

The Office of the Adjudicator Annual Report

April 2023

The following Report to Ofcom and the Competition and Markets Authority 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.

*The Office of the Adjudicator Limited
Registered in England No 5808371
Registered Office: Riverside House
2a Southwark Bridge Road
London SE1 9HA*

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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 subsequently merged with the Competition Commission (“CC”) to become the Competition and Markets Authority (“CMA”). **This is the Annual Report for the fiscal period up to the end of March 2023.** 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 ITV 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.

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

1.1.3.1 Background

Given the confidential nature of the information that the Office handles, security is a high priority. Access to Ofcom's offices at Riverside House 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.

1.1.4 Access to appropriate information systems

The Office has online access to all of the industry data it requires. 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 takes decisions on disputes based on evidence supplied by the parties supplemented by other information to which the Office has access. Decisions may 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 was 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 2022/23;
- 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 provides for 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; and the opportunity to hold 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 Managing Director of ITV Commercial.

1.2.4 Interim reports process

The Undertakings state that the Adjudicator shall bring to the attention of Ofcom and the OFT - now the Competition and Markets Authority ("CMA") - 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 CMA.

1.3 Relationships with key stakeholders

Since the last Annual Report of April 2022, the Adjudicator has maintained a dialogue with industry participants as well as contact with ITV.. The purpose of these contacts is 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

Since the last Annual Report in April 2022, the Office has received no Notices of Adjudication.

2.2 Informal guidance

The Office has received one guidance enquiry from advertisers/media agencies since the last Annual Report in April 2022. This compares with three enquiries during the previous corresponding period.

Disputes and guidance requests are, and always have been, *ad hoc* in their nature, timing and source. Various factors will affect the numbers of guidance enquiries that are brought in a period, due to the individual circumstance of each negotiation and the prevailing market dynamics at that time.

The low level of guidance enquiries reflects the good general awareness of ITV and Media agencies/advertisers of their obligations and rights within the Undertakings. Greater numbers of guidance enquiries have occurred historically during periods of changing market dynamics either specific to ITV (e.g. when changes are made to ITV's terms and conditions or sales policy), or during periods of wider market disruption or change.

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>. No new guidance has been published since the last Annual Report in April 2022.

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. This 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. In order to protect the identity of the enquiring party, these copies are appropriately redacted and are provided at any time up to six months after the initial enquiry.

3.0 Reporting on ITV's compliance

3.1 General considerations

Since the April 2022 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

Under section 6 of The Undertakings, ITV is obliged to send CRR offers to those media buyers and advertisers who contract on an annual calendar year basis by 1 November each year. The Adjudicator has received confirmation from ITV that CRR offers for annual 2023 contracts were sent.

3.4 The Competition & Markets Authority (CMA) grants consent to ITV's proposed change to its time length factors.

The CMA's decision can be found on the link below:

[Final decision \(publishing.service.gov.uk\)](https://publishing.service.gov.uk)

It is a requirement of the Undertakings that ITV obtains the consent of the CMA before changing its airtime sales system in a way that materially alters the basis on and the way in which they offer commercial airtime for sale.

ITV wished to change the time length factors that it uses for its advertising (which are different depending on the region) and to harmonise these factors across its regions into standardised time length factors across all its regions, using the same time length factors employed by Channel 4.

Following both a consultation on the proposal and the CMA's provisional decision, the CMA granted its consent on 4 October 2022.

The Office was engaged throughout the process with both ITV and the CMA, and as stated by the CMA in its assessment section the Office informed the CMA, it *"is supportive of ITV's proposal to streamline time length factors across their regions. We are confident that these marginal changes will not adversely affect advertisers, who at the same time continue to be protected by the CRR remedy on ITV1."*

4.0 Regulatory developments relating to the sale of TV advertising

4.1 HFSS advertising on TV - Update

As noted in our previous Annual Report, on 14 May 2022, the Government announced a delay to the implementation of its restrictions on multibuy deals and advertising on TV and online.

The restrictions banning high in fat, salt or sugar (HFSS) product adverts on TV before 9pm and paid-for adverts online will be paused for a year, meaning they come into force January 2024. This is due to a delay to the Health and Care Bill receiving Royal Assent, as well as a growing recognition that the industry needs more time to prepare.

4.2 Ofcom Consultation on Changes to TV Advertising Rules

On 15 July 2022 Ofcom opened a “call for evidence”, to determine whether the rules that restrict the amount of advertising shown on public service broadcasters (“PSBs”) should be changed.

A link to the consultation is below.

[We’re seeking views on changes to TV advertising rules - Ofcom](#)

On 19 April 2023, having reviewed responses to its “call for evidence”, Ofcom announced its preferred option with regard to changes to the TV advertising rules concerning PSBs and opened a formal consultation. The deadline for consultation responses is 31 May 2023.

When launching the consultation, Ofcom have explained that its “current view” is that:

“providing PSB channels with the same freedom in advertising minutage and scheduling as other commercial channels would not significantly affect the range of services available to viewers, or materially affect audiences’ perceptions of their quality. We also consider that our other regulatory tools – such as setting licence obligations – are an effective means of maintaining the high levels of quality that audiences expect from PSB services.

Allowing the PSB channels slightly greater flexibility in the scheduling of advertising may also strengthen their commercial position as they continue to manage their transition to digital-led organisations, and afford them greater opportunity to monetise their content.”

