

ITV plc

Review of the Contract Rights Renewal Undertakings

Summary of ITV's views on Possible Variations

1. Introduction

- 1.1 On 15 September 2009 the CC published its provisional decision as to changes of circumstance (Provisional Decision)¹ in connection with its review of the Contract Rights Renewal Undertakings (CRR). The Provisional Decision acknowledges that there have been substantial changes in the market since 2003 but concludes that they are not sufficient to justify the abolition of CRR. On the same day, the CC published for consultation a notice of possible variations to CRR (Notice of Variations).²
- 1.2 ITV strongly disagrees with the CC's provisional conclusion that the changes since 2003 are not sufficient to justify the abolition of CRR. In ITV's view the CC's provisional conclusion is based on a number of serious errors of fact and law and is at variance with the overwhelming weight of objectively verifiable evidence and data. Indeed, in ITV's view the shortcomings in the Provisional Decision are such as to undermine the basis for the CC's provisional conclusion. ITV considers that a fair and proper evaluation of the evidence shows incontrovertibly that it is appropriate to abolish CRR – and also that it would be inappropriate to maintain any other lesser constraint on ITV.
- 1.3 It follows that ITV does not consider that any of the possible variations put forward in the Notice of Variations is either necessary or appropriate. The comments in this paper should be read and understood accordingly and, in particular, as being made without prejudice to ITV's contention that the appropriate outcome to this review is the abolition of CRR in its entirety.

2. Possible variations

- 2.1 In its Notice of Variations the CC seeks views about two types of possible variation to CRR: (1) those that would take into account the decline in ITV1's market share and the increase in the ability of media buyers to run campaigns effectively without ITV1; and (2) those that would mitigate the unintended effects of CRR. ITV comments briefly on each of these in turn below.
- (a) Variations which take into account the decline in ITV1's market share and the ability of certain types of campaigns to be run effectively without ITV1***
- 2.2 The CC identifies two possible variations under this heading: (a) limiting the scope of CRR to address only ITV1's advantage in delivering large audiences; and (b) removing elements of CRR while maintaining protection of media buyers through a requirement on ITV to offer airtime on fair and reasonable terms.

¹ Review of ITV contract rights renewal undertakings—Provisional decision as to changes of circumstance, published by the Competition Commission on 15 September 2009

² Notice of possible variations to the undertakings, published by the Competition Commission on 15 September 2009.

(a)(1) limiting the scope of CRR to ITV1's large audiences

- 2.3 The CC suggests that this proposal might be achieved by separating the sale of ITV1 airtime into regulated and unregulated parts (where the regulated parts would relate to delivering large audiences). The CC notes a number of issues with this proposal including the need for separate contracts, the need to identify a proxy for "size of audience", the need for a transitional period and the risk of unintended effects.
- 2.4 ITV considers that the CC's concerns in this regard are well founded. ITV further points out that, unless ITV were radically to change its current trading model, such a regime would severely curtail the ability of ITV1 to optimise its inventory. Yet if ITV were to change its current trading model when other broadcasters retained their models, this would place ITV at an undue competitive disadvantage relative to other broadcasters.³

(a)(2) converting CRR into a requirement to offer fair and reasonable terms

- 2.5 The CC suggests that this proposal might be achieved by removing elements of the roll-over rights under CRR and replacing them with a requirement for ITV's dealings with its customers to be conducted on a fair and reasonable basis. The CC notes a number of issues with this proposal including the difficulty of establishing and consistently applying a fair and reasonable test, the loss of certainty in terms of outcomes for ITV customers and the likelihood of an increase in the number of disputes going to Adjudication. In view of these issues, the CC invited views on ways in which practical guidance might be established for assessing whether terms proposed by ITV are fair and reasonable.
- 2.6 ITV accepts that adoption of a "fair and reasonable regime" would result in a loss of certainty for customers of ITV1. However, ITV considers that such certainty is no longer required by its customers having regard to the changes in ITV1's position that have occurred since 2003. Moreover, such certainty has become a significant impediment to the proper functioning of the market. In particular, ITV1 customers derive undue (and unanticipated) benefits from the CRR regime which discourage them from engaging in meaningful negotiation with ITV. Thus the removal of this degree of certainty would deliver a better functioning market.
- 2.7 ITV accepts that a "fair and reasonable regime" would need to be supplemented by additional provisions if it were to avoid an undue number of Adjudications. ITV considers that it would be possible to devise appropriate provisions that would have such an effect.
- (a) Appropriate provisions might include commitments by ITV:
- to make a stand alone offer for ITV1 airtime;
 - not to require a customer to increase its SOB commitment to ITV1 unless there had been an increase in ITV1 SOCI;
 - to maintain the average contracted weighted discount on ITV1 at its current level;
 - not to change an advertiser's current discount on a discriminatory basis;
- and

