

The Office of the Adjudicator Periodic Report

April 2005

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 CRRS Scheme and CRRS 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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Overview

The CRR¹ (Contracts Rights Renewal) was introduced to the television advertising market in November 2003. Its objective was to protect Advertisers and Media Agencies in relation to the terms on which they purchase airtime on ITV1. The Adjudicator considers that CRR has been broadly successful in this regard.

When the CRR remedy was proposed, there were initial concerns from interested parties that it would be difficult to regulate and to ensure compliance by ITV plc with a behavioural remedy. There was also some unease that certain provisions of the undertakings were open to interpretation, and that the calculation that allowed Advertisers to remove share from ITV plc on an annual basis, in direct proportion to ITV1's loss in share of commercial impacts (The Audience Ratchet Mechanism), was too complicated.

These initial concerns appear to have been largely unfounded. After sixteen months and two deal seasons, the key stakeholders have expressed a high degree of satisfaction with the remedy. This includes Advertisers, Media Agencies and Broadcasters other than ITV plc. ITV plc has undoubtedly made efforts to familiarise itself and comply with the undertakings. However, concerns remain in relation to specific aspects of ITV plc's behaviour and the Adjudicator considers that this demands continued vigilance by his Office, Ofcom and the OFT. This should not be taken to indicate that the CRR remedy has not been broadly successful. It is a view that appears to be shared by the vast majority of participants in the industry, who have advocated the continuance of the CRR remedy, at least for the foreseeable future.

The Adjudicator has welcomed the support and guidance that Ofcom has provided the Office of the Adjudicator during the first sixteen months of his appointment.

1.0 The Adjudicator's Office

David Connolly was appointed as the Adjudicator in December 2003, in time to oversee the first deal season under the CRR remedy. He is located within the Ofcom Offices at Riverside House, and was immediately operational, having been fully equipped in terms of on-line research data. He recruited his full complement of staff by March 2004.

2.0 Building Relationships with Key Stakeholders

In order for the remedy to be effective the Adjudicator was of the view that from the outset he had to be accessible to industry participants and had to take steps to ensure that they understood the CRR remedy and were aware of their rights. To this end he initiated contact with the key stakeholders in the first few months of his appointment. This included, in particular, meeting with the following.

- Advertisers and Media Agencies to explain his role and listen to their views.
- The key industry bodies, ISBA and the IPA, to seek their views on how the CRR remedy was progressing.
- UK Broadcasters, to seek their views on CRR and on the television trading environment in general.
- Ofcom, initially to provide guidance on the interpretation of the undertakings.

3.0 Disputes

The Office handled six formal disputes in the first year. The dispute process set out in the undertakings was adhered to by all parties and confidentiality was maintained throughout. Decisions were taken swiftly, with all dispute determinations delivered within two weeks of the dispute submission. Four of the determinations were in favour of the complainant. The

¹ The CRR was the remedy put into place as a pre-condition of the Carlton/ Granada merger

other two disputes were settled in the middle of the dispute process. Settlement occurred in both cases when the claimants wrote to the Adjudicator expressing a desire to withdraw the Notice of Adjudication, following a resolution of the issues in dispute.

4.0 Guidance Enquiries

In the first sixteen months of the operation of CRR the Office received 103 telephone guidance enquiries. Initially, many guidance enquiries related to how certain clauses in the undertakings should be interpreted as a matter of principle. After that initial period, guidance enquiries tended to relate to whether certain alleged behaviour on the part of ITV plc was compatible with the undertakings. The Office cannot advise on individual contracts and negotiations. Nonetheless, where a guidance enquiry falls within the remit of the Office, it is able to provide guidance by directing the parties to the relevant sections of the undertakings and the technical guide (a guide written by Ofcom that gives examples of frequently asked questions relating to CRR). The Office has adopted the practice of confirming any guidance in writing.

5.0 ITV plc Compliance

ITV plc's compliance with the undertakings has been inconsistent over the first year of the operation of CRR. In the initial period after its introduction, ITV plc greatly assisted the successful introduction of the remedy by extending the CRR negotiation deadline. In addition, ITV plc has provided Advertisers and Media Agencies with CRR offers prior to any contracts being signed.

ITV plc has adopted its own interpretation of the undertakings, as it is entitled to do. However, Advertisers and Media Agencies are fully entitled to form their own interpretations, which may differ from ITV plc's. In the event of a dispute, the Adjudicator will provide his own interpretation of the relevant provision within the context of the specific dispute that he has been asked to adjudicate on.

