

Technical background guide to advertisers and buyers' rights under the CRR remedy

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Foreword

The Undertakings in relation to the Carlton/Granada merger have now been accepted by the Secretary of State. In relation to the sale of commercial airtime, the Contracts Rights Renewal (CRR) remedy has been prescribed in order to protect advertisers and media buyers going forward.

The ITC and Ofcom believe that this remedy will work most effectively if all parties understand their rights and obligations and if advertisers/media buyers exercise their rights fully. As such, in conjunction with the text of the statutory Undertakings itself, the ITC and Ofcom are publishing this background technical guide to the CRR remedy to help advertisers and media buyers to understand how it will work in practice.

In this guide we have tried to answer all of the questions that were raised over the last few weeks. However, to the extent that you have further questions Ofcom has set up an email helpline where you can address further queries CRR@Ofcom.org.uk.

Responses to these emails will be made publicly available on the section of the Ofcom website dedicated to information about the ITV merger, at: http://www.ofcom.org.uk/codes_guidelines/crr/index.htm

Please note that this document is meant as guidance only. The views expressed within this document are without prejudice to any subsequent view taken by the OFT and/or the Secretary of State and/or the ITC/Ofcom in relation to the Carlton/Granada Undertakings. Advertisers/media buyers who rely in any way on this guidance do so entirely at their own risk. To the extent that any advertiser/media buyer has questions in relation to their own specific contractual or legal position they should seek their own legal advice. Ofcom will only be able and willing to give further general advice in relation to this guidance. For the avoidance of doubt, this document supersedes the ITC's and Ofcom's previous CRR Technical Summary. To the extent that there is any inconsistency or conflict between this document and the Carlton/Granada Undertakings, the Undertakings take precedence. Ofcom will keep this guidance under review and reserves the right to amend it at any time.

Overview of CRR

The Competition Commission (CC) found that the proposed merger between Carlton and Granada could have an adverse effect on the competition for the sale of advertising airtime. Because of this they recommended that a remedy was needed to protect the market - the Contracts Rights Renewal (CRR) remedy.

Under the CRR, advertisers and media buyers have a number of rights which are designed to ensure that they are left no worse off as a result of the Carlton/Granada merger.

The first right is to continue your existing contractual terms with Carlton and/or Granada for buying airtime on ITV1.

- What is currently in your contract with Carlton or Granada in relation to ITV1 is fully and completely protected – all terms and conditions covering all aspects of your deal are covered, regardless of what the provision is. All other rights under the Undertakings are supplemental to what is contained in your contract.
- However, this “Protected Contract” is your fall-back right. You may always negotiate a variation to this contract or indeed negotiate an entirely new contract. You are under no obligation to use your protected contract as it currently stands.
- Any variations made to your protected contract, or any new contracts offered by Carlton or Granada, must be offered on fair and reasonable terms.

The second right is to change your share of broadcast commitment(s) to ITV1 in contracts with Carlton or Granada by means of the CRR ratchet – the Audience Ratchet Mechanism (ARM).

- The ARM ensures that your share of broadcast commitment(s) to Carlton/Granada automatically moves in line with any movement in Carlton/Granada's share of commercial impacts in the market.
- Moreover, your share of broadcast commitment(s) can never rise higher than the original level specified in your initial contract.

The third right is the ability to seek the determination of the Adjudicator in relation to contractual disputes between Carlton/Granada and any advertiser/buyer in relation to commercial advertising time on ITV1.

- To the extent you are not satisfied that terms offered by Carlton or Granada are fair and reasonable, then you have the option of bringing this dispute to the Adjudicator who will assess whether or not Carlton or Granada have offered fair and reasonable terms.
- The Adjudicator will also deal with disputes about the interpretation of contracts and enforcement of contracts.

- If you believe that Carlton/Granada have unreasonably withheld their consent in allowing the advertiser to switch between media buyers, you may take the matter to the Adjudicator.

In addition to these basic rights, there are a number of supplemental rights specified in the Undertakings in order to provide you with additional protection. These cover:

1. Movement of an advertiser between media buyers
2. The treatment of lapsed advertisers
3. The treatment of new entrants
4. What happens when advertisers merge
5. What happens when media buyers merge
6. What happens when contracts are varied or new contracts are signed

Below we explain all of your rights in more detail.

The Protected Contract (Clause 6 of the undertakings)

Who is protected?

Anyone who **currently** has a contract with Carlton or Granada for the purchase of advertising airtime, or who **has held one since 1st January 2001**. To the extent that you have held numerous contracts since 1 January 2001, it is the latest contract that applies. If you had a contract in 2003, it is this contract that is protected.

If you do not currently hold a contract with Carlton or Granada, and have not held one since 1st January 2001, the first new contract that you conclude with Carlton and/or Granada will automatically become your protected contract going forward.

It is only those parties who contract **directly** with Carlton or Granada (or whose terms for buying airtime are separately identified in a contract with Carlton or Granada) that have a protected contract. Therefore, three broad categories of people hold protected contracts:

- Advertisers who have their own specific contract with Carlton or Granada, i.e. they do not use a media buyer. In this case the advertiser itself is protected by the CRR.
- Media buyers who have a contract with Carlton or Granada. Whether this media buyer has an umbrella/agency deal or whether it has a line-by-line deal, the current contract as it stands is protected.
- Advertisers who have a specific share of broadcast (SOB) commitment and discount level specified as a "line-by-line" deal in a media buyer's contract. In this case, the terms relating to the advertiser itself are protected under CRR.

Advertisers who do not have a line-by-line deal with a specified SOB commitment, but who are covered under an agency deal do **not** hold a protected contract. Their media buyer's contract is protected, and as such the advertiser is indirectly protected. Even if such advertisers have specific terms set out in their contract with their media buyer they have no direct protection unless this is incorporated in the media buyer's contract with Carlton and/or Granada. Imputed or implied terms between these advertisers and Carlton/Granada are not protected. As such, they will not be able to take those terms with them if they move between media buyers, nor are they entitled to "roll over" their existing terms with their agency once the contract ends.

This remedy does not in any way affect the underlying contracts between advertisers and media buyers. As such, contracts between advertisers and media buyers are not protected contracts. Contractual negotiations between media buyers and advertisers are subject to normal commercial negotiations. CRR is only applicable to contracts with Carlton or Granada for the purchase of airtime on ITV1.

What exactly is protected?

All **existing contractual terms** for the sale of television advertising airtime in relation to ITV1, however they are expressed, are protected (as long as these are contracts with Carlton or Granada).

Share of broadcast is protected but will be able to vary annually in line with the ARM (see below). Contracts that have fixed prices/fixed cost per thousands are protected at the level of that fixed price. Contracts that specify a different reference price can continue to use that reference price. And all other non-price terms – duration, procedures for incorporating new business, first in break etc – are all protected. The safeguards in the Undertakings are **in addition to** any rights that you enjoy under your existing contract(s). What is written in your contract must be the starting point at all times.

Note that, with this increased certainty and the likely increased reliance on contractual terms, you will also need to be vigilant to ensure that you are meeting other aspects of your contractual commitments – contractual certainty cuts both ways. Thus, past flexibility on the part of Carlton and Granada in relation to terms and conditions in contracts cannot be guaranteed going forward. You must also ensure that you meet your contractual obligations as set out in your contracts.

What happens to my contractual commitment in relation to ITV2 and other ITV owned digital channels?

The CRR only applies to ITV1 and only to contracts with Carlton or Granada. The CRR guarantees that you are able to purchase advertising on ITV1 as you have done previously for the same share of broadcast and the same discount level.

Under this guarantee, there are no obligations on you in relation to any other Carlton/Granada owned channel. They would be subject to a separate commercial negotiation between you and Carlton/Granada. The CRR does not require you to contract for any other ITV channels.

However, to the extent that you have existing contracts in relation to other Carlton/Granada channels, which do not run out this year, these contracts must be honoured.

Example 1

An advertiser has a contract which specifies a SOB commitment for ITV1 and one for ITV2 and this contract was **due to run out in December 2003**. In this case, CRR applies to the ITV1 part of the contract (if it was sold by either Carlton or Granada). The SOB commitment for 2004 will then be changed in line with the ARM, to the extent Carlton/Granada's share of commercial impacts changed between 2002 and 2003. The CRR does not apply to ITV2. It would be for Carlton/Granada and the advertiser to negotiate a new arrangement in relation to ITV2. This may be at a higher or lower SOB than last year, or indeed the advertiser may decide not to take ITV2 at all.

