

The Office of the Adjudicator Annual Report

April 2008

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 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 is the Annual Report for the fiscal period up to March 2008.** The Annual Report and the Report published in October each year 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.

All confidential information contained in the Annual Report is redacted from this 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, in particular of the OFT's review of CRR

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) ("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 in section 1.1.3 and the way in which the Adjudicator deals with disputes. A limited number of people are involved in the dispute process.

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. 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 managing director of ITV Customer Relations.

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

In addition to the regular meetings with senior ITV staff, as laid out in the MoU, the Adjudicator has attended industry conferences, and held meetings since the last Periodic Report of October 2007 with a number of companies from the UK’s advertising community. These have included agencies, media owners and the auditing community. These meetings are held regularly to allow the Adjudicator to seek views on the workings of the Undertakings and general commentary of the television marketplace. 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 attended meetings 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. Comment from these bodies can be found in Section 4 of this Report.

2.0 Disputes and guidance

2.1 Disputes

The Office received three Notices of Adjudication since the publication of the last Annual Report in April 2007 in relation to disputes between media agencies/advertisers and ITV. This is the same number as occurred during the preceding 12 month period to April 2007.

The Adjudicator has acted swiftly in relation to all of these disputes, and all determinations were delivered within the statutory time frame as laid out within the CRR Rules.

The three disputes raised the following issues.

- Offering airtime on a fair and reasonable basis (two disputes).
- Contract enforcement and interpretation.

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

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 in April 2007, with 17 of these coming in the first half of the year (April – September '07) and a further 20 in the latter half (October '07 – March '08). This consistency in the number of guidance requests during the last year is unusual. In previous years an imbalance has occurred between the number of guidance enquiries received in the first half and the second half of the year (in our April 2007 Report it was noted that 7 enquiries had occurred in the first half of the year and 30 had been received in the second half of the year). This previous imbalance (between the first half and second half of the year) reflects the fact that most annual airtime agreements are contracted between October and March and therefore greater guidance on interpreting the Undertakings is generally required during this period.

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 since the last Annual Report have related, among others, to the following issues.

- The review of CRR
- Charges applied by ITV to bookings made after the advanced booking deadline
- Charges applied by ITV to campaigns wishing to defer
- The movement of an advertiser within an agency deal moving to a line by line deal
- The calculation of the ARM mechanic
- Taking a holiday from ITV1
- Variations to contracts
- The meaning of fair and reasonable within the Undertakings

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>. During this period no new guidance has been posted on this website.

3.0 Reporting on ITV's compliance

3.1 General considerations

Since the publication of the October 2007 Periodic Report, ITV has continued to cooperate within the rules of the Undertakings.

3.2 Contracts

In previous reports the Adjudicator has expressed his concern that a large amount of contracts received by his Office were not countersigned by advertisers and agencies. This situation, in the absence of evidence of deemed acceptance, could lead to uncertainty as to the precise agreements contracted between parties, and could potentially make determination of disputes more difficult, as the Office might have to base its analysis on draft contracts and summaries of key terms.

The ITV legal team have devised a formalised timetable, which has been in place three years, to cover the due process covering contract agreement. ITV appears to have made reasonable efforts to follow the formalised timetable over the course of this period. The Adjudicator hopes that, going forward, ITV, agencies and advertisers will all attempt to adhere to the formalised timetable and move towards countersigning agreements rather than relying on the concept of deemed acceptance through trading. In most contracts the vast majority of the obligations fall upon ITV. It would appear therefore, to be to the benefit of the advertiser/media agency to complete contracts as quickly as possible in order to ensure those obligations are binding.

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

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.

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

Our last response was in October 2007, so this response effectively covers the 2008 'trading season'.

