

The Office of the Adjudicator Annual Report

April 2013

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.

*The Office of the Adjudicator Limited
Registered in England No 5808371
Registered Office: Riverside House
2a Southwark Bridge Road
London SE1 9HA*

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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 Annual Report for the fiscal period up to March 2013.** 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 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

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 new MoU covers the provision of a number of different categories of information and documents, including in particular the following:

- copies of final sales contracts 2012/13;
- reports on the trading balance by ITV region;

The new 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 Periodic Report in October 2012, and in addition to the regular meetings with senior ITV staff (as laid out in the (new) MoU), the Adjudicator has held meetings with 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.

1.4 Adjudicator research project

As mentioned in the Periodic Report, the Adjudicator intends to ask willing market participants to complete a research questionnaire. The aim of the questionnaire is to provide the Adjudicator with wide ranging views on the current TV landscape, how it is likely to change in the future, and the developments that could potentially cause such change. The research project has been drafted in a way that will allow it to be up-dated in the future in order to identify trends over time. Originally, the Adjudicator intended to conduct this research in the final months of 2012, but after further consideration, it was considered more appropriate to conduct it over the quieter summer period. As mentioned above, the Adjudicator holds meetings with a number of representatives of the UK's advertising community, and these meetings tend to be concentrated and focussed over the autumn/winter negotiation season period. Conducting the research over the summer will provide the Adjudicator with market viewpoints outside of the negotiation season window.

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 during the reported period of April '12-March'13.

2.2 Informal guidance

Fifteen guidance enquiries were brought to the Office by advertisers and media buyers since the last Annual Report in April 2012 (compared to four in the previous year).

Five came in the first half of the year (April-Sept '12), with ten in the second half (October '12-March '13). The number of guidance enquiries received by the Office fluctuates from year to year. Whilst the number this year is higher than last year, this is simply likely to reflect the ad hoc nature of enquiries, which remain far lower than when CRR was in its infancy. The Adjudicator continues to believe this is the result of both ITV and advertisers/media buyers having:

- a) good general awareness of their obligations and rights within the Undertakings; and
- b) a clear understanding of the revisions to the Undertakings that resulted from the Competition Commission review of CRR (aided by the publication by this Office of additional guidance).

However, it is noticeable that media buyers are keen to understand their rights and how developments might affect these when changes occur, either within the market or to the ITV airtime 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>.

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 on the issue in question previously given by the Office.

3.0 Reporting on ITV's compliance

3.1 General considerations

Since the October 2012 Periodic 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 good during this period.

3.3 ITV Personnel changes with responsibility for CRR

Since the inception of CRR, the Office's main point of contact with ITV in relation to CRR had been Andy Bagnall, ITV's Director of Business Development. In March 2013, Andy retired from ITV after 35 years of service. The Office can report that a smooth transition of responsibilities has occurred, and we would like to wish Andy every success in his future endeavours.

3.4 ITV's airtime Terms and Conditions

In the previous annual report (April 2012), it was noted that the IPA had raised the issue of changes that ITV had made to their ratecard Terms and Conditions within their 2012 ITV Airtime Terms and Conditions. The Office stated that guidance on this subject had previously been published on its website, and for completeness the guidance was presented in that report.

In December 2012, ITV published its new ITV Airtime Terms and Conditions for 2013. Within these terms and conditions, ITV introduced a new Station Average Price ("SAP") calculation ("Broadcast Station Price"). This new SAP calculation provides an additional SAP trading option for advertisers and media buyers, in addition to the three pre-existing SAP calculations (pure station price, duration weighted station price, and gross station price).

The Office has subsequently received guidance enquiries in relation to the new SAP calculation. In these instances we have directed people to the previously published guidance on our website, which for convenience we lay out below.

3. If ITV amends its ratecard terms and conditions in the middle of a deal period, am I necessarily bound by them for the purposes of my current deal?

No. ITV's ratecard terms and conditions are contractual terms and conditions in the same way as the terms and conditions in the main body of your contract with ITV (e.g. such as any SOB commitment). Contractual terms and conditions cannot generally be introduced or amended unilaterally by one party. The ratecard terms and conditions governing your contract with ITV will generally be those that were in place at the time of the deal season when your contract was agreed. If ITV purports to introduce new or amended ratecard terms and conditions in the

middle of a contract period, they will form part of your contract with ITV only if you have agreed to the changes.