Example 2

An advertiser has a contract which specifies a SOB commitment for ITV1 and one for ITV2 and this contract was **due to run out in December 2004**. In this case, CRR applies to the ITV1 part of the contract (if it was sold by either Carlton or Granada). The SOB in relation to ITV1 will then be changed in line with the ARM, to the extent Carlton/Granada's share of commercial impacts changed between 2002 and 2003. However, the advertiser must continue to meet the contractual terms in relation to ITV2 precisely as they are specified in their contract until December 2004, when this element of the contract can then be renegotiated. CRR does not apply to ITV2. At this point the advertiser/buyer may negotiate a higher or lower SOB for ITV2, or may decide not to take ITV2 at all.

What if my terms with Carlton and my terms with Granada are different?

Your two existing contracts with Carlton and Granada are both protected entirely separately. Therefore the terms in each remain in force regardless of the differences. You are under no obligation to bring them together. You may keep them entirely separate and CRR, including the ARM, will apply entirely separately to both.

To the extent you and Carlton/Granada wish to bring the terms together into an amalgamated contract, the agreement of such a contract is a commercial contractual negotiation, which is entirely up to both parties to agree. Carlton/Granada must offer fair and reasonable terms. If you think the terms are unreasonable, as with any dispute over advertising airtime contracts you may take this issue to the Adjudicator.

What about Ulster, SMG and Channel- are they covered under CRR?

To the extent that Carlton/Granada sell airtime covering Ulster, SMG and Channel's sales, their airtime is included under CRR. However, to the extent that these channels sell their own airtime, their airtime is not covered under CRR. For example, contracts sold by SMGTS on behalf of SMG are not covered.

What if there is no specific mention in my contract of a SOB minimum purchase commitment to ITV? Does this mean I can purchase no ITV airtime (or much less than I do now) and still get the protection of CRR?

No. Contracts can encompass understandings, historical trading patterns and other factors that are not necessarily written down, to the extent that they could be shown as a matter of law to be part of the contract. Thus, if you bought no airtime from Carlton and Granada, or substantially less than you do now, you might well be in breach of your contract and Carlton/Granada could terminate your contract.

Do I have to take my protected contract?

No. You are always free to negotiate a new contract with Carlton and/or Granada.

How do I take my protected contract?

Two months before your existing contract expires Carlton and Granada will offer you the option of rolling forward your protected contract on the same terms as you currently have. This offer will stay open until:

1. You accept it and CRR rolls forward; or
2. 1. You conclude new terms (either as a variation to your existing protected contract or an entirely new contract) with Carlton and/or Granada.

If you accept CRR, your contract rolls forward (with the adjusted SOB), with all the existing terms and conditions maintained. This includes the duration of the contract. So if you currently have a three-year contract, and you opt to roll it forward protected, then you will be rolling it forward for three years (with the SOB being adjusted in line with audiences each year). After 2 years and 10 months, Carlton and Granada would again make you the offer of CRR for the next contract period.

If you conclude new terms with Carlton and Granada (either as a variation to your existing protected contract or under an entirely new contract), you may agree with Carlton/Granada to make these new terms your protected contract going forward (see agreement to make a new protected contract Clause 10(d) below). If this is the case, 2 months before this new/varied contract expires you will be given the option of rolling it forward under CRR.

Alternatively, if you did not make the new/varied contract your protected contract, two months before the new contract expires Carlton and Granada will again make the offer of taking up your old protected contract. In this case you do not have the automatic protection of rolling forward the new/varied contract. Some advertisers/buyers may find this approach useful if their needs are only likely to change temporarily.

You can also choose to do neither of these things, and decide not to advertise on ITV1 at all for a period of time. If this is the case, your protected contract offer remains open while you take this "holiday" from ITV. To the extent you then wished to return to ITV1 following this holiday, you would be treated as a lapsed advertiser returning to the market. You could seek to negotiate a new contract, or return to your previous protected

contract. If you return to your protected contract, you would have to meet all of the terms and conditions of that contract – including the full duration and the SOB commitment.

Example

An advertiser has a 1-year contract with Carlton/Granada running from January to December, with a SOB of 51%. On 1 November Carlton/Granada make an offer to the advertiser to roll forward its existing terms under CRR, with an appropriately adjusted SOB – say 50%. The advertiser decides not to advertise on ITV1 for the first quarter of the following year. In April the advertiser decides to take up its protected contract again. The protected contract would last for 12 months at the adjusted SOB (50%) i.e. the contract would now run April to March. The other option open to the advertiser would be to negotiate a new contract to run from April to December. Carlton/Granada would have to offer fair and reasonable terms for this new contract, but this would not require them to offer the same discount and SOB for a period that was only 8/12ths of the period under the original CRR contract. To the extent the advertiser did not believe it was being offered fair and reasonable terms by Carlton/Granada, it could then take this to the Adjudicator.

When will I be varying my contract versus signing a new contract?

The Undertakings are not prescriptive about when a change constitutes a variation or a new contract, because this is essentially a contractual matter between both parties. As with other contractual disputes, to the extent that you believe that Carlton/Granada is behaving unreasonably you may take the issue to the Adjudicator.

Another reason for not being prescriptive on this issue is that what may be a variation to one contract might actually be regarded as a completely new contract in another case. For example, if a media buyer contracts for all demographics, but wishes to change the day-parts against which it contracts for one demographic, then this is likely to be only a variation. However, if an advertiser only purchases airtime in one time period (e.g. day-time) and then wishes to switch to only purchasing in another (e.g. peak) then this would seem likely to be a new contract.

For the avoidance of doubt, varying an existing protected contract does not mean that the other terms and conditions in the rest of the protected contract either change or become unprotected. All other terms and conditions remain as they are and “protected”, unless they need to change to take account of the variation (for example a higher SOB commitment may be required in the example above if the advertiser wishes to move all its advertising from day-time to peak). The variance itself can then be incorporated within that existing protected contract, subject to mutual agreement.

New contracts themselves can also be turned into new protected contracts, again subject to mutual agreement (see the section on 10(e) below, which discusses making variations and new contracts protected contracts).

What if I want to conclude a new contract but it is late December and I need airtime on 1 January?

One of the concerns most frequently expressed was that your contract may run out in December, and although you may want to negotiate a new deal with Carlton and Granada, you also need airtime on 1st January to cover the January sales.

As set out above, Carlton/Granada make an offer to roll forward existing terms under the CRR on 1 November, and this offer remains open until accepted or new terms are agreed. Suppose that you decide to negotiate with Carlton and Granada as to new or varied contractual terms. If you are not satisfied that the terms being offered by Carlton and Granada are fair and reasonable, you can refer the matter to the Adjudicator. If you have done that, but the matter has not yet been resolved by, say, 30th December then you can accept your CRR contract for the limited purpose of purchasing advertising time until the Adjudicator reaches a decision. You should inform Carlton/Granada at that time that you are accepting CRR on that basis. Once the Adjudicator has made his decision, you may switch over to the newly negotiated terms – provided that the Adjudicator found them to be fair and reasonable – even though you accepted CRR at renewal. If the Adjudicator does not find the terms fair and reasonable, then you can continue to purchase airtime based on CRR terms, until fair and reasonable terms are agreed with Carlton/Granada (or approved by the Adjudicator), at which point you can switch over to the newly negotiated terms. This ensures that you can always advertise on 1 January if you need to, and you can never be “forced” into accepting a deal because time for negotiating alternative terms is running out.

The same procedure would, of course, apply, if the contract came up for renewal at a time other than December.

What if I want to change the terms of my contract mid-way through my contract?

You are free to negotiate with Carlton/Granada at any time, and if you mutually agree to change the terms of your current contractual commitments, you can of course do this at any time throughout the year. However, if you have signed up to a new contract or accepted the offer to roll forward your existing protected contract then the Adjudicator may not consider it fair or reasonable for you to attempt to invalidate a freely entered into contract at will.

As such, if you accept Carlton /Granada's offer to roll forward your existing protected contract in December, and then wish to negotiate new terms in March, the Adjudicator is very unlikely to find it fair or reasonable for you to be allowed to switch to these new terms until you complete the terms of the contract you previously accepted. The exception to this is under the circumstances set out in the previous question where the terms of the new contract are in dispute and you need to purchase airtime until that dispute is resolved and accept a CRR contract in order to do so.

In addition, the option to revert to your protected contract is one that is only available on expiry of your existing contract. As such, you cannot sign new terms with Carlton/Granada and then in August revert back to your protected contract. You must wait until the expiry of the new contract. Thus, if you sign a new three year deal the option of reverting back to your old protected contract is only applicable at the end of the three years.

What if I breach the terms of my protected contract?