However, the Adjudicator remains concerned in relation to a number of issues that have been raised on more than one occasion by Advertisers and Media Agencies. The Adjudicator must bring to the attention of Ofcom and the OFT any matter that gives rise to a reasonable suspicion on his part that ITV plc is not complying with the undertakings. In the first sixteen months four such issues were raised by the Adjudicator. ITV plc took steps to remedy some of these issues, and in particular agreed not to enforce certain contentious proposed changes to its 2004 Standard Terms and Conditions and not to include those changes in its 2005 contracts.

In its provision of information, ITV plc was initially very co-operative, but became less consistent over time. In July 2004, the Adjudicator and ITV plc agreed a Memorandum of Understanding (MOU), which has aided the Office in its requests for information.

6.0 Views of Key Stakeholders

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. Some Broadcasters chose to put their views to the Adjudicator in writing, and others requested a meeting with the Adjudicator to discuss the issues in person.

There was a general satisfaction with the CRR remedy and with the Office of the Adjudicator, and an acknowledgement of its success in limiting ITV plc's ability to exploit its position in relation to ITV1 airtime. Nonetheless both ISBA and the IPA shared common concerns in relation to at least two issues:

- the stiffening of penalties for Advertisers who booked after the AB deadline, or sought to defer or cancel a campaign; and
- the modification of ITV plc's 2004 Rate card Terms and Conditions.

The other issue that was consistently raised by the parties was the extent to which ITV plc has sought to link the purchase of advertising time on ITV1 with the purchase of advertising time on ITV2 and other ITV plc digital channels.

Most parties commented that they would like to see the CRR remedy continue until at least 2008, and called for Ofcom and the OFT to resist any argument that it might be curtailed in the near future. One party asked to reserve judgement until later in 2005 as to how long the remedy should remain in place.

7.0 Key Areas of Focus for 2005

The Adjudicator will continue to concentrate on the core functions of his role: swift and effective resolution of disputes; monitoring ITV plc's compliance with their undertakings; and producing regular reports for Ofcom and the OFT.

The Adjudicator will continue dialogue with all stakeholders (and in particular industry bodies, Advertisers, Media Agencies (London and Regional) and UK Broadcasters) to listen to their views and concerns about CRR and to allow him to maintain a high level of market knowledge.

The Adjudicator will also consider the impact of CRR on industry market developments and highlight any significant changes through his periodic reports to Ofcom and the OFT.

Statutory Framework

In November 2003, undertakings were accepted by the Secretary of State for Trade and Industry pursuant to the Fair Trading Act 1973, section 88(2), from the Channel 3 Broadcasters Carlton Communications Plc ("Carlton") and Granada Plc ("Granada"), as required of them by Secretary of State as a condition of approval of the agreed merger of those Broadcasters to form ITV plc. These undertakings required the appointment of an Adjudicator to adjudicate on any dispute between ITV plc and Advertisers / Media Agencies that arise out of the interpretation or exercise of the rights or obligations set out under the Contracts Rights Renewal ("CRR") remedy.

Paragraph 22 of the Contracts Rights Renewal Adjudication Scheme ("the CRRA Scheme") provides that every 3 months (or as otherwise agreed with Ofcom) the Adjudicator shall make a written Periodic Report to Ofcom and the OFT. This is the Annual Report.

Pursuant to paragraph 22 of the CRRA Scheme, this report sets out:

- the Adjudicator's determinations in relation to disputes;
- the Adjudicator's views about the performance of Carlton and Granada in complying with the undertakings (in relation to CRR);
- the Adjudicator's views about the operation of the undertakings (in relation to CRR), the CRRA Scheme and the CRRA Rules together with any recommendations;
- 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.

1. Introduction

1.1 The Carlton and Granada Merger

The merger of Carlton and Granada was approved by the Secretary of State on condition that the companies abide by a set of rules to protect the advertising community from unfair or discriminatory practices in the selling of television airtime. Carlton and Granada were only allowed to merge on condition that they agreed to the terms of a new regulatory mechanism called the Contracts Rights Renewal (CRR) remedy. The CRR remedy gave a number of basic rights to Advertisers and Media-Buyers to ensure that they are “no-worse-off” than they were before the merger. In addition to this remedy an Adjudicator was appointed and subsequently an Office was formed. The primary function of The Office of the Adjudicator is to adjudicate on disputes between Advertisers/ Media Agencies and ITV plc.

The CRR remedy sets out a number of rights that Advertisers and Media Buyers have when buying advertising time from Carlton/Granada.

The remedy gives Advertisers and Media Buyers the right to renew their current contracts with Carlton and Granada, with no increase in the share of their spend that they commit to ITV1 and no reduction in the discounts they receive. From now until the remedy is no longer necessary, the share of revenue committed by Advertisers/ Media Buyers on television advertising to Carlton/Granada need not increase above 2003 levels.

