

The Office of the Adjudicator Periodic Report

October 2006

Contents:

Overview

1.0 Office of the Adjudicator

- 1.1 Core Operating Functions
- 1.2 Core Processes
- 1.3 Relationship with Key Stakeholders
- 1.4 Adjudicator Research

2.0 Disputes and Guidance

3.0 Reporting on ITV plc's Compliance

4.0 Stakeholders views of the Operation of the Undertakings and the CRR Scheme

Overview

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 Secretary of State as a condition of approval of the agreed merger of those Broadcasters to form ITV plc. These Undertakings required the appointment of an Adjudicator to adjudicate on any dispute between ITV plc 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 CRR 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 October report and the Annual report in April are made available to the public.

Pursuant to paragraph 22 of the CRR 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 CRR Scheme and the CRR 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. Confidential information provided to Ofcom and the OFT has been redacted from this report.

1. Office of the Adjudicator

1.1 Core Operating Functions

1.1.1 The Adjudicator

The Adjudicator was appointed by Ofcom in November 2003 and is independent; in particular from Ofcom, but also from any commercial television broadcaster in the United Kingdom and all other parties to any dispute he is asked to decide upon, in accordance with Annex 3 of the Undertakings.

In the Annual report in April it was announced that David Connolly would be vacating his post and that the process to recruit a replacement was underway. Robert Ditcham, formerly Commercial Director at Initiative, was appointed as Adjudicator on 1 May 2006. The handover process was smooth and the office remained resourced and operational throughout.

As soon as he began as the new Adjudicator Robert Ditcham established a handover period to July with David Connolly to ensure the transition was seamless. He has also conducted numerous meetings with Stakeholders and assembled a new team at the Office.

1.1.2 The Office of the Adjudicator's Staff

In September the Adjudicator appointed Richard Baker, as Deputy Adjudicator. Richard was head of TV trading at Brand Connection and previously the TV Director for Unilever at Initiative. In addition the Office has an Executive Assistant, Claire Gilmour and 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 Adjudicator's Office handles, security is a high priority. Access to Riverside House, where the Adjudicator's Office is situated, can be gained only with the use of security cards. In addition, 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 of the Adjudicator have access to the safes;

- has a lockable area in Riverside House which can only be accessed by a member of the Office;
- operates a clear desk policy;
- has a policy that 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

This is 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 plc. Ofcom make payments in the first instance, but it invoices ITV plc 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 of the Adjudicator, 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;
- presentations made by the Office to Advertisers and Media Agencies.

1.2 Core Processes

1.2.1 Procedures 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" 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). 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 Notice of Adjudication has to be completed. The Notice of Adjudication 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 plc must also be sent a copy of this Notice of Adjudication. If the Adjudicator decides to act on the dispute, ITV plc must send a Notice of Reply setting out its response to the Notice of Adjudication.

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 plc.

1.2.2 Confidentiality Processes

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 plc (Memorandum of Understanding)

A Memorandum of Understanding (“MOU”) was formalised with ITV plc 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 plc. 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 for 2006. 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 plc.
- A fortnightly report on the past, present and future position of the Trading Balance by ITV plc region.
- A full report on the treatment of all bookings made after the ABD (advance booking deadline).
- 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 plc, 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 plc; a monthly meeting between a member of the Office and ITV plc’s Sales Operation Controller and Sales Operation Planning Controller to discuss any issues arising from ITV plc’s Trading Balance figures; and a quarterly meeting between the Adjudicator and the Managing Director of ITV 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 plc 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 May 2006, the Adjudicator has attended meetings with media representatives at the IPA and ISBA. Additionally, the Adjudicator met with Agencies, ITV senior staff and other broadcasters to establish contacts and stay abreast of market developments.

1.4 The Office of the Adjudicator Research

In August the Adjudicator commissioned the first research project of the Office, intended to increase the amount of information available to him when determining disputes. The research was based around certain hypothetical dispute scenarios. 20 representative buyers were interviewed and asked how they would respond in negotiations in the hypothetical scenarios. The Adjudicator is conscious that answers to hypothetical questions do not always reflect what people would do in practice. Nonetheless, the Adjudicator considers that the information provided by the research provides reasonable evidence of how the market would behave in certain dispute situations. If and when disputes arise that are similar to the hypothetical scenarios in the research project, the Adjudicator will take into account the results of the research alongside other information provided by the parties.