If you breach an important condition of your contract then Carlton/Granada may lawfully be able to terminate your protected contract.

The CRR Ratchet (Clauses 7, 8, 9 and Annex 1)

The remedy provides an **Audience Ratchet Mechanism (ARM)** to protect advertisers/buyers and to reflect any decline in ITV1's share of commercial impacts. The detail for this calculation is set out in Annex 1 of the Undertakings entitled **CRR Ratchet**. The share of broadcast commitment(s) currently set out in contracts in relation to ITV1 will change proportionately on a one-for-one basis with changes in Carlton/Granada's delivery of commercial impacts on ITV1.

What is my initial share of broadcast and how does the "cap" work?

Where a protected contract was in place **before 1 January 2004**, the **initial SOB commitment** is the SOB set out in the final 12 months of the contract. For most parties this is their share of broadcast commitment in 2003.

The cap ensures that you never need to give more than the initial SOB commitment in your protected contract, unless you want to. To the extent that Carlton/Granada's delivery of commercial impacts increases above the level of the cap, you can benefit from this increase, without having to give a greater SOB. Of course, you are always free to give more if you so choose. If more than one share of broadcast is specified in the contract, each share of broadcast in the contract is capped at its initial level.

Example

If an advertiser signed a 1-year deal at the end of 2002 for 2003, the SOB set out in that contract is the initial SOB and therefore the cap. They will never be forced to give a higher share of broadcast than they did last year. If an advertiser had a three-year deal, with a reducing SOB over the three years, it is the SOB in the last year that is the initial share of broadcast and is capped. Therefore, again they will never be forced to give a higher share of broadcast than they did in 2003.

To the extent contracts are not annual, then they are treated similarly, i.e. for a 6-month contract, it would be capped at the SOB in the last 6 months for which a SOB was contracted.

If a new protected contract comes into force on or **after 1 January 2004**, then the initial share of broadcast, and hence the cap, applies to the first 12 months of that protected contract. Therefore if a new advertiser enters the market in 2005, the SOB that it commits to in that new protected contract will form the cap going forward for CRR purposes.

Does this mean that I can vary my contract each year and reduce the cap I face?

No it does not. The cap is set at your initial share of broadcast, as set out in your existing protected contract, for whichever products you currently contracted for at the time. A

variation to an existing protected contract is not a new contract. As previously discussed when a variation occurs, all the other terms and conditions in the protected contract remain the same. This includes the initial SOB which defines the cap.

To the extent you negotiate an entirely new contract after 1 January 2004 (for example you are buying a different range of products than before) and agree with Carlton/Granada that this new contract will become your protected contract going forward then the initial SOB as set out in that new contract will, of course, become the new cap.

It is our view, however, that it would not be fair and reasonable for you to attempt to reduce the cap you are exposed to by suggesting that each variation to a protected contract is in fact a new protected contract with a new cap. If there is a dispute as to whether a change is a variation or a new contract, the Adjudicator would, of course, be able to assess this. However, we would expect the Adjudicator to find that Carlton/Granada are behaving fairly and reasonably where you are simply trying to reduce the cap you face by suggesting that variations in existing terms amount to a new contract.

What is the "base year"?

If a protected contract was in place before 1 January 2004, the "base year" for the measurement of commercial impacts is 2002 as set out in the CC's report. This means that the change to the share of broadcast commitment(s) is calculated each year against the share of commercial impacts that ITV delivered in 2002. The relevant share of broadcast commitment for the calculation is the initial share of broadcast commitment set out in the protected contract applying for 2003 (or an earlier contract if there was no contract for 2003).

Example

Let us assume that in the protected contract, the **initial share of broadcast** commitment is 52%. In December 2003 it is calculated that Carlton and Granada's share of commercial impacts has fallen by say 2 percentage points from 45% in 2002 to 43% in 2003 (an overall fall of 4.4%). The **revised SOB** going forward for 2004 would then be 49.7% (also an overall fall of 4.4%). In December 2004 Carlton/Granada's share of commercial impacts in 2004 must be calculated again and compared to commercial impacts in 2002. Let us say that the share has fallen a further 5 percentage points from 43% in 2003 to 38% in 2004 (a total fall since 2002 of 7 percentage points or 15.6%). In this case, the revised SOB commitment going forward into 2005 would fall by 15.6% as against the initial (2003) SOB commitment. Therefore, the SOB for 2005 would be 43.9%.

If a protected contract does not run on a calendar year basis, then the base year is adjusted accordingly. For example, a contract that runs from April 2003 to March 2004 would have April 2002 to March 2003 as its base year. Similarly, if an advertiser has a limited period contract (a "burst" contract), which only runs from say January to August, then the base "year" for comparison for that advertiser is January to August 2002.

If a lapsed advertiser claims its rights to a protected contract from a prior year, 2002 is still the basis of comparison. As such, for an advertiser who had a contract in force throughout 2001, the SOB commitment would not fall in line with ITV's fall in commercial impacts since 2001. If it did, the advertiser with an out-of-date contract might fare better

than those who continued to advertise in the market. Any reduction is still based against changes in commercial impacts since 2002. Similarly, advertisers who had long-term deals (say three years) that expire this year will apply the ratchet against a base year of 2002. If they do not believe that this adequately reflects the current market situation, they are, of course, free to negotiate new terms.

If a new protected contract comes into force on or after **1 January 2004** for a year, then the base year is the 12-month period prior to the Protected Contract coming into force. Therefore, if a new advertiser contracts in December 2004 to enter the market from January 2005, the base year for calculations for that advertiser will be 2004.

How will the changes in Carlton/Granada audiences be measured?

Changes in audiences will be measured using changes in Carlton/Granada's delivered commercial impacts by demographic, region and time period contracted for.

How is the ratchet calculated?

Although the formula itself looks complicated, the concept is in fact relatively simple. Whatever you currently contract for, and only those things you contract for, considered in the ratchet. Therefore, only those demographics, only those regions and only those time periods that you currently contract for have any bearing on your revised share of broadcast commitment.

In addition, in these regions and time periods, the demographics you purchase are weighted according to your proportion of spend on each of them.

The ratchet is calculated for each **separately** defined share of broadcast commitment set out in your contract. Therefore, to the extent you have only line-by line deals each specifying a SOB, each SOB is revised. To the extent you have separate SOB commitments for two different demographics, then each of those commitments are revised separately in line with what happens to each demographic. To the extent that you have a single umbrella deal with a single SOB, it is only that SOB that is revised.

Note the ARM only applies in relation to SOB commitments. The ARM is not applied to volume commitments.

Note also that calculations are based on the relevant impact currency as used in the contract (e.g. 30 second ratecard equivalent or duration weighted as appropriate).

Example 1

An advertiser contracts for 16-34 adults in Tyne Tees only during peak time over an entire year. In this case the comparison of commercial impacts assesses the difference in the share of commercial impacts achieved for 16-34 adults in Tyne Tees during peak time last year versus the share of commercial impacts achieved for 16-34 adults in Tyne Tees during peak time in 2002. No other changes in any other demographics or regions or times outside peak are considered. Therefore, if the share of impacts outside peak has increased, but share of impacts in peak has fallen, only the fall in peak is considered. Similarly if the share of commercial impacts in Tyne Tees increases but the

share in London falls, it is only the increase in Tyne Tees that is considered.

Example 2

Another advertiser contracts for 16-34 adults and Housewives with children in Tyne Tees only during peak time over an entire year with a **share of broadcast commitment for each of these demographics** specified in the contract. In this case again only the changes in Tyne Tees and peak time are considered. However, in this case both demographics – 16-34 adults and Housewives with children – are considered, but in this region and time period only.

If the advertiser puts 50% of its money into each demographic, and if the share of commercial impacts among 16-34 adults rise by 10% and among Housewives with children fall by 10%, then **the specific share of broadcast associated with each demographic is adjusted accordingly**. This means that the SOB associated with 16-34 adults increases by 10% (or stays the same if the cap has already been reached) and the SOB associated with Housewives with children falls by 10%

Example 3

Another advertiser contracts for 16-34 adults and Housewives with children in Tyne Tees only during peak time over an entire year with a single share of broadcast commitment covering both demographics. In this case again only the changes in Tyne Tees and peak time are considered. Again, both demographics – 16-34 adults and Housewives with children – are considered, but in this region and time period only.