However, this “Protected Contract” is a fall-back right. Advertisers and Media Buyers may always negotiate a change to this contract or indeed negotiate an entirely new contract. If they do negotiate a change or a new contract, Carlton and Granada must offer them fair and reasonable terms to do so.

The remedy also links advertising terms to audience performance, and gives Advertisers/ Media Buyers the right to automatically reduce the proportion of their spend they give to ITV plc if the merged Carlton/Granada’s audiences shrink. This linkage is a simple, proportionate ratchet mechanism called ARM² (Audience Ratchet Mechanism). The ratchet offers both added protection to Advertisers and Media Buyers as well as a powerful incentive to the merged Carlton/Granada to produce compelling programming of widespread appeal to UK viewers.

Advertisers and Media Buyers have the right to bring contractual disputes to the “Adjudicator”. The role of the Adjudicator is to ensure that Carlton and Granada respond fairly when the demands of Advertisers or Media Buyers change from time to time. The Adjudicator will act as an expert to determine the outcome of disputes between the broadcaster and its advertising customers.

In addition to these basic rights, CRR also gives Advertisers/ Media Buyers a number of additional rights to cover certain situations. These cover:

- The rights of an Advertiser to move between Media Buyers
- How Advertisers who previously held contracts with ITV plc should be treated
- How new Advertisers should be treated
- What happens when Advertisers or Media Buyers merge

² 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.

This package of rights is designed to ensure that Advertisers and Media Buyers are not in any way disadvantaged as a result of the Carlton/Granada merger.

The ITC and Ofcom, have appointed an Adjudicator, with a strong background in the television advertising market, to act as an expert should there be any disputes between an Advertiser or Media Buyer and the merged Carlton/Granada.

In examining a dispute the Adjudicator has access to all of the merged Carlton/Granada's contracts and trading information. His decisions are final and binding on Carlton/Granada. Advertisers and Media Buyers have a right of appeal to Ofcom under defined circumstances and thereafter to the courts if required.

1.2 Purpose of the Office

The purpose of the Office, as outlined in Annex 3 of the undertakings is to determine any dispute between Carlton and / or Granada, whether as separate or merged companies, and any Media Buyers and Advertisers, or any other person in relation to contracts for the sale of Commercial Airtime pursuant to the undertakings.

The Office makes reports to Ofcom and the Office of Fair Trading (OFT), setting out determinants in relation to any dispute, his views about the operation of the undertakings, the CRRA scheme and the CRRA rules together with any recommendations, his views about the performance of Carlton and Granada in complying with the undertakings, his opinion about the evolution of the advertising airtime sales market and any other relevant matters and information that he may think is appropriate.

The Office also has to bring to Ofcom and the OFT's attention any matter that gives rise to a reasonable suspicion on his part that Carlton and /or Granada are not complying with the undertakings.

2. Goals and Objectives of the Office in 2004

2.1 Establishing Core Operating Functions

2.1.1 Recruiting Adjudicator

The Adjudicator was appointed by Ofcom in November 2003 and is independent; in particular from Ofcom, but also any commercial television broadcaster in the United Kingdom and all other parties to any dispute he is asked to decide upon, in accordance with Annex 3 of the undertakings. David Connolly previously worked at Media Agency Starcom Motive where he was Vice Chairman.

2.1.2 The Office of the Adjudicator's Staff

The Adjudicator took up office in December 2003. The Office has two other full time staff and one freelance legal advisor. In January 2004, Asha Pankhania, an Economics graduate from the University of Birmingham, was recruited as a Research Analyst. In March 2004, Gayle Noah, a graduate with seven years media buying experience was recruited as the Senior Advisor to the Adjudicator from the Media Buying Agency Mindshare. Julian Gregory, a barrister from Monckton Chambers, specialising in Competition Law, has been providing legal advice to the Office on a part-time basis since March 2004.

2.1.3 Creating Secure Office Environment and Procedures

Given the confidential nature of the information that the Adjudicator's Office handles, security is a high priority. Access to Riverside House, where the Adjudicator's Office is situated, can be gained only with the use of security cards. In addition, the Adjudicator has put in place additional procedures to ensure that the confidential information is fully protected. In particular, the Office:

- uses heavy duty safes to store all confidential information. These are kept locked at all times, and only members of staff at the Office of the Adjudicator have access to the safes;
- has a lockable area in Riverside House which can only be accessed by a member of the Office;
- operates a clear desk policy;
- has a policy that no confidential documents should leave the building.

