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# The Office of the Adjudicator Periodic Report

**April 2004**

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 CRRA Scheme and CRRA Rules together with any recommendations, his views about the performance of Carlton and Granada 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.

# Contents

<b>Section</b>		<b>Page</b>
	Management Summary	3
1	Statutory Framework	7
2	The Office of The Adjudicator	8
3	Determinations in relation to the adjudication of disputes	10
4	ITV PLC's compliance with the undertakings	12
5	The operation of the undertakings	15
6	Views of the IPA and ISBA	17

# Management Summary

## Introduction of the Undertakings

The introduction of the undertakings to the television advertising market came at the end of 2003, when the vast majority of contracts were due to be re-negotiated with ITV plc<sup>1</sup>. This caused a delay to the negotiation season as ITV plc, Advertisers and Media Agencies had to familiarise themselves with the undertakings and come to terms with the impact and effect that the Contracts Rights Renewal (CRR) Remedy<sup>2</sup> would have on each individual deal. However, the Adjudicator considers that, once that process was completed, the undertakings were generally well understood and well implemented.

Nonetheless, it is important to remember that the 2004 deal season was a somewhat artificial negotiation period, in that the undertakings had only just come into force. The effectiveness of this remedy will not be truly evident until the 2005 negotiations have been completed. Now that ITV plc has completed its calendar year contracts with Advertisers and Media Agencies, it is important that it continues to comply with the undertakings in its day to day trading throughout the year. It is also imperative that ITV plc abides by the deadlines set out in the undertakings, and delivers CRR offers to Advertisers and Media Agencies two months prior to a contract expiring to enable Agencies/Advertisers to have sufficient time to fully assess their options.

## Adjudicator's Initial Objectives

In the first few months of the operation of the CRR Remedy, the Adjudicator set himself the following initial objectives.

- To raise awareness and educate all parties in relation to the undertakings and the CRR Remedy.
- To be easily accessible to all Advertisers and Media Agencies, to listen to their views, and to inform them of the extent of the Office's powers and of the adjudication process.
- To gather and organise relevant information from ITV plc, including TV contracts and Trading Balance<sup>3</sup> information, in order to allow the Adjudicator to make informed decisions in relation to disputes.
- To recruit a team with the necessary skills to run the Office effectively.

## Disputes

The Office handled three disputes in the first quarter of 2004. In light of the considerable number of contracts with ITV plc that were due for renewal in this period, and the fact that

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<sup>1</sup> Unless otherwise stated, references to ITV plc should also be taken to refer to Carlton Communications Plc and Granada Plc, where the reference is to a period before the merger was completed.

<sup>2</sup> The CRR was the remedy put in place as a pre-condition of the Carlton/ Granada merger.

<sup>3</sup> The Trading Balance is the device ITV uses to monitor its airtime 'inventory'. The bottom line will reflect whether ITV has under-sold or over-sold their inventory. Since one of the key functions of the Office of the Adjudicator is to assess whether or not ITV plc is materially overtraded a full and detailed understanding of ITV's inventory is necessary.

the negotiations were the first to be carried out after the introduction of the CRR Remedy, the Adjudicator considers that three disputes was not in any way an excessive number.

The dispute process as set out in the undertakings was adhered to by all parties, which included maintaining the confidentiality requirements stipulated by the Adjudicator. In order to maintain fluidity in the market, decisions were taken swiftly: in one case, the determination was delivered only five days after receipt of the Notice of Adjudication<sup>4</sup>. All three determinations were in favour of the complainant<sup>5</sup>. The decisions were based on the individual merits of each case that was presented to the Adjudicator.

The Office also handled a number of Guidance Enquiries, where issues regarding the interpretation of the undertakings were raised. In each instance, the party that made the enquiry was directed to the appropriate sections of the undertakings for clarification. To the extent that the vast majority Guidance Enquiries did not result in a formal dispute being submitted to the office it would appear that ITV plc and Media Agencies/ Advertisers were able to reach mutual agreement.

### **ITV PLC Compliance**

On the whole, the Adjudicator considers that ITV plc's compliance with the undertakings has been good. In particular, ITV plc was flexible in its extension of the CRR deadline allowing all parties some additional time to understand the undertakings. In addition, ITV was willing to continue to negotiate with Advertisers and Media Agencies who had not finalised terms even beyond this date.

