

The Office of the Adjudicator Annual Report

April 2009

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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Contents:

Background

1.0 Office of the Adjudicator

2.0 Disputes and guidance

3.0 Reporting on ITV's compliance

4.0 CRR Review and related issues/relevant matters

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

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 Annual Report for the fiscal period up to March 2009.** 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.

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, 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 2008/09. 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 2008 with a number of companies from the UK’s advertising community. These meetings are held regularly 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 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. Comments from these bodies can be found in Section 5 of this Report.

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. This is the first time that no disputes have been brought to the Adjudicator since the inception of the CRR remedy. During the preceding 12 month period to April 2008 there were 3 disputes.

The Undertakings have now been in force for six deal seasons and both ITV and agencies/advertisers are now generally aware of their rights and obligations under the Undertakings. Where clarification is needed agencies/advertisers have sought guidance from the Office - as discussed below.

2.2 Informal guidance

A total of 28 guidance enquiries were brought to the Office by advertisers and media agencies since the last Annual Report was published in April 2008. 13 of these came in the first half of the year (April – September '08) and 15 in the second half (October '08 – March '09).

This spread of guidance enquiries is consistent with the year to April 2008. Neither of the last two years has maintained the pattern that was common until then, namely of significantly more guidance enquiries in the second half of the year when most contracts are negotiated.

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

- The review of CRR
- The process for bringing disputes
- The movement of an advertiser dealt on a line by line basis moving between agencies
- Charges applied by ITV to bookings made after the advanced booking deadline
- Conditional selling
- The movement of an advertiser within an agency deal moving agency
- The calculation of the ARM mechanic
- Short term bookings
- 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>. Since the last Annual Report in April 2008 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?”

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 October 2008 Periodic Report ITV has continued to cooperate within the rules of the Undertakings.

3.2 Contracts

The Adjudicator is pleased to report that the provision of contractual information to the 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.

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.

3.3 Bundled Offers and Conditional Selling

Over the last year, a number of media buyers have commented to the Office that ITV has frequently sought to conduct negotiations on the basis of an 'ITV family' package, rather than negotiating ITV1 and the ITV digital channels separately. For example, the IPA has commented on this both in this report (see Section 6) and in the April 2008 Annual Report. The Office has also received a number of guidance enquiries concerning bundled 'ITV family' offers.

To date, this issue has not resulted in any formal complaints to Ofcom or in disputes to the Adjudicator. Nonetheless, it appears that a number of media buyers are not clear as to the legal position and their rights in this situation. This is perhaps unsurprising, given that a number of different sets of rules are potentially applicable, and as the distinctions between some of the legal terms used is not necessarily straightforward.

Accordingly, the Adjudicator intends to publish some guidance in relation to this issue on the Office's website <http://www.adjudicator-crr.org.uk/enquiries.htm>. This guidance will take the form of identifying the different sets of legal rules which are potentially applicable, and the regulatory bodies responsible for enforcing them.

The guidance will not purport to establish any new tests or determine that certain types of behaviour are or are not lawful. This is in part because the Office is not responsible for administering two of the three sets of rules, and also because under each set of rules the legal position will depend on the particular circumstances of the case. It should be noted that there are therefore a large number of rules that fall into Ofcom's remit and are not the responsibility of the Office of the Adjudicator.

Under the Ofcom airtime sales rules: (i) conditional selling by any Broadcaster is strictly prohibited; but (ii) the bundling of channels is permitted.

A summary and discussion of the airtime sales rules can be found at:

http://www.ofcom.org.uk/tv/ifi/guidance/ITV_airtime_sales/Airtime_sales_rules/

Media buyers should direct any complaints or queries relating to these rules to Ofcom. There are two more sets of rules which are potentially applicable in this situation: (i) the general competition rules enforced by Ofcom and the Office of Fair Trading, (ii) the Undertakings.

ITV is entitled to propose a bundled offer, but media buyers are entitled to respond by requesting ITV also to make separate offers for airtime on ITV1 and the ITV digital channels. ITV is required to provide such separate offers, and any separate offer in respect of ITV1 airtime must be “fair and reasonable” under the Undertakings.

4.0 CRR Review and related issues/relevant matters

The Adjudicator is independent of both the OFT and Ofcom – the bodies carrying out the CRR Review process. However, the Adjudicator has engaged fully in that process, submitting full response documents to the OFT's initial statement of issues and subsequent supplementary questions and latterly to the OFT consultation of January 2009 of the 'Review of the Contract Rights Renewal Undertakings'.

