

The Office of the Adjudicator (CRR) Periodic Report

October 2019

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

1.0 Office of the Adjudicator

2.0 Disputes and guidance

3.0 Reporting on ITV's compliance

4.0 Regulatory developments relating to the sale of TV advertising

5.0 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 Periodic Report for the period April - September 2019.** 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 2018/19;
- 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 2019, 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 2019.

2.2 Informal guidance

The Office received one guidance enquiry from advertisers/media agencies since the Annual Report in April 2019. This compares with three enquiries during the equivalent period last year (April-September 2018).

Disputes and guidance requests are, and always have been, *ad hoc* in their nature, timing and source. 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 2019.

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 2019 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 2019 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 Government consultation on HFSS advertising on TV

On 18 March 2019, the Government published a consultation document “Introducing further advertising restrictions on TV and online for products high in fat, sugar and salt (HFSS).”

The consultation provides for three broadcast consultation options:

Option 1 to “introduce a 9pm-5.30am watershed on broadcast TV”, where “HFSS food and drink in scope could not be advertised between 5.30am and 9pm, the same hours as the editorial watershed.”

Option 2 to “implement a ladder system to determine what products can and cannot be advertised between 5:30am-9pm. This would be to reward companies that are reformulating their products or already have healthier products on the market, by giving them advertising freedoms.”

Option 3 – no watershed

The consultation closed 10 June 2019.

The outcome to the public feedback to this consultation has yet to be published.

4.2 Ban on betting adverts on TV during live sport agreed by gambling companies

In December 2018, it was announced that gambling companies had agreed to a ban on the placements of betting adverts on TV during live sport, including after 9pm if the event started before 9pm. The new rules were implemented in August 2019. This voluntary ban is a “whistle to whistle” ban, applying from 5 minutes before the event begins until 5 minutes after it has finished. Horse racing and greyhound racing are exempt from the ban.

The Adjudicator will monitor developments closely 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

30th October 2019

Robert Ditcham
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Dear Robert,

Thank you for your letter 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.

SBA believes that, although the market has changed hugely since 2003, the mechanism should remain, to protect advertisers from the pricing strength of ITV.

ISBA continues to review the situation actively and engages in regular fact-finding with market participants.

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

Yours sincerely,

Bobí Carley
Head of Media

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

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29 October 2019

Dear Robert

Adjudicator's Report: April - September 2019

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 2019

The pattern of this letter follows that of the previous two submissions, all of which differ 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.

In terms of protecting advertisers from potentially unfair or discriminatory practices in the selling of television airtime, then CRR has operated successfully since its inception. Anecdotally, we believe there are very few referrals to the Office of the Adjudicator which would also indicate that as a remedy it has worked well.

Date: 3 May 2019

Page: 2

Much has been written about the growth of investment the advertising market has made into digital advertising channels and the growth of advertising expenditure into pure-play internet offerings like Google and Facebook - internet-enabled media expenditure now accounts for over 60% of the UK advertising market. And against this backdrop, there is the debate as to whether CRR, which has been in place since 2003, is still appropriate in 2019 under these very different market place conditions.

It is useful, however, to refer back to the thrust of the case for introducing the CRR remedy. This was centred around the unique properties that ITV had in reaching large audiences and enabling mass cover build over a very short period of time. Two very different arguments can be made around this in 2019.

1. That as competition for each advertising dollar has intensified since 2003, then there is more competition and that is enough to stop any unfair practices.
2. That as audiences have fragmented across a wider range of channels, then ITV's monopoly over large, concurrent audiences has increased.

It is worth noting that 90% of the 100 largest commercial programme audiences were delivered by ITV in 2018. The figures would be 97.5% if you extend to the top 1000 programmes. This would support the second hypothesis that ITV is still unique in its ability to deliver large audiences and build high levels of reach very quickly. It is, therefore, still extremely difficult to replace ITV on TV schedules.

Finally, we note that there is no single point of view across the IPA member agencies as to CRR and we also note that market circumstances have changed. Some of these changes, however, also mean that CRR applies to a decreasing amount of ITV's spot advertising revenue as more and more spend migrates to Broadcaster Video On Demand (BVOD) which isn't covered by CRR legislation. Any debate, therefore, needs a full representation of the facts to reach any coherent conclusion.

Please do not hesitate to contact me should you wish to discuss any of the above.

Yours sincerely



Nigel Gwilliam
Director of Media Affairs