Nonetheless, a number of substantive issues relating to ITV plc's compliance have been raised informally by participants in the industry, in particular in relation to:

- Making fair and reasonable offers on ITV1 conditional on accepting a position on ITV2
- Advertisers switching between Media Agencies
- Methodology for calculating revised share of broadcast (SOB<sup>6</sup>) commitments under the CRR Audience Ratchet Mechanism ("ARM")<sup>7</sup>

To date none of these issues has been brought as a formal dispute to the Adjudicator. However, to the extent that any party were to raise these issues as a formal dispute the Adjudicator would be able to adjudicate on them.

The undertakings, state that the Adjudicator shall bring to Ofcom's and the Office of Fair Trading's (OFT) immediate attention any matter that gives rise to a reasonable suspicion on his part that ITV plc is not complying with the undertakings. If such a matter arises the

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<sup>4</sup> In order to formally bring a dispute to the Adjudicator, a Notice of Adjudication must be completed by the Advertiser or Media Agency.

<sup>5</sup> It is worth noting that only Advertisers or Media Agencies can bring a dispute to the Adjudicator – ITV plc may not.

<sup>6</sup> Share of Broadcast is the proportion of a Media Agency/ Advertiser's total TV advertising spend that it has committed, as part of its contract, to a particular channel or sales house in return for a given discount. It may be specified by reference to any one or more of the following shares: (i) total share on a national basis; (ii) share for a particular region or regions; (iii) share for a particular demographic audience; or (iv) share for a particular time period or periods.

<sup>7</sup> ARM ensures that a share of broadcast commitment to ITV plc automatically moves in line with any movement in ITV plc's share of commercial impacts in the market.

Adjudicator can submit a 'Process and Interim Report' to Ofcom and the OFT. One such report was sent to Ofcom and the OFT in the first quarter of 2004.

In terms of the provision of information and documents to the Adjudicator, ITV plc initially cooperated fully with the Adjudicator, delivering information to the Office and meeting deadlines as requested. For example, both ITV plc companies delivered sales contracts for the years 2001 to 2003 within the deadlines set. This involved a considerable amount of information gathering by ITV plc and its efforts were appreciated by the Adjudicator.

More recently, however, ITV plc's performance in complying with requests for information and documents has been less consistent. The Adjudicator and ITV plc are in the process of agreeing a standardised process which will be used to ensure that the exchange of information fully meets the needs of the Office, in terms of detail and timeliness, going forward. The Adjudicator is hopeful that this will assist ITV plc in ensuring full compliance over the next quarter.

### **The Operation of the Undertakings**

The Adjudicator is of the opinion that the CRR Remedy and the provisions of the undertakings have generally been well understood and well implemented, in the sense that the undertakings were relied on as a reference point by ITV plc, Media Agencies and Advertisers during the contract negotiation season.

However, there are undoubtedly certain provisions in the undertakings that are open to interpretation, and particularly those clauses containing the word "material" or the phrase "fair and reasonable". ITV plc has its own interpretation of those provisions. The Adjudicator considers that Media Agencies and Advertisers should form and argue their own conclusions as to the meaning of those provisions, which may differ from ITV plc's conclusions, and be prepared to challenge ITV plc where there is doubt or disagreement. Ultimately, in the event of a dispute, the Adjudicator will provide his interpretation of "material" and "fair and reasonable" within the context of the specific dispute that he has been asked to adjudicate on.

Where Media Agencies had previously held umbrella agency contracts, there was a fairly even split between those that accepted CRR, those that negotiated a contract variation, and those that negotiated a new contract. The majority of line by line Advertisers accepted CRR, although some negotiated a new contract. The latter occurred more frequently when there had been a change in Media Agency.

### **Views of participants in the industry**

The Adjudicator wrote to ISBA, the IPA and other broadcasters to seek their views on the operation of the undertakings and the CRRA Scheme.

Most parties thought that the CRR system has run smoothly and that ITV plc has generally complied with the undertakings and behaved in a fair and reasonable fashion.

However, there were also areas of concern about ITV plc's behaviour that were consistently raised. The most prominent of these related to:

- ITV plc's leverage of ITV2 as the 'deal breaker' when a Media Agency/ Advertiser sought a contract variation or a new contract
- A rigid approach to price and SoB where Advertisers were switching between Media Agencies.

