

The Office of the Adjudicator Annual Report

April 2017

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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Contents:

Background

- 1. Office of the Adjudicator**
- 2. Disputes and guidance**
- 3. Reporting on ITV's compliance**
- 4. Regulatory developments relating to the sale of TV advertising**
- 5. Stakeholders views of the operation of the Undertakings and the CRR scheme**

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 2017.** 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 ITV 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.

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 2016/17;
- 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 2016, 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 2017 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

Since the last Annual Report in April 2016, the Office has received six Notices of Adjudication. Five of these disputes were the subject of a determination. The sixth was withdrawn after the parties reached a negotiated solution (following the Adjudicator suggesting that further negotiations might be appropriate).

These disputes arose out of the same set of negotiations and involved the same media agency (although they concerned issues relating to a number of different advertisers).

The six disputes were submitted simultaneously but all determinations were nonetheless delivered within the timeframe as laid out within the CRR Rules.

The 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 four of the determined 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.

The six Notices of Adjudication received since the last Annual Report (April 2016 to March 2017) is equal to the number received during the previous reporting period (April 2015 to March 2016).

2.2 Informal guidance

The Office has received six guidance enquiries from advertisers/media agencies since the last Annual Report in April 2016.

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 2016.

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 2016 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 New OFCOM code on the Scheduling of TV Advertising

On 1 April 2016, OFCOM published its latest Code on the scheduling of television advertising.

4.2 New OFCOM Broadcasting Code

On 9 May 2016, OFCOM published its latest version of its Broadcasting Code, which covers all programmes broadcast on or after 9 May 2016.

4.3 Payday loan TV ads

On 29 June 2016, the Broadcast Committee of Advertising Practice (BCAP) announced that following its consultation into the advertising of high-cost short-term credit (HCSTC) they decided not to introduce any scheduling restrictions on the advertising of HCSTC.

4.4 Sky plc

On 3 March 2017, Twenty-First Century Fox, Inc made a formal notification to the European Commission of its intention to acquire the shares in Sky plc it does not already own. On 16 March, the Secretary of State for Culture, Media and Sport issued a European intervention notice requesting Ofcom to report by 16 May on the effects of the proposed transaction. Following the announcement of a general election, this reporting deadline has since been put back until 20 June.

4.5 Digital Economy Bill

Under the BBC's new charter Ofcom will become the BBC's first external regulator in the Spring 2017, subject to the Digital Economy Bill becoming Law.

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



25th April 2017

Robert Ditcham
Adjudicator CRR
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Dear Robert,

Thank you for your letter of 4th April requesting our comments for your next periodic report to Ofcom.

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

As mentioned in our previous submission, our members are well aware of how the UK TV landscape has changed significantly since CRR was introduced. However, we would like to add that the rapid pace of change and the fragmenting of the televisual landscape means that we must monitor the situation even more closely.

With the above in mind, we still reiterate our continued commitment to the CRR remedy itself. As long as ITV plc still 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,

Mark Finney

Director of Media and Advertising

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

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Robert Ditcham

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2 May 2017

Dear Robert

Adjudicator's Report: October 2016 – March 2017

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 2016 to March 2017.

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.

Such familiarity, together with ITV's continued focus on constructive agency engagement via standard-setting service levels, has meant that breaches of the undertakings have become increasingly rare.

2. How has CRR operated?

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

During Adam Crozier's ongoing tenure, ITV's reliance on TV spot revenue has continued to decline with greater balance in its operations as demonstrated by the 13% rise in revenue in its Studios division (2016 YOY). ITV's share of commercial impacts (SOI) continues to decline although the rate has slowed.

The need for CRR remains crucial to deter exploitation of market strength to help create an environment in which a non-confrontational approach is favoured by the broadcaster's commercial team.

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Date: 2 May 2017
Page: 2

3. Office of the Adjudicator

All members continue to value the presence of the Adjudicator.

The possibility of referring matters to the Adjudicator underpins the robustness of a CRR mechanism that continues to be highly pertinent in current market conditions.

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