

The Office of the Adjudicator Periodic Report

October 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 CRRRA Scheme and CRRRA 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.

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Management Summary

Introduction

This report covers a quiet period in the television market, in terms of contract negotiation, as the majority of annual deals are struck during the winter period. However, it is also traditionally a time when there are a substantial number of 'pitches'¹, where advertising accounts can potentially move between Media Agencies. The movement of accounts between Agencies will often result in contract renegotiation, and potential disagreement between Media Agencies and Broadcasters.

Potential disputes are not limited to contract negotiation. Issues can also arise through the interpretation of clauses in Advertisers/ Media Buyer contracts, which can emerge through the day to day administration of the deals.

The undertakings introduced a considerable amount of change to the framework within which Advertisers/ Media Agencies negotiate terms with ITV plc. Ofcom stated at the inception of the CRR² (Contracts Rights Renewal) remedy that it would only work effectively if all parties understood all of their rights and obligations and if Advertisers/ Media Buyers exercise their rights fully. The Adjudicator is of the opinion that Advertisers and Media Agencies have over time become more familiar with their rights under the CRR remedy and are more confident of their position when in discussions with ITV plc.

In the period since the last report, ITV plc's compliance and willingness to co-operate fully with the Office has been good. We are now approaching the period when contracts for 2005 are due to be renegotiated. The Adjudicator is conscious that this period represents a further test of ITV plc's willingness to fully comply with its undertakings. This point is also raised by the IPA, in its submission, and the Adjudicator concurs with the IPA's view that in the negotiation period ITV plc must carry out its obligations with expedience and punctuality.

Activity of the Office of the Adjudicator in Quarters 2 and 3

In the second and third quarters the Adjudicator set his Office the following objectives.

- To arrange a number of individual meetings with Advertisers, and London and Regional Media Agencies to discuss the undertakings, to outline the role of the Adjudicator, and to listen to their views on the CRR remedy.
- To continue to develop its dialogue with all UK Broadcasters in order to hear their views of the operation of the undertakings and to discuss the evolution of the advertising airtime sales market.
- To develop its own dedicated website

The Adjudicator is pleased to report that all of these objectives have been achieved. The Adjudicator has held over 60 workshops with interested parties since the last report, including key Advertisers, London and Regional Media Agencies, Industry Bodies (IPA and ISBA) and Broadcasters (including the ITV plc Sales Team). The Adjudicator created a standard presentation, which was adapted to meet the needs of the audience.

The Office of the Adjudicator has also developed its own dedicated website, which houses material relevant to the undertakings and the CRR remedy. This is located at www.adjudicator-crr.org.uk

Adjudication of Disputes

The Adjudicator is pleased to report that no disputes were submitted in the period since the last report. This is not surprising as historically the summer has always been a quiet period in terms of the number of contracts that are being re-negotiated with ITV plc. Nonetheless, there were still a number of potential areas, notably relating to contract interpretation and business moving between Media Agencies, where disputes could possibly have arisen.

¹ This refers to a process whereby Media Agencies compete to win advertiser's accounts

² The CRR was the remedy put into place as a pre-condition of the Carlton/ Granada merger

A substantial number of guidance enquiries were brought to the Office in the period since the last report. It is to ITV's credit that there were no disputes in this period and that those that were flagged to the Office as potential disputes by both Advertisers and Media Agencies were settled without a Notice of Adjudication³ being submitted.

While the Office cannot advise on individual contracts and negotiations, it is able to provide guidance by directing the parties to the relevant sections of the undertakings and the technical guide. Any guidance is without prejudice to the view that may be taken by the Adjudicator if and when the issue is brought as a formal dispute, when further information relating to the issue may be available and may need to be taken into account (for example, details of historical precedents showing how the parties have dealt with similar issues in the past).

The issues on which the Office was asked for guidance most frequently were in relation to:

- Inclusion / exclusion of New Business within an Agency deal;
- The methodology behind the calculation of the ARM⁴ (Audience Ratchet Mechanism). This refers to the mechanism that allows Advertisers/ Media Agencies the opportunity to reduce their SOB (share of broadcast)⁵ revenue commitment to ITV plc in line with any loss of share in ITV plc's commercial impacts.

ITV plc's compliance with the undertakings

The Adjudicator has since the last report agreed a Memorandum of Understanding ("MOU") with ITV plc under which ITV plc provides the Adjudicator with certain categories of general information and documents, i.e. information and documents that are not related to specific disputes. Since the MOU has been in effect, ITV plc's cooperation with the Adjudicator's requests for information and documents has been good.