- Although, ITV is complying with the expressed requirements of the undertakings, concerns were raised about meeting the ‘spirit of the agreement’.

These views are set out in section 6 of the report where the parties agreed that their views could be made public.

### **Office Objectives in the 2nd Quarter**

The Office of the Adjudicator will continue to carry out its duties as stipulated in the CRRA Scheme and CRRA Rules.

In particular, a key objective for the Office in the second quarter of the year is to increase its dialogue with participants in the industry. The Office is looking to arrange a number of individual meetings with key Advertisers, London Media Agencies and Regional Media Agencies to discuss the undertakings and the role of the Adjudicator, and to listen to their viewpoints.

The Office is also looking to continue to develop its dialogue with all UK broadcasters in order to discuss their view of the operation of the undertakings and the evolution of the advertising airtime sales market.

## Section 1

# Statutory Framework

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 Secretary of State as a condition of approval of the agreed merger of those broadcasters to form ITV plc. These undertakings required the appointment of an Adjudicator to adjudicate on any dispute between ITV plc 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 OFT<sup>8</sup>. This is the first of these Periodic Reports.

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;
- the Adjudicator’s opinion about the evolution of the advertising airtime sales market;
- 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 adequately on each of these areas. Confidential information provided to Ofcom and the OFT has been redacted from this report.

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<sup>8</sup> One of these Periodic Reports will be designated the Adjudicator’s Annual Report

## Section 2

# The Office of the Adjudicator

## 2.1 Location

The Office of the Adjudicator is located on the fifth floor of Ofcom's Riverside House building. The Office can be contacted at:

Riverside House  
2a Southwark Bridge Road  
London  
SE1 9HA

Telephone number: 0207 783 4590

## 2.2 Security

Given the confidential nature of the information that the Adjudicator's Office handles, security is a high priority. As such, we have put in place a number of procedures to ensure that confidential information is fully protected:

- Access to Riverside House can be gained only with the use of security cards.
- 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 of the Adjudicator have access to these safes.
- The Office operates a clear desk policy.
- The Office has a policy that no confidential documents should leave the building.

## 2.3 Staffing

The Adjudicator took up office in December 2003. Initially, the Office seconded a senior economist from Price Waterhouse Coopers to help to set up databases and assist in organising and analysing information relating to the UK television advertising market. However, a permanent team has now been put in place. In January 2004, Asha Pankhania, an Economics graduate from the University of Birmingham, was recruited as a Research Analyst. In March 2004, Gayle Noah, a graduate with seven years media buying experience, joined from the Media Agency Mindshare. Julian Gregory, a barrister from Monckton Chambers specialising in Competition Law, has been providing legal advice to the Office on a part-time basis since March 2004.

## 2.4 Website

The Office has a dedicated area on the Ofcom website, although the Office plans to develop its own dedicated website in the next quarter. All documentation related to the undertakings and the Office of the Adjudicator can be found on this site, including a copy of the undertakings, a "Guide to The CRR Remedy", and the Process for Disputes, and Dispute Forms. The website is:

[http://www.ofcom.org.uk/codes\\_guidelines/broadcasting/tv/itv\\_merger\\_airtime\\_sales\\_rules/ff\\_adjudicator/](http://www.ofcom.org.uk/codes_guidelines/broadcasting/tv/itv_merger_airtime_sales_rules/ff_adjudicator/)

## **2.5 Process for 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” document on the Adjudicator’s area of the Ofcom website explains key areas 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). Prior to submitting a formal dispute, the Adjudicator recommends that potential complainants read this guidance as it will help them in formulating their case.

## **2.6 The Notice of Adjudication**

The Notice of Adjudication is a standardised form 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 issue that the Advertiser or Media Buyer has with the new offer.

ITV plc must also be sent a copy of this Notice of Adjudication. If the Adjudicator decides to act on the dispute, ITV plc must send a Notice of Reply setting out its response to the Notice of Adjudication.

## **2.7 Dispute Decisions**

The Office took the decision that it would give a detailed explanation for its decisions. Any confidential information that was 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 historical data, prevailing market conditions, current contracts and other contracts in the market. The decision by the Office is final and binding on ITV plc.

## **2.8 Processes with ITV PLC**

The Office has set up a number of formal processes with ITV plc over the past month to ensure it receives sufficient information.

