

Submission from ITV plc, 26 February 2010

Review of the Contract Rights Renewal Undertakings

Summary of ITV's views on the Provisional Decision on Remedy 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's Response to the Provisional Decision strongly disagreed with the CC's assessment that *"the competitive environment is still very similar to that identified in the CC's 2003 report"*. In ITV's view the CC's assessment and provisional conclusions lacked balance and objectivity, were based on biased and unreliable third party evidence and were at variance with the overwhelming weight of objective, verifiable data. The CC's assessment of the competitive environment is also at odds with Ofcom's market findings in the PSB review. So seriously did ITV regard the shortcomings in the CC's assessment, that ITV urged the CC to undertake a wholesale re-evaluation of the evidence, ITV being confident that this would support the case for total abolition of CRR. The CC has declined to do that, or to engage with ITV in any material way regarding the substantial shortcomings that ITV identified in the CC's document, despite a request to do so by the Main Board of ITV plc.
- 1.3 On 19 January 2010, the CC published its Provisional Decision on remedy variations (**Provisional Decision on Remedies**)³, which sets out the CC's provisional conclusions about possible variations to CRR, in the light of responses received to its Notice of Variations.

2. The Provisional Decision on Remedies

- 2.1 In the Provisional Decision on Remedies, the CC provisionally concluded that there should not be any change to CRR, save for a change to the definition of ITV1 to accommodate new channel variants like ITV1+1 and HD. In arriving at this conclusion, the CC rejected a proposal put forward in outline by ITV – called the Rules for the Protection of Advertisers (**RPA**). The CC rejected ITV's outline RPA proposal on the basis that it would not *"be able to remedy effectively the adverse effects arising from the merger"*⁴; and that CRR (as amended by the CC's proposed re-definition of ITV1) remains a proportionate remedy.

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.

³ Review of ITV Contract Rights Renewal Undertakings—Provisional decision on remedy variations, published by the CC on 19 January 2010.

⁴ Provisional Decision on Remedies, paragraph 1.9.

ITV1+1/HD

- 2.2 If CRR is to be retained (and ITV does not accept that it should be) ITV confirms its previously stated view that the proposed change to the definition of ITV1 to include +1 and HD is both appropriate and necessary.
- 2.3 The Provisional Decision on Remedies proposed a caveat to deal with regional differences between the various ITV1 variants. ITV does not fully understand the proposed caveat. However, ITV is concerned that it could have profound implications for the viability of its proposed +1 and HD channels. ITV assumes that such implications are not intended by the CC. ITV is confident that a proper understanding of the facts will demonstrate to the CC that the proposed caveat is unnecessary and inappropriate.

RPA

- 2.4 In its Provisional Decision on Remedies the CC concluded that RPA is not a viable alternative to CRR and should be rejected. ITV profoundly disagrees with this view and considers that it is fundamentally flawed, as is the reasoning that underlies it.
- 2.5 In considering RPA, the CC has misapplied the "proportionality test" in a number of respects.
- (a) The CC wrongly rejected RPA as an alternative on the ground that it would not provide the same level of protection to advertisers as CRR. That is a profound misapplication of the proportionality test. The CC should have assessed whether RPA provided the protection necessary in the changed market conditions of 2010, not whether it provided the same level of protection as CRR.
 - (b) The CC was wrong to have considered (as it did) that any material weakening of CRR would be unacceptable. Such an approach is not only at odds with the principle of proportionality but it is also inconsistent with the CC's expressly stated objective of seeking a more proportionate alternative to CRR to reflect the market changes since 2003, since such an alternative must, by definition, imply some weakening of the constraints of CRR.
 - (c) The CC wrongly considered only whether CRR was or was not proportionate. It failed to consider (as it should have done) whether CRR is the least distortionary remedy that would address the merger effects, not simply whether CRR costs less than the detriment that would arise absent the remedy.
 - (d) The methodology employed by the CC for assessing the cost to ITV of CRR and the proportionality of CRR as a continuing remedy is untenable. Indeed, the methodology is so deeply flawed that it is reasonable to infer that the CC employed it in order to achieve a pre-determined outcome – namely to enable it to find that CRR remains proportionate – rather than to make an objective assessment of the proportionality of CRR.
- 2.6 In addition, the CC wrongly rejected RPA on the grounds that it would fail to deliver certainty to advertisers. The CC's attachment to delivering certainty to advertisers is misconceived. First, it fails to take account of the fact that, not only did media buyers not enjoy any such "certainty" pre-merger, but also they would not do so in any competitive market. Secondly, the certainty arising due to CRR is one of its most serious shortcomings as a remedy. It has given rise to many of the unintended consequences and dynamic inefficiencies of CRR, delivered unwarranted "windfall

benefits" to media buyers and entrenched the competitive positions of agencies leading to muted competition between them. Thirdly, it ignores once again the changed market circumstances from 2003 when CRR was put in place. The CC should in fact be adopting the opposite approach to certainty. In the light of the changes since 2003, the CC should be looking for an alternative to CRR that delivers *less certainty* to advertisers than CRR and an alternative that is therefore more likely to deliver the original objectives of CRR – i.e. that would encourage flexible negotiations between ITV and its customers, thereby reducing the market distortions and dynamic inefficiencies created by CRR and re-invigorating the competition between agencies that has been muted by CRR.

- 2.7 The CC has also failed to adopt a fair and proper process for assessing RPA. In particular, the CC appears to have engaged with third parties about RPA whilst declining to engage with, or seek clarification from, ITV prior to publishing its Provisional Decision on Remedies. As a result, a number of the CC's concerns about ITV's original RPA proposal are based on misconceptions about the proposal or relate to minor issues that ITV is able to address. Had the CC engaged with ITV properly on the RPA proposals – engagement that ITV sought and the CC declined – these concerns could have been addressed before the CC published its Provisional Decision on Remedies.
- 2.8 In the weeks before publication of the CC's Provisional Decision on Remedies, ITV undertook considerable work to refine its RPA proposal to ensure that it would be workable in practice. ITV approached the CC with a view to discussing its refinements of the RPA proposal but the CC declined to further discuss RPA with ITV until its Provisional Decision on Remedies had been published.

Revised RPA proposal

- 2.9 In response to the Provisional Decision on Remedies, ITV has now submitted the outline of a revised RPA proposal to the CC. As with the original proposal, ITV has submitted its revised RPA proposal without prejudice to its contention that abolition of CRR in its entirety is the appropriate outcome to this review. ITV remains firmly of the view that the case for abolition of CRR is supported by the overwhelming weight of objectively verifiable data.

3. Conclusion

- 3.1 The CC acknowledges that ITV's market position today has declined since 2003. If CRR is not to be abolished in its entirety, as ITV considers it should be, ITV's revised RPA proposal should be adopted in place of CRR.
- 3.2 ITV's revised RPA proposal (RPA Mk2) is explained in more detail in a separate document which is available on the CC's website⁵.

⁵ Submission from ITV plc, 24 February 2010, Review of the Contract Rights Renewal Undertakings, ITV's revised RPA proposal at http://www.competition-commission.org.uk/inquiries/ref2009/itv/pdf/rpa_mk_2_for_publication.pdf.