Several Advertisers and Media Agencies have expressed their concern to the Adjudicator that, should ITV1 lose a significant share of commercial impacts in 2004, then the forthcoming negotiation season will provide a true test of ITV plc's intention to fully comply with its CRR obligations.

In particular, some Agencies expressed concern that, in these negotiations, ITV plc might discriminate or threaten to discriminate between Agencies that are considered to be 'supporters/ preferred partners' of ITV plc and those that are not. There was concern that those Agencies that were considered to be supporters would receive preferential treatment in the day to day delivery of deals.

It is important to stress that to date the Adjudicator has not received any evidence of discriminatory behaviour by ITV plc, in their day to day delivery of deals.

Senior management at ITV plc has assured the Adjudicator that ITV staff are fully aware of their obligations and of the repercussions of any such behaviour.

If the Adjudicator 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. Ofcom has stated that it would consider any form of discriminatory behaviour, or behaviour from which a threat could be reasonably implied, on the part of ITV plc as a possible indication of non-compliance with the undertakings and would act accordingly.

³ In order to formally bring a dispute to the Adjudicator, a Notice of Adjudication must be completed by the Advertiser/ Media Agency. It is worth noting that only Advertisers/ Media Agencies can bring a dispute to the Adjudicator, ITV plc cannot.

⁴ 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.

⁵ 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.

The Operation of the undertakings

The Adjudicator is of the opinion that many Advertisers, and most Media Agencies, are now well versed in their rights under the CRR remedy. This is evident, in part, from the way in which the Adjudicator has tended to receive guidance enquiries. This has increasingly been in the form of an Advertiser/ Media Agency seeking assurances on its interpretation of issues in advance of a meeting with ITV plc, rather than seeking direction on an interpretation presented to them following a meeting with ITV plc.

Nonetheless, the Adjudicator considers that certain common areas of uncertainty remain. Some of those areas will undoubtedly arise in the context of the upcoming season of contract negotiations. Consequently, the Adjudicator highlights some of those areas in section 5 of this report.

Views of the operation of the undertakings and the CRR Scheme

The Adjudicator wrote to ISBA, the IPA and other Broadcasters to seek their views on the operation of the undertakings and the CRR Scheme. ISBA and the IPA agreed that their views could be made public.

The IPA reported that in providing guidance to its members, some had commented that the Office of the Adjudicator's direction had enabled them to reach a fair and reasonable settlement with ITV and thus avoid the need to invoke any formal dispute procedure.

Most parties thought that the CRR system has continued to run fairly smoothly and that ITV plc has generally complied with its undertakings and behaved in a fair and reasonable fashion. The IPA reported that some of its member agencies felt that ITV plc has actually behaved in a more co-operative and positive fashion than it did at the beginning of the CRR process. It also noted that some areas that had been highlighted as problems in the past were being gradually resolved as all parties became more aware of their rights under CRR.

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

- The method used by ITV plc in calculating the Audience Ratchet Mechanism (ARM) figures
- The length of time taken to agree CRR figures. It is felt that if ITV plc looks to be in a position where they could lose share under the CRR remedy, then they might attempt to prolong the process in their forthcoming negotiations with Advertisers and Media Agencies, in order to delay them from being able to make firm commitments to other Broadcasters.
- ITV plc's leverage of ITV2 as the 'deal breaker' when a Media Agency/ Advertiser seeks a contract variation or a new contract on ITV1. Many predicted that, in 2004, ITV2 would enjoy an increase in its revenue that was disproportionate in size to its increase in audience share over time.
- ITV plc continuing to adopt a rigid and mechanical approach to negotiations.

In its submission, ISBA commented that it was aware that simplified versions of the ARM calculation were being agreed by Media Agencies and ITV plc, and expressed its concern that Media Agencies should not look to use simplified versions of this calculation if it does not deliver the most positive impact for Advertisers.

These views are set out in section 6 of the report.

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 CRR 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. This is the second of these Periodic Reports.

Pursuant to paragraph 22 of the CRR 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 CRR Scheme and the CRR 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.

