



Airtime sales rules

Rules and guidance of ITV advertising sales

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Section 1

Introduction and background

1. On 7 October 2003 the ITC and Ofcom issued a joint consultation as to whether any specific ex ante rules are still required to protect the TV advertising sales market and if so the form that any new rules should take. In addition, on 30 October 2003 the ITC and Ofcom issued an update to that consultation document, informing the market that, due to requests to have maximum clarity as early as possible in this year's TV advertising deal season, the ITC and Ofcom would endeavour to issue our conclusions on this consultation early in December.

2. The ITC and Ofcom sought views as to whether or not it would be appropriate to continue to apply ex ante rules in relation to airtime sales, or whether to rely on ex post competition law. Views were sought in three specific areas:

Rules in relation to ITV's airtime sales

Rules in relation to different combinations of sales houses jointly selling airtime

Rules in relation to conditional selling and with-holding airtime.

3. Below we set out our conclusions on each of these issues. The decisions set out in this document take effect immediately.

Section 2

Ex ante rules in relation to ITV's airtime sales

4. The ITC and Ofcom sought views on the appropriateness of continuing to ban 'share for ITV deals', and whether any additional rules are needed in relation to ITV's airtime sales in order to protect the market more generally.

5. Most respondents felt that it would be appropriate to lift the prohibition on share for ITV deals, although a few stated that it should be retained in order to prevent Carlton and Granada from tying sales of the non-consolidated licensees into the merged Carlton/Granada product indefinitely.

6. Share for ITV deals were principally banned by the ITC as they were seen as a way for Carlton and Granada to tacitly collude in selling their airtime together. Since Carlton and Granada are to be allowed to sell their airtime together under a single sales house going forward, the rationale for maintaining the prohibition on share for ITV deals no longer exists to the extent that Carlton and Granada sell airtime on behalf of all ITV regions. However, the ITC and Ofcom would remind Carlton and Granada that any bundled ITV product sold by them would have to be sold in a sufficiently transparent manner to ensure that revenue apportionment between regional franchises was accurately reported for the purpose of calculating licence fees.

Conclusion: The prohibition on share for ITV deals is lifted

7. The Contracts Rights Renewal (CRR) remedy has been put in place to address any potential detriments to competition arising as a result of Carlton and Granada merging their sales operations. However, some respondents felt that additional ex ante rules should be applied to ITV in order to provide further safeguards going forward.

8. Some respondents felt that Carlton and Granada should be required to divest themselves of all other airtime sales products aside from ITV1, i.e. that they should not be allowed to sell airtime on behalf of ITV2, ITV News or any other Carlton/Granada owned digital channel. The ITC and Ofcom do not believe that such divestiture is appropriate for a number of reasons:

Following its lengthy and in-depth investigation into the potential anti-competitive effects of the Carlton/Granada merger the Competition Commission (CC) did not believe that such divestiture was necessary as they did not make it a requirement of the merger

The ITC and Ofcom believe that the CRR substantially breaks the leverage opportunities from ITV1 into the digital market. In particular, CRR provides a guarantee to all advertisers and media buyers that they can access ITV1 on fair and reasonable terms, with no obligation to purchase any ITV products other than ITV1

Better specification of conditional selling rules (see below) will further ensure that any remaining market power that ITV may have in relation to ITV1 is kept in check

Leveraging issues may be dealt with under Chapter II of the Competition Act.

9. Other respondents felt that Carlton and Granada should be under an obligation not to change the existing airtime sales system [1](#). This requirement is clearly important, and that is

why it is specifically covered under Carlton and Granada's undertakings to the Secretary of State. As such, the maintenance of the current airtime sales system is a statutory requirement on Carlton and Granada and, at this point in time, we do not believe that it requires a further ex ante rule. Nonetheless, the ITC and Ofcom will keep under review the need to underpin any aspects of the Carlton/Granada undertakings with licence conditions in the future.

Conclusion: The ITC and Ofcom do not believe it is appropriate to apply further specific ex ante to Carlton and Granada at this point in time.

Section 3

Joint selling of airtime

10. The ITC *Rules Regarding Advertising Sales Arrangements* (2001) set out a number of detailed rules as to how advertising time could be jointly sold by competitors. These rules prohibited the joint selling of airtime by Carlton and Granada, as well as the two London Channel 3 licensees from selling airtime together.

11. The *Rules* also set a limit of 5 per cent on national licensees, or small Channel 3 licensees, who wished to sell their airtime jointly with other national licensees. In addition, national licensees with a market share equivalent to GMTV or less could resell their airtime jointly with either of the two main Channel 3 airtime sales houses.