Ofcom are consulting on two options:

- "1. To bring PSB advertising rules fully into line with those for non-PSB channels.*
- 2. To bring PSB advertising rules into line with those for non-PSB channels, while retaining safeguards that limit the number of internal breaks allowed in programmes. **This is our preferred option**".*

Ofcom has explained that:

"Under both options, all PSB and non-PSB channels would be subject to the same limit of showing no more than an average of 12 minutes of television advertising and teleshopping spots per hour – of which no more than nine minutes may be television advertising. In each case, existing restrictions on the frequency of advertising in films, news and children's programmes would be kept in place.

Under the second option, the PSB channels would remain subject to stricter rules on the number of internal breaks permitted in programmes. This would mean, for example, that a half-hour programme on a PSB channel would still only be allowed one advertising break, while a half-hour programme on a non-PSB channel would continue to be allowed two breaks.

Subject to responses to our consultation, we may also consider maintaining the status quo."

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

5.1 Stakeholder feedback

In section 5.2 of this Report, ISBA and the IPA set out their opinions of the workings of the Undertakings.

5.2

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 ISBAs view of the operation of the Undertakings and the CRR Scheme



24th April 2023

Robert Ditcham
Adjudicator CRR
The Office of the Adjudicator (CRR)
Riverside House
2a Southwark Bridge Road
London SE1 9HA

Dear Robert,

Thank you for your letter requesting our comments for your 2023 periodic report to Ofcom.

Given our necessary ignorance of any confidential details which might have come before you, and consistent with our previous submissions, we have no specific issues to raise at this point.

ISBA's TV & Video group continue to keep TV trading developments high on their agenda and continue to engage with experts in this area. We have had no member enquiries regarding CRR. As the TV landscape evolves ISBA, on behalf of our members will continue to review advertisers needs and ensure that advertisers best interests are preserved.

ISBA believes that, although the market has changed hugely since 2003, the mechanism should remain, to protect advertisers from the pricing strength of ITV.

Finally with regards to the OFCOM consultation: Quantity and scheduling of television advertising on public service channels; currently are not of the view that removal of the stricter COSTA rules would have an adverse impact on the effectiveness of the CRR obligations.

Please do not hesitate to let me know if you require further any comment or input.

Yours sincerely,

Bob Carley
Head of Media
ISBA

5.2.2 IPAs view of the operation of the Undertakings and the CRR scheme.

The IPA has no additional comments to make since their last submission in our Annual Report in April 2022. A copy of the submission given at that time appears below.

Institute of Practitioners in Advertising 44 Belgrave Square T: +44 (0) 207 235 7020 Facebook
London DL: +44 (0)20 7201 8250 www.facebook.com/theIPA
SW1X 8QS E: nigel@ipa.co.uk Twitter
www.ipa.co.uk @The_IPA

Robert Ditcham

Ofcom
Riverside House
2a Southwark Bridge Road
London
SE1 9HA



13 April 2022

Dear Robert

Adjudicator's Report: October 2020 – March 2021

As requested, this letter draws together the views of a cross-section of IPA media agencies on the operation of the ITV Undertakings, the CRR mechanism and the Adjudicator's Office for the period from October 2020 to March 2021

The pattern of this letter follows that of recent submissions, which differ somewhat from that of the IPA's periodic reports submitted since the Office of the Adjudicator was set up in 2003/2004.

1. Operation of the Undertakings

With well over a decade of operation, all parties are well versed in the above provisions.

2. How has CRR operated?

Our members indicate ITV remains a satisfactory operator within the market and context of TV trading deals.

3. Office of the Adjudicator

The Adjudicator and his Office fulfil their functions extremely efficiently and promptly.

In terms of protecting advertisers from potentially unfair or discriminatory practices in the selling of television airtime, then CRR has operated successfully since its inception. Anecdotally, we believe there are very few referrals to the Office of the Adjudicator which would also indicate that as a remedy it has worked well.

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Much has been written about the growth of investment the advertising market has made into digital advertising channels and the growth of advertising expenditure into pure-play internet offerings like Google and Facebook - digital expenditure now accounts for c. 70% of the UK advertising market. And against this backdrop, there is the debate as to whether CRR, which has been in place since 2003, is still appropriate in 2022 under these very different market place conditions.

It is useful, however, to refer back to the thrust of the case for introducing the CRR remedy. This was centred around the unique properties that ITV had in reaching large audiences and enabling mass cover build over a very short period of time. Two very different arguments can be made around this in 2022.

1. That as competition for each advertising dollar has intensified since 2003, then there is more competition and that is enough to stop any unfair practices.
2. That as audiences have fragmented across a wider range of channels, then ITV's monopoly over large, concurrent audiences has increased.

It is worth noting that 89 of the 100 largest commercial programme audiences (89%) were delivered by ITV in 2021. The figures would be 93.2%, if you extend to the top 1000 programmes. This would tend to support the second hypothesis that ITV still unique in its ability to deliver fast cover build and that it is still extremely difficult to replace ITV on TV schedules.

Finally, we note that market circumstances have changed. Some of these changes also mean that CRR applies to a decreasing amount of ITV's spot advertising revenue as more and more spend migrates to Broadcaster Video On Demand (BVOD) which isn't covered by CRR legislation.

Any debate therefore needs a full representation of the facts to reach any coherent conclusion.

Please do not hesitate to contact me should you wish to discuss any of the above.

Yours sincerely



Nigel Gwilliam
Director of Media Affairs