

The Office of the Adjudicator Periodic Report

October 2012

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 2012.** 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,

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 2011/12. 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 2012, 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 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.

Ahead of the forthcoming negotiation season the Adjudicator has also met with the Sales Director of ITV where discussions included, ITV sales policy, the TV market, developments within the TV market place and ITV compliance.

1.4 Adjudicator research project

The Adjudicator is currently drafting a research questionnaire, to be answered by willing market participants from all corners of the TV advertising market (broadcasters, media buyers, sales houses and advertisers). The aim 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 issues that could potentially cause such change. The research project will be drafted in a way that will allow it to be up-dated in the future in order to identify further trends, opinions and predictions. It is anticipated that the research will be conducted in the final months of 2012.

2.0 Disputes and guidance

2.1 Disputes

The Office has received no Notices of Adjudication since the last Annual Report in April 2012 (i.e. relating to disputes between media agencies/advertisers and ITV).

Following the Competition Commission's review of CRR, the Adjudicator published guidance on its website regarding the resulting revisions to the Undertakings. This has helped to ensure a consistent understanding of the changes 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

Five guidance enquiries have been brought to the Office by advertisers and media agencies since the last Annual Report in April 2012. This compares with only one enquiry for the equivalent period last year (April-September 2011). This increase reflects the very low number received in 2011. 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 take place between October and March.

In recent years, the Office has received fewer guidance enquiries than in the early years of CRR. This is likely to be the result of the following factors.

- a) ITV and advertisers/media buyers now tend to have a reasonably good understanding of their obligations and rights within the Undertakings (including, as noted above, in the light of the recent changes).
- b) ITV has stated its intention 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 2012 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 2012 Annual Report, ITV has continued to cooperate within the rules of the Undertakings.

3.2 Contracts

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

3.3 ITV's airtime Terms and Conditions

In its letter to the Adjudicator in April 2012 (for our Annual Report), the IPA commented on the fact that ITV had (in December 2011) made changes to its ratecard Terms and Conditions: specifically clause 3 of the deal conditions contained within the 2012 ITV Airtime Terms and Conditions.

As we noted in our April 2012 Annual Report, the following guidance on this subject appears on the Office of the Adjudicator website, and has done so for at least six years.

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 currently no on-going regulatory developments relating to the sales of TV advertising.

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



1st October 2012

Robert Ditcham
Adjudicator CRR
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Dear Robert

ISBA RESPONSE TO YOUR REQUEST FOR COMMENT FOR YOUR PERIODIC REPORT TO OFCOM

Thank you for your letter of September 27th requesting our comments for your next periodic report to Ofcom.

As is usual in the middle of the trading year and immediately after the relatively quiet summer period, this year somewhat exacerbated by the Olympics, we have no new or specific comments to add. That said, I would take the opportunity to reiterate our and our members' clear and abiding view that as long as ITV has a dominant market share, regulatory intervention will remain necessary.

The only relevant, if adjacent, development has been our response to the OFT's and Ofcom's concurrent consultations on Global Radio plc's acquisition of Guardian Media Group's assets.

In our responses, we expressed concerns at the very significant ownership concentration taking place in the radio medium. (Industry estimates that Global will have around 60% market share by revenue). We understand that other radio groups and the agencies body, the IPA, expressed similar concerns.

We therefore suggested that some form of behavioural intervention should be considered, and invited further dialogue as to how this might best be achieved, with your Office clearly in mind as an example. As I write this we await the regulators' decision as to whether to recommend to the new Secretary of State that the acquisition is referred to the Competition Commission.

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', is written over a horizontal line.

Bob Wootton
Director of Media & Advertising

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

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03 October 2012

Dear Robert

Adjudicator's Report: April – September 2012

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 2012.

1. Operation of the Undertakings

As noted in earlier reports, April-September forms 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?

Given CRR has now been in the market-place for 8 years, all parties are thoroughly well versed on the constraints and opportunities available within the regulations.

According to playback from members, ITV Sales has generally behaved well across the period, although as noted above, this may have as much to do with the quiet nature of spring and summer as with its more customer-friendly stance towards the market.

Having said this, as was mentioned in our earlier October 2011 - March 2012 Report, it is clear that the arrival of Fru Hazlitt and her sales team has seen a genuine shift from the "old ITV" toward a more customer-centric and collaborative approach. (While, by contrast, there are reports re Channel 4 which may suggest a hardening of attitude from that broadcaster.)

Cont.

President
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Mike Leeson
Hon. Treasurer
Maggie Prost

Director General
Paul Bainsfair
Secretary
Geoffrey Russell

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Of course, while ITV continues to show a friendly face, it is still tough in face-to-face negotiations. This is not surprising as it has profit targets to hit.

Given that ITV is – at present - probably in its weakest CRR position for some time - this may very well lead to an increased number of referrals for the next negotiation round.

3. Office of the Adjudicator

No disputes were reported during this period.

However, as with earlier reviews, IPA members continued to value the role of the Adjudicator as an on-going deterrent to the risk of cavalier behaviour by ITV.

As agencies noted, all the while ITV1 - and the ITV family as a whole - retain their dominance in the market, the temptation for salespeople unfairly to exploit this power will remain unless adequate safeguards remain in place.

In the words of one respondent, "I don't think ITV softens its negotiation stance (*as a result of the presence of the Office of the Adjudicator*) but " it continues to give agencies an important and valuable means of tempering an overtly aggressive stance."

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

Yours sincerely



Geoffrey Russell
Secretary and Director for Media Affairs