

The Office of the Adjudicator Periodic Report

April 2006

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 CRR Scheme and CRR 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 with the objective of protecting 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. With a full three deal seasons having been operated under CRR, the remedy has become an accepted component of the airtime trading system with the key stakeholders becoming comfortable with the mechanism.

The Adjudicator has noted a change in the nature of the disputes and guidance enquiries that have been raised with the office in the last twelve months. Some of the earlier issues related to conduct on the part of ITV plc which, in the opinion of the Adjudicator, was obviously not compatible with the Undertakings. That has tended not to be the case in more recent submissions, in which the issues have more often reflected a less extreme (and sometimes understandable) divergence of opinion as to what constitutes fair and reasonable.

In the last twelve months ITV plc's compliance and cooperation with the Undertakings has been satisfactory. However, ITV plc's willingness to comply with the Undertakings may be tested during the course of and immediately following disputes, when the relations between Agency and Broadcaster can become fraught. This can also be the case during contract negotiations. It is very important moving forward that ITV plc should be scrupulous in its conduct towards Agencies when a dispute has been submitted. Any suspicions of discrimination on the part of ITV plc will be referred to Ofcom for investigation.

1.0 The Adjudicator's Office

David Connolly is due to vacate the position of Adjudicator in April 2006 having been in the role for a period covering three full deal seasons. All parties are committed to ensuring a smooth handover to the new Adjudicator.

2.0 Activity of the Office in 2005-2006

A priority for the Adjudicator was to ensure that Advertisers and Media Agencies were aware of their basic rights under CRR going in to the negotiations for 2006 Airtime Contracts. He consequently met with key Media Agencies; both Regional and London-based; in advance of the 2005/06 deal season to highlight the pertinent issues that could arise in their dealings with ITV plc.

The Adjudicator, along with Ofcom, presented to the ITV Sales senior staff in November 2005 to make them aware of potential trading issues that might arise during the negotiation season and to make clear the standards of behaviour they expected them to adhere to.

The Adjudicator attended regular meetings with Media representatives at the IPA and ISBA, the two main industry trade bodies, to seek their views of the operation of the CRR remedy. Additionally, the Adjudicator met with other broadcasters to stay abreast of market developments.

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

3.0 Disputes and Informal Guidance

The Office received three Notices of Adjudication since the last Annual Report was published in April 2005 in relation to disputes between Media Agencies/ Advertisers and ITV plc. The Office acted on all of these disputes. This brings the total number of disputes, brought since the introduction of the CRR remedy, to nine.

The Office found in favour of the complainant in two of the most recent the cases, determining that ITV plc had not offered fair and reasonable terms, and in favour of ITV plc in the other.

The three dispute determinations have all been delivered within two weeks of the dispute submission.

The three disputes raised the following issues.

- The terms offered by ITV plc to a Media Agency that was proposing to amend some of the parameters of its core Agency deal.
- The terms offered to an Advertiser requesting a 'burst'² campaign on ITV1.
- A resubmission of an earlier Notice of Adjudication where the Agency was dissatisfied with the revised terms offered by ITV plc.

A total of 68 guidance enquires were brought to the Office by Advertisers and Media Agencies since the last report was published, with 28 of these coming in the first half of the year and a further 40 in the latter half. This imbalance is to be expected as most annual airtime agreements are contracted between October and March and hence guidance as to interpretation of the Undertakings is most likely to be required in this period. The number of queries was considerably lower than the previous year, where there were over a hundred, indicating that Advertisers and Media Agencies have become more familiar with their rights under CRR.

4.0 Reporting on ITV's plc Compliance

The Adjudicator's general impression of the negotiation season, based in large part on comments from key stakeholders, was that ITV plc, whilst being forceful in its negotiating style, has operated within the rules of the Undertakings. The Office did not receive the same type of complaints about ITV Sales' behaviour as it had done in previous years. For example, there were no complaints from Agencies about threats of reprisals by ITV Sales for those Agencies which do not invest in ITV1. This was a concern in the previous year.