The Office of the Adjudicator receives a monthly Trading Balance breakdown by region. This includes Trade Balances for past, present and future months. The Office meets fortnightly with ITV plc to discuss the Trading Balance. ITV plc also supplies the Office each week with a top-line deal update. Deal contracts are supplied to the Adjudicator once they are finalised. ITV plc has agreed with the Office that they will deliver presentations detailing their negotiation objectives, as and when required by the Office.

## **2.9 Access to Information**

The Office has online access to all of the industry data it requires, including data supplied by BARB, Donovan Data Systems and Nielsen. In addition, the Office has developed its own systems and processes for analysing key issues.

### Section 3

## Determinants in relation to the Adjudication of Disputes

### 3.1 Formal Disputes

The Office has received three Notices of Adjudication to date in relation to disputes between Media Agencies / Advertisers and ITV plc. The Office acted on all of these disputes. All disputes were submitted by Media Agencies; none were submitted by Advertisers. In all three cases the Office found in favour of the Media Agency, determining that ITV plc had not offered fair and reasonable terms.

Two of the disputes related to policy on day to day trading. The first was with reference to ITV plc's policy on late approvals<sup>9</sup>; the other on the price offered for a 'burst'<sup>10</sup> campaign.

The third dispute was in regard to the interpretation of the CRR remedy on an annual contract, where historically there had been a commitment to deliver both a guaranteed share and a minimum expenditure to Carlton and Granada.

The decisions taken by the Adjudicator were based on the individual merits of each case. All the disputes were resolved after a decision had been made by the Adjudicator, as none were referred back to the Office.

As far as we are aware, all parties abided by the confidentiality agreement stipulated in the Dispute Decision Notice.

The Office of the Adjudicator has the power to award costs in certain circumstances. To date, none of the parties were awarded costs in the disputes.

### 3.2 Guidance Enquiries

A number of enquiries were brought to the Office by Media Agencies. No enquiries were raised by Advertisers. The Office handled these enquiries by providing guidance to the Media Agencies by referring them to the relevant sections of the undertakings. Although some of these enquiries were initially flagged as potential disputes, which the Adjudicator could have adjudicated on had they been brought formally, it is to ITV plc's credit that none of these cases actually materialised as Notices of Adjudication. The issues raised were in relation to the following:

- Share and pricing on ITV plc when Advertisers switched their account to a new Media Agency;
- The methodology behind the calculation of the ARM mechanism. This refers to the mechanism that allows Advertisers/ Media Agencies the opportunity to reduce their share of broadcast revenue commitment to ITV plc in line with any loss of share in ITV plc's commercial impacts;
- The extent to which ITV plc sought to link the purchase of advertising time on ITV1 with the purchase of advertising time on ITV2 and other ITV plc satellite channels;

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<sup>9</sup> Airtime booked after the advanced booking deadline set by ITV plc

<sup>10</sup> A campaign which is broadcasted for a limited period of time e.g. four weeks

- Taking a 'Holiday' from ITV plc. This refers to those Advertisers which have a protected contract with ITV plc, but do not want to take up their CRR offer immediately. If they choose not to advertise on ITV plc for a period of time, they are entitled to return to ITV plc as a 'lapsed' Advertiser at a later date;
- The ability to exercise a Volume Ratchet<sup>11</sup> clause rather than ARM in calculating CRR;
- The ability to CRR 'short-term' contracts (i.e. with a duration of less than one year);
- Contract Variation<sup>12</sup> through adjustment of the regional shares into ITV plc

While the Office cannot advise on individual contracts and negotiations, the Office remains available to provide guidance on the issues mentioned above and other issues covered by the CRR Remedy.

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<sup>11</sup> Whereby an increase in expenditure by an Advertiser/ Media Agency on a particular channel/ sales house results in an increase in discount

<sup>12</sup> A variation to an existing protected contract

## Section 4

# ITV PLC's Compliance with the Undertakings

## 4.1 The Provision of Information

ITV plc has set up a compliance team with one key contact responsible for handling requests. ITV plc has generally followed the procedures set out in the undertakings in relation to disputes, and has adhered to the deadlines specified.

