

The Office of the Adjudicator Periodic Report

October 2009

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 2009.** This Report and the Annual Report (published in April) 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 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 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 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; and
- 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 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 the documentation needed to submit a dispute;
- the Adjudicator's Periodic Reports;
- updated guidance enquiries; and
- other news, in particular of the current 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 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 had meetings since the last Annual Report of April 2009 with a number of companies from the UK’s advertising community. These meetings are held 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 met 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 5 of this Report.

The Adjudicator has also met with OFCOM, OFT and the Competition Commission 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 2009.

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, a dispute has been received in the April to September period in only one of the last five years.

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 2009. This is exactly the same number of enquiries as were brought during the same period in 2008. 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.

The issues on which guidance enquiries have been received since the last Annual Report include:

- The review of CRR
- Protected contracts
- Contract variation
- Taking a holiday from ITV1
- The movement of line by line advertisers between agencies
- The meaning of fair and reasonable within the Undertakings
- The movement of an advertiser from an agency deal to a line by line deal

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 heading of this new guidance that was published is:

“What are the rules concerning ITV seeking to conduct negotiations on an ITV family basis?”

3.0 Reporting on ITV's compliance

3.1 General considerations

Since the April 2009 Annual Report ITV has continued to operate within the rules of the Undertakings.

During this period the Television marketplace has seen a dramatic decline in revenues due to the economic downturn. Despite this, and to the credit of ITV, adherence to the Undertakings and to the processes involved has been good.

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.

4.0 CRR Review and related issues/relevant matters

The Adjudicator is independent of both the Office of Fair Trading (OFT) and Ofcom – the bodies carrying out the preliminary CRR Review process. However, the Adjudicator has engaged fully in that process, submitting full responses to the OFT's initial statement of issues, subsequent supplementary questions and January 2009 consultation entitled 'Review of the Contract Rights Renewal Undertakings'. In the latest stage of the review the Office has provided information to and continues to cooperate with the Competition Commission.

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

5.1 Introduction

In section 5.2 of this Report, stakeholders provide written feedback on their opinions of the workings of the Undertakings.

5.2 Stakeholder responses

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.

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



Robert Ditcham
Adjudicator CRR
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London SE1 9HA

1st October 2009

Dear Robert

Thank you for your letter requesting our comments for your next periodic report to Ofcom.

As it is the 'quiet' season immediately before the annual trading round, we have no specific comments to relay from our members, but offer the following:

The market for commercial TV is significantly down year-on-year, but we have been extremely busy on the subject of Contract Rights Renewal for most of the year to date, first with the joint OFT/Ofcom review and now with the Competition Commission's subsequent process.

We have worked tirelessly to stimulate, gather and synthesize the view of our advertiser members, and have then made lengthy and detailed submissions to, and appeared before, the regulators.

We are now contributing our comments to the CC's Provisional Decision as to Changes of Circumstance and Notice of Possible Variation to the Undertakings and look forward to contributing further to their deliberations as they require.

We have found these documents particularly interesting, as they reveal some of the more detailed workings of the market hitherto only known to ITV, your office and the individual agency or advertiser protagonists. They show in public for the first time the extent to which the balance of attention within ITV has shifted - from the delivery of first-class public service broadcasting across the whole schedule (and especially in peak) to the narrower business pursuit of targeting programme investment towards those areas where they believe the quickest and easiest gains in share of commercial impacts (SOI) can be found.

These revelations have attracted considerable press comment, as well as disappointment amongst those advertisers who have so far been able to take the considerable time needed to consume the documents in the necessary depth. Meanwhile we have also been keeping a close eye on ITV's (thus far frustrated) attempts to secure a new Chief Executive who we hope might yet lead them to a better place.

Our position remains that we seek a strong, performing, ITV, but not one which is able to leverage its clear remaining dominance to force its pricing ahead of its audience to its advertiser customers' disadvantage.

I hope this helps - as always, happy to provide further comment or information as requested.

Best wishes

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

Bob Wootton
Director of Media & Advertising

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



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30th September 2009

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Dear Robert

Adjudicator's Report: April – September 2009

This note provides an update on the operation of the ITV Undertakings, the CRR mechanism and the Adjudicator's Office over the last six months.

1. Operation of the undertakings

As noted in previous reports covering this time of the year, April-September is not a major trading period - and members have had little new to play back with regard to the Undertakings.

2. How has CRR operated?

Despite the above, however, the activities of ITV Sales have continued to underline the case for maintaining CRR.

Although it may have been expected that the broadcaster would have kept a low profile while the Competition Commission considered a possible relaxation of the remedy, reports from IPA agencies indicate that ITV has continued to pay a very robust game.

Even within the environment of the review, members commented on frequent intransigence in day-to-day negotiations and the enforcement of penalties for all but the most minor of campaign changes.

Despite the depressed state of the market, it has been reported that ITV has levied maximum penalties for late money, changes to campaigns etc in major contrast to the rest of the market - which has been prepared to work with agencies to accommodate such adjustments.



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(Significantly in the last week, possibly in response to the Commission's provisional conclusion on CRR, a noticeable hardening in ITV attitudes has been reported - with the announcement, for example, that it will now charge penalties for money approved one day post the December Advance Booking Date.)

This overall attitude does much to explain the near universal support shown by the media agencies in their submissions to the OFT and Competition Commission for maintaining some form of CRR - and provides further justification for the latter's decision that "changes in circumstances have not sufficiently changed the competitive environment identified in the 2003 report, or operation and effect of the CRR remedy, to warrant ITV's release from the Undertakings".

3. The Adjudicator's Office

Although no referrals were reported during this period, members continue to support the role of the Adjudicator as an important incentive in ensuring meaningful negotiations between the parties and a deterrent to cavalier sales force behaviour.

I hope this is useful. Do let me know if you require any additional information.

Geoffrey Russell
Director for Media Affairs