ITV plc's conduct towards Agencies during the course of disputes has in general been acceptable, although there was one dispute where complaints were raised with the Adjudicator regarding ITV's behaviour towards day to day trading issues with the Agency. It is imperative that ITV plc is scrupulous in its conduct towards an Agency when a dispute has been brought.

An issue that was highlighted by Media Agencies and raised in the IPA submission to this report was ITV plc's potential to leverage its power in relation to ITV1 by demanding that more share should be invested into its digital channels. However, it is worth noting that those Agencies who 'CRR'd' their ITV1 contracts were then in a strong negotiation position with ITV plc, when discussing terms of business on the ITV digital channels.

² A short term campaign negotiated on an ad hoc basis.

The Adjudicator has noted that a relatively high proportion of Guidance Enquires have come from Regional Media Agencies, indicating that these companies are as familiar with their rights under CRR as their London counterparts. It is important that ITV plc is as rigorous in ensuring consistent behaviour towards all Agencies, regardless of their size or locality.

In the report published in October 2005, the Adjudicator expressed his concern that a large number of contracts received by his office were in draft form which ITV plc informed him was partly due to Advertisers and Media Agencies failing to sign and return the draft contracts they sent out. The ITV legal team has since taken the initiative to devise a formalised timetable to cover the due process covering contract agreement. The Adjudicator welcomes any initiative that removes ambiguity from the process of contract agreement and this is a measure that will benefit all parties concerned.

5.0 Views of Key Stakeholders

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

All respondents expressed satisfaction with the effectiveness of the CRR remedy and suggested that it should remain in place for as long as ITV plc held a significant share of the TV market across its portfolio of channels.

The IPA expressed concern that the remedy had allowed broadcasters other than ITV to adopt a policy that was focussed simply on acquiring a share of CRR movement. Channel 4 in particular was singled out for aggressively pursuing such a policy.

Both ISBA and the IPA noted that the ITV Sales team were operating more tightly to the letter of its trading agreements, particularly with regard to implementing cancellation/amendment policies. There was also growing concern that ITV had brought forward the advanced booking deadlines even further than in the previous year.

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

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 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 ARM³ (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

³ 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. Activity of the Office in 2005-2006

2.1 Core Operating Functions

2.1.1 The Adjudicator

The Adjudicator was appointed by Ofcom in November 2003 and is independent; in particular from Ofcom, but also from 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 September 2005, Matthew Harvey, an English graduate from the University of Cambridge, was recruited to replace Asha Pankhania as Research Analyst. In January 2006, Gayle Noah, left her position as Senior Advisor to the Adjudicator to take up the role of Media Manager at Danone. 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.

David Connolly is due to vacate the position of Adjudicator in April 2006 having been in the role for a period covering three full deal seasons. At time of writing, Ofcom is in the process of recruiting a replacement and all parties are committed to ensuring a smooth transition. After stepping down as Adjudicator, David Connolly is subject to a substantial period of employment restrictions and is specifically prohibited from joining a company involved in the television airtime sales market until the end of the next deal season in February 2007. In addition, he is bound by a confidentiality agreement, which requires he does not disclose any sensitive information he has been exposed to during his time in office in any future employment.

2.1.3 Maintaining a 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 Financial Procedures

This is set in accordance with Annex 3 of the Undertakings. Ofcom has 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 it invoices 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 made by the Office to Advertisers and Media Agencies.

The website includes 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 Standard Terms and Conditions.

2.2 Core Processes

2.2.1 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 Adjudication⁴ (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 along with the nature of the redress which is sought.

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.

⁴ 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.

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.

2.2.3 Maintaining 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 2005/06. 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 Balance⁵ by ITV plc region.
- A full report on the treatment of all bookings made after the ABD (advance booking deadline)⁶.
- A monthly summary of all DRTV⁷ (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.

⁵ 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.

⁶ Airtime booked after the advanced booking deadline set by ITV plc.

⁷ This refers to television campaigns which enable viewers to respond directly by having a contact number shown in the advertisement.