Outside the specific context of disputes, ITV plc has provided or agreed to provide several different categories of relevant information and documentation to facilitate swift decision making in the event of a dispute. In December 2003 and January 2004, Carlton and Granada provided the Adjudicator with:

- copies of sales contracts for the years 2001 to 2003
- an initial presentation on the mechanics of their Trading Balances

Additionally, ITV plc provides the Adjudicator with a monthly report on the past, present and future state of the Trading Balance by ITV plc region, and has agreed to provide the Adjudicator with a copy of any written Sales Policies. This position was reached in an initial period during which ITV plc's cooperation with the Adjudicator's requests for information and documentation was excellent.

More recently, however, ITV plc's performance in complying with requests for information and documents has been less consistent. In particular, the Office has made a number of requests to ITV plc recently which are still outstanding. The Adjudicator and ITV plc are in the process of agreeing a standardised process which will be used to ensure that the exchange of information fully meets the needs of the Office, in terms of detail and timeliness, going forward. The Adjudicator is hopeful that this will assist ITV plc in ensuring full compliance over the next quarter.

The Adjudicator will determine a dispute by reference to all of the information available to him at the time that the dispute falls to be determined. Paragraph 15 of the CRR Rules provides that if, without showing sufficient cause, any party has failed to provide information or documents requested by the Adjudicator, the Adjudicator may, among other things, draw such adverse inferences from that failure to comply as may, in the Adjudicator's opinion, be justified.

## 4.2 Understanding and application of the Undertakings

ITV plc's agreement to defer the deadline for acceptance of the CRR remedy greatly assisted the successful introduction of the undertakings in their first year of operation. This allowed time for Media Agencies/ Advertisers to consider and evaluate all their options as to whether they should renew their current protected contract or negotiate a new protected contract.

ITV plc staff also appear to have made a significant effort to familiarise themselves with the undertakings, and have generally been aware of the significance of the undertakings during the negotiation season.

Additionally, although Media Agencies raised a considerable number of Guidance Enquiries with the Adjudicator during the negotiation season, only three disputes materialised. It would

therefore appear that, in many cases, ITV plc managed to avoid a dispute by reaching agreement with the Media Agency concerned.

### **4.3 Interpretation of the Undertakings**

A number of issues relating to ITV plc's interpretation of the undertakings were brought to the attention of the Adjudicator. Many of these are detailed in section 3.2 under 'Guidance Enquiries'. The Adjudicator considers that it is important for Media Agencies and Advertisers to be well versed on the undertakings and be in a position to challenge ITV plc's interpretations and policies where there is doubt or disagreement. This would appear to be the case, in particular, in relation to the three issues set out in the following sections.

#### **4.3.1 Making Fair and Reasonable Offers on ITV1 Conditional on Accepting a Position on ITV2**

Several parties have raised with the Adjudicator the extent to which ITV plc has attempted to link the purchase of advertising time on ITV1 with the purchase of advertising time on ITV2 (including the IPA, whose views are set out in section 6).

In particular, it has been suggested that, when a Media Agency has sought to vary a contract or negotiate a new contract, ITV plc has often presented an increased investment on ITV2 as the solution to reaching a new agreement.

The Undertakings clearly stipulate that ITV are obliged to offer fair and reasonable terms in relation to ITV1 to Media Agencies and Advertisers. If a Media Agency or Advertiser considers that the terms on which it is being offered airtime on ITV1 (which could include any terms requiring it also to purchase airtime on ITV2) are not fair and reasonable, it is free to challenge ITV plc.

Ofcom also has rules specifically prohibiting conditional selling. These can be found on Ofcom's website at:

[http://www.ofcom.org.uk/codes\\_guidelines/broadcasting/tv/itv\\_merger\\_airtime\\_sales\\_rules/uk\\_airtime\\_sales\\_rules/tech\\_details](http://www.ofcom.org.uk/codes_guidelines/broadcasting/tv/itv_merger_airtime_sales_rules/uk_airtime_sales_rules/tech_details)

If, in the course of carrying out his functions, the Adjudicator forms a reasonable suspicion that ITV plc is making offers on ITV1 conditional on also agreeing terms on ITV2, he will report this issue to Ofcom who will assess whether it requires further investigation.

#### **4.3.2 Advertisers Switching Between Media Agencies (Clause 10 (b))**

In some instances where Advertisers switched Media Agencies and that Media Agency did not have specific provisions in its contracts with both Carlton and Granada to allow the new business to be automatically incorporated into its Media Agency Deal, the Office was contacted with a Guidance Enquiry.