If the advertiser puts 50% of its money into each demographic, and if commercial impacts among 16-34 adults rise by 10% and among Housewives with children fall by 10%, then there is **no change in the overall share of commercial impacts or share of broadcast commitment** once these two movements are averaged out. (Note this of course assumes that the relative shares of the two demographics are the same)

If, however, the advertiser spends 10% of its advertising expenditure on 16-34 adults and 90% on Housewives with children, then the overall share of broadcast commitment falls. The reduction would be a decrease of 8%. This is because:

- 10% of its money went on 16-34 Adults which has increased 10% = a rise of 1%
- 90% of its money went on Housewives with children which has fallen 10% = a fall of 9%
- Overall, these two equate to a decrease of 8% (1% - 9% = - 8%)

More formally, this calculation is set out in Annex 1, and says that, in order to calculate the ratchet (R) you take:

Share of revenue committed to demographic 1 in the relevant regions and time periods *
(the current share of commercial impacts for demographic 1 / the previous share of commercial impacts for demographic 1)

And you add this to:

Share of revenue committed to demographic 2 in the relevant regions and time periods *
(the current share of commercial impacts for demographic 2 / the previous share of commercial impacts for demographic 2)

You continue to add this up for each demographic, within the region and time periods, for the SOB that you are revising.

This calculation gives a number which is multiplied by the initial share of broadcast commitment to give the revised SOB for the coming year. If for example $R = 0.75$, then you multiply the initial share of broadcast by 0.75 to give the revised share of broadcast.

Of course, the SOB cannot increase above the cap of the initial SOB commitment. Therefore, if R is greater than one (e.g. 1.1) then R is applied as if it equals 1.

Example 4

An advertiser's initial share of broadcast commitment in 2003 is 50%, and ITV's share of commercial impacts in 2002 was 50%. If ITV's share of commercial impacts over 2003 falls to 48%, the advertiser's revised share of broadcast commitment for 2004 also falls to 48%. If in 2004 ITV's share of commercial impacts increased to 51%, the advertiser's revised share of broadcast commitment would increase, but only to 50%, i.e. the initial share of broadcast level.

Example 5

To the extent that a media buyer has an agency deal and contracts for all demographics, over all regions and all time periods, with revenues evenly spread across each of these, then the calculation is relatively simple. It is the total change in Carlton/Granada's share of commercial impacts since 2002 which drives the share of broadcast commitment. However, to the extent that the media buyer weights its expenditure – e.g. in relation to a particular demographic – then this weighting would again be taken account of, as in the example above.

When is the cap applied?

The cap is applied after all weighting and averaging of demographics, regions and time periods has been carried out. Once this final number for overall movement in share of commercial impacts and associated share of broadcast has been arrived at, the applicability (or not) of the cap is then considered.

For the avoidance of doubt, if a number of demographics are purchased and one demographic increases above the level at which that demographic was purchased in 2003, there is no separate cap applied to this demographic. Thus, if the increase in that demographic was negated by a fall in another demographic, the two movements could cancel each other out with no cap applying at all.

What if I have two separate contracts – one with Carlton and one with Granada?

To the extent that both of these contracts contain their own SOB, then the ARM applies to both, calculated separately based on each contract (i.e. the Carlton contract will take account of changes in commercial impacts in Carlton regions and the Granada contract will take account of changes in commercial impacts in Granada regions)

If you have a SOB in one contract and not in the other, then the ARM is applied to the contract in which there is a SOB. Only the relevant regions are included. For example, if your Granada contract does not include a SOB term but your Carlton contract does, then your revised SOB is based on changes in commercial impacts in Carlton regions and your Granada contract remains unchanged.

What if I have a SOB for London and a SOB for the rest of ITV?

The ARM is applied to each separately defined SOB. Therefore, in this case there are two calculations: a ratchet for London, based on what happens to the demographics that you contract for in London during the time periods you contract for, and a ratchet for the rest of ITV, based on what happens to the demographics that you contract for in all non-London regions during the time periods you contract for.

What if I only contract in bursts?

If you only contract from say January to June each year, then the relevant comparison is the change in commercial impacts (for those demographics, regions and time periods that you contract for) from January to June in this year versus the commercial impacts in the base year. Impacts during July to December would not be counted.

What if I have a three year contract – is the ARM only applied at the end of the three years?

No the ARM applies annually, even if you have a longer term contract. Therefore, your SOB commitment changes each year on the anniversary of your contract (with any subsequent adjustments being made once final data is available from BARB).

What if I already have a mechanism that reduces SOB in my contract?

The fundamental principal of CRR is that what is in your contract is protected. Therefore, to the extent that you already have a mechanism for reducing SOB set out in your contract, this is protected. However, if applying the ARM to your 2003 commitment would reduce your SOB by a greater amount, then the ARM would apply.

When will I know my revised SOB for the coming year?

Two months prior to the expiry date of your current contract, Carlton and Granada will provide you with an accurate forecast of their share of commercial impacts based on the demographics, regions and time periods that you contract for. They will also provide you

with your estimated revised share of broadcast commitment. Updates to this will be provided to you on request during the negotiation period. If estimates prove to be inaccurate, the revised share of broadcast commitment(s) will be adjusted once the final relevant commercial impacts are known (i.e. once BARB has provided the final data).

Fair and reasonable (Clause 10(A))

Carlton and Granada are under an obligation to ensure that they offer airtime to advertisers and media buyers – whether already in the market or new entrants – on fair and reasonable terms. This is the case whether it is in relation to an entirely new contract or around the terms for a variation in an existing contract.

What if I only want to change something small in my contract?

If your contract allows for variations already, then you will still be able to do this. So if your contract allows you to change demographics providing your SOB stays the same, then this will continue to be the case going forward.

If your contract does not allow for variations, we would expect that most small changes to contracts could be accommodated by a simple variation to an existing protected contract. Any variation to an existing protected contract can become part of the protected contract subject to agreement (see 10(e) below). However, as discussed above, we have not attempted to be prescriptive about when a change is a variation versus a new contract. This is a contractual matter between both parties. As with any contractual dispute, to the extent that you believe that Carlton/Granada are behaving unreasonably you may take the issue to the Adjudicator.

What if I want to radically change my contract?

CRR is only a fall back option. You are always free to negotiate new contracts – radical or otherwise. Carlton and Granada are obliged to offer you fair and reasonable terms for any new contract, or any variation to an existing contract. If you are not satisfied that they are doing so then you can take the matter to the Adjudicator.

Does fair and reasonable mean everyone will get the same price?

No. Fair and reasonable does not mean that the price will become the lowest price in the market, nor does it mean that it will become the average price in the market. It means that, based on your current contract, historical data, other contracts in the market, and the prevailing market conditions that the price that Carlton/Granada offer you is fair and reasonable within that context. This means that there is likely to be a wide range of prices for any given contract that could be fair and reasonable.

It is for Carlton/Granada to make you an offer, and if you don't believe it is fair and reasonable, then you, as the other contracting party, may take the dispute to the Adjudicator. However, the Adjudicator will not set a price. He will simply assess whether or not the proposal made by Carlton/Granada is fair and reasonable. He will not be

assessing whether or not you have got the cheapest deal you can, merely whether or not the offer on the table is or is not fair and reasonable.

If the Adjudicator finds a price fair and reasonable does that set a precedent?

No. Any particular decision with regard to what is/is not fair and reasonable is made in relation to that specific dispute and cannot be presumed to set a general standard for what is fair and reasonable, either for other advertisers/buyers or in relation to other changes to the same contract.

What if I don't believe my current terms are fair and reasonable?

Any contracts concluded with Carlton and/or Granada while they were separate entities are presumed to be fair and reasonable, either now, or as modified as a result of the ARM. This means that the Adjudicator will not entertain disputes simply on the basis that you are currently paying more for your advertising than another advertiser/media buyer, or that you are paying more than you ideally want to. The starting presumption is that you concluded these terms with two separate entities while they were competing and as such you received competitive terms. The Adjudicator's role is to consider whether changes made subsequent to the merger are fair and reasonable, not to un-pick the history of contractual arrangements.

However, to the extent that you can prove that over time there has been a substantive change to your position, and as a result the price you are paying is now no longer fair and reasonable, then you can, of course, bring this to the Adjudicator if negotiations with Carlton/Granada prove unsuccessful.

Example 1

One possible such substantive change is that, over time, the quality of the airtime you receive on ITV may decline. To take an extreme example: suppose a media buyer has an agency deal and contracts evenly across all day-parts. Suppose that Carlton and Granada invest heavily in the daytime schedule and nothing into peak time, such that the share of commercial impacts during the daytime increase by 50%, but the share of commercial impacts in peak falls by 50%. Overall, these two changes may balance out, and for an agency buying across all day-parts there would be no reduction in the SOB. However, some of the agency's clients could be dissatisfied, as they may be more concerned about peak delivery than day-time delivery.

