

The Office of the Adjudicator Annual Report

April 2007

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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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 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. 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.

1. Office of the adjudicator

1.1 Core operating functions

1.1.1 The adjudicator

In the October 2006 periodic report it was reported that Robert Ditcham had been in office since May 1st and was assembling his team. The office is now fully staffed and operational.

1.1.2 The office of the adjudicator's staff

In September 2006 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. 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 of the adjudicator 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

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;
- updated guidance enquiries

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" 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 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 plc (Memorandum of Understanding)

A Memorandum of Understanding ("MOU") has been formalised with ITV plc. 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 2006/07. 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.

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. During March such proposals were made and ITV have adopted these changes.

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 the October 2006 periodic report, 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.

In February the adjudicator conducted a regional tour of agencies to meet key buyers and discuss trading relationships with ITV.

2.0 Disputes and informal guidance

2.1 Disputes

The office received three Notices of Adjudication since the last annual report was published in April 2006 in relation to disputes between media agencies/advertisers and ITV plc. The office acted on all of these disputes. The number of disputes occurring since the last annual report is the same as occurred during the preceding 12 month period to April 2006.

The adjudicator has acted swiftly in relation to all disputes, with all dispute determinations having been delivered within the statutory time frame as laid out within the CRR rules.

The three disputes raised the following issues.

- The terms offered by ITV plc to a media agency requesting a line by line deal for an advertiser previously within an agency deal
- The terms offered by ITV plc to a media agency that was proposing to amend some of the parameters of its core agency deal
- A dispute relating to contract enforcement and interpretation

The office found in favour of the complainant in one of the cases, determining that ITV plc had not offered fair and reasonable terms, and in favour of ITV plc in the other two.

2.2 Informal guidance

A total of 37 guidance enquiries were brought to the office by advertisers and media agencies since the last annual report was published, with 7 of these coming in the first half of the year and a further 30 in the latter half. This imbalance is consistent with previous years and is to be expected as most annual airtime agreements are contracted between October and March and hence guidance as to interpretation of the undertakings is most likely to be required in this period. Whilst the number of guidance enquiries for the full year was considerably lower than the previous year, the number of enquiries coming in the last 6 month period was more consistent with the same period the previous year, when 40 guidance enquiries were received.

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 enquiries received during the period have related, among others, to the following issues.

- The movement of a line by line advertiser moving into an agency deal
- The movement of an advertiser previously within an agency deal moving to a line by line agency
- The methodology behind the calculation of the ARM mechanism. This refers to the mechanism that allows advertisers/ media agencies the opportunity to reduce their SOB (share of broadcast) revenue commitment to ITV1 in line with any loss of share in ITV plc's commercial impacts
- Charges applied by ITV to bookings made after the advanced booking deadline
- The ability for an advertiser to take a holiday from ITV
- The position of an advertiser's contract when that advertiser is bought by another advertiser
- The position of an advertiser wishing to secure airtime whilst contract negotiations are ongoing whilst still having the ability to dispute the deal
- CRR and burst deals

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 relation to the position of the advertiser wishing to secure airtime whilst contract negotiations are ongoing a new guidance was subsequently posted (9. Guidance Enquiries) on the adjudicator's website: <http://www.adjudicator-crr.org.uk/enquiries.htm>

In November the office posted a new guidance note (10. Guidance Enquiries) on the website, in relation to the proposed prohibition on advertising food and drink high in fat, salt and sugar (HFSS) in and around TV programmes of particular appeal to children.

3.0 Reporting on ITV plc's compliance

3.1 General considerations

Since the October 2006 periodic report ITV has continued to cooperate within the rules of the undertakings. Over this period the level of contact by agencies with the adjudicator's office for guidance and the number of disputes raised has been consistent with the same period in previous years.

3.2 Contracts

In the report published two and a half years ago, 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 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 2006 and 2007 to date. Despite this, it was reported in the October report that as of then a large number of 2006 deals remained unsigned. 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.

4.0 Stakeholders views of the operation of the undertakings and the CRR scheme

4.1 ISBA view of the operation of the undertakings and the CRR scheme

- Although this response covers the more active period since November 2006, the detail of our comments is limited by the scheme's confidentiality, which remains good.
- In terms of overall operation, our perception is that the scheme is working well and the market for ITV1 airtime is orderly. To the best of our and our members' knowledge, disputes are being resolved informally in advance or at formal determination and there are no outstanding issues.
- The CRR scheme itself continues to provide a positive impetus for ITV to optimise its audience, to advertisers' benefit. Advertisers continue to seek a competitive ITV1 and have therefore been pleased to note some pockets of ITV audience resurgence in Autumn 2006 and early 2007, suggesting that the positive force of CRR is now making itself felt.
- ITV1's share of TV advertisement revenue remains well over 40%, and its successful digital sibling channels lift this to about 45%. This continuing dominant position necessitates continued regulatory intervention.
- In our past responses we have widened our canvass slightly to include mention of some related or second-order effects of the Undertakings (eg the more robust negotiating stances of other broadcasters seeking 'their share' of funds released from ITV under CRR). For information, the nature and degree of these concerns remain more or less unchanged.
- We also note that the transition from the previous adjudicator, David Connolly, to yourself and personnel changes in your support team have both been achieved smoothly and without visible disturbance. Given the complexity and the sometimes charged nature of the Office's business, this is a credit to its management and structure.

4.2 IPA view of the operation of the undertakings and the CRR scheme

1. CRR is now well established and both sides know the rules

Agencies and sales people are now well acquainted with CRR and the early anxiety displayed by both sides has largely disappeared. The result has been that the mechanism has worked smoothly across the period Nov 06 to March 07.

2. Having said this, agencies still remain wary

All respondents remained convinced that CRR is still needed to prevent ITV from exploiting its dominance. As one less charitable observer put it, "ITV has worked out the limit of where it can go before we involve the adjudicator and invariably it operates on that limit. Without CRR/ the adjudicator they would undoubtedly try to go beyond it."

3. There was a belief among some that ITV could be "on its best behaviour" for a purpose.

Leaving aside greater experience and familiarity with CRR, some agencies expressed the thought that ITV's recent strict policy of "following the rules" could have an ulterior purpose.

Indeed one member stated that ITV would "do everything they can to avoid adjudication. It is a big thing for them" - going on to suggest that the more adjudicator references they could stop, the better their senior management could argue CRR / the adjudicator were unnecessary and market was self - regulating.

As indicated above, this is not a view shared by our media agencies who continue to believe that, leaving aside the constraints that CRR imposes on the market, the mechanism and the adjudicator are still key elements in keeping ITV in line.

4. Leveraging access to the ITV digital offering in ITV1 negotiations

Some agencies have reported that ITV Sales are increasingly linking negotiations on their digital channels with their targets for ITV1 - significantly raising prices on the digital channels YOY, if they feel that negotiations on ITV1 are not going well.

5. Testing the new adjudicator

While it was only one agency, it was felt that ITV could be testing the boundaries with the new adjudicator