

# The Office of the Adjudicator (CRR) Periodic Report

October 2014

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 has now merged with the Competition Commission (“CC”) to become the Competition and Markets Authority (“CMA”). **This is the Periodic Report for the period April - September 2014.** 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 (now 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 (CRR)**

### **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 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 2014, and in addition to the regular meetings with senior ITV staff (as laid out in the (new) MoU), the Adjudicator has met with 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.

## 2.0 Disputes and guidance

### 2.1 Disputes

The Office has received no Notices of Adjudication since the last Annual Report in April 2014.

### 2.2 Informal guidance

The Office has received no guidance enquiries from advertisers/media agencies since the Annual Report in April 2014. This compares with one enquiry during the equivalent period last year (April-September 2013).

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's belief that both ITV and advertisers/media buyers have good general awareness of their obligations and rights within the Undertakings, would appear to be borne out by the reducing level of guidance enquiries during the past couple of years.

When relevant the Office will post general guidance on to the Adjudicator website: <http://www.adjudicator-crr.org.uk/enquiries.htm>. Since the Annual Report in April 2014 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 2014 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 Gambling and e-cigarettes

Since the April report, there have been two developments relating to the sale of TV advertising to particular types of advertisers.

First, the Department of Culture Media and Sport has requested that a review of the effects of gambling advertising should be carried out by a number of bodies, namely the Gambling Commission, Committee of Advertising Practice (CAP), the Broadcast Committee of Advertising Practice (BCAP), the Advertising Standards Authority (ASA) and Ofcom. When announcing its Gambling Review on 29 April 2014, the CAP stated:

*“Following the implementation of the Gambling Act in 2007, the public now sees more gambling advertising than it had done previously. The Act removed restrictions that had previously prohibited most betting and gaming services from advertising.*

*As the amount of ads has increased, so has the number of complaints to the ASA. Moreover, as technology evolves, consumers are accessing gambling products in new and different ways such as online and via mobile devices.*

*In this context, we believe it is timely to launch a review”*

An announcement on the outcome on the review is expected in the autumn of 2014.

Second, on 9 October 2014, it was announced that from 10 November 2014 e-cigarette products can be shown, including in use, in TV advertising for the first time. The adverts will need to adhere to strict rules, and the CAP/BCAP will conduct a review after 12 months.

### 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.

On 23 September the CMA published its decision to undertake a review of paragraphs 2 (c) and 2(f) of the Undertakings.

On 21 October the CMA published a notice of intention to release Carlton and Granada (ITV) from their obligations under paragraphs 2(c) and 2(f) of the Undertakings.

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

## 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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Adjudicator CRR  
Ofcom  
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9<sup>th</sup> October 2014

Dear Robert

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

Thank you for your letter of the 24th September inviting comments for your periodic review to Ofcom and the OFT. I am responding on behalf of my Director, Bob Wootton.

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 major issues to raise.

As has become customary in our responses, we would like to take this opportunity to comment on related matters which might have an impact on our members'.

A broadcaster has drawn our attention to a certain number of its competitors quite extensively using their airtime to promote their own products and services. This echoes back to the 1990's when ITV gave substantial amounts of this to its failed OnDigital proposition. In one case, we've been shown data that suggests that more than 10% of a broadcaster's inventory is being deployed thus. We and our members are therefore gathering information through their agencies. Doubtless it will be discussed further.

We can also confirm that ISBA has responded to Ofcom's consultation on The Scheduling of Television Advertising. In summary, we concurred with many of the enhancements to COSTA proposed by Ofcom with a few specific comments.

We have also noted and responded to the CMA's re-opening of this consultation into the ITV of variation undertakings. In summary, we do not consider that the proposed changes to provisions arising from changes in circumstances have any material bearing on our members.

In conclusion, as ever would like to reiterate our continued commitment to the CRR remedy and that spot is still vitally important. We are noticing, however, 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-clear CRR picture with ITV.

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

With best wishes

Yours sincerely

**Mario Yiannacou**  
*Media & Advertising manager*

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President: Jon Woods  
Director General: Mike Hughes  
Secretary: Chris Perret FCS

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

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22 October 2014

Dear Robert

**Adjudicator's Report: April – September 2014**

As requested this letter draws together feedback from a cross-section of IPA member agencies on the operation of the ITV Undertakings, the CRR mechanism and the Adjudicator's office for the above period.

As such it repeats the pattern of the IPA's previous submissions to your office since its inception in 2003/4.

**1. Operation of Undertakings**

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

Adam Crozier's 5 year transformation plan seems to be working, with a reduced dependency on TV spot revenues, developed digital offering across multi-platform, and interest in global content business with some recent US acquisitions. This has led to strong revenue and profit generation across H1 2014.

The ITV commercial team is now customer centric and sets the standard for other broadcasters in terms of service and professionalism. That said, this year ITV's share of commercial impacts (SOCl) is likely to fall by 3-5% depending on the audience. This makes the CRR mechanism very relevant.

**2. How has CRR operated?**

ITV's expected fall in SOCl means those advertisers and agencies with protected contracts are, under CRR, able to reduce share into ITV's main terrestrial channel by a commensurate degree. Feedback from our members suggests ITV has been fair and reasonable for those advertisers wishing to reduce their share/investment into ITV.

ITV will always argue that to maintain the heritage and output of the UK's flagship commercial channel, they rely on support from advertisers to allow them to produce popular, quality programmes as Downton Abbey, Broadchurch and the like.

<b>President</b> Ian Priest <b>Hon. Secretary</b> Tom Knox <b>Hon. Treasurer</b> Maggie Frost	<b>Director General</b> Paul Rainfair <b>Secretary</b> Tom Mott	The Institute of Practitioners in Advertising is a company limited by guarantee. Registered in England no.221167	
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The need for CRR remains as important as ever to deter exploitation of market strength and to help create an environment in which a non-confrontational approach is favoured by the broadcaster's commercial team.

### 3. Office of the Adjudicator

All members continue to value the presence of the Adjudicator.

Whilst none reported the need to raise substantive issues across the period, the ongoing relevance of CRR in light SOCI was specifically mentioned. 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 contact me.

Yours sincerely,



Nigel Gwilliam  
Consultant Head of Media and Emerging Technology