

The Office of the Adjudicator (CRR) Periodic Report

October 2015

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 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 Office of Fair Trading (“OFT”), which has now merged with the Competition Commission (“CC”) to become the Competition and Markets Authority (“CMA”). **This is the Periodic Report for the period April - September 2015.** 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 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 (now CMA) 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 (CRR)

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 and Donovan Data Systems. 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,

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" section 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)

In August 2004 the Office formalised a Memorandum of Understanding (“MoU”) with ITV. This standardised a 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.

In November 2012 the Office, ITV and Ofcom agreed a new MoU. The new MoU has been created to update and refresh the original MoU, and to reflect revisions to the Undertakings.

The new MoU, like the original, facilitates 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 2014/15;
- reports on the trading balance by ITV region; and
- reports on the treatment of all bookings made after the ABD (advance booking deadline).

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; meetings 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 Director of TV Sales.

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

Since the last Annual Report of April 2015, and in addition to the regular meetings with senior ITV staff (as laid out in the (new) MoU), the Adjudicator has met with representatives of the UK's advertising community. These meetings are held 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 written to 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 has received no Notices of Adjudication since the last Annual Report in April 2015.

2.2 Informal guidance

The Office has received 4 guidance enquiries from advertisers/media agencies since the Annual Report in April 2015. This compares with no enquiries during the equivalent period last year (April-September 2014).

It is usual for relatively few guidance enquiries to be received between April and September as most negotiations between advertisers/media buyers and ITV tend to take place between October and March.

The Adjudicator believes that both ITV and advertisers/media buyers have good general awareness of their obligations and rights within the Undertakings. This appears to be borne out by the fact that there have been fewer guidance enquiries over the past couple of years.

When relevant the Office will post general guidance on to the Adjudicator website: <http://www.adjudicator-crr.org.uk/enquiries.htm>. Since the Annual Report in April 2015 no new guidance has been posted.

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.

As part of the new MoU, and in the interests of transparency, the Office has agreed to provide anonymised copies of individual guidance to ITV. In order to ensure that the identity of the enquiring party cannot be identified, these copies are appropriately redacted and are provided at any time up to six months after the initial enquiry. This system ensures that, in the event of a dispute, all parties (including ITV) are aware of any advice previously given by the Office on the issue in question.

3.0 Reporting on ITV's compliance

3.1 General considerations

Since the April 2015 Annual 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 efficient and satisfactory during this period.

3.3 CRR Offers

As required by Section 6 of The Undertakings, ITV will be sending CRR offers to those media buyers and advertisers who contract on an annual calendar year basis by 1 November 2015. ITV commits to informing the Office when these have been sent out.

4.0 Regulatory developments relating to the sale of TV advertising and other related matters

4.1 The European Commission consultation on the current Audio-visual Media Services Directive (AVMSD)

On 6 July 2015, the European Commission launched a consultation seeking views “on how to make Europe’s audio-visual landscape fit for purpose in the digital age”. The Commission was seeking views on the how well the current European regulatory framework, The Audio-visual Media Services Directive (AVMSD) was working and whether changes were required to improve it and reflect the changing media landscape.,

Within the Q&A that accompanied the consultation document the Commission stated,

“Why is feedback requested on commercial communications (advertising, sponsorship etc.)?”

Traditional and on-demand broadcasters have to follow EU rules related to the advertising of certain products (e.g. tobacco and alcohol) and advertising targeting children. Rules which limit advertising to 12 minutes per hour transmitted only apply to TV broadcasters.

The public consultation asks what is the impact of these rules and whether they should stay as they are or be changed in the future either by rendering them more flexible (e.g. on the number of interruptions due to advertising) or more stringent in certain cases, for example when it comes to advertising of alcohol or fatty food.”

The consultation closed on 30 September 2015.

4.2 Ofcom views on advertising minutage within its Third Review of Public Service Broadcasting published 2 July 2015

On 2 July 2015, Ofcom published its third review of public service TV broadcasting, entitled “Public Service Broadcasting in the Internet Age”. Among other things, Ofcom remarked on the current restrictions on advertising minutage on PSB channels, stating (para 6.15.2):

“We have previously concluded that given our existing legislative duties, the purpose of regulation in this area and the evidence gathered, we believe that there continues to be a strong case for UK-specific restrictions on advertising minutage on PSB channels, over and above the hourly limit set at a European level in the AVMS Directive. We remain open to reviewing this position if strong new evidence emerges that provides greater certainty that the outcome of any changes to the rules could materially benefit public service broadcasting.”

4.3 Gambling and payday loan TV ads

Since the April report, there have been developments relating to the sale of two specific categories of TV advertising.

On 20 August 2015, following a review of gambling advertising, the Industry Group for Responsible Gambling announced that gambling adverts with sign-up offers would be banned before 9pm on TV. This change becomes operational in February 2016, when the second edition of the Gambling Industry Code for Socially Responsible Advertising comes into force.

On 7 October 2015, the Broadcast Committee of Advertising Practice (BCAP) launched a consultation calling for views on whether payday loan TV advertisers should face scheduling restrictions. The consultation closes on 16 December 2015.

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

23rd October 2015



Robert Ditcham
Adjudicator CRR
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Dear Robert,

Thank you for your letter of 7th October requesting our comments for your next periodic report to Ofcom.

The recent period represents the 'quiet' season immediately before the annual trading round, so it is perhaps unsurprising that we have no specific comments to relay from our members.

We are however continuing to observe a blurring by all broadcasters of the line between spot and non-spot trades, which is in turn serving somewhat to obscure a once-clearer CRR picture with ITV.

ISBA is still of the view that intervention remains necessary, and will continue to be so as long as ITV remains the clear dominant force in the TV market.

Finally, we would like to take this opportunity to reiterate our continued commitment to the CRR remedy itself. Not only does it remain one of the most effective competition interventions ever, but as long as ITV plc throws such a long shadow across the market for commercial advertising airtime, it remains a necessary protection for ITV's business customers.

Please don't hesitate to contact me if you require further any comment or input.

Yours sincerely,

Mario Yiannacou
Media & Advertising manager

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

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2 November 2015

Dear Robert

Adjudicator's Report: April – September 2015

As requested this letter draws together feedback from a cross-section of IPA member agencies on the operation of the ITV Undertakings, the CRR mechanism and the Adjudicator's office for the above period.

As such it repeats the pattern of the IPA's previous submissions to your office since its inception in 2003/4.

1. Operation of Undertakings

As you will be aware, April-September is a quiet trading period for media agencies and no concerns have been reported regarding the operation of the undertakings.

2. How has CRR operated?

Given CRR has now been in the market-place for 11 years, all parties are thoroughly well versed on the constraints and opportunities available within the regulations.

According to playback from members, ITV Sales has generally behaved well across the period. Buyers are keen to underline that robust agency/ broadcaster discussion will still take place – and expect this as part of commercial negotiation – but with everyone knowing clearly what CRR will permit, the parties appear content with the current situation.

President
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Secretary
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3. Office of the Adjudicator

All members continue to value the presence of the Adjudicator.

Whilst none reported the need to raise substantive issues across the period, the possibility of referring matters to the Adjudicator continues to be highly pertinent in current market conditions.

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

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Nigel Gwilliam', written in a cursive style.

Nigel Gwilliam
Consultant Head of Media and Emerging Technology