12. The ITC and Ofcom sought views as to whether or not these specific rules in relation to joint selling should be maintained, or whether it would be sufficient to rely on general competition law to determine if joint selling or any further consolidation of sales houses would be permissible.

13. Views on this issue were split. Some respondents felt that explicit ex ante rules should be maintained in order to provide certainty to the market on the issue of further consolidation. Other respondents stated that, given the uncertainty created by the Carlton/Granada merger and the introduction of the CRR, any ex ante rules introduced at this time were unlikely to be robust and indeed such rules could themselves provoke further consolidation. A number of respondents felt that Chapter I of the Competition Act provided sufficient protection in relation to joint selling.

14. The ITC and Ofcom have given this issue careful consideration and we believe that specific ex ante rules in relation to joint selling are no longer necessary. There are a number of reasons why we believe this to be the case.

15. The existing ITC *Rules* were put in place as a direct consequence of the last CC enquiry into the TV advertising market back in July 2000, where the CC found that competition between national sales houses was weak, and that ITV formed its own separate market segment. The CC's decision in October 2003 redefines the structure of the TV advertising market. Inherent in the CC's latest findings is an assumption that the TV advertising market exhibits a greater degree of substitutability between channels now than when they examined it in July 2000, and consequently competition is stronger. The ITC and Ofcom's regulation of this market should reflect the CC's findings. Given Ofcom's statutory duties to ensure that it does not maintain regulatory burdens that have become unnecessary, it would seem that, in light of the CC's view that substitutability between national sales houses (and hence competition) has increased, it is appropriate to remove the additional burden of ex ante rules in relation to joint selling.

16. Furthermore, joint selling between competitors can be dealt with appropriately under Chapter I of the Competition Act. When the ITC last updated its ex ante rules in May 2001, the Competition Act was a relatively new tool, with limited precedent in relation to its use. Given this lack of firm precedent, and the disparate, non-competitive structure of the TV advertising market at the time, it was prudent to ensure the TV advertising market was fully protected from anti-competitive behaviour by maintaining ex ante rules. In addition, of course, the ITC did not have concurrent powers under the Competition Act.

17. Two and a half years on and the Competition Act is well established. The CC found the TV advertising market to be a more competitive market and, from vesting, Ofcom will have

the ability to apply the Competition Act. As a result of all of these factors the ITC and Ofcom believe it is appropriate to remove explicit ex ante rules in relation to joint selling.

18. However, the ITC and Ofcom wish to make it clear that the removal of our ex ante rules does not mean that we are giving approval to joint selling or further consolidation in this market [2](#). Chapter I of the Competition Act provides a strong and effective remedy for preventing joint selling where it is anti-competitive.

19. Under the OFT's guidelines [3](#) it is clear that an appreciability test would be applied when assessing whether joint selling infringes the Chapter I prohibition. Although generally the OFT take the view that an agreement will not have an appreciable effect on competition if the parties' combined share of the relevant market is less than 25%, they also state that there will be circumstances in which this will not be the case.

20. Given the structure of the UK TV advertising sales market, the ITC and Ofcom believe that we would be likely to find that joint selling could still have an appreciable effect on competition even if the parties had a combined market share of less than 25% [4](#). And, although every case must be judged on its particular facts, following preliminary analysis we think it likely that the joint selling of advertising airtime by two or more of the larger sales houses could have an appreciable effect on competition. If this were the case, it would be considered to be an infringement of Chapter I. Whether such conduct could be exempted in a particular case would depend on the facts of the case and, in particular, whether the economic benefits of the conduct outweighed the adverse impact on competition in accordance with the conditions for exemption set out in Section 9 of the Competition Act.

21. Similarly, we would presume that if the merged Carlton and Granada were to enter into any further joint selling arrangements that this could also have an appreciable effect on competition.

22. If two or more sales houses wished to merge their sales houses or form a joint venture for the sale of their advertising any such proposal would be subject to the merger [5](#) control provisions under the Enterprise Act 2002. Under the Enterprise Act a qualifying merger would be prohibited if it were to lead to a substantial lessening of competition.

23. Therefore, reliance on general competition law does not mean that further consolidation in the TV advertising market is inevitable. Instead it means that the competition authorities (Ofcom, OFT or the CC as appropriate) would judge any future proposal in relation to joint selling on the merits of that proposal at the time it is presented.