The research Hypotheticals and topics covered:

- price position vs varying SOB
- price position vs varying Dayparts
- price dynamics of special programming
- questions relating to children's advertising
- general views on CRR

ITV and the IPA were consulted, and indicated that they were content with the methodology. The Adjudicator would like to thank ITV and the IPA for their cooperation, and also the Agencies for their time in participating in the interviews.

2.0 Disputes and Informal Guidance

2.1 Disputes

The Office received no Notices of Adjudication in the last 6 months since the Annual Report was published in April 2006 in relation to disputes between Media Agencies/Advertisers and ITV plc. The summer months are the quietest time for airtime negotiation with many contracts negotiated on a calendar year basis. Over the corresponding period last year there were no disputes.

2.2 Informal Guidance

A total of 7 guidance enquires were brought to the Office by Media Agencies since the last report was published. The number of queries was considerably lower than the previous year, where there were 28, indicating that Advertisers and Media Agencies continue to become more familiar with their rights under CRR.

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.

- Guidance enquires have related, among others, to the following issues:
- Copy error; query related to compensation under CRR
- Advertiser moving to a new Agency Deal.
- The status of 2 year deal and the ARM calculation
- New Advertiser committing to achieve a launch date whilst still having the ability to dispute a deal.

(A new guidance note was subsequently posted (9. Guidance Enquiries) on the Adjudicator's website – www.adjudicator-crr.org.uk)

- Ability to renegotiate terms under CRR based on change in Advertiser category demand.
- Clarification on ITV's commitment to Deal delivery on Children's programming and minutage
- Clarification on ARM ratchet and SOB relationship if ITV's share went UP

3.0 Reporting on ITV plc's Compliance

3.1 General Considerations

In his report published in April 2006 the Adjudicator reported that ITV plc, whilst remaining forceful in its negotiating, had cooperated within the rules of the Undertakings and the Office had continued to receive less complaints than in the past about ITV Sales' behaviour. This has remained the case over the last 6 months and credit is due to ITV plc for its continued compliance.

3.2 Contracts

In the report published in October 2005, the Adjudicator expressed his concern that a large amount of contracts received by his office were in draft form which ITV plc informed him was partly due to Advertisers and Media Agencies failing to sign and return the draft contracts it sent out. The Adjudicator reported that this situation was leading to uncertainty as to the precise agreements that had been contracted between parties. This could potentially have made the determination of disputes more difficult, as the Office might have to base its analysis on draft contracts and summaries of key terms.

Shortly after the October Report was published, the Adjudicator raised this issue with the Head of Legal Affairs at ITV plc. The ITV legal team took the initiative to devise a formalised timetable to cover the due process covering contract agreement.

ITV plc appears to have made reasonable efforts to follow the formalised timetable over the course of this year. Despite this, as of October 2006 a large number of 2006 deals remained unsigned. This is highly unsatisfactory. The Adjudicator hopes that, for 2007, ITV, Agencies and Advertisers will all attempt to adhere to the formalised timetable and ensure that contracts are signed much earlier than they have been in previous years. The Adjudicator intends to raise this matter with the IPA and ISBA.

4.0 Stakeholder's views of the operation of the Undertakings and the CRR Scheme

4.1 IPA's view of the operation of the Undertakings and the CRR Scheme

1. Operation of the Undertakings

Given that the time span from May to September is not a major trading period, agencies had little new to report with regard to the operation of the Undertakings.

Having said this, all our members still watched ITV's activities closely - and a number of those who responded to this round of research, continued to comment on ITV's vigorous - some say draconian - implementation of cancellation/amendment policies.