2.1.4 Access to appropriate Information Systems

The Office has online access to all of the industry data it requires, including data supplied by BARB, Donovan Data Systems and Nielsen Media Research. BARB, Donovan Data Systems and Nielsen Media Research have all been very helpful to the Office in setting these systems up and providing ongoing support. In addition, the Office has developed its own systems and processes for analysing key information.

2.1.5 Establishing Financial Procedures

This is set in accordance with Annex 3 of the undertakings. Ofcom have set a budget for the total costs of the Adjudicator and his Office for each year in advance, after having consulted with ITV plc. Ofcom make payments in the first instance, but they invoice ITV plc on a quarterly basis for the actual costs incurred up to the maximum of the relevant budget.

2.1.6 The Office of the Adjudicator Website

The Office's website is at www.adjudicator-crr.org.uk and houses all documentation relating to the undertakings and the Office of the Adjudicator, including;

- the undertakings;
- a 'Technical Guide to The CRR Remedy';
- the process for disputes including any documentation needed to submit a dispute;
- the Adjudicator's Periodic Reports;
- presentations taken by the Office to Advertisers and Media Agencies.

Since October 2004 the website has also included information relating to Guidance Enquiries received by the Office that are of a general nature. For example, the website provides clarification on the ARM calculation and information related to ITV plc's 2004 Standard Terms and Conditions.

2.2 Establishing Core Processes

2.2.1 Establishing Procedures for Submitting Disputes

The procedure for disputes is set out in the CRR Rules (Annex 3 of the undertakings). For the purposes of clarification, the "Process for Disputes" on the Adjudicator's website explains key aspects of the procedure, such as the distinction between a dispute and a complaint, the importance of making a case clearly, and the need to include evidence and relevant documentation in the Notice of Adjudication³ (Dispute form). Prior to submitting a formal dispute, the Adjudicator recommends that potential complainants read this guidance as it will help them in formulating their case.

When a party wishes to submit a dispute, a Notice of Adjudication has to be completed. The Notice of Adjudication is a standardised form designed to minimise the administrative burden on all parties. It asks for details of the key facts and supporting evidence relating to the case. The submitted form should include a brief summary of the dispute, the number of discussions between both parties in relation to the dispute, details of the areas of change in the offer and the aspect of the offer to which the Advertiser or Media Buyer objects.

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

The Office took the decision that it would give a detailed explanation for its decisions. Any confidential information provided by either party in support of its case is redacted in the explanation. The Office will make decisions on disputes using evidence supplied by the parties which is supplemented by other information to which the Office has access. Decisions will take into account, in particular, historical data, prevailing market conditions, the current contract between the parties and other contracts in the market. The decision by the Office is final and binding on ITV plc.

2.2.2 Confidentiality Processes

Confidentiality is of paramount importance to the operation of the Office. Confidentiality is maintained through the general office procedures set out at section 2.1.3 above and the way in which the Adjudicator deals with disputes. A limited number of people are involved in the dispute process. Confidentiality clauses are inserted on all documentation sent out to external parties involved in the dispute.

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.

2.2.3 Establishing Information Flows with ITV plc (Memorandum of Understanding)

A Memorandum of Understanding (“MOU”) has been formalised with ITV plc. This is a standardised process for the provision to the Office of certain general information and documents, i.e. information and documents that do not relate to specific disputes.

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. 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 Balance⁴ by ITV plc region.
- A full report on the treatment of all bookings made after the ABD (advance booking deadline)⁵.
- A monthly summary of all DRTV⁶ (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 ITV plc’s Trading Balance figures; and a quarterly meeting between the Adjudicator and the Managing Director of ITV Sales.

2.2.4 Interim Reports Process

The undertakings state that the Adjudicator shall bring to the attention of Ofcom and the OFT any matter that gives rise to a reasonable suspicion on his part that ITV plc is not complying with the undertakings. If such a matter arises the Adjudicator can submit a ‘Process and Interim’ report to Ofcom and the OFT.

2.3 Building Relationships with Key Stakeholders

The Adjudicator was appointed in November 2003, shortly before the 2004 deal season was due to commence. The immediate objective was therefore to ensure that Advertisers and Media Agencies were aware of their basic rights under CRR. The Adjudicator presented at two main industry meetings to Advertisers, Media Agencies and Broadcasters, outlining the key elements of CRR, his role in the process and the extent of his powers. A dedicated area was set up on the Ofcom website, which housed a copy of the undertakings, a ‘Technical Guide to The CRR Remedy’, the process for disputes and dispute forms.