24. It is for all parties who jointly sell airtime together to ensure that they are not in breach of the Competition Act.

Conclusion: All ex ante rules in relation to the joint selling of airtime are removed. All parties in this market must ensure that their sales arrangements comply with the Competition Act.

Section 4

Withholding airtime and conditional selling

25. The ITC and Ofcom also sought views as to whether ex ante rules should be retained in relation to conditional selling and withholding airtime in an attempt to increase prices, or whether such practices would be best dealt with under general competition law, i.e. the Chapter II prohibition. If such rules were to be maintained, the ITC and Ofcom sought views as to which licensees the rules should apply to.

26. Views on both these issues were mixed.

Conditional selling

27. 'Conditional selling' occurs when a broadcaster requires that an advertiser/buyer who wishes to purchase airtime on one channel buy another of the broadcaster's products as a pre-condition of the sale. In its 1996 Consolidated Statement Regarding Advertising Sales Arrangements the ITC confirmed that the practice known as 'conditional selling' was incompatible with licensees' obligation to refrain from practices that are prejudicial to fair and effective competition.

28. Most respondents felt that it was essential that ex ante rules in relation to conditional selling should be maintained in relation to ITV1 following a Carlton/Granada merger. The CC in its report on the Carlton/Granada merger expressly referred to the ITC's 1996 statement as the CC believed that it was an important rule in preventing Carlton/Granada from leveraging market power in relation to ITV1 into other, digital, channels such as ITV2. Views as to whether or not ex ante rules in relation to joint selling should be extended beyond Carlton and Granada were mixed, with broadcasters stating that such extension is unnecessary, and advertisers/ buyers stating that such rules must apply to all sales houses.

29. In consultation with advertisers/media buyers over the last few weeks it appears to the ITC and Ofcom that the practice of conditional selling has become wide-spread. Thus, although general substitutability between sales houses has increased, this is on the basis that the majority of these sales houses effectively conditionally sell their products, reducing choice and maintaining artificially high prices to advertisers/buyers overall. Regulations restricting the overall supply of advertising airtime helps to make this possible.

30. As such, although conditional selling by a dominant firm could be addressed under Chapter II of the Competition Act, the ITC and Ofcom believe that the practice of conditional selling by all sales houses, not just those that are dominant, is prejudicial to fair and effective competition. Therefore, continued ex ante rules prohibiting such conduct are justified, but the ITC and Ofcom will keep the need for this rule under review.

31. In prohibiting conditional selling, the ITC and Ofcom would like to make it clear that we are not prohibiting sales houses from bundling products. As such, to the extent that a sales house wishes to offer a price for Channel A, a price for Channel B and a price for a bundled product of Channel A and Channel B this would be acceptable providing that the pricing of any such bundled product was not in itself predatory and in breach of the Chapter II prohibition. However, the channel must not make the sale of Channel A conditional on the advertiser/buyer taking Channel B or vice versa.

Conclusion: Conditional selling of all channels will continue to be prohibited under ex ante rules. The ITC and Ofcom will keep the need for this rule under review.

Withholding airtime

32. The ITC regulates the amount of time that can be devoted to advertising by commercial channels in accordance with the relevant EC Directives [6](#). While specifying maximums, these rules do not specify a minimum number of minutes to be sold. However, the ITC has, in the past, stated that failure by the terrestrial broadcasters to sell advertising time to the maximum extent in an attempt to restrict supply and push up prices is likely to be considered to be prejudicial to fair and effective competition, and as such, would breach the conditions of their licence. This is not currently formalised as a licence condition but was specified in their licence tenders.

33. Again, respondents' views on this issue were mixed. Most respondents felt that this rule should continue to be applied to ITV1. Other analogue terrestrial broadcasters felt that they should no longer be covered by this restriction. Others felt that it should continue to apply to all terrestrial broadcasters. Advertisers and buyers generally felt that this rule should be extended to all channels.

34. Whether or not a particular channel would find it profitable to withhold supply of its airtime will depend on the elasticities in relation to its airtime. If the channel restricts supply, will this result in an increase in price and if so will that increase in price more than offset the fall in quantity such that overall revenues increase?

35. For most of the major channels supply is already restricted. As such, further restricting supply would be expected to increase prices to advertisers/ buyers. Whether or not the increase in price increases total revenue will depend on the price elasticity of demand for that product. If demand for a particular sales house's product is inelastic, then any increase in price would be expected to lead to an increase in total revenues overall, making the withholding of airtime a profitable strategy. If demand is not inelastic, then the sales house will always sell the maximum time available to it. The greater the substitutability for the product, the more elastic its demand will be.