Elsewhere, the only other specific issue mentioned related to ITV's reduction in children's programme hours. This caused a few agencies short-term problems in those instances where the broadcaster had significantly under-delivered against those agencies' children's campaigns. The situation has now been resolved, as ITV has increased its hours again - however, at least one member had informed the company, it would have been prepared to go to the Adjudicator/Ofcom over the reduction, had this concern not been addressed.

How has CRR operated?

Moving onto CRR, all responding agencies were aware of the recent debate, promoted by ITV, on the future of CRR.

Reactions to the broadcaster's wish to see this constraint removed, however, varied.

Most were of the opinion that CRR continued to play a valuable role in protecting agencies from the demands of a potentially aggressive (and certainly still dominant) ITV sales force - pointing out, that had the mechanism not existed in the current situation, the broadcaster would simply have raised its costs to offset the revenue losses resulting from poor audience performance.

This was not to say, however, that our members did not recognise the difficulties which ITV was experiencing and the potential problems, which its lower revenues posed re programming budgets.

All agencies recognised the value of a mass-market broadcaster running high-quality programming, which attracted large and diverse audiences.

However, members were quick to highlight that the root cause of ITV's budgetary problems did not lie with CRR, but with the broadcaster's historical choice of programming - and that the removal of the constraints in these circumstances would merely allow it to disguise the financial consequences of poor output decisions.

Having said this, some members were sympathetic to the possibility of an alternative to CRR, but this would only be acceptable:

If it were able to offer similar protection against the threat of an over-dominant ITV sales force;

Any additional revenues generated by improved audiences were ploughed back into programming (and not, as many suspected, simply returned to shareholders).

The Adjudicator's Office

Playback from all agencies paid tribute to the on-going work of the Adjudicator's Office - which was seen to be expert, fair and responsive.

The transition from David Connolly to Robert Ditcham was felt to have worked well - with both individuals applauded for their open and communicative style.

Having recently taken over his post, Robert was particularly congratulated on the early steps he had taken to visit all the key agencies to discuss his role - and for the research he had initiated into the market - both of which moves were seen to bode well for the future.

4.2 ISBA's view of the operation of the Undertakings and the CRR Scheme

Overall, our collective sense is that CRR has worked and continues to work well to deliver its objective of preventing ITV from leveraging its dominant position to force its prices.

Our understanding is that CRR has operated with increasing smoothness and efficiency as the market has come more fully to understand its mechanism and provisions over time with each successive trading round. Considerable credit must go to the Office of the Adjudicator for its important part in this process.

The Office of the Adjudicator plays a key role in ensuring "fair trading terms" even without formal adjudication. We believe that its existence and continued focus is providing a channel whereby disputes are often resolved prior to reaching the formal adjudication stage. We consider this an almost invisible, but most significant, benefit.

Despite the regrettable declines in its audience and share, which leads to diminished revenues via the CRR linkage, ISBA's view is that ITV's market position remains one of significant dominance, and will do so for some considerable time yet to come. The need for appropriate competition interventions therefore persists.

ISBA also continuously considers the future shape of the market for UK commercial TV airtime (in all its forms, but principally spot in this specific regard). We are therefore aware of ITV's frequent calls for overturn or modification of the CRR remedy.

You might have seen a piece I had published in Campaign in July which set out our position in more detail for the record.

We trust that the Office of the Adjudicator will be fully engaged and involved before and during the implementation of any such changes as might be considered necessary over time.

In parallel with the market's having grown to understand and fully implement CRR, other commercial broadcasters have adapted to it. Many major advertisers now feel that it has enabled those in stronger market positions to take more robust negotiating positions, demanding 'their share' of what they see as 'windfall' from ITV.

Before closing, I would also update you on progress made against points in our last periodic response in March 2006. We commented that there were some indications that CRR was leading ITV to tighten certain of its trading terms. On late copy deadlines and charges, we have made some good progress with ITV and other broadcasters since then. We also understand that the downturn in the market for TV airtime has also led broadcasters including ITV being rather less rigid in their attitude towards monies released after advance booking deadlines. Whilst we do not hope for a continued slowdown, we do hope that the rather more customer-focused attitude now abroad might continue to prevail as and when the market climate might improve.