One of these Periodic Reports will be designated the Adjudicator's Annual Report

2. The Office of the Adjudicator⁷

2.1 Activity of the Office of the Adjudicator in Quarters 2 and 3

In his first report the Adjudicator stated that a key objective for his Office in the second quarter was to increase its dialogue with participants in the industry. The intention was to hold meetings on an individual basis with Television Advertisers, London and Regional Media Agencies, and Broadcasters. The Adjudicator intended to discuss and provide clarity on the undertakings and the role of the Adjudicator, and to hear the viewpoints of others on the effectiveness of the CRR remedy.

In the period running from April to August 2004 the Adjudicator held over 60 such meetings, including one recently with the ITV plc Sales Team. The Adjudicator has created a standard presentation. This covered the following areas:

- The background to the ITV merger
- The key objectives of CRR
- The Office of the Adjudicator's team and key duties
- The dispute process
- A summary of the Adjudicator's first report
- A viewpoint on the main guidance enquiries received by the office

The guidance enquiries section dealt with the following topics;

- A perspective on the Adjudicator's views on the meaning of 'Fair and Reasonable' and 'Material'
- The process for Advertisers switching between Media Agencies
- The methodology behind ARM calculations
- The clause entitling Advertisers/ Media Agencies to take a 'holiday'⁸ from ITV1
- ITV1 only offers versus bundled offers and the issue of conditional selling

The Office found these meetings useful in appreciating the degree to which the participants fully understood their rights under the CRR remedy. He was also able to hear, in a confidential setting, the concerns that some of the key participants had with the undertakings. These are dealt with in section 4 of the report which covers ITV compliance.

The feedback from the participants on these meetings has been positive. The Adjudicator would like to stress that he is always available to meet with participants in the industry that are affected by the undertakings and who might benefit from such a meeting.

⁷ Background information on the Office of the Adjudicator, such as that relating to location, security, staffing, the process for disputes, the Notice of Adjudication and access to information was set out in the Adjudicator's Periodic Report dated April 2004. Further background information is available on the Adjudicator's website (<http://www.adjudicator-crr.org.uk/>).

⁸ This refers to Advertisers who do not want to take up their CRR offer immediately and thus are entitled not to advertise on ITV plc for a period of time; enabling them to return to ITV plc as a 'lapsed' advertiser at a later date.

2.2 Website

The Adjudicator stated that a second objective was for the Office was to launch its own dedicated website. This has now been realised. The site houses all documentation relating to the undertakings and the Office of the Adjudicator, including;

- a full version of the undertakings
- a "Technical Guide to The CRR Remedy"
- the process for disputes
- The Adjudicator's Periodic Reports
- the Adjudicator's most recent presentation to Advertisers and Media Agencies

The website will be regularly updated to include information relating to the CRR remedy, that Advertisers and Media Agencies may find useful.

The Office of The Adjudicator website address is:

www.adjudicator-crr.org.uk

The website can also be accessed from the Ofcom website.

3. Adjudication of Disputes

3.1 Formal Disputes

There have been no formal disputes submitted to The Adjudicator since the last report. This is not surprising as historically the summer has always been a quiet period in terms of the number of contracts that are re-negotiated with ITV plc. Nonetheless, there are still a number of potential areas, notably relating to contract interpretation and business moving between Media Agencies, where disputes could possibly have arisen. It is to ITV plc's credit that there were no disputes in this period and that those that were flagged to the Office as potential disputes by Advertisers and Media Agencies were settled without a Notice of Adjudication being submitted.

3.2 Guidance Enquiries

A substantial number of guidance enquiries were brought to the Office by Advertisers and Media Agencies since the last report was published. While the Office cannot advise on individual contracts and negotiations, it is able to provide guidance by directing the parties to the relevant sections of the undertakings and the technical guide. Any guidance provided is without prejudice to the view that may be taken by the Adjudicator if and when the issue is brought as a formal dispute, when further information relating to the issue may be available and may need to be taken into account (for example, details of historical precedents showing how the parties have dealt with similar issues in the past).

Many of these enquiries were from Advertisers and Media Agencies seeking an interpretation of certain clauses in the undertakings. The following issues were among some of the concerns raised, with the first two being the ones that featured most frequently.

- The inclusion / exclusion of New Business within an Agency deal as Advertisers moved between Media Agencies.
- The methodology behind the calculation of the Audience Ratchet 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 ability to apply CRR to 'burst' contracts.
- The degree to which ITV plc sought to penalise cancellations and deferment of campaigns.
- The interpretation of individual clauses within a contract.