In such circumstance, it may be appropriate to suggest that the "quality" of the product that ITV is delivering has fallen, and as such, the agency could attempt to negotiate a lower price with Carlton/Granada. If it did not believe that the price offered was fair and reasonable, then it could take the matter to the Adjudicator.

Quality of impacts could be a particular issue for those who contract for Kids time. This is because, while other demographics can be "picked up" at any time during the day, kids advertising is limited in the times in which it is effective. Disputes over changes to the time periods in which Carlton/Granada deliver the contracted impacts would be matters for the Adjudicator to consider.

Example 2

Carlton/Granada could begin to show kids advertising late at night or while children are at school. Although the share of Kids impacts for that time will fall, this could be cancelled out by a corresponding rise in another demographic if these things are all covered under an agency deal.

Clearly if there is a separate share of broadcast defined for Kids which specifies the relevant time periods then this is not an issue.

What happens if the Adjudicator determines that the terms I have been offered are not fair and reasonable?

The contract is then remitted back to Carlton/Granada. They are obliged to offer new terms on a fair and reasonable basis. In the event that you are not satisfied that this new offer is fair and reasonable, then you can remit the new terms to the Adjudicator for consideration again. This process can continue until you are offered terms that you believe are fair and reasonable or until the Adjudicator determines that terms are fair and reasonable. There is no limit on the frequency with which you can bring the dispute to the Adjudicator. Since Carlton/Granada will be funding the Adjudicator, and the greater the number of disputes the greater the staffing budget that the Adjudicator will require, it is in Carlton/Granada's best interest to minimise the number of references to the Adjudicator and to provide fair and reasonable terms without repeated recourse to the Adjudicator, not least because Ofcom will be monitoring the number and type of references carefully.

Movement of advertisers covered under Agency Deals (Clause 10 (B))

It is important that advertisers continue to have the same flexibility post-merger as they currently enjoy. Advertisers who are part of an umbrella deal are protected only indirectly via the protection of the media buyer's contract. However, it is important that such advertisers are able to move about as freely as pre-merger without risking losing protection under the remedy.

How can an advertiser without its own protected contract switch between media buyers? Can Carlton/Granada prevent an advertiser from moving between agencies?

If a media buyer has specific provisions in its contract which allow it to incorporate new business, then this will continue to be the case, and an advertiser won by the agency will be protected under the media buyer's protected contract.

If the agency does not have a new business clause, then an advertiser is nevertheless **automatically** incorporated into an existing agency deal (although, of course the media buyer should give Carlton/Granada appropriate notice of this change) and can benefit from the protection of that deal, unless Carlton/Granada can demonstrate that they have good reason to withhold their consent for such a move.

Carlton/Granada may withhold their consent in only four specified circumstances:

- To avoid overtrading to a material extent. This does not mean that they may withhold consent if they are likely to be marginally over-traded. The movement must leave them overtraded to a material extent. What is material will vary from case to case.
- To avoid materially increasing existing overtrading. The fact that Carlton/Granada may be overtraded in the first place does not give them an easy reason to withhold consent. Only if the movement of an advertiser makes the situation materially worse, can they withhold consent. Materially worse does not, of course mean, "only very slightly" worse.
- If it would leave them in breach of another contractual arrangement already in existence. For example, the advertiser moving to the agency may wish to benefit from a term which would allow it to be first in break in a particular programme. However, this may conflict with an existing commitment to provide first in break in the programme to another advertiser.
- If there was a material reduction in the advertiser's SOB commitment, i.e. by moving to the new media buyer, the advertiser's SOB would fall by a material amount. Again, what is material will vary on a case by case basis.

These are all circumstances in which Carlton/Granada may withhold their consent.

Where Carlton/Granada withhold their consent, they must offer fair and reasonable terms to the new media buyer in order to accommodate the new advertiser. Carlton/Granada will also offer to allow the media buyer to include the new revised terms as part of the new media buyer's protected contract.

To the extent that Carlton/Granada withheld their consent, and the advertiser/media buyer did not believe their reasons were valid, then the advertiser/media buyer could challenge the fact that Carlton/Granada had withheld their consent by taking the matter to the Adjudicator. The Adjudicator would assess the dispute and determine whether or not Carlton/Granada had, in fact, good grounds for withholding consent. It would be for Carlton/Granada to demonstrate that they had good cause.

If the Adjudicator finds that Carlton/Granada did not have grounds for withholding consent, then the advertiser would be allowed to move and automatically be incorporated into the new media buyer's protected deal.

If Carlton/Granada have withheld consent appropriately and have offered new terms to accommodate the advertiser but the advertiser/media buyer does not believe that the new terms offered are fair and reasonable then the advertiser/media buyer can take this dispute to the Adjudicator.

As such, advertisers are in no way stuck with their current media buyer: they may switch to an alternative agency as they wish. Carlton/Granada cannot withhold their consent unreasonably and cannot prevent the advertiser from moving. It is only the specific terms on which the advertiser can be accommodated as part of the new agency deal that may be affected.

What if I want to change media buyers but my current media buyer won't tell me their existing terms?

The Adjudicator will have access to your current media buyer's contract. As such, if Carlton/Granada refuses consent for you to move to a new media buyer, and you do not

believe it is right for them to do so, you can bring the dispute to the Adjudicator without knowing your current media buyer's deal. Since the Adjudicator will have access to your current media buyer's deal, he will be able to determine whether or not Carlton/Granada were or were not within their rights to withhold their consent. As such, you do not need to know the terms of your current media buyer's deal in order to be able to move between media buyers.

Movement of advertisers covered under Line-by-Line Deals (Clause 10 (C))

An advertiser specified in a line-by-line deal (i.e. one with its own SOB) can move between media buyers and take its current line-by-line deal with it. This does not mean that the advertiser is incorporated into the new agency's existing deal. It means that the advertiser may move to a new media buyer and retain its current terms with Carlton/Granada as set out in its existing protected contract.

What if I wish to take advantage of an agency deal?

If a line-by-line advertiser wishes to switch media buyers and be incorporated into the new media buyer's agency deal, then it is treated the same as an advertiser with no protection (i.e. one who is currently covered under an agency deal) who switches between media buyers as set out in the previous section (10B).

What if I am a media buyer with line by line deals only – won't this affect my ability to win new business?

Currently when a media buyer with only line-by-line deals wins a new piece of business it has to negotiate new terms with Carlton/Granada in order to meet the promises it has made to the advertiser. This will continue in future, and Carlton/Granada will be obliged to offer that agency fair and reasonable terms for that new client.

However, it has been suggested that, with the introduction of CRR, advertisers will be more aware of whether or not an agency will be able to deliver the deal it has promised, and that this may disadvantage advertisers with line-by-line deals in pitching for new business, since they do not have an overall "umbrella" deal into which new business can be incorporated.

There is no reason to believe that line-by-line advertisers will be disadvantaged. Firstly, buyers with agency deals cannot **guarantee** an advertiser the terms that they are offering to other clients, any more than line-by-line agencies. As set out above, there are a number of reasons why it may be reasonable for Carlton/Granada to withhold their consent to such a move, making a guarantee invalid.

In addition, if a line-by-line agency has always been able to get what they promised an advertiser in the past due to their strong negotiation strengths there is no reason why this should not continue in the future.

However, to the extent that a line-by-line agency has concerns that it may be disadvantaged, it may seek to conclude an agreement with Carlton/Granada as to how

new businesses would be incorporated into their business in future. Such a contract might be in the form of an “umbrella” deal for unspecified new clients, or might include a range of possible SOBs and discounts pertaining to different types of businesses. This would give the agency the “guarantee” that it requires in the pitching round. Again, Carlton/Granada would have to offer fair and reasonable terms for any such agreement, and if the agency did not believe this to be the case it could then take the issue to the Adjudicator.

New entrants under Agency Deals (Clause 10 (D))

New advertisers can enter the market through a media buyer and benefit from that media buyer's protection, in a similar fashion to the process for advertisers who wish to switch media buyers.

The advertiser can be **automatically** incorporated into an existing agency deal (though, of course the media buyer should give Carlton/Granada appropriate notice of this change) and benefit from the protection of that deal, unless Carlton/Granada withhold their consent. Carlton/Granada may withhold their consent in only three specified circumstances:

- To avoid overtrading to a material extent. This does not mean that they may withhold consent if they are likely to be marginally over-traded. The movement must leave them overtraded to a material extent.
- To avoid materially increasing existing overtrading. If they are already overtraded and the movement makes the situation marginally worse then they may not withhold consent. However if it makes it materially worse than they may.
- If it would leave them in breach of another contractual arrangement already in existence.