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



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26th March 2009

Dear Robert

OFFICE OF THE ADJUDICATOR PERIODIC REPORT

Thanks for your letter of March 18th inviting comments for your latest periodic report to Ofcom and the OFT on the operation of the CRR Undertakings.

As you say, the current OFT/Ofcom review of the Undertakings has elicited so much recent effort in this area that there is little if anything to add to the very extensive responses put forward by ISBA, many of its advertiser members and the major media agencies.

The weight and volume of these responses is quite unprecedented in recent times, and bears testament to the sheer breadth of advertiser and media buyer support for CRR and concern that the Undertakings should not be varied, eased or removed (except perhaps to address any technicalities in ITV's delivery).

As ever, we are not privy to any details of individual cases which might have been referred to your Office since our last response. However, our conversations with our members continue to throw up concerns about certain of ITV's sales activities:

- Several of our members have reported that ITV is now seeking to encourage advertisers out of agency umbrella arrangements and into line-by-line deals. We are not aware of any similar pressures coming from other broadcasters.

Although there are undoubtedly some mixed opinions amongst advertisers as to the advantages of umbrella deals, we must question why ITV, apparently uniquely, is seeking to circumvent them.

- Reports of conditional selling by ITV continue, whether in the form of preferential pricing of ITV's channels in return for disproportionate investment in its channels or of 'improved access' to special/event programmes or sponsored properties.

Given ITV's market power, we believe there is a very fine line between acceptable flexibility of normal business arrangements and the leveraging of undue dominance.

As we said in our substantial response to the OFT review, we consider that the Office of the Adjudicator continues to have a critical role to play in ensuring fair and reasonable terms for advertisers using ITV.

None of these comments is sufficiently sensitive to lead me to request its excision 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', with a long horizontal flourish extending to the right.

Bob Wootton

Director of Media & Advertising

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



Institute of Practitioners in Advertising

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25th March 2009

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Dear Robert

Adjudicator's Report : October 2008 – March 2009

As requested, this letter reports on the operation of the ITV Undertakings, the CRR mechanism and the Adjudicator's Office across the period from October 2008 to March 2009.

Given that these provisions have now been in the UK media marketplace for six years, most of the points made below will be familiar - although they remain valuable, if nothing else, to underline the continued tension between ITV Sales - as the dominant provider in the commercial broadcasting sector - and its media agency customers.

1. Operation of the Undertakings

As the Adjudicator will be aware, this period has coincided not only with a formal review on the future of the CRR mechanism conducted by the Office of Fair Trading, but also one of the most turbulent periods in ITV's history brought on by the economic recession.

Against this background, it is therefore perhaps not surprising that some agencies reported that the ITV sales operation had appeared less overtly aggressive during the last six months than in previous reporting periods.

Having said this, playback was not without some concern.

This time last year, IPA agencies reported increasing use of the "ITV Family" proposition as part of the broadcaster's negotiating package - with ITV sales staff becoming practised "in leveraging the power of their digital channels to retain budgets and meet their sales objectives".



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This approach has now become established, with the broadcaster setting itself a target in terms of CRR retention across its family of channels and being unwilling to negotiate anything on its digital offering, if the investment proposal on behalf of the agency or client is not roughly in line with the ITV target.

Negotiations for 2009 followed this pattern, with the suggestion in one instance that ITV set out with a policy of total CRR retention plus 1%, refusing "to engage properly until we talked about investment levels which were in excess of the CRR retention-based number".

2. How has CRR operated?

Few members reported the need to make referrals to the Adjudicator across this period, citing market conditions as a possible constraint on the broadcaster's historical robust attitude to negotiation.

Having said this, some comment was received re ITV's willingness to be flexible, with this being seen as a deliberate challenge to test the readiness of the agencies to refer the matter.

There was no doubt among any of our respondents "that the existence of CRR and the Adjudicator continues to act as a constraint on the broadcaster's tendency to cavalier behaviour".

3. The Adjudicator's Office

As has been mentioned in previous reports, member agencies value the Office of the Adjudicator as much for its deterrent value as for its actual interventions.

While referrals across the period were low, all respondents continued to stress the importance of the Adjudicator's role - and their concerns, should this protection be removed.

I hope this is useful. If you should have any queries or require additional information, please do not hesitate to let me know.



Geoffrey Russell
Director for Media Affairs