The Adjudicator telephoned key stakeholders to ask their initial views on how the new remedy was progressing, and notified Media Agencies and Advertisers of the Adjudicator’s area on the Ofcom website. The Adjudicator met with the relevant directors of the key industry bodies, ISBA and the IPA to discuss his role and how to work most effectively with them. The Adjudicator also held a number of meetings with ITV plc to discuss establishing a working process with them, including key contacts and the supply of information to his office.

A substantial number of guidance enquires were brought to the Office by Advertisers and Media Agencies prior to and during the 2004 deal season. Guidance enquiries are discussed further below.

⁴ 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 its 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.

⁵ Airtime booked after the advanced booking deadline set by ITV plc.

⁶ This refers to television campaigns which enable viewers to respond directly by having a contact number shown in the advertisement.

After the majority of negotiations with ITV1 had been completed for 2004, the Adjudicator held workshops with interested parties, including key Advertisers, London and Regional Media Agencies, Industry Bodies (IPA and ISBA) and Broadcasters (including the ITV plc Sales Team). The purpose of these meetings was to listen to their views on the operation of the undertakings and to provide interpretation on the meaning of certain clauses in the undertakings. The Adjudicator created a standard presentation, which was adapted to meet the needs of the audience. Over 70 such workshops were held in 2004.

The Office of the Adjudicator 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. Certain standard responses to common guidance enquiries are posted on the site.

While the Adjudicator is independent of Ofcom, he has worked closely with them on certain areas of the undertakings and the CRR remedy, especially on issues relating to ITV plc's compliance.

The Adjudicator produces a quarterly report to Ofcom and the OFT. He may also meet with them provide them with further information on issues that have arisen from these reports.

2.4 Disputes and Informal Guidance

2.4.1 Disputes

The Office has received six Notices of Adjudication to date in relation to disputes between Media Agencies/ Advertisers and ITV plc. Three disputes were handled in the period December 2003 to April 2004, and three more in the period October 2004 to December 2004. The Office has acted on all of these disputes.

In four cases the Office found in favour of the complainant, determining that ITV plc had not offered fair and reasonable terms. Two of the disputes were settled in the middle of the dispute process. Settlement occurred in both cases when the claimants wrote to the Adjudicator expressing a desire to withdraw the Notice of Adjudication, following a resolution of the issues in dispute.

The Adjudicator has acted swiftly in relation to all disputes. The four dispute determinations have all been delivered within two weeks of the dispute submission.

The following issues were raised in the disputes to date.

- The price offered by ITV plc to an Advertiser/ Media Agency that booked after the AB deadline.
- The price offered by ITV plc for a 'burst'⁷ campaign.
- The interpretation of the CRR remedy on an annual contract, where historically there had been a commitment to deliver both a guaranteed share and a minimum expenditure to Carlton and Granada.
- The penalty charges levied by ITV plc on an Advertiser which asked to change both the dates of its campaign and the brand that was to be advertised.
- An Advertiser that had switched Media Agencies. The Media Agency was of the view that the new terms of the share and price offered by ITV plc were not fair and reasonable.
- A re-submission of a previous dispute. The Media Agency was of the view that the new offer made by ITV plc was not fair and reasonable.

2.4.2 Informal Guidance

A substantial number of guidance enquiries were brought to the Office by Advertisers and Media Agencies. Some guidance enquiries related to how certain clauses in the undertakings should be interpreted as a matter of principle. Enquiries of this sort were frequently received in the period January 2004 to October 2004. Since October 2004, guidance enquiries have tended to relate to whether certain behaviour of ITV plc is compatible with the undertakings.

⁷ A short-term campaign negotiated on an ad-hoc basis

The Office cannot advise on individual contracts and negotiations. Nonetheless, where an enquiry falls within the remit of the Office, 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). The Office has adopted the practice of confirming any guidance in writing.

In the first sixteen months of the operation of CRR the Office handled 103 telephone guidance enquiries. A substantial number of issues were also raised during the Adjudicator's workshops with Advertisers and Media Agencies. The number of guidance enquiries decreased over time as Advertisers and Media Agencies became more familiar with their rights under CRR.

Guidance enquires have related, among others, to the following issues;