These are all circumstances in which Carlton/Granada may withhold their consent. In this case, since it is a new advertiser, they do not have an existing SOB to consider: there can be no material diminution in commitment.

Where Carlton/Granada withhold their consent, they must offer fair and reasonable terms to the media buyer in order to accommodate the new advertiser. Carlton/Granada will also offer to allow the media buyer to include the new revised terms as part of the media buyer's protected contract.

To the extent that Carlton/Granada withheld their consent, and the advertiser/media buyer did not believe their reasons were valid, then the advertiser/media buyer could challenge the fact that Carlton/Granada had withheld their consent by taking the matter to the Adjudicator. The Adjudicator would assess the dispute and determine whether or not Carlton/Granada had in fact good grounds for withholding consent.

If the Adjudicator finds that Carlton/Granada had incorrectly withheld consent, then the advertiser would be allowed to be incorporated into the new media buyer's protected deal.

If Carlton/Granada have reasonably withheld consent and have offered new terms to accommodate the advertiser but the advertiser/media buyer does not believe that the new terms offered are fair and reasonable then they can take this dispute to the Adjudicator.

What if I don't want to use a media buyer?

If you do not want to use a media buyer, or if you are a new media buyer entering the market, Carlton/Granada are obliged to offer you fair and reasonable terms. Disputes will be referred to the Adjudicator.

Creating New Protected Contracts (Clause 10(E))

If you hold or have held a protected contract and vary this contract, you can make the varied contract your protected contract subject to agreement with Carlton/Granada. Carlton/Granada may not unreasonably withhold their agreement. If you believe that Carlton/Granada have unreasonably withheld agreement then this dispute can be referred to the Adjudicator.

If you hold or have held a protected contract and negotiate an entirely new contract, you can make the new contract your protected contract subject to agreement with Carlton/Granada. Carlton/Granada may not unreasonably withhold their agreement. If you believe that Carlton/Granada have unreasonably withheld agreement then this dispute can be referred to the Adjudicator.

Mergers (Clause 10(F) and (G))

Where two or more advertisers with their own contracts or line-by-line deals merge, they can:

- apply the CRR on the basis of the larger or largest of the advertisers terms (as long as Carlton/Granada is not made to overtrade to a material extent, existing overtrading is not materially increased and Carlton/Granada are not left in breach of another contractual arrangement already in existence);
 - apply CRR to a weighted average (based on annual spend on commercial airtime) of the advertisers terms; or
 - roll forward the two separate contracts, with CRR continuing to apply to both
- Where two media buyers merge, they can:
- apply CRR to the weighted average of both contracts (based on annual spend on commercial airtime, or
 - roll forward both contracts separately, with CRR continuing to apply to both.

Maintenance of the current Airtime Sales System (Clause 10(H))

Under the terms of the Undertakings Carlton/Granada may not change the current airtime sales system in a way that materially alters the basis on which they offer airtime for sale, or the way in which they sell it, without the express permission of the OFT.

This includes the use of SAP (including the maintenance of the different SAP calculations currently used by Carlton and Granada), continuing to sell all of the existing demographics, all of the existing regions, and all of the existing time periods that are currently sold. In addition they may not change the current mix of specials versus long-term contractual deals. Existing weighting factors must be maintained, and the averaging of minutes must not be manipulated to the detriment of CRR.

Clearly, initiatives like amalgamating their two sales forces and updating their IT systems are not issues that will materially alter the current airtime sales system to the detriment of advertisers/buyers, so long as the nature of the system is unchanged. However, to the extent that Carlton/Granada make changes, which an advertiser/media buyer considers could have a material impact on their business, they should bring this to Ofcom/OFT's attention immediately.

What will happen to SAP if Carlton/Granada launch a national product?

In order to meet the terms of their licences Carlton and Granada must apportion revenue to the appropriate licensed region in which it is earned. Currently there are specific formulae, which deal with apportionment when ITV sells macro regions. A similar process would be put in place if ITV sold a national product. The ITC audits and monitors the apportionment of ITV's revenues and Ofcom will continue to do so in future. As such, each regional SAP would continue to be accurately reported.

What about the different time weighting factors used by Carlton and Granada?

Carlton/Granada are expected to maintain these different calculations, unless they could demonstrate that changing the weighting factors would not materially change the way in which airtime is sold. To the extent that adjusting these weighting factors would, for example, lead to an artificial increase in commercial impacts, this would be seen to have a material effect on the market.

What happens to the different SAP calculations that Carlton and Granada currently use?

Carlton/Granada are expected to maintain the different SAP calculations going forward, unless they could demonstrate that changing the calculations would not materially change the way in which airtime is sold.

What if Carlton/Granada attempt to manipulate SAP through intra-group sales?

The ITC currently monitors intra-group sales carefully, and Ofcom will continue to do so. Changes to intra-group sales patterns in an attempt to manipulate SAP would be detected by the regulator very quickly.

Will I still be able to buy all ITV regions?

Technical background guide to advertisers and buyers' rights under the CRR remedy

Yes. Carlton/Granada are obliged to continue to sell all the regions it currently sells.

Can ITV change the mix of airtime by increasing the number of specials?

No. Carlton/ Granada must maintain the proportion of specials currently available.

Applicability to ITV1 Only (Clause 11)

The Undertakings relate to ITV1 contractual deals only, and then only where it is sold by Carlton and/or Granada. As such, ITV2, other Granada channels, sponsorship deals and the pricing of specials do not fall within the scope of these Undertakings.

The Adjudicator (Clause 12 –16 and Annex 2 and 3)

Given the level of contractual complexity in the airtime sales market the Competition Commission felt that an additional body should be established that would specialise in adjudicating on contractual disputes in this area between the parties and advertisers/media buyers.

The Adjudicator's role is to adjudicate in disputes connected with the CRR remedy, and in particular:

- to deal with complaints arising from incremental changes from the basic contract, e.g. owing to changes in demand, where a media buyer/advertiser feels that the price being charged by ITV to facilitate the change was unfair;
- to deal with complaints arising from new contracts to the extent that an advertiser/media buyer does not believe that terms being offered to it are fair and reasonable;
- to deal with any disputes arising where Carlton/Granada withhold their consent in relation to advertisers switching media buyers or new entrants being incorporated into agency deals; and
- to resolve general disputes in relation to contract enforcement and interpretation.

Who can use the Adjudicator?

Any advertiser/media buyer who wishes to change an existing contract with Carlton/Granada for ITV1 advertising time or is attempting to conclude a new contract (including new entrants) with Carlton/Granada for ITV1 advertising time who does not believe that the terms being offered by Carlton/Granada are fair and reasonable, or any advertiser/media buyer who believes their rights in relation to CRR as set out in the Undertakings has been infringed, may apply to the Adjudicator.

This means:

- Any advertiser/media buyer with an existing contract for airtime
- Any advertiser/media buyer trying to negotiate a new contract. This includes advertisers/buyers who do not currently have a contract (i.e. new entrants/lapsed advertisers)
- Any advertiser who is trying to move between media buyers and believes Carlton/Granada have withheld their consent when they should not have. This means that, even though the advertiser does not have a direct contract of its own with Carlton/Granada, in these circumstances, it may still access the Adjudicator.

In addition, SMG, Ulster and Channel may apply to the Adjudicator in relation to the rollover terms of their sales contracts with Carlton/Granada, but not in relation to contracts for advertising airtime between Carlton/Granada and advertisers/buyers.

To be clear, the option of bringing disputes to the Adjudicator is generally only open to those parties who contract or are trying to contract with Carlton/Granada for advertising time on ITV1. Other broadcasters and other parties such as trade associations may not bring disputes to the Adjudicator, and advertisers may not bring disputes relating to their contracts with their media buyer to the Adjudicator. These are outside the Adjudicator's scope of consideration.

To use the Adjudicator the person bringing the dispute must have signed up to the CRR Adjudicator Rules (see below).

Do I have to use the Adjudicator?

No, you do not. The use of the Adjudicator is optional for advertisers and buyers. To the extent that you can resolve any contractual issues between yourselves, then voluntary settlement is always open to you. The option of airing any contractual dispute in a normal court of law is, of course, still open to you, although you could then face more substantial legal costs than those which you would pay if you use the Adjudicator.

Carlton/Granada cannot force you to take any dispute to the Adjudicator, nor can they take an issue to the Adjudicator and force you to go along too. It is your right entirely whether or not you wish to use the Adjudicator.

However, if you do wish to use the Adjudicator then Carlton/Granada must allow you to do so. If you wish to use the Adjudicator, you must agree to be bound by his Rules for the duration of the existing dispute (see below).