- We continue to understand that CRR is working well and the market for ITV1 airtime is orderly. To the best of our and our members' knowledge, disputes continue to be resolved informally in advance or at formal determination and there are no outstanding issues. The Adjudicator and his Office continue to command the respect of the industry.
- The CRR scheme itself continues to provide a positive impetus for ITV to optimise its audience, to both viewers' and advertisers' benefit. At the time of our last response, we suggested that the positive force of CRR might be borne out by the prediction that ITV1's share of adult impacts was to increase by 1% year on year.
- 2007 showed an encouraging 11% growth in overall TV viewing, with wide consumer adoption of new technologies like wide, flat screens and HD receivers leading to raised levels of viewing. After showing audience declines for several years, ITV's audience in 2007 was more or less on par with the previous year's. Informed by this fairly stable year-on-year audience performance, the trading season saw ITV holding its revenue share. Advertisers continue to seek a competitive ITV1 and were therefore pleased with the channel's relative audience renaissance in 2007.
- With the OFT/Ofcom Review of CRR under way, we would take this opportunity to confirm that ITV1's share of TV advertisement revenue is now just slightly below 40 (39.33) %, its successful digital sibling channels lifting ITV plc's overall share to about 45 (44.83)%.

Since the merger which led to the formation of ITV plc and the inception of CRR in 2003, ITV has actually increased its share of the top 1000 programmes slightly from 977 to 981. We therefore reiterate our belief that ITV's continuing dominant position necessitates continued regulatory intervention.

- In our last response, we also mentioned Ofcom's ongoing consideration of the implications of the European AudioVisual Media Services Directive, particularly with respect to the current Rules governing the Amount and Distribution of Advertising (RADA). We note that Ofcom has now opened a consultation on this issue, any outcome of which might impact on CRR. It will therefore have to be weighed and considered in that light as well as the wider viewer, advertiser and broadcaster interest.

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

Adjudicator's Report : October 2007 – March 2008

This note follows on from earlier IPA papers re the operation of the ITV Undertakings, the CRR mechanism and the Adjudicator's Office.

Significantly, the marketplace appears to have settled down in terms of the operation of CRR, with many members simply reporting that the constraint is working efficiently and effectively - and that they have nothing new or exceptional to add to their previous comments.

1. Operation of the Undertakings

As noted above, the ITV Undertakings and CRR have been in the marketplace for five years – and all parties are now fully acquainted with their respective rights and responsibilities.

Given the robust approach shown by the broadcaster's sales force historically, our members expect it to play a "hard game" - and they are rarely "disappointed" in this respect.

Most recently, practically all IPA members have commented on the extent to which the "ITV Family" proposition has become part of the broadcaster's negotiating package, with ITV sales staff becoming increasingly skilled in leveraging the power of their digital channels to retain budgets and meet their sales objectives.

To quote one member, "while the broadcaster did not attempt overtly to demand more cash for ITV1 than it was entitled to under CRR, it was very "bullish" about its ITV Family proposition, almost to the extent of arm-twisting."

2. How has CRR operated?

On the back of the most successful year for ITV in the CRR "era", the broadcaster quite naturally adopted a very confident stance during the latest negotiation round with our members.

Having said this, the presence of the CRR was felt to have been effective in preventing this confidence morphing into aggression and, in general, our members reported that negotiations had run relatively smoothly.

Inevitably, some agencies noted difficulties but broadly speaking, it was felt that a combination of the mechanism and the desirability of avoiding overly aggressive behaviour at a time when CRR was under review by the Regulators, had tempered discussions.

In this latter context, all agencies were adamant in their belief that CRR – or some similar equally effective form of protection – continued to be vital in preventing ITV from unfairly exploiting its continued dominance.

To this extent, and despite ITV's protestations to the contrary, they saw no difference in the broadcaster's position in today's marketplace from that which existed in 2003.

3. The Adjudicator's Office

As with previous reports, respondents stressed the continued importance of the Adjudicator as a deterrent to cavalier behaviour.

While relatively few members reported making referrals, they continued to underline the Adjudicator's value as a fallback in the event of the broadcaster of adopting an unfair or intransigent stance.

Having said this, some agencies did suggest that the current referral process tended to be somewhat daunting and protracted for smaller operations, albeit practically all who had taken cases to adjudication reported a satisfactory outcome.