4. If ITV amends its ratecard terms and conditions, do I have to accept the changes in my next deal agreement?

No. As with other terms and conditions, ITV's ratecard terms and conditions will form part of your contract with ITV only if you agree to them. If you are unable to reach agreement with ITV in relation to one or more of the ratecard terms and conditions, it would be open to you to agree with ITV that the ratecard terms and conditions should form part of your contract except for the contested provisions. If you considered that one or more of the ratecard terms and conditions were not 'fair and reasonable', and ITV insisted that the relevant provisions must be incorporated into your contract, you would be entitled to bring a dispute to the Adjudicator.

4.0 Regulatory developments relating to the sale of TV advertising

There are no regulatory developments to comment on during the reported period (Apr '12-Mar '13).

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 ISBA view of the operation of the Undertakings and the CRR scheme



5th April 2013

Robert Ditcham
Adjudicator CRR
The Office of the Adjudicator (CRR)
Riverside House
2a Southwark Bridge Road
London SE1 9HA

Dear Robert

**ISBA RESPONSE TO YOUR REQUEST FOR COMMENT FOR YOUR PERIODIC REPORT TO OFCOM
(PUBLIC / REDACTED VERSION)**

Thank you for your letter of April 2nd requesting our comments for your next periodic report to Ofcom. The 2013 trading round is complete and apart from the widely-publicised standoff between WPP's Group M and Channel 4 which was resolved in mid-January, we are not aware of any other specific new issues.

Similarly, the Competition Commission's inquiry into Global Radio's acquisition of Guardian Media Group's assets, which issue we have commented on in previous responses to you, continues. As you know, we have suggested a behavioural remedy which might involve an extension of powers of your office, though at this time the CC appears to be leaning towards structural intervention involving the disposal of certain acquired stations.

As ever, I would be happy to provide further comment or information as required.

With 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

The Incorporated Society of British Advertisers Ltd

ISBA
Langham House
1b Portland Place
London W1B 1 PN

T 020 7291 9020
F 020 7291 9030
E info@isba.org.uk
W isba.org.uk

President
Jon Woods
Director General
Mike Hughes
Secretary
Chris Ferrel FCIS

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Federation of Advertisers

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

Institute of Practitioners in Advertising 44 Belgrave Square London SW1X 8QS www.ipa.co.uk
T: +44 (0) 207 235 7020
DL: +44 (0)20 7201 8203
E: geoff@ipa.co.uk
Facebook www.facebook.com/theIPA
Twitter @IPA_Updates

Robert Ditcham
The Office of The Adjudicator (CRR)
Riverside House
2a Southwark Bridge Road
London SE1 9HA



8th April 2013

Dear Richard

Adjudicator's Report: October 2012 – March 2013

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 2012 to March 2013.

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

After almost 10 years of operation, an entire media generation has grown up under the constraints imposed by the undertakings – to the extent that these provisions have now become an accepted part of the TV trading environment.

Such familiarity, together with ITV's move away from its earlier confrontational approach to its customers, has meant that breaches of the undertakings have become increasingly rare, with no instance reported during the period in question.

2. How has CRR operated?

In the words of one agency respondent, "ITV appears to have accepted that it will be working under CRR for the foreseeable future and is focusing on generating revenue in other ways."

The period of "testing" which took place between January 2004 and June 2005 - when the broadcaster was probing the limits of CRR - has long since passed.

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On the basis of available playback, this, together with the new sales team's shift from the "old ITV" towards a more customer-centric and collaborative approach, has meant that few referrals are likely to have taken place.

3. The Adjudicator's Office

IPA members continue to be very satisfied with the operation of the Office - commenting favourably on its twice yearly canvassing of agency opinion and the promptness with which responds to queries.

Given the changes which have taken place in key personnel at ITV since the inception of the Office of the Adjudicator, it is more difficult nowadays to identify a direct relationship between it and broadcaster behaviour.

Having said this, however, it is felt that the Office's presence continues to exercise a "calming" influence over possible temptations for the ITV Sales Team unfairly to exploit its continued market strength - while for clients and agencies, it grants confidence that should such CRR-linked issues arise, there is a clear and accepted route to ensure their rapid resolution.

I hope this is useful. If you should have any queries or require additional information, please do not hesitate to let me know.

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

Geoffrey Russell
Secretary and Director for Media Affairs