with it and know it inside out. The old days of constantly probing to try to find weaknesses in the system have thankfully gone downstream and we can all get on with life".

This and combination of both a more customer-centric and collaborative sales operation and the commercial success of ITV as a whole have removed much of the antagonism which characterised early Adjudicator Reports, with playback – at least across this latest period - restricted to single statements like "Nothing to report" and "ITV behaving within the rules."

Buyers are keen to underline that robust agency/ broadcaster discussion will still take place – and expect this as part of commercial negotiation – but with everyone knowing clearly what CRR will permit, the parties appear content with the current situation.

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Geoffrey Russell

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**3. Office of the Adjudicator**

No disputes were reported during this period.

Having said this, as with earlier submissions, knowing that the Adjudicator is there, if needed, continues to act as a valuable moderator on market behaviour.

I hope this is useful. If you should require any additional information, please don't hesitate to let me know.

Yours sincerely

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

Geoffrey Russell  
Secretary and Director for Media Affairs