

# The Office of the Adjudicator Periodic Report

**October 2008**

The Periodic 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 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 2008.** This Report and the Annual Report (published in April) are made available to the public. Any confidential information contained within these Reports is redacted from the public version.

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 ITV plc 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 in the Periodic 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](http://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 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 2007/08. 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**

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 Annual Report of April 2008 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 the television marketplace 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 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.

The Adjudicator has also met with OFCOM and the Office of Fair Trading in the context of the ongoing CRR review.

## **2.0 Disputes and guidance**

### **2.1 Disputes**

The Office received no Notices of Adjudication since the last Annual Report in April 2008 in relation to disputes between media agencies/advertisers and ITV. During the corresponding period in 2007 i.e. April-September 2007, one Notice of Adjudication was received.

It is not unusual for there to be no disputes during the April-September period, which tends to be the quieter six month period for deal negotiations. Indeed, there were no disputes during the April-September 2004, April-September 2005 and April-September 2006 periods.

### **2.2 Informal guidance**

A total of 13 guidance enquiries were brought to the Office by advertisers and media agencies since the last Annual Report was published in April 2008. This is slightly lower than the number of enquiries brought during the same period in 2007, when 17 were brought, although it is higher than the 7 brought during the same period in 2006, when 7 enquiries were made. As mentioned above, there tends to be fewer negotiations between advertisers/ media agencies and ITV in this period, reflecting the fact that most annual airtime agreements are contracted between October and March (when guidance on interpreting the Undertakings is therefore more frequently required).

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
- The movement of line by line advertisers moving agency
- The meaning of fair and reasonable within the Undertakings
- The calculation of the ARM mechanic on longer term deals
- ITV terms and conditions
- The process of Adjudication

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 new guidance has been posted on this website. The headings of the new guidance published are:

“I want a new ITV1 contract but the Advanced Booking Deadline (“ABD”) for the first planned activity is approaching and I have been unable to negotiate agreeable terms with ITV. What can I do?”

“If I want to book airtime after the ABD, do the Undertakings apply?”

“If I have an urgent need to book airtime after the ABD, but do not consider the terms being offered to me by ITV are fair and reasonable, what can I do?”

“Can I bring a dispute at any time?”

## **3.0 Reporting on ITV's compliance**

### **3.1 General considerations**

Since the April 2008 Annual Report ITV has continued to cooperate within the rules of the Undertakings.

### **3.2. Contracts and the provision of information generally**

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

The Adjudicator is also pleased to report that the formalised timetable that the ITV legal team devised to cover the contract agreement process is being followed and that the countersigning of contracts by advertisers and agencies is occurring to a greater extent.

Previously, the Adjudicator had expressed concern that many of the contracts received by the 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.

During 2008 the Office suggested amendments to the way in which ITV provides information to the Office concerning airtime sales contracts. ITV has adopted this new process.

## 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



October 8<sup>th</sup>, 2008

Robert Ditcham  
Adjudicator CRR  
Ofcom  
Riverside House  
2a Southwark Bridge Road  
London SE1 9HA

Dear Robert

**OFFICE OF THE ADJUDICATOR PERIODIC REPORT**

Thanks for your letter of September 19<sup>th</sup> inviting our comments for your next periodic report to Ofcom and the OFT.

The recent period in question is traditionally a quiet one in terms of TV trading as it precedes the annual trading round which is now in full swing.

Having canvassed our leading TV advertiser members, I confirm we have no specific issues to raise, though as usual this is not surprising as they are typically one step removed from any confidential discussions their media agencies might be having with your office. In summary, the remedy continues to appear to be working effectively and smoothly from our perspective.

Meanwhile, ISBA and its members have been actively participating in the joint OFT/Ofcom Review of the Undertakings which commenced in February. We have argued, and will continue to argue, that ITV's position in the market remains clearly dominant and that regulatory intervention regarding its pricing remains necessary.

The most important component of any such restraint looking forwards will be to preserve the performance relationship which CRR introduced in 2003. At that time, advertisers were gravely concerned that a merged ITV would leverage its position to charge them more for the same audiences. These fears were proved to be well-grounded as ITV's audience continued to decline over subsequent years, CRR effectively preventing ITV from charging advertisers more while delivering them less.

Advertisers would not condescend a scenario in which ITV were allowed to revert to the previous, perverse situation where it exploited its market power to leverage higher prices even as its audiences declined. Advertisers believe that ITV should continue to be strongly incentivised to maintain its focus on delivering the strongest and most attractive content to its audience, thus driving its commercial fortunes. We are obviously mindful of the unprecedented worsening economic situation which continues to unfold as I write, but still adhere to this principle.

Given their nature, I don't need to ask you to excise any of the above comments from your report as I have sometimes on the past. Please don't hesitate to contact me if you require further information or comment. Meanwhile, best wishes.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Bob Wootton', is written over a horizontal line.

**Bob Wootton**  
*Director of Media & Advertising*

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

8th October 2008

Dear Robert

### **Adjudicators' Report : April-September 2008**

This note provides an update on the operation of the ITV Undertakings, the CRR Mechanism and the Adjudicators' Office over the last 6 months from the standpoint of IPA member agencies.

#### **1. Operation of the Undertakings**

As will be appreciated, the period from April to September 2008 is a comparatively quiet one for our member agencies and the majority of respondents had no new comments to add to those expressed in earlier reports.

#### **2. How has CRR operated?**

Despite this low level of activity, however, our members continued to mention a series of concerns, which in their minds, served to underline the ongoing need for the CRR mechanism.

In this context, one respondent felt that it was part of ITV strategy continually to test out agencies by deviating from the terms of existing deals - through, for example, restriction of access to programming that was part of the deal or under-delivery in daytime peak - to see what might happen. (This was particularly concerning when applied short-term so that the referral system, were it to be applied, would not be able to supply a resolution in time.)

Likewise, it was noted that as ITV's digital channels had grown, so its demands in terms of price and investment had become increasingly linked to the level of CRR retention to which the agency would agree. If the agency went for the minimum, then the prices demanded on these channels would increase.

Indeed, for this reason - far from seeking any reduction in CRR - some of our members would actually like to see the Adjudicator's remit expanded to encompass the entire ITV "family".

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### 3. Office of the Adjudicator

As has been stated in earlier reports, the presence of the Adjudicator is felt to be as important in maintaining order in this area as his ability to make judgements on the cases brought before him.

While some agencies felt that the threat of making a referral did not, perhaps, carry the same level of concern for ITV as two or three years ago ( both agencies and sales people now know what to expect ), the comparative ease with which ITV slipped into "dominant player" mode reinforced their belief that enforceable regulations governing the broadcaster's negotiation and implementation behaviours remained and continue to remain as relevant now as when they were first introduced in 2004.

I hope this is useful. If you should require any additional information, do let me know.

Best wishes,

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

Geoffrey Russell  
Secretary and Director of Media Affairs