A short-term campaign negotiated on an ad-hoc basis

4. ITV plc's compliance with the undertakings

4.1 The provision of information

In his first report the Adjudicator stated that ITV plc's performance in complying with requests for information and documents had become less consistent over time. He also stated that he intended to agree a standardised process with ITV plc for the provision to the Office of certain general information and documents, i.e. information and documents that do not relate to specific disputes.

A Memorandum of Understanding ("MOU") has now been agreed. The MOU has facilitated the effective processing of information requests made by the Adjudicator, under paragraph 21 of the Scheme, ensuring that there is full and timely compliance by the provision of up-to-date information within a specified deadline, without over-burdening ITV plc. Since the MOU has been in effect, ITV plc's cooperation with the Adjudicator's requests for information and documents has been good.

The MOU covers the provision of a number of different categories of information and documents, including in particular the following.

- Copies of final sales contracts for 2004. Where contracts are not available The Office will be supplied with a summary of the key terms on which Media Agencies/ Advertisers are trading with ITV plc.
- A fortnightly report on the past, present and future position of the Trading Balance¹⁰ by ITV plc region.
- A full report on the treatment of all bookings made after the ABD (advance booking deadlines)¹¹.
- A monthly summary of all DRTV¹² (Direct Response Television) campaigns by region.
- The MOU also puts in place regular status meetings between the Office and ITV plc, in which both parties are able to discuss any concerns that they might have in relation to the operation of the undertakings. This includes a monthly meeting between the Office and ITV plc; a monthly meeting between a member of the Office and ITV plc's Sales Operation Controller and Sales Operation Planning Controller to discuss any issues arising from the ITV plc's Trading Balance figures; and a quarterly meeting between the Adjudicator and the Managing Director of ITV plc.

4.2 Media Agency concerns regarding compliance by ITV plc

Several Advertisers and Media Agencies have expressed their concern to the Adjudicator that, should ITV1 lose a significant share of commercial impacts in 2004, then the forthcoming negotiation season will provide a true test of ITV plc's intention to fully comply with its CRR obligations.

In particular, some Agencies expressed concern that, in these negotiations, ITV plc might discriminate or threaten to discriminate between Agencies that are considered to be supporters of ITV plc and those that are not. There was concern that those Agencies that were considered to be supporters would receive preferential treatment in the day to day delivery of deals.

It is important to stress that to date the Adjudicator has not received any evidence of any discriminatory behaviour by ITV plc, in their day to day delivery of deals.

¹⁰ The Trading Balance is the device ITV plc 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 plc's inventory is necessary.

¹¹ Airtime booked after the advanced booking deadline set by ITV plc.

¹² This refers to television campaigns which enable viewers to respond directly by having a contact number shown in the advertisement.

Senior management at ITV plc has assured the Adjudicator that ITV staff are fully aware of their obligations and of the repercussions of any such behaviour.

Ofcom has stated that it expects the Adjudicator to play a pro-active role in this market. If the Adjudicator 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.

Further, Ofcom has also stated that it would consider any form of discriminatory behaviour, or behaviour from which a threat could be reasonably implied, on the part of ITV plc as a possible indication of non-compliance with the undertakings and would act accordingly. It is essential that Advertisers and Media Agencies have confidence in taking issues to the Adjudicator without any fear that such a course will affect their relationship with ITV plc.

Advertisers and Media Agencies have also raised other issues with the Adjudicator as Guidance Enquiries. These are set out at section 3.2 above. Those issues included, among others, the inclusion / exclusion of new business within an agency deal, and the methodology behind the calculation of the Audience Ratchet Mechanism ("ARM"). Concerns relating to calculation of the ARM were also raised by ISBA and the IPA, who in addition highlighted concerns relating to conditional selling by ITV plc. The Adjudicator will continue to monitor ITV plc's compliance in relation to these and other issues.

Technical Guide, p27/32.
Technical Guide, p27/32.

5.0 The Operation of the undertakings

5.1 The undertakings

In his first report, the Adjudicator expressed concern that while the CRR Remedy and the provisions of the undertakings were generally well understood and well implemented, he was not convinced that all Advertisers and Media Agencies were fully aware of their rights and were willing to challenge ITV plc where there were areas of doubt.

In the course of the last six months most Media Agencies, through their dealings with ITV plc, will have encountered certain issues that are addressed in the undertakings. The Adjudicator is of the opinion that many Advertisers, and most Media Agencies, are now well versed in their rights under the CRR remedy. This is evident, in part, from the way in which the Adjudicator has tended to receive recent guidance enquiries. This has increasingly been in the form of an Advertiser/ Media Agency seeking assurances on its interpretation of issues in advance of a meeting with ITV plc, rather than seeking direction on an interpretation presented to them following a meeting with ITV plc.