What do I have to do in order to use the Adjudicator?

Carlton/Granada will offer you the option of inserting a new clause into your contract. This clause will state that a dispute in relation to CRR could be sent to the Adjudicator at your request and that both parties agree to abide by the Adjudicator Rules and Scheme. This offer will remain open indefinitely, and as such you can wait until an actual dispute arises before inserting the clause.

In addition, if you do not yet have a contract in which to insert the new clause you will be offered the option of going to the Adjudicator to resolve disputes in relation to CRR providing they agree to be bound by the Adjudication Rules and Scheme.

Once you have agreed to be bound by the Rules and Scheme, the matter can then be raised with the Adjudicator by sending him an Adjudication Notification, summarising the nature of the dispute. Once the Adjudicator is in place, he will establish the precise format of the Adjudication Notification in line with the Rules and Scheme.

Why do I have to agree to be bound by the Adjudicator Rules and Scheme in order to use the Adjudicator?

The Adjudicator Rules and Scheme set out the process and procedures that the Adjudicator will follow. Since this is how he will make his decision you must also be bound by his Rules. For example, he can only make a fair decision that is binding on Carlton/Granada if you provide him with accurate and honest information. By signing up to the Rules and Scheme you would be obliged to do so.

Do I have to do what the Adjudicator says?

You are obliged to comply with all the directions and orders made by the Adjudicator (e.g. to provide information and follow his procedures) during the process of the adjudication. But you will not necessarily be bound by his decision.

The decision of the Adjudicator is final and binding on Carlton/Granada but not on you. As such, Carlton/Granada must comply with his ruling. If for example the Adjudicator finds that Carlton/Granada have not offered fair and reasonable terms, then the contract will be remitted back to them to make a fair and reasonable offer. Similarly, if the Adjudicator finds that Carlton/Granada do not have grounds for withholding consent to an advertiser switching to a new media buyer, then they must allow the advertiser to switch.

If the Adjudicator finds "against" you then you have a number of options:

1. You can accept the Adjudicator's ruling and sign the new contract; or
2. You can appeal to Ofcom. If you consider that the Adjudicator's decision is incorrect, you can explain why to Ofcom: for example, you may believe that the Adjudicator did not discharge his functions appropriately, or you may have new and relevant information on the matter. If, in light of these representations, Ofcom considers it appropriate, Ofcom may then rehear the whole dispute and issue a new determination; or
3. You may walk away and simply return to your existing protected contract and not take the matter any further.
4. You can decide not to buy any airtime from Carlton/Granada as you are unable to agree acceptable terms.

Do Carlton/Granada always have to abide by the Adjudicator's decision?

Yes. As part of the Undertakings, Carlton/Granada have agreed to be bound by the Adjudicator's decision. They have no right of appeal to Ofcom.

How quickly will the Adjudicator reach a decision?

As soon as he has come to a decision he is obliged to inform the parties to the dispute as soon as possible. This will be as short a time as it takes for the Adjudicator to come to a decision. The timetable set out in the Rules and Scheme is the maximum time the Adjudicator can take in normal circumstances.

Who pays the Adjudicator?

The Adjudicator will be an independent individual appointed by the ITC/Ofcom on a self-employed basis. The ITC/Ofcom will pay the Adjudicator, and then bill Carlton/Granada for the costs. In this way there will be no direct financial relationship between the Adjudicator and Carlton/Granada.

How much does it cost to use the Adjudicator?

There is no cost for using the Adjudicator. All costs of the Adjudicator are born by Carlton/Granada. However, an advertiser/media buyer will bear their own (e.g. legal) costs of using the Adjudicator except in exceptional circumstances.

If an advertiser/buyer appeals to Ofcom, then it will bear the normal costs of such action.

Can I be charged costs if the Adjudicator finds against me?

The Adjudicator may decide that a party other than Carlton/Granada should bear the costs of the adjudication. This will be solely at the Adjudicator's discretion. If, for example, you made a series of frivolous and vexatious complaints, or if you were deliberately trying to force Carlton/Granada to incur excessive costs, then the Adjudicator may require you to pay costs. However, in general, all costs in relation to the Adjudicator and adjudication will be borne by Carlton/Granada.

Can costs be awarded to me if the Adjudicator finds in my favour?

Yes. The Adjudicator has the discretion to order Carlton/Granada to pay you all or a proportion of your own (e.g. legal) costs of using the Adjudicator, if, for example, he considered their conduct deserved it. Note, however, that this is a matter purely within the discretion of the Adjudicator, and would not generally be expected to occur. As such, you should not rely on the fact that Carlton/Granada will have to pay your legal costs.

Why can the Adjudicator say he is unable to act?

There may be a conflict of interest where the Adjudicator feels he cannot act. Or he may feel that the issue he is being asked to adjudicate on is outside his scope of responsibility. For example the issue being brought to the Adjudicator may be a regulatory one that is for Ofcom to investigate, rather than something that the Adjudicator has the powers to consider.

Does the Adjudicator have “teeth”?

The Adjudicator has sufficient powers to deal with contractual disputes and to enforce his determinations in relation to Carlton/Granada.

He also has the power to bring to Ofcom's attention any problems occurring in the market. This is an important provision, in that it allows the Adjudicator to raise matters regarding the general conduct of the market which do not pertain to a specific contract dispute. In particular, he has the power to bring it to Ofcom's attention if he considers that advertisers/buyers are unwilling to bring formal disputes to him for fear of retribution by Carlton/Granada.

Ofcom has substantial powers as the sectoral and competition regulator of the broadcasting sector to investigate any issues that the Adjudicator brings to its attention. In particular, Ofcom will monitor the operation of the CRR remedy in the market, with the help of the Adjudicator, and can take action to address any behaviour which contravenes the broadcasters licences or competition law. In this regard Ofcom has the ability to impose very substantial penalties and sanctions on broadcasters if required and justified.

What would happen if I was afraid to use the Adjudicator because ITV might exact retribution? Can the Adjudicator investigate issues arising in the market?

To the extent you wish to raise issues with the Adjudicator anonymously you are free to do so. However, he will not be able to adjudicate on a specific contract without discussing that specific contract with Carlton/Granada.

Nonetheless, Ofcom/ITC expect the Adjudicator to play a pro-active role in this market. If he hears that issues are arising, or sees anomalous contractual terms being agreed, he will be within his remit to bring such issues to the attention of Ofcom and the OFT. In addition, we would expect him to have very close ties with industry associations, such as ISBA and the IPA, and indeed with other broadcasters. All of these organisations can raise issues about the operation of the CRR with the Adjudicator informally. The Adjudicator is obliged to raise issues in relation to the effective operation of CRR with Ofcom/OFT in his quarterly reports, and can do so immediately if appropriate.

The ITC/Ofcom would consider any form of threatening behaviour, or behaviour from which a threat could be reasonably implied, on the part of Carlton/Granada as a possible indication of inappropriate exercise of market power and would act accordingly. The Adjudicator is there to be used by the industry in order to mitigate any market power that Carlton/Granada may have post merger. It will be essential that you have confidence in

taking issues to the Adjudicator without any fear that this will affect your relationship with Carlton/Granada.

ITC/Ofcom wish to make clear that complaints can be made to them in the strictest of confidence.

Why can't the Adjudicator determine prices and investigate issues?

The Adjudicator's role is essentially one of answering "yes" or "no" when presented with a particular dispute, e.g. are these terms fair and reasonable? Are Carlton/Granada left materially overtraded? The reason for this is because he is not a regulator. He has not been vested with any powers by Parliament and therefore it would be inappropriate for him to have powers that are wider in scope. His role is to be an expert in his field, and provide adjudication in the event of a specific, narrowly defined dispute.

Similarly, it is not appropriate to vest him with investigatory powers. This is Ofcom's role as the regulator of this market. However, we envisage a very close working relationship between Ofcom and the Adjudicator, and the Adjudicator will report to Ofcom on issues arising in the airtime sales market. To the extent that these issues require further investigation Ofcom will have the necessary statutory powers to do so, and will not hesitate to use them if appropriate.

However, we fully expect that the Adjudicator will actively engage with all parts of this industry and, given his closeness to the market, we expect that he will be in an excellent position to inform Ofcom of any areas where Ofcom ought to carry out detailed investigations.

Can the Adjudicator act against anti-competitive behaviour by Carlton/ Granada?