Media Agencies reported that ITV plc often advised them on **its policy** on business moving between Media Agencies. This policy was generally reported as being that, unless the Media Agency's contract specifically stipulated how new business should be incorporated, business could only move automatically into a Media Agency deal which had a higher Share of Broadcast (SoB) commitment to ITV plc. If the business was moving to a Media Agency Deal that had lower SoB to ITV plc, then ITV plc would only be prepared to offer terms for that Advertiser either outside of the new Media Agency's umbrella deal or within an amended Media Agency deal. A rigorous application of such a policy, where ITV plc could only

increase its SoB whenever Advertisers switched between Media Agencies would, by default, stop any increase in share to the other broadcasters.

This issue raises the question of the correct interpretation of the word “material” in clause 10(b) of the undertakings. That word is clearly open to different interpretations. ITV plc’s policy on that clause reflects its own interpretation. However, Media Agencies and Advertisers are fully entitled to form their own interpretations, which may differ from ITV plc’s. They should be aware that ultimately, in the event of a dispute, the Adjudicator will provide his interpretation of “material” within the context of the specific dispute that he has been asked to adjudicate on.

The Adjudicator will stress in forthcoming meetings with Media Agencies and Advertisers that it is their right to challenge ITV plc’s interpretations and policies on this issue, and that they are not obliged simply to accept ITV plc’s view on what constitutes a “material” change, whether in relation to a loss of SoB to ITV plc or to an overtrade position on its Trading Balance.

#### **4.3.3 CRR calculations**

Annex 1 of the undertakings sets out the methodology for calculating revised SOB commitments under the CRR ARM mechanism. Where ITV plc presents revised SOB commitments based on the CRR Ratchet, it is important that Media Agencies and Advertisers check the calculations to ensure that the methodology set out in Annex 1 has been properly applied.

The IPA has noted that, apart from in a few of cases, Media Agencies and ITV plc are using a simplified version of the CRR ARM calculation. While Media Agencies are, of course, free to negotiate SOB commitments which differ from those resulting from the ARM calculation, the Adjudicator considers that it is advisable for the Media Agencies nonetheless to be aware of what they would be entitled to under a correct application of the Annex 1 methodology, so that they are in a position properly to weigh up the advantages and disadvantages of negotiating a different level of commitment.

#### **4.3.4 Summary**

In summary, it is the Adjudicator’s view that ITV has sought opportunities to gain commercial advantage through its own interpretation of the undertakings. However, this is to be expected from any commercially orientated organisation. Advertisers and Media Agencies must realise that it is in their right to form their own interpretations of the undertakings, and to challenge ITV interpretations where there is doubt or disagreement.

## Section 5

# The Operation of the Undertakings

## 5.1 The Undertakings

The Adjudicator is of the opinion that the CRR Remedy and the provisions of the undertakings have generally been well understood and well implemented, in the sense that the undertakings were relied on as a reference point by ITV plc, Media Agencies and Advertisers during the contract negotiation season.

However, there are undoubtedly certain provisions in the undertakings that are open to interpretation, and particularly those clauses containing the word “material” or the phrase “fair and reasonable”. ITV plc has its own interpretation of those provisions. Media Agencies and Advertisers should also form and argue their own views as to the meaning of those provisions, which may differ from ITV plc’s views. Where differences emerge, Media Agencies and Advertisers should not immediately bring a dispute to the Adjudicator, but should first attempt to reach agreement with ITV. Nonetheless, to the extent that agreement cannot be reached a dispute can be brought to the Adjudicator.

The Office’s view in relation to certain specific aspects of the undertakings is as follows.