- Share and pricing on ITV1 when Advertisers switched their account to a new Media Agency.
- The status of a contract when an Advertiser switches Media Agencies.
- The methodology behind the calculation of the ARM mechanism. This refers to the mechanism that allows Advertisers/ Media Agencies the opportunity to reduce their SOB (share of broadcast)⁸ revenue commitment to ITV1 in line with any loss of share in ITV plc's commercial impacts.
- The extent to which ITV plc has sought to link the purchase of advertising time on ITV1 with the purchase of advertising time on ITV2 and other ITV plc digital channels.
- Taking a holiday⁹ from ITV1. This refers to those Advertisers which have a protected contract with ITV plc, but do not want to take up their CRR offer immediately. If they choose not to advertise on ITV plc for a period of time, they are entitled to return to ITV plc as a 'lapsed' Advertiser at a later date.
- The ability to exercise a Volume Ratchet¹⁰ clause rather than ARM in calculating CRR.
- The ability to CRR contracts including 'burst' deals.
- Contract Variation¹¹ through adjustment of the regional shares into ITV plc.
- The inclusion/ exclusion of New Business within an Agency deal as Advertisers moved between Media Agencies.
- The degree to which ITV plc sought to penalise cancellations and deferment of campaigns.
- The interpretation of individual clauses within a contract.
- Threat of reprisals from ITV plc, to those Advertisers/ Media Agencies who considered removing their full CRR allowance from ITV plc.
- Guidance on the resubmission of a dispute.
- ITV plc's proposed changes to their 2004 Standard Terms and Conditions

⁸ 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.

⁹ 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.

¹⁰ Whereby an increase in expenditure by an Advertiser/ Media Agency on a particular channel/ sales house results in an increase in discount

¹¹ A variation to an existing protected contract

2.5 Reporting on ITV plc's Compliance

2.5.1 General Considerations

Initially, in the period immediately after their introduction, ITV plc's compliance with the undertakings was good. In particular, ITV plc was flexible in its extension of the CRR deadline allowing all parties some initial time to understand the undertakings, and was willing to continue to negotiate with Advertisers and Media Agencies who had not finalised terms even beyond this date. This greatly assisted the successful introduction of the undertakings in their first year of operation.

As far as the Adjudicator is aware, ITV plc has fulfilled its obligation, set out in the undertakings, to provide Advertisers and Media Agencies with CRR offers two months prior to any contract expiring.

A number of issues relating to ITV plc's compliance with the undertakings have been raised by participants in the industry throughout the year. Two points may be made in relation to this.

First, on several occasions issues have been raised by Advertisers or Media Agencies as potential disputes. It is to ITV's credit that many of these potential disputes were settled without the need for a Notice of Adjudication to be submitted.

Secondly, in some instances, issues have been raised in relation to clauses in the undertakings which are clearly open to more than one interpretation, one example being the correct interpretation of the word "material" in clause 10(b) of the undertakings. Media Agencies reported that ITV plc often advised them of **its policy** in relation to such clauses. However, ITV plc's 'policy' in fact represents its own interpretation of the undertakings. To the extent that ITV plc's interpretations were favourable to its own interests, the Adjudicator notes that this is unsurprising given that ITV plc is a commercially orientated organisation. However, Advertisers and Media Agencies are fully entitled to form their own interpretations, which may differ from ITV plc's. They should be aware that ultimately, in the event of a dispute, the Adjudicator will provide his interpretation of the relevant provision within the context of the specific dispute that he has been asked to adjudicate on.

However, although the undertakings may be open to interpretation in respect of certain issues, their meaning is clear in other respects, and the Adjudicator remains concerned in relation to a number of issues that have been raised on more than one occasion by Advertisers and Media Agencies. The main areas of concern since the start of the CRR remedy include the following;

- The methodology behind the calculation of the ARM. This refers to the mechanism that allows Advertisers/ Media Agencies the opportunity to reduce their SOB revenue commitment to ITV plc in line with any loss of share in ITV plc's commercial impacts.
- The inclusion / exclusion of new business within an agency deal.
- The ability to apply CRR to 'burst' contracts.
- The extent to which ITV plc has sought to link the purchase of advertising time on ITV1 with the purchase of advertising time on ITV2 and other ITV plc digital channels.
- The extent to which ITV plc has sought to penalise bookings made after the AB deadline, and campaign deferrals and cancellations.
- Significant changes which ITV proposed to make to its 2004 Ratecard Standard Terms & Conditions.
- Allegations of threats of reprisals by ITV plc to Media Agencies which considered removing their full CRR allowance from ITV1.

The undertakings provide that the Adjudicator must bring to Ofcom and the OFT's immediate attention any matter that gives rise to a reasonable suspicion on his part that ITV plc is not complying with their undertakings. Over the first 16 months, the Adjudicator raised four different issues with Ofcom, where he was of the opinion that ITV plc could be in breach of their compliance with the undertakings.

Ofcom convened a meeting with the Adjudicator and ITV plc in December 2004 to discuss some of the issues raised by the Adjudicator. Following the meeting ITV plc took steps designed to ensure that it complied with the undertakings.