No. It is the regulator's job to ensure fair and effective competition in this market and to apply our various competition powers as appropriate. ITC/Ofcom will deal with any anti-competitive behaviour in this market. As such, the Adjudicator has no powers to initiate proceedings against Carlton/Granada, nor will he initiate market reviews (which falls to Ofcom under the Enterprise Act), nor will he have the powers to apply the Competition Act, nor generally to deal with collusion, abuse of dominance or any other competition issues. All of these powers will continue to rest with Ofcom.

However, given the Adjudicator's experience in relation to this market, he will be in a strong position to raise issues with Ofcom where he believes that Ofcom should undertake a competition investigation, and we would fully expect him to raise such issues at our quarterly meetings, or earlier if the Adjudicator believes the issue is serious enough to warrant it.

How will Ofcom know if the CRR remedy is working?

ITC/Ofcom intends to monitor this remedy carefully. The Adjudicator will report quarterly to the ITC/Ofcom as well as the OFT. He will keep them informed as to how the CRR is working, the number and nature of the disputes that he is handling, and any other issues where advertisers/media buyers feel that their rights have been infringed either directly

or indirectly. He may also want to monitor the trends in discounts and share of broadcast terms in contracts, and compare these with Carlton/Granada's audience performance to identify any adverse or unexplained movements.

The Adjudicator also has the power to recommend to Ofcom and the OFT that the Adjudicator Rules or Scheme should be amended if he feels amendments would be appropriate.

Of course, Ofcom would also be keen to hear directly from advertisers/media buyers/other broadcasters to the extent that they had concerns that they wish to raise in relation to the operation of CRR.

What will the Adjudicator report to Ofcom in his regular reports?

We would expect the Adjudicator to keep us informed of issues in relation to the operation of CRR like: the number of complaints he has received; the type of complaint (e.g. in relation to over-trading or a lack of fair and reasonable terms); percentage of successful/unsuccessful cases against Carlton/Granada; if a contract has been remitted to him over and over again because Carlton/Granada have not offered fair and reasonable terms.

We would also expect the Adjudicator to report any areas of concerns he may have in relation to the CRR that have been expressed to him in a formal, informal or anonymous capacity. In addition, the Adjudicator is required to inform the ITC/Ofcom if amendments to the Adjudicator Rules or Scheme could be appropriate.

What information will the Adjudicator have?

The Adjudicator will have access to every contract for advertising airtime to which Carlton or Granada are a party. Carlton/Granada will be obliged to provide copies of any new contracts or contract variations to the Adjudicator as they are signed, if he requires it.

In addition, the Adjudicator may request any additional information that he feels necessary from Carlton/Granada. This could include information on their actual trading balances, for any region, demographic or time period contracted for in the market.

We would expect the Adjudicator to determine his own procedures in relation to the information that he requires from Carlton/Granada, and in particular the procedures by which Carlton/Granada provide him with all new contracts and the format in which he requires any additional data.

The Adjudicator must, of course, respect the confidentiality of the information received and will not generally disclose it to other parties.

Information provided to the Adjudicator will not be passed to Ofcom/ITC or OFT, except as part of the Adjudicator's quarterly report.

Can an advertiser bring a dispute against their media buyer to the Adjudicator?

No. The Adjudicator will only hear disputes in relation to Carlton and/or Granada and then only in relation to advertising on ITV1. The Adjudicator will not determine disputes between media buyers and advertisers in relation to their contracts.

The Adjudicator has no powers to demand contracts between media buyers and advertisers since the Undertakings only bind Carlton/Granada's behaviour (though of course they may volunteer such information if they believed it was important in relation to a dispute in relation to Carlton/Granada).

Can the Adjudicator give me informal advice that a price is likely to be fair and reasonable?

No. The Adjudicator cannot advise on a contract where it may later be called on to resolve a dispute in connection with that contract. It cannot set indicative prices or participate in the contractual negotiations between parties.

Will the Adjudicator be independent from everyone?

The Adjudicator will be independent – in particular from Ofcom, Carlton, Granada, all other UK broadcasters, advertisers, media buyers and any company connected with the TV advertising market. That is not to say that he will not at some stage have worked for some of these companies, but for the duration of his appointment (and for a period afterwards) he must have no links with them.

What if the Adjudicator leaves and goes to work for my rivals?

The Adjudicator will not be able to work for any party in the market for a substantial period after leaving office. This will encompass at least one deal season.

In addition, he will be bound by a confidentiality agreement, which will require that he does not disclose anything that he learns while in office, and may not use any information he learns in any future employment.

What if the Adjudicator runs out of money mid-year?

Ofcom and the ITC have established a substantial budget for the Adjudicator, to ensure that he can carry out all of the functions required of him. This budget includes a flexible element, which will be used to the extent the Adjudicator requires it. If he needs to increase the complement of permanent staff to deal with the number of disputes arising, then he can do so. In the event that this is still not sufficient funding, the ITC and Ofcom have the power to procure further funding from Carlton/Granada.

Duration

Why is there no end date for the CRR specified?

As with all statutory Undertakings, the CRR will remain in place for as long as it is needed. As such there was no need to build in any form of "sunset" clause. However, the CC provided their view that this remedy was likely to be needed for at least three years. This was based on the fact that they did not believe that Carlton/Granada's market share was likely to fall sufficiently quickly to remove the Undertakings before then.

If Carlton/Granada wished to be released from the Undertakings, they would have to make a case to the Secretary of State/Competition Commission as to why this should be the case. Clearly Ofcom and the OFT would input their views into any such process.

In addition, the Competition Commission suggested that Ofcom and the ITC should review the operation of the advertising market in due course. This would provide a further opportunity for a thorough investigation of the remedy at an appropriate time.

Wider Competition Issues

Ofcom will still retain its normal competition functions in relation to ITV following this merger. Therefore, to the extent that any party believes that any behaviour is occurring in this market which would fall to be considered under Ofcom's general competition powers or under our sector specific competition powers, then they should bring this to our attention immediately. Issues in relation to conditional selling would be one example of such behaviour.

To the extent that a party is unsure whether or not a particular practice would fall under Ofcom's competition powers Ofcom would stress that individuals are free to make confidential written or oral submissions to us, which would then allow us to assess whether or not a case should be taken forward. Even in taking a case forward, Ofcom could still ensure the confidentiality concerns of any parties are met.

Glossary

Adjudicator - the expert appointed to hear disputes in relation to the CRR

Advertiser - a purchaser of advertising airtime

Agency deal - a type of agreement between a Media Buyer and a particular channel or sales house, where the agreement specifies the Media Buyer's Share of Broadcast commitment and the discount level it will receive in aggregate

ARM – Automatic Ratchet Mechanism. The ratchet that applies in relation to CRR.

Base year – The year against which changes in Carlton/Granada's share of commercial impacts is measured. If the Protected Contract was in place before 1 January 2004 the base year is 2002. If the Protected Contract comes into force after 1 January 2004, then the base year is the 12 month period prior to the contract coming into force.

Commercial Impact - the viewing by one member of the target audience of an advertisement (including an interactive advertisement), as currently measured by BARB (the Broadcasters' Audience Research Board)

Current Airtime Sales System - the features and processes currently used by Carlton and Granada in relation to the sale of ITV1 advertising.

Initial share of broadcast – The SOB at which an Advertiser's/Media Buyer's commitment to Carlton/Granada is capped. If the Protected Contract came into force before 1 January 2004 the SOB set out in the final 12 months is the initial share of broadcast. If a new Protected Contract comes into force on or after 1 January 2004, then it is the SOB in relation to the first 12 months of that contract.

Line-by-Line Agreement - a type of agreement between a Media Buyer and a particular channel or sales house where the agreement specifies the specific Share of Broadcast commitment and the discount level received by some or all of the Advertisers on whose behalf the Media Buyer is contracting

Media Buyer - a purchaser of advertising time on behalf of an Advertiser

Overtrading - a situation in which Carlton and Granada are or would become unable to meet their contractual obligations to supply advertising time.

Protected Contract - a contract for the purchase of Commercial Airtime that is either:

1. the most recent contract that has been in force between an Advertiser or Media Buyer and Carlton or Granada between 1 January 2001 and 1 November 2003.
2. the first new contract entered into by a new Advertiser/Media Buyer if they have not held a contract between 1 January 2001 and 1 November 2003

Regulator - the Independent Television Commission ('ITC') and/or the Office of Communications ('Ofcom')

Share of Broadcast (SOB) - the proportion of an Advertiser's or Media Buyer'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 and which may be specified by reference to any one or more of a total share on a national basis, or for a particular region or regions, or for a particular demographic audience or audiences or for a particular time period or periods

Station Average Price (SAP) - a benchmark price for delivery of a specific target audience. It is defined for each target audience and for each region sold.

Umbrella Agreement – see Agency Deal