Nonetheless, the Adjudicator considers that certain common areas of uncertainty remain. Some of those areas will undoubtedly arise in the context of the upcoming season of contract negotiations. The Adjudicator highlights some of those areas in the following section.

5.2 Common queries

ARM Calculations:

- ARM figures will be calculated based on the protected contract. This may not necessarily be the current contract.
- If under CRR, contract terms were rolled-over from 2003, then 2002 will be the base year for any Share of Impact changes. If a new Protected Contract is in place for 2004, then 2003 will be the base year for any Share of Impact changes.
- Regional Share of Broadcast figures are capped for ARM calculations Regional Share and ITV spend profiles are not.
- A simpler version of the Audience Ratchet Mechanism may have been mutually agreed between ITV plc and Advertisers/ Media Agencies. In this case, the contractually agreed mechanism will be used if any disputes are raised.
- Under Clause 7 of the undertakings, contracts that are agreed for more than one year will still be able to apply the ARM factor on the anniversary of that contract. Only if the Advertiser or Media Agency agrees in its contract to waive its rights under Clause 7, will the Share of Broadcast commitment be fixed for the full term of the agreement.

Bundled Offers from ITV plc:

- ITV plc are not precluded from making 'bundled offers', which may tie in a commitment to ITV1 with ITV plc's other channels (ITV2 etc.) However, the undertakings require ITV plc to make fair and reasonable offers on ITV1 alone, or if an Advertiser/ Media Agency does not want a bundled offer.

Taking a Holiday from ITV1:

- An Advertiser/ Media Agency cannot take a 'holiday' from ITV1 once it has accepted CRR. The CRR offer will remain open until it is accepted by the Advertiser/ Media Agency, or a new contract or variation is negotiated.

Timing of Offers

- ITV must send out offers 2 months in advance of the end of the year (31st October, for contracts ending in December).
- There is an obligation on ITV to send out accurate offers. This can include detailed workings if requested.
- ITV are under an obligation to send out final offers in a timely way. If this obligation is not met by ITV, the Media Agency/ Advertiser can bring a formal dispute to the Adjudicator.

ITV 2004 Standard Terms and Conditions

ITV have consolidated their Standard Terms and Conditions, and these differ from the Standard Terms and Conditions previously used when trading as Carlton and Granada.

- If a 'new' contract has been negotiated for 2004, it will be subject to the new ITV plc 2004 Standard Terms and Conditions. Media Agencies and Advertisers should be aware of the changes in the 'new' Standard Terms and Conditions prior to agreeing to a new contract with ITV plc. It is their right to challenge any aspect of the Standard Terms and Conditions before any agreement is finalised.
- If a contract was CRR'd or rolled over from 2003, then all agreed Standard Terms and Conditions from 2003 are maintained and protected.

The Standard Terms and Conditions for 2003 and 2004 are accessible through the ITV Sales website. The following three documents constitute the 2004 Standard Terms and Conditions and Media Agencies and Advertisers should be the aware of importance of all three documents in relation to their contracts;

- Broadcasters; Standard Airtime Sales Terms and Conditions,
- ITV Sales; Standard Deal Terms and Conditions
- ITV Sales Limited; Glossary of Airtime Contract Terms

6.0 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 your request for a viewpoint on the ongoing operation of the undertakings and the CRR Scheme from the perspective of the IPA and its member agencies.

6.1.1 Our historical position of the undertakings/ CRR

As with our earlier review on this area, what follows represents a consolidation of the observations of a cross-section of our media membership as at the end of August 2004.

As you will be aware, the period from April to August is generally a pretty quiet one for most of our agencies – with the majority simply adapting existing deals rather than becoming engaged in major negotiation.

Having said this, it has been possible to draw a series of conclusions from the responses I have received. Specifically:

6.1.2 The operation of the approach

Member agencies continue to appreciate the assistance and guidance they receive from the Adjudicator's Office in gaining a clear understanding of their rights as a result of the undertakings – with many commenting that such advice has enabled them to reach a fair and reasonable settlement with ITV and thus avoid the need to invoke any formal disputes procedure.

Nevertheless it remains the case that for most agencies CRR has reinforced a rigidity of behaviour and interpretation which continues to make negotiation both protracted and mechanical.