2.5.2 Supply of Information

In order to carry out his functions, the Adjudicator requires ITV plc to supply him with certain information. Following the introduction of the undertakings, ITV plc set up a compliance team with one key contact responsible for handling requests. In December 2003 and January 2004, Carlton and Granada provided the Adjudicator with:

- copies of sales contracts for the years 2001 to 2003; and
- An initial presentation on the mechanics of its Trading Balance.

Additionally, ITV plc agreed to provide the Adjudicator with a monthly report on the past, present and future state of the Trading Balance by ITV plc region. Agreement on these issues was reached in an initial period in which ITV plc's cooperation with the Adjudicator's requests for information and documentation was excellent.

However, ITV's performance in complying with such requests became less consistent over time. In order to remedy this, a Memorandum of Understanding (MOU) was agreed in July 2004. The MOU covers the provision of a number of different categories of information and documents, including in particular those listed in section 2.2.3 above.

ITV plc's cooperation in relation to the provision of information and documents improved in the period immediately following the introduction of the MOU.

The Adjudicator also notes that the majority of 2004 contracts have remained unsigned by Advertisers / Media Agencies and ITV plc. The negotiation of contracts and agreement over when contracts will be signed is, of course, a matter for Advertisers / Media Agencies and ITV plc. However, the terms of current contracts are relevant to several issues under the undertakings. The fact that the majority of 2004 contracts have remained unsigned during 2004 has meant that the Office has at times been forced to base their analysis on draft contracts and the summaries of key terms. As long as a contract remains unsigned there is a possibility of some uncertainty as to precisely what has been agreed between the parties. This predicament is likely to create difficulties in the context of a dispute.

3.0 Key Areas of Focus for 2005

3.1 Core Functions

The Adjudicator will continue to concentrate on the core functions of his role; swift and effective resolution of disputes; monitoring ITV plc's compliance with their undertakings; and producing regular reports for Ofcom and the OFT.

3.2 Ongoing Dialogue with Stakeholders

The Adjudicator will also continue dialogue with all the key stakeholders; Industry Bodies, Advertisers, Media Agencies (London and Regional) and UK Broadcasters. He intends to hold one to one meetings with them, to listen to their views and concerns about CRR. The Adjudicator will extend the list of agencies that he intends to meet with to include smaller billing Media Agencies in London and the Regions.

3.3 Market Development

The Adjudicator will also continue to consider the impact of the CRR on industry market developments and highlight any significant changes through his regular reports to Ofcom and the OFT.

- The effect of CRR on the Broadcasters
 - Revenue trends by station
 - Growth in multi-channel homes
 - Viewing trends by platform
- The effect of technology on audiences and advertising revenue
 - Interactive TV advertising
 - Personal Video Recorders
- Advertisers & Media Agencies
 - Monitor account shifts between Media Agencies and Media Agency Buying Groups
 - The consolidation of Media Agency buying groups

4.0 IPA and ISBA views of the operation of the undertakings and the CRR Scheme

4.1 IPA's view of the operation of the undertakings and the CRR Scheme

1. CRR and the Undertakings

As has been pointed out in earlier reports, the IPA was not in favour of a behavioural remedy to address advertiser anxieties resulting from the formation of a single Carlton/Granada sales house.

Having said this, our members have grown broadly to respect the CRR scheme and to acknowledge its success in limiting ITV plc's ability to exploit its position in the market.

In this context, a number of our members have commented on the scrupulous attitude taken by ITV plc senior sales management toward the Undertakings - although this has been tempered a little, by what some consider a less rigorous stance elsewhere in that organisation.

Most significantly, the modification, without notification, of ITV plc's Terms and Conditions during the summer - such that they effectively negated the CRR scheme - deeply unsettled many IPA members and added to a sense, held by some, that certain elements within the broadcaster's sales operation continued to resent the constraints imposed as a result of the merger and sought every opportunity to erode them.

The subsequent intervention by Ofcom to restore the original Ts and Cs was much appreciated by the IPA, but the whole experience was felt by many to endorse their original fears with regard to sales consolidation and to underline the continued need for vigilance, lest similar moves be made to undermine CRR in the future.

2. So how has CRR worked in practice?

a) General operation

In broad terms, it is felt that CRR has been a benefit to agency negotiations during 2004/05- and is anticipated to be even more so across the next twelve months, with its probability of larger than anticipated falls in ITV plc's audience share.

There are still some instances of confusion about the mechanics of remedy, particularly when business changes agency - but these are gradually being removed as the parties become more familiar with the set-up.

Having said this, responses suggest the way in which ITV plc has worked CRR has varied.

Many agencies have spoken of the broadcaster adhering strictly to the rules - and it is apparent that, with the Adjudicator and Ofcom in the wings, steps have generally been taken to ensure the company has "played by the book".