36. It is difficult to assess these price elasticities of demand in advance. Our view is that the major terrestrial analogue channels, with the tightest restrictions on the amounts of airtime they can sell and the highest levels of demand, have the potential to withhold airtime and increase profits. For this reason we consider that a rule prohibiting the withholding of airtime should continue to apply to them.

37. There remains a question as to whether the rule should also apply to digital channels. None of these channels in themselves have a sufficiently large market share to merit the application of the rule. As such it is not proposed to apply it to any other channel.

38. However, there is an argument that the rule should apply to the channels sold by Sky, as collectively these channels have a significant share of the advertising market. We do not propose to do so: it would be an extension of regulation, without there being a strong case that there is a problem; and it would have a material impact on the way that these channels did business, for example by requiring them to interrupt the scheduling of movies and sports with advertisements. But we believe the matter should be kept under review.

Conclusions: The ITC and Ofcom will prohibit the withholding of airtime by analogue terrestrial broadcasters, on the grounds that it would be prejudicial to fair and effective competition and will keep the application of the rule to other channels under review.

Footnotes

1. For example by changing Carlton or Granada's current loading factors or reducing the number of regions they sell.
2. Actual consolidation (i.e. a merger) of sales houses would be considered by the OFT under the Enterprise Act. The Enterprise Act 2002 provides that any mergers meeting the 'turnover test' or the 'share of supply test' are investigated by the OFT and the Competition Commission where there is a significant prospect that the merger may be expected to lessen competition substantially.
3. See OFT Guideline The Chapter I Prohibition (OFT 401, March 1999)
4. Joint selling could also be considered, in certain circumstances, to be a form of price fixing, and as such an examination of the 'object' or intent behind any such agreement would also be important.
5. The Enterprise Act 2002 applies a two stage test to establish whether transactions by which two or more enterprises cease to be distinct are subject to UK merger control. The turnover test is met if the target company has a UK turnover exceeding £70m and the share of supply test is met if the merging parties will together supply at least 25 per cent of goods or services of a particular description either in the UK or in a substantial part of it (OFT, Overview of the Enterprise Act, OFT 518, June 2003).
6. For Channels 3, 4 and 5 a maximum of 168 minutes a day is allowed, with an average of 7 minutes an hour overall and 8 minutes during peak hours. There is a maximum of 12 minutes allowed in any one clock hour.

Annex 1

Ofcom's consultation principles

Ofcom has committed to meeting the seven tests for consultations set out below:

1. Hold discussions with stakeholders before issuing a major consultation document – so that Ofcom's thinking is subject to an early sense-test. If this is not possible, an open meeting to explain the proposals will be held soon after publication.
2. Be clear about who is being consulted, why, on what questions and for how long.
3. Make the document as simple and concise as possible – with a summary of no more than two pages - and make it easy to respond to. This may involve issuing a shorter version aimed at hard-to-reach groups, like SMEs.
4. Allow 10 weeks for responses, other than on dispute resolution.
5. Analyse responses with care and an open mind. This involves giving reasons for subsequent decisions, and an account of the views expressed.
6. Monitor and evaluate consultations, and designate a consultation champion – an evangelist within Ofcom for better consultation and reach out, and a contact point for comments on our process.
7. Explain why Ofcom is departing from any of these tests if it has to – for example, because of urgency or confidentiality. If a shorter period is required, Ofcom will draw this to the attention of stakeholders, as a red flag item.

Annex 2

The ITC and Ofcom's rules in relation to Advertising Sales Arrangements

This set of rules replaces the ITC's Rules Regarding Advertising Sales Arrangements (2001) and its Consolidated Statement Regarding Advertising Sales Arrangements (1996). These rules take effect from 1 December 2003.

1. Joint selling by sales houses will be considered under Chapter I of the Competition Act. It is for all licensees to ensure that they are compliant with the Competition Act.
2. Conditional selling of all channels will continue to be prohibited under ex ante rules. However, bundling of channels will be permitted to the extent this does not breach Chapter II of the Competition Act. The ITC and Ofcom will keep the need for this rule under review.
3. Withholding of advertising airtime by analogue terrestrial channels will be prohibited. The ITC and Ofcom will keep under review the need to extend this rule to digital channels.
4. The ITC and Ofcom will keep under review the need to underpin any aspects of the Carlton/Granada merger undertakings with licence conditions in the future.