6.1.3 How have we found ITV's behaviour?

As with our earlier report, most respondents have continued to find ITV personnel both informed with regard to the detail of the undertakings and sensitive to their obligations.

Some agencies have felt the Broadcaster has behaved in a more co-operative and positive fashion than it did at the beginning of the CRR process and there are indications that early concerns over thorny areas like the handling of new business may gradually be being resolved as the parties come to a greater understanding of what constitutes "material overtrading" and "material loss of broadcast share".

Having said this some agencies continue to report intransigence in this area, while there appears widespread concern over the length of time which ITV takes to arrive at the correct CRR/ ARM figures, with many commenting that the Broadcaster is slow to share both its information and calculations with agencies.

In the words of one respondent "Although this is only weighted BARB data these weightings are often quite complex and so full, open and timely sharing of (information) would make things easier They are not doing anything "wrong" here, but clearly they are looking to gain advantage with some agencies that may not be as thorough as they should be."

Likewise other agencies have commented that they have had to challenge ITV as to how figures were calculated before they could reach final numbers on which both parties agreed.

This has caused some concern with regard to the main 2005 negotiations where it has been pointed out that if agencies wish to “CRR” their terms, they will not know the correct CRR figure until well into the year, since they will need to check and question all the numbers the Broadcaster submits.

Given that other negotiations will be taking place at the same time, this could mean these would be held up while agreement is reached on the share coming out of ITV – a situation which, it is suggested, provides ITV with every incentive for slowing the process down.

For this reason, it is felt imperative by some members that ITV releases the 2005 CRR offers on time.

At this point, it is believed ITV should issue audience projections where forecasts have been made (October-December 2004) to give time for agencies to discuss issues with ITV and to plan ahead with other stations/ channels. Alternatively, it has been suggested that ITV could issue some preliminary figures – say three months before – with it being noted that, by 10th October, December budgets will have been committed and CRR numbers could be reasonably accurately calculated.

6.1.4 Conditional selling

In our last report, we highlighted that the problem of conditional selling “had not gone away” and that as soon as any variation to CRR was considered, salespeople were quick to bundle any revised offer along with requirements to spend on ITV2, GSB and S4C.

Although we are clearly not as yet in the main negotiation season, the current picture with regard to conditional selling appears less clear cut. One agency has reported a backing off of trying to bundle up ITV2 with ITV1; for others, however, ITV3 has now joined the stable in the “bundling process” whenever 2005 is discussed.

This, together with ITV’s ability to slow down the trading season with other Broadcasters, has led to a feeling in some quarters, that the Broadcaster is still actively seeking ways around the controls imposed on it – leading to the likelihood of friction in the heat of the main negotiation season.

This sensitivity is particularly marked given recognition of the likelihood of significant monies migrating out of ITV as a result of the Broadcaster’s decline in audience share and the ability which the ratchet mechanism grants Advertisers to reduce their commitment to ITV1 while retaining existing discounts.

In these circumstances, it is recognised that the ITV sales force will come under enormous pressure to make up shortfalls and the temptation to seek to exploit perceived loopholes in the set-up will grow correspondingly.

Needless to say, our members are alive to this danger and will seek guidance – and if necessary invoke a formal disputes procedure – should they believe that ITV is in breach of either the letter or spirit of its undertakings.

6.2 ISBA’s view of the operation of the undertakings and the CRR Scheme

Having canvassed our leading members, we have few comments to make.

Overall, we are unaware of any further referrals - as indeed we should be given the confidentiality constraints which prevail.

With ITV’s continuing decline in audience, we expect the ratchet element of the Contract Rights Renewal remedy to engage during the 2004 trading round for 2005 airtime. This coupled with ITV’s increasing familiarity with the CRR and the commercial pressures confronting them lead us to expect a much tenser trading round than 2003/4, and in turn more referrals to the Adjudicator.

In your first report, you indicated that several Media Agencies appeared to be finding CRR and its attendant computations very complex, and had developed their own individual and non-uniform simplified versions. Our conversations confirm this. Although they are at pains to reassure us of negligible differences between original and simplified versions, we have some concerns that widespread use on non-uniform simplifications will cloud the effective operation and positive impact for Advertisers of CRR.

We are therefore reassured that any adjudication will be done against the full, standard and original formulae and are briefing our leading members accordingly.

Apart from this, we have no further comment at this time.