

The Office of the Adjudicator (CRR) Periodic Report

October 2018

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 Periodic Report for the period April - September 2018.** 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 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 (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

1.1.3.1 Background

Given the confidential nature of the information that the Office handles, security is a high priority. Access to Ofcom's offices at Riverside House 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.

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 Mediaocean. 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 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 2017/18;
- 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 provides for 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; and the opportunity to hold 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 OFT - now the Competition and Markets Authority (“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 of April 2018, and in addition to regular meetings with senior ITV staff, 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 received no Notices of Adjudication since the last Annual Report in April 2018.

2.2 Informal guidance

The Office received three guidance enquiries from advertisers/media agencies since the Annual Report in April 2018. This compares with no enquiries during the equivalent period last year (April-September 2017).

Disputes and guidance requests are, and always have been, *ad hoc* in their nature, timing and from where they originate. Various factors will affect the numbers of guidance enquiries that are brought in any period. However, the following general observations can be made:

- ITV and Media agencies/advertisers have a good general awareness of their obligations and rights within the Undertakings; and
- greater numbers of requests for guidance are made during periods of change or changing market dynamics, e.g. when changes are made to ITV's terms and conditions.

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 2018.

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 2018 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 CRR Offers

ITV has confirmed that, as required by Section 6 of The Undertakings, by 1 November 2018 it had sent CRR offers to those media buyers and advertisers who contract on an annual calendar year basis.

4.0 Regulatory developments relating to the sale of TV advertising and other related matters

4.1 Childhood obesity

On 25th June 2018, the Department for Health and Social Care published, ‘*Childhood obesity: a plan for action, chapter 2*’. Within this publication the government announced;

“We will consult, before the end of 2018, on introducing a 9pm watershed on TV advertising of HFSS products and similar protection for children viewing adverts online, with the aim of limiting children’s exposure to HFSS advertising and driving further reformulation. We will explore options to ensure that any restrictions are proportionate, help to incentivise reformulation in line with the aims of the sugar and calorie reduction programmes, and consider a focus on those products that children consume and most contribute to the problem of childhood obesity.”

The Office will monitor any consultation or further developments as they arise for any potential effects on either CRR or TV advertising more generally.

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, stakeholders provide feedback on 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 ISBA view of the operation of the Undertakings and the CRR scheme



ONE VOICE

26th November 2018

Robert Ditcham
Adjudicator CRR
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Dear Robert,

Thank you for your letter of 12th November 2018 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.

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 UK advertisers.

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

Yours sincerely,

Steve Chester
Director of Media

5.2.2 IPA view of the operation of the Undertakings and the CRR Scheme

The IPA have chosen to reprise their submission to the Annual Report as the feedback from their members remains the same.

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Robert Ditcham

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25 April 2018

Dear Robert

Adjudicator's Report: October 2017 – March 2018

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 April to September 2017.

The pattern of this letter follows that of the previous submission, with both differing somewhat from that 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.

2. How has CRR operated?

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

3. Office of the Adjudicator

The Adjudicator and his Office fulfil their functions extremely efficiently and promptly.

We continue to receive diverse feedback from IPA media agencies with regard to CRR as a whole. There has been significant evolution in the media landscape with

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the consolidation of TV Sales Houses, the continued fragmentation of audiences, the growth in digital audiences and the dominance of two internet-based players.

Some parties are questioning whether CRR remains fit for purpose given these significant changes. That said the key thrust of the IPA's submission at the time of the Carlton Granada merger was ITV's uniqueness in its ability to deliver large-scale audience coverage build at speed and the non-substitutability of television for those advertisers that need this. On ITV still being unique in its ability to deliver fast cover build it is worth noting that 90% of the 100 largest commercial programme audiences were delivered by ITV in 2017. The figures would be in the 98.5% if you extend to the top 1000. It is still extremely difficult to replace ITV on TV schedules.

With this in mind, were any call for a review of CRR to be made, we would expect this to come from incoming ITV CEO Carolyn McCall. In that event were a consultation to be called, we would of course make a submission.

In the interim, please do not hesitate to contact me should you wish to discuss any of the above.

Yours sincerely



Nigel Gwilliam
Consultant Head of Media & Emerging Technology