Having said this, others - perhaps linking into the suspicions aroused by the Ts and Cs issue mentioned above - have reported that throughout the year, the broadcaster has been continuously "testing the waters".

To quote one respondent "Where discussions do not go as ITV plc wish, they have sought ways to stretch the CRR boundaries to their own advantage We have had increased pressure applied and penalties raised on bookings made after advance booking dates and changes made post AB to campaign details; traditionally we have been shown much greater levels of flexibility."

Although such tightening up may be the inevitable result of the more onerous conditions under which ITV plc sales now operates, IPA members have noted that this rigorous adherence to Terms and Conditions, impacts on a whole host of very

significant elements of the deal from programme access/premiums to late deferments.

This, in turn, we are informed, has led to a number of major disagreements, with ITV plc apparently “spinning out” the negotiation process - settling only hours before the final deadline for them to send their response.

The suggestion has therefore been made that some official framework of response times for certain situations might be helpful for agencies and focus the minds of the broadcaster.

b) Bundling

There has been a similar mixed response to the thorny issue of bundling/conditional selling.

While some members have reported that ITV plc has been prepared to offer various elements as a bundled package, “but was scrupulous not to position this as conditional selling” – others have been less charitable.

Moreover, although conditional selling may be difficult to pin down, it has been pointed out that its dangers will take on increasing importance as ITV1’s audience declines further, but, at the same time, it grows its digital channels (ITV2, ITV3 and soon to come ITV4). Indeed, it has been forecast that within two to three years, the ITV plc’s “corporation” share of commercial revenue (being above 40%) may become the major cause for media buyer concern - even though ITV1’s share may have fallen below this figure.

3. Where does the Adjudicator fit into this and how long is the post likely to be needed?

Given the specific issues outlined above, there is little doubt in agencies’ minds that the CRR scheme could not operate effectively without the presence of an Adjudicator.

The threat of an official complaint/formal ruling is felt by many to be *the* key deterrent in ensuring a fair and satisfactory outcome to negotiations.

Thus, given that the majority of our members see the negotiating process in the future as likely to become increasingly robust - as the broadcaster seeks to keep the potential of lost funds within the ITV plc system - they have therefore underlined the importance of retaining the Adjudicator post for at least the next two years - and as ITV plc grows its digital family and tries to leverage ITV1 and its digital offering, would see this requirement extending to the 07 trading season for the 08 terms.

4. Finally, how well do agencies feel the Office of the Adjudicator has done its job to date?

Given that it will inevitably reflect on personalities, the following observations are difficult. However, to quote one of our respondents, “even when he is not required to intervene, the Adjudicator’s presence is sufficient to ensure the system works”.

Across the last twelve months, David Connolly and his team have shown themselves to be highly knowledgeable, attentive and dedicated - while David’s personal integrity and balanced approach have been, we believe, vital in winning the post of adjudicator, the respect of our members and ITV plc alike.

During the early days of his appointment, some comment was made in the press, regarding the low public profile David was keeping in his role.

On behalf of the advertising industry, we should commend rather than criticise him for this stance. Discretion is a key factor in the success of his office and – as our members will attest - a lack of publicity should never be confused with a lack of effectiveness.

4.2 ISBA's view of the operation of the undertakings and the CRR Scheme

1 GENERAL COMMENTS

The system's confidentiality requirements restrict our access to the detail which would form the basis of more specific comments. However, we can report general satisfaction amongst advertisers that the remedy is in place and proving to be effective in preventing ITV plc from using its dominance to leverage its revenues as its audience regrettably continues to slide.

We would continue to most strongly resist any argument that CRR might be curtailed, at least until such time as ITV plc's market share has declined to a point where the consensus amongst buyers and sellers is that it was no longer dominant. Whilst ITV plc's audience and revenue share are declining, such a point is clearly a long way off.

The remedy seems to have brought some welcome order to the trading season. The requirement for ITV plc to issue statements of entitlement by a fixed date ensures a uniform start point, whilst the formalisation of dealing brought about by the remedy's existence and application appear to have removed some of the more excessive brinkmanship that has characterised earlier trading seasons.

2 TERMS AND CONDITIONS

We note with satisfaction Ofcom's intervention during 2004 which resulted in ITV plc's unreasonable amendments to its terms and conditions being overturned.

3 PENALTIES

One specific area of increasing advertiser concern is ITV plc's apparent stiffening of its application of penalties for late booking and deferment or cancellation.

Several of our members have commented on discernible stiffening by ITV plc of its application of penalty clauses. Some have suggested that this stiffening is disproportionate to the volume or nature of the deferments or cancellations themselves.

We are keen to ensure that any such application is fair, reasonable and consistent.