2.3 Relationships with Key Stakeholders

A priority for the Adjudicator was to ensure that Advertisers and Media Agencies were aware of their basic rights under CRR going in to the negotiations for 2006 Airtime Contracts. He consequently met with key Media Agencies; both Regional and London-based; in advance of the 2005/06 deal season to highlight the pertinent issues that could arise in their dealings with ITV plc.

The Adjudicator, along with Nicola Floyd of Ofcom, presented to the ITV Sales senior staff in November 2005 to make them aware of potential trading issues that might arise during the negotiation season and to make clear the standards of behaviour they expected them to adhere to. The topics covered in this presentation included:

- The Bundling/Conditional selling of the ITV digital channels
- Threats of Reprisals
- Preferred Agency partners/discrimination
- Calculation of CRR figures
- Taking Holidays from ITV commitments
- Imposition of penalties for booking airtime after AB deadlines
- Negotiation of longer term deals

The Adjudicator attended regular meetings with Media representatives at the IPA and ISBA, the two main industry trade bodies, to seek their views of the operation of the CRR remedy. Further comment from these bodies can be found in Section 5 of this report.

Additionally, the Adjudicator met with Agencies, other broadcasters and ITV senior staff regularly throughout the year to stay abreast of market developments.

3.0 Disputes and Informal Guidance

3.1 Disputes

The Office received three Notices of Adjudication since the last Annual Report was published in April 2005 in relation to disputes between Media Agencies/ Advertisers and ITV plc. The Office acted on all of these disputes.

The Office found in favour of the complainant in two of the cases, determining that ITV plc had not offered fair and reasonable terms, and in favour of ITV plc in the other.

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

The three disputes raised the following issues.

- The terms offered by ITV plc to a Media Agency that was proposing to amend some of the parameters of its core Agency deal.
- The terms offered to an Advertiser requesting a 'burst'⁸ campaign on ITV1.
- A resubmission of an earlier Notice of Adjudication where the Agency was dissatisfied with the revised terms offered by ITV plc.

⁸ A short term campaign negotiated on an ad hoc basis.

3.2 Informal Guidance

A total of 68 guidance enquires were brought to the Office by Advertisers and Media Agencies since the last report was published, with 28 of these coming in the first half of the year and a further 40 in the latter half. This imbalance is to be expected as most annual airtime agreements are contracted between October and March and hence guidance as to interpretation of the Undertakings is most likely to be required in this period. The number of queries was considerably lower than the previous year, where there were over a hundred, indicating that Advertisers and Media Agencies have become more familiar with their rights under CRR.

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 where appropriate.

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

- What would constitute a fair and reasonable price for an Advertiser or Media Agency that wanted to commit either more or less share into ITV1, beyond the level granted to them by the ARM mechanism.
- The status of a contract when an Advertiser switches between 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)⁹ revenue commitment to ITV1 in line with any loss of share in ITV plc's commercial impacts.
- The right of an Agency to use their CRR position as a 'fall-back' position that allows them to book airtime beyond their current deal contract, while they continue to negotiate terms for the following deal period.
- The status of an Agency that is in contention with ITV plc over the specifics of a draft contract.
- The status of an Advertiser that sells a division of their business.

4.0 Reporting on ITV plc's Compliance

4.1 General Considerations

In his report published in October 2005, the Adjudicator reported that there was a certain amount of disquiet amongst Advertisers and Media Agencies regarding the management changes that had taken place at ITV plc, fearing that this could lead to a more confrontational approach to negotiations. This has proved to be unfounded. The Adjudicator's general impression of the negotiation season, based in large part on comments from key stakeholders, was that ITV plc, whilst being

⁹ 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.

forceful in its negotiating style, has operated within the rules of the Undertakings. The Office did not receive the same type of complaints about ITV Sales' behaviour as it had done in previous years. There have been no complaints from Agencies about threats of reprisals by ITV Sales for those Agencies which do not invest in ITV1. This was a concern in the previous year.

ITV plc's conduct towards Agencies during the course of disputes has in general been good. However there was one instance when an Agency that had brought a Notice of Adjudication indicated to the Adjudicator that they felt ITV plc was not being as accommodating in its day