- **CRRA Rules and CRRA Scheme** - the Office found that the CRRA Rules (Annex 2) and the CRRA Scheme (Annex 3) were generally clear and the dispute process was straightforward.
- **CRR Offers** - under Clause 6 of the undertakings, ITV are obliged to set out offers two months in advance. Due to the lateness of the undertakings being finalised, the CRR offers were sent to agencies on 5 December 2003. To compensate for this, on 22 December 2003 ITV plc extended the deadline for accepting the CRR offers from the 31 December 2003 to 16 January 2004. ITV plc also deferred the March Advance Booking Deadline from the 12 January to the 20 January 2004. This enabled both Media Agencies and Advertisers to adjust to the CRR remedy and consider their options in relation to their protected contracts.
- **CRR Calculations** - several agencies raised the issue that the CRR calculations presented to them by ITV plc did not follow the methodology set out in Annex 1 of the undertakings. This issue is discussed in section 4 above.
- **Accepting CRR** - as far as the Adjudicator is aware; all the major Media Agencies accepted the CRR remedy by the extended deadline date of 16 January 2004.
- **Agreement on Calendar Deals** - the key elements of the ITV plc deals (shares and prices) that were due for renewal in January 2004 were agreed by mid-March by Media Agencies and Advertisers. However, in some cases, the Adjudicator understands that some of the detailed terms and conditions are still under negotiation.
- **Contracts** - where Media Agencies had previously held umbrella Agency contracts, there was a fairly even split between those that accepted CRR, those that negotiated a contract variation, and those that negotiated a new contract. The majority of line by line Advertisers accepted CRR, although some negotiated a new contract. The latter occurred more frequently when there had been a change in Media Agency.

## 5.2 “Taking a Holiday from ITV PLC”

Those Media Agencies and Advertisers who have a protected contract with ITV plc, but do not want to take up their CRR offer immediately, may decide not to purchase airtime from ITV for a period of time. If they choose not to advertise on ITV plc, they are entitled to return at a later date following this “holiday”.

In the last deal period, due to the lateness of the negotiation period and the need to agree the CRR remedy as a minimum fall-back position, some Media Agencies considered that this was a redundant clause. It was generally seen as impractical for Media Agencies with large umbrella deals to take advantage of the 'holiday clause', as the holiday would need to be taken by all of the clients covered by that deal. Nonetheless, those Media Agencies with line by line deals were in a stronger position to take up this opportunity. This clause may be utilised by more Advertisers and Media Agencies in the next dealing season, when they will have had greater opportunity to plan for this possibility.

### **5.3 Timescale in Determining Disputes**

The timescale for disputes is set out in paragraph 19 of the CRRA Scheme, which provides that a decision shall be given within 15 working days after the Notice of Adjudication, or within 20 working days with the consent of the Referring Party (although this could be extended if both parties were in agreement). There was some initial concern among Media Agencies and Advertisers that the timescale proposed to complete the dispute process was prolonged, and could 'drag on'. However, the Office has dealt with all disputes swiftly: in practice, the minimum time taken to settle a dispute was five working days; the maximum was twelve working days. We believe the swiftness with which the Office has responded to disputes should alleviate the concerns of Buyers/ Advertisers on this issue.

## Section 6

# IPA and ISBA Views of the Operation of the Undertakings and the CRR Scheme

## 6.1 IPA's View of the Operation of the Undertakings and the CRR Scheme

This responds to a request from the Adjudicator for a viewpoint on the above from the IPA and its member agencies. As such, it represents a consolidation of the observations of a cross section of our media membership as at the end of March 2004.

### 6.1.1 Our historical position of the Undertakings/CRR

As both the Adjudicator and Ofcom will be aware, the IPA was not in favour of a behavioural remedy to address Advertiser anxieties resulting from the formation of a single Carlton/Granada sales house. Having said this, once the decision was made to adopt this approach, we have worked closely with the Regulator to ensure the resulting system operates as smoothly and as effectively as possible. In this context, we would pay tribute to:

- The refreshing, highly consultative, approach of the Ofcom team during the development of the scheme;
- Their energy, commitment and willingness to listen
- The speed with which they were able to get the system up and running, albeit subject to some of the concerns expressed later in this paper.

### 6.1.2 How has the approach actually worked?

Generally speaking the CRR system has run remarkably smoothly, with all respondents commenting favourably on the level of operational advice they have received from both Ofcom and the Adjudicator's Office to ensure this.

In practice, the fact that the ruling on a single ITV plc and the CRR mechanism came late in the year - and ITV plc's delay in putting its senior management team together - meant that some agencies experienced a degree of confusion in the build up to Christmas, with the traditional negotiation season pushed back at least a month and many buying discussions continuing into 2004.

Opinions on whether this was a problem or not varies by member, however, what is clear is that - at least in the early days - Carlton/Granada appear to have struggled with CRR/Audience Ratchet Mechanism calculations, with many agencies reporting wrong figures needing subsequent correction.

