

The Office of the Adjudicator Periodic Report

October 2011

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 2011.** 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, Donovan Data Systems and Nielsen Media Research. BARB, Donovan Data Systems and Nielsen Media Research have all been very helpful to the Office in setting these systems up and providing ongoing support. 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, in particular of the Competition Commission's review of CRR.

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)

A Memorandum of Understanding (“MoU”) was formalised with ITV in August 2004. This is a standardised 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.

The MoU has facilitated 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 2010/11. Where contracts are not available the Office will be supplied with a summary of the key terms on which media agencies/ advertisers are trading with ITV;
- a fortnightly report on the past, present and future position of the trading balance by ITV region;
- a full report on the treatment of all bookings made after the ABD (advance booking deadline); and
- a monthly summary of all DRTV (Direct Response Television) campaigns by region.

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; a monthly meeting 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 commercial sales director.

When considered necessary, to enhance the efficiency and effectiveness of the Office, the Adjudicator will propose any amendments deemed necessary to the MoU to ITV, either in relation to the provision of data or the timetable of such provision.

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 2011, and in addition to the regular meetings with senior ITV staff (as laid out in the MoU), the Adjudicator has attended industry conferences and 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 met 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.

2.0 Disputes and guidance

2.1 Disputes

The Office received no Notices of Adjudication in relation to disputes between media agencies/advertisers and ITV since April 2011.

The Adjudicator is pleased to observe that, consistent with his view at the time of the Annual Report in April 2011, the guidance published on the Adjudicator website following the conclusion to the Competition Commission's review of CRR appears to have facilitated an understanding on the revised Undertakings that has been consistent as between ITV and advertisers/media buyers, and more generally maintained a high level of awareness and understanding of parties' rights and obligations under CRR.

2.2 Informal guidance

Only one guidance enquiry has been brought to the Office by advertisers and media agencies since the last Annual Report in April 2011. This compares with 11 for the equivalent period last year (April-September 2010). It is usual for a lower number of guidance enquiries to occur during this period (April-September) as fewer negotiations between advertisers/media buyers and ITV take place, although this is the lowest number for this period since the Undertakings came into force.

The fact in recent times fewer guidance enquiries have been received by the Office could be the result of:

- a) the general awareness that ITV and advertisers/media buyers have of their obligations and rights within the Undertakings;
- b) clear understanding of the revisions to the Undertakings (resulting from the conclusion of the Competition Commission review of CRR) following the publication by this Office of additional guidance ahead of the last negotiation season; and/or
- c) the stated desire of ITV to adopt a more collaborative approach to its trading arrangements with its advertiser and media buyer customers.

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 2011 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.

3.0 Reporting on ITV's compliance

3.1 General considerations

Since the April 2011 Annual Report ITV has continued to cooperate within the rules of the Undertakings.

3.2 ITV micro regions

ITV intends to close their split micro region functions for certain areas at the end of 2011.

On 9 June 2011 the OFT announced its provisional decision that this would not "materially alter the basis on which ITV offers Commercial Airtime for sale".

The OFT's final decision in September 2011 confirmed its provisional view that ITV's plans will not materially alter the basis on which ITV offers Commercial Airtime for sale. Equally, the OFT does not regard the change as constituting a material alteration to the Current Airtime Sales System (CASS). The OFT considers that ITV's commercial plans in this regard are therefore compatible with the Undertakings.

Transitional arrangements have been offered by ITV to effected advertisers.

3.3 Contracts

The Adjudicator is pleased to report that the provision of contractual information to the Office from ITV has been good during this period.

4.0 CRR and other regulatory issues and developments

4.1 Ofcom announces a wider review of the advertising market

On 17 March 2011, Ofcom announced a review of the way TV advertising is traded.

On 10 June 2011, Ofcom published a consultation on Competition issues in the UK advertising trading mechanism. Ofcom were “consulting on whether or not to refer the UK market for TV advertising to the Competition Commission (CC) for market investigation.”

Ofcom can make a reference to the CC if they believe there are “reasonable grounds for suspecting that any feature, or combination of features, of a market ...prevents, restricts or distorts competition....”

At the time of writing this Report, Ofcom had not published their findings of this review.

4.2 Airtime Sales Rules

On 1 September 2010, Ofcom removed the Airtime Sales Rules. Two pre-existing rules were lifted.

1. The prohibition against conditional selling across a portfolio of channels.

However, ITV will remain obligated under CRR to offer an ITV1 only deal, should media buyers and advertisers request it.

2. The requirement on PSB broadcasters to sell all of their advertising minutage.

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



18th October 2011

Robert Ditcham
Adjudicator CRR
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Dear Robert

Thank you for your letter of 17th October requesting our comments for your next periodic report to Ofcom.

The recent period represents the 'quiet' season immediately before the annual trading round, so it is perhaps unsurprising that we have no specific comments to relay from our members.

2010 & 2011 have seen something of a welcome renaissance in ITV's overall audience performance. As CRR is designed to protect advertisers from being pressed to maintain their expenditure with ITV as its audience falls, so it has naturally had less force - for the best of reasons.

That said, the 2012 trading season is now under way and we expect it to be hard-fought as the economy continues to be extremely brittle and as new, senior sales figures at three of the four main sales points seek to make their marks.

Moreover, a broadcaster's overall success is very often due to the performance of a few key programmes. ITV is no exception to this, which is why CRR will surely continue to comprise a key component of negotiations going forwards.

ISBA is of the firm view that intervention remains necessary, and will continue to be so as long as ITV remains the clearly dominant force in the market *regardless of transmission platform(s)*. That CRR remains in place after numerous thorough inquiries by The Competition Commission, The Office of Fair Trading, Ofcom and the House of Lords' Communications Select Committee confirms that this is far from a unique perspective.

I hope this helps – happy for all the above content to be public and as always, to provide further comment or information as requested.

Best wishes

A handwritten signature in black ink, appearing to read 'Bob Wootton', with a long horizontal flourish extending to the right.

Bob Wootton
Director of Media & Advertising

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



Institute of Practitioners in Advertising

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25th October 2011

Dear Robert

Adjudicator's Report: April – September 2011

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 2011.

1. Operation of the Undertakings

As will be recalled from earlier reports, April-September represents a comparatively quiet trading period for media agencies and, as such, our members reported no significant difficulties with the broadcaster.

2. How has CRR operated?

ITV is currently enjoying a comparatively good year and has been in the fortunate position of delivering a healthy share of commercial impacts (SOI) across 2011 on ITV1, supported by continued growth across its digital channels.

In line with this, ITV1, itself, has outperformed its terrestrial/PSB competitors year-to-date, with a share of commercial impacts in line with 2010 estimated for the year as a whole.

This has meant that, under CRR, advertisers with protected contracts could not reduce their share of expenditure into that channel.

ITV1's strong audience share is forecast to continue with re-commissions of Britain's Got Talent, The X Factor and Downton Abbey for 2012, along with new formats like the US co-funded drama series, Titanic, which is due to air across Quarter 1, 2012.

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3. Office of the Adjudicator

No disputes were reported during this period.

Having said this, IPA members continued to believe the role of the Adjudicator remains vital.

To quote one respondent, "It will be interesting to see if the obvious aggression and the (old) ITV habit of pushing the rules to the limit will mollify at all under the new regime. However, all the while the broadcaster is dominant in the market, the temptation to abuse its position will remain - unless there is an equally strong deterrent in place (ie the current referral system)."

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

Best wishes

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

Geoff Russell
Company Secretary/Director for Media Affairs