

The Office of the Adjudicator Annual Report

April 2016

The following Report to Ofcom and the Competition and Markets Authority 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 subsequently 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 2016.** 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 CMA 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

The financial procedures of the Office 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)

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 was 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 2015/16;
- 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 Managing Director of ITV Commercial.

1.2.4 Interim reports process

The Undertakings state that the Adjudicator shall bring to the attention of Ofcom and 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 Annual Report in April 2015, and in addition to the regular meetings with senior ITV staff (as laid out in the new MoU), the Adjudicator has met with a number of representatives of the UK's advertising community. These meetings 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 held discussions 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 2016 airtime, the Adjudicator met with the Managing Director of ITV Commercial where discussions included, ITV sales policy, the TV market, developments within the market place and ITV compliance.

2.0 Disputes and guidance

2.1 Disputes

During the reporting period, April 2015 - March 2016, the Office received six Notices of Adjudication. These disputes involved one media agency and concerned a number of issues and advertisers.

The Adjudicator acted swiftly in relation to these disputes, all of which were brought simultaneously, and all determinations were delivered within the allowable timeframe as laid out within the CRR Rules.

The six disputes raised the following issues:

- Offering airtime on a fair and reasonable basis
- Pricing
- The treatment of bookings

The Adjudicator found in favour of the agency in five of the disputes, determining that ITV had not offered fair and reasonable terms. The Adjudicator found in favour of ITV in one dispute, determining that ITV had offered fair and reasonable terms.

2.2 Informal guidance

The Office received twelve guidance enquiries from advertisers/media agencies since the last Annual Report in April 2015.

The number, nature and timings of enquiries, varies from year to year. Whilst *ad hoc* in content, enquiries tend to rise during periods of change, e.g. when changes are made to ITV's Airtime Terms and Conditions.

It is clear to the Adjudicator, through his meetings and conversations with market participants, that both ITV and advertisers/media buyers have a good general awareness of their obligations and rights within the Undertakings.

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>. However, no new guidance has been posted since the last Annual Report in April 2015.

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 2015 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

4.1 The European Commission consultation on the current Audiovisual Media Services Directive (AVMSD)

On July 6 2015, the European Commission launched a consultation seeking views “on how to make Europe’s audiovisual landscape fit for purpose in the digital age”. The Commission was seeking views on the how well the current European regulatory framework, The Audiovisual Media Services Directive (AVMSD) was working and whether changes were required to improve it and reflect the changing media landscape.,

Within the questions and answers that accompanied the consultation document the Commission stated,

“Why is feedback requested on commercial communications (advertising, sponsorship etc.)?”

Traditional and on-demand broadcasters have to follow EU rules related to the advertising of certain products (e.g. tobacco and alcohol) and advertising targeting children. Rules which limit advertising to 12 minutes per hour transmitted only apply to TV broadcasters.

The public consultation asks what is the impact of these rules and whether they should stay as they are or be changed in the future either by rendering them more flexible (e.g. on the number of interruptions due to advertising) or more stringent in certain cases, for example when it comes to advertising of alcohol or fatty food.”

The consultation closed on 30 September 2015.

4.2 Ofcom views on advertising minutage within its Third Review of Public Service Broadcasting published 2 July 2015

On 2 July 2015, Ofcom published its third review of public service TV broadcasting, entitled “Public Service Broadcasting in the Internet Age”. At paragraph 6.15.2, Ofcom remarked on the current restrictions on advertising minutage on PSB channels, stating:

“We have previously concluded that given our existing legislative duties, the purpose of regulation in this area and the evidence gathered, we believe that there continues to be a strong case for UK-specific restrictions on advertising minutage on PSB channels, over and above the hourly limit set at a European level in the AVMS Directive. We remain open to reviewing this position if strong new evidence emerges that provides greater certainty that the outcome of any changes to the rules could materially benefit public service broadcasting.”

4.3 Gambling and payday loan TV ads

Since the last Annual report, there have been developments relating to the sale of TV advertising to two specific categories of advertiser.

On 20 August 2015, following a four strand review of gambling advertising, the Industry Group for Responsible Gambling announced that gambling adverts with sign-up offers would be banned before 9pm on TV. This change became operational in February 2016, when the second edition of the Gambling Industry Code for Socially Responsible Advertising came into force.

On 7 October 2015, the Broadcast Committee of Advertising Practice (BCAP) launched a consultation calling for views on whether payday loan TV advertisers should face scheduling restrictions. The consultation closed on 16 December 2015.

4.4 Code on the Scheduling of Television Advertising (“COSTA”)

On 9 July 2015, Ofcom published a statement following its consultation on the COSTA rules. This statement stated that Ofcom had decided to:

1. continue to use an EPG approach to the measurement of scheduled programme duration;
2. include text in COSTA to set out the specific exemptions which apply to breaks on public service channels and minutage rules on certain local television services; and
3. amend a range of definitions within COSTA, such as those which apply to teleshopping and films, to make the code clearer and easier to follow.

The revised code was originally due to come in to force on 1 November 2015, but following representations from licensees Ofcom decided to extend the implementation date to 1 April 2016 – in order to provide more time for broadcasters to adjust.

4.5 Products high in fat, salt and sugar (HFSS)

There has been considerable media coverage of the concerns expressed by government and the wider public relating to the risks to (in particular) children from products high in fat, salt and sugar. The media owners are naturally concerned that this could lead to the introduction of additional restrictions on the advertising of this category of goods. Ofcom last looked into the effectiveness of restrictions in 2010 when it concluded that advertising had a relatively modest impact on children’s food preferences.

The Office will continue to monitor any future developments.

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

5.1 Stakeholder feedback

In section 5.2 of this Report, ISBA and the IPA set out their opinions of the workings of the Undertakings.

5.2

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.

5.2.1 ISBAs view of the operation of the Undertakings and the CRR scheme



27th April 2016

Robert Ditcham
Adjudicator CRR
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Dear Robert,

Thank you for your letter of 13th April requesting our comments for your next periodic report to Ofcom.

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

It may seem in recent months that our focus has softened somewhat, however, we still reiterate our continued commitment to the CRR remedy itself. As long as ITV plc still and continues to dominate the market for commercial advertising airtime, the remedy 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.

Yours sincerely,

Mario Yiannacou
Media & Advertising manager

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5.2.2 IPAs view of the operation of the Undertakings and the CRR scheme

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11 May 2016

Dear Robert

Adjudicator's Report: October 2015 – March 2016

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 2015 to March 2016.

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

Unlike some earlier iterations, the current ITV commercial team has been described as excellent in terms of service and output during the leadership tenure of Kelly Williams.

2. How has CRR operated?

Our members indicate ITV remains a fair and appropriate operator within the market and context of TV trading deals.

Buyers are keen to underline that robust agency/ broadcaster discussion still takes 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.

President
Tom Knox
Hon. Secretary
Nicky Unsworth
Hon. Treasurer
Maggie Frost

Director General
Paul Baines
Secretary
Tom Mott

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3. Office of the Adjudicator

All members continue to value the presence of the Adjudicator.

Whilst there has been no cause to raise issues directly, the presence of a clear line of communication should such instances arise provides reassurance to the buying community.

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