³ In the same way that the CC found in 2003 that prohibiting ITV alone from entering into SOB deals would place ITV at an undue competitive disadvantage.

- to maintain access to ITV1 specials at their current levels and at current prices (subject to appropriate limitations, eg re content rights).
- (b) These commitments could be further elaborated by reference to factors that ITV would be obliged to take into account when making a fair and reasonable offer for ITV1. These might include:
 - the terms of the current contract of the agency/advertiser for ITV1 airtime;
 - changes in a range of metrics (such as SOCI, SOCV and VOCl) that reflect changes in ITV1's ability to deliver advertiser needs over the preceding year;
 - volume of spend by the agency/advertiser; and
 - the need to avoid contractual commitments that would lead to ITV1 being over-traded.

ITV would also take account of other factors where relevant to the circumstances of a particular advertiser/agency (eg the expected performance of ITV's upcoming programme schedule, or the acquisition or loss of content affecting ITV1's ability to deliver particular audiences targeted by the advertiser/agency).

- (c) A dispute as to whether ITV's offer is fair and reasonable would be referred to Ofcom under arrangements modelled on Ofcom's existing dispute resolution processes under the Communications Act⁴.

2.8 ITV considers that the inclusion of such provisions under a "fair and reasonable regime" should deliver sufficient clarity for ITV's customers and also avoid an undue number of Adjudications.

(b) Variations which mitigate the unintended effects of CRR

2.9 In considering these variations, a critical issue for ITV is the need to avoid a provision that creates the kind of dynamic inefficiencies and costs that CRR imposes on ITV's business today. In ITV's view, the CC's provisional conclusion fails to appreciate the scale and importance of these unintended effects of CRR and significantly underestimates the overall impact of them on ITV's business. In ITV's view, these effects are a sufficient reason in themselves to warrant the abolition of CRR.

2.10 The CC identifies three possible areas for changing CRR. ITV comments briefly on each of these in turn below.

(b)(1) Definition of ITV1 in CRR

2.11 The CC suggests that the definition of ITV1 should be amended to include ITV1+1 and ITV1HD.

2.12 If CRR is abolished (as ITV submits the evidence shows that it should be) the definition of ITV1 would not be an issue. However, if CRR were to remain, ITV is firmly of the view that the definition of ITV1 should be amended to include ITV1+1 and ITV1HD, as proposed by the CC. Had these ITV1 variants existed in 2003, the definition of ITV1 would have covered them at that time.

⁴ Or such other dispute resolution process as may be agreed in the course of this review by the CC, Ofcom and ITV.

(b)(2) Incentives for ITV to focus primarily on maximising ITV's SOCI

- 2.13 The CC suggests two ways in which the current unintended SOCI maximising consequences of CRR might be altered.
- (a) The first is to use an alternative measure of ITV1's market share in ARM. The CC notes that an alternative measure might introduce fresh unintended consequences and suffer from specification problems relative to SOCI. ITV considers that the CC's concerns in this regard are well founded.
 - (b) The second is to change the ARM formulation so that, if ITV1's SOCI were to fall, ITV's customers would be entitled to a lower automatic reduction in SOB commitment to ITV1 than under the present formulation – thereby reducing ITV's incentive to SOCI maximise. The CC notes various concerns about such a variation, including the difficulty of justifying objectively an alternative ARM formulation. ITV considers that the CC's concern in this regard is well founded.

(b)(3) The difficulties for ITV in reacting to changing demand

- 2.14 The CC invites views on any variations to CRR that might introduce more flexibility into the negotiation process between ITV and its customers.
- 2.15 Apart from adoption of a "fair and reasonable regime" (of the kind described above) ITV is not aware of a variation to CRR that would be likely to deliver greater flexibility in negotiations and an acceptable outcome to such negotiations.

+ + + + +