In fact, it has been suggested that with the exception of a handful of cases, neither agencies nor ITV plc are now using the full CRR formula - but rather a simplified version of it which avoids the laborious need to calculate by target audience, by region, by month.

### 6.1.3 How have we found ITV PLC's behaviour?

Although some Agencies remain to be convinced re the long-term intentions of ITV plc, most have indicated that ITV plc personnel have shown detailed knowledge of the undertakings and have been sensitive to their obligations.

Nevertheless, there is a sense in some quarters that the new system has reinforced a rigidity of behaviour and interpretation that has made the negotiation process painful and sometimes, very mechanical.

Without doubt the most controversial area in this context has been new business, where most agencies have noted ITV plc as being quick to quote “material overtrading” or “material loss of broadcast share”, if a client’s agency switch was not felt to favour the broadcaster.

Similarly concern has been expressed on varying interpretations of the CRR rules with regard to what constitutes a “contract variation” (vs. a completely new contract) - while others have raised queries on the possible manipulation of advertising minutage to maximise commercial impacts.

In this latter context, it has been pointed out that although such moves are within ITV plc’s rights, they could be pushed to extremes to help maximise revenues going forward under CRR – potentially impacting on the broadcaster’s ability to deliver specific marketing objectives for some Advertisers.

#### **6.1.4 Conditional Selling**

Although much concern was expressed by IPA members with regard to the conditional selling of ITV 2, GSB and S4C in the period prior to the Carlton/ Granada merger, it is clear from our analysis that this problem has not gone away.

While the CRR mechanism applies only to ITV1 and so no pressure can be applied to support ITV 2, GSB and S4C via this route, all respondents reported that as soon as any variation to CRR was discussed, salespeople have been quick to bundle any revised offer along with requirements to spend on these supplementary channels.

#### **6.1.5 Conclusions**

On the basis of this analysis:

- most Agencies have found CRR to be effective and to work smoothly;
- ITV PLC has generally honoured its undertakings and behaved in a fair and reasonable fashion.
- Having said this:
- the approach has inevitably tended to remove some of the competitive dynamic of the market, making TV trading more inflexible than previously;
- Concerns exist with regard to the literal interpretation of contracts, and continued channel bundling in non-CRR negotiations.

Given that referrals to the Adjudicator are confidential, we have not sought information on this area – although some respondents have indicated that they have had to work hard to avoid such a course of action. Having said this, the ability to refer has been felt very useful in ensuring that negotiations have been “fair and reasonable” – and without this backstop, misgivings over the opportunity for an abuse of power would re-emerge.

With regard to the future:

- many Agencies believe it is vital that ITV plc release the 2005 CRR on time, suggesting that it should also issue audience projections where forecasts have been made (October-December 2004) to give agencies the opportunity to discuss issues with ITV plc and to plan ahead with other stations/channels. (Alternatively, preliminary figures could be issued approximately three months earlier as by 10th October, December budgets will have been committed and CRR numbers could be reasonably accurately calculated.)
- Similarly there have been requests from some quarters that to prevent unnecessary delay in future negotiations Carlton/Granada should be required to respond to any new proposal made by an agency within an agreed, realistic timeframe.

## **6.2 ISBA's View of the Operation of the Undertakings and the CRR Scheme<sup>13</sup>**

Throughout, ISBA feels there has been a 'strong sense in the marketplace that ITV plc would be at some pains to avoid provoking references' to The Office of the Adjudicator at such an 'early stage, and that media agencies would also be hesitant to make references lest it cast doubt over their buying prowess'.

These factors have meant that, there has been little to discuss despite trading issues featuring prominently on each ISBA TV Action Group agenda. Confidentiality has been upheld as private conversations ISBA has had, has suggested that 'most current trade press comment, whilst logically-based, is some way off the mark'.

ISBA believes 'this is a great compliment to the current security of the system; the net result is that we are not really in a position to comment on whether the CRR or the Adjudicator are working'.

ISBA finds itself advising a 'number of Advertisers who have moved (or are considering moving) their media business and are now unsure of their entitlements'. Thus, ISBA have expressed that they hope the Adjudicator will be able to take a 'proactive role in the case of Advertisers who move and might thus become stateless'.

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<sup>13</sup> This section summarises the views provided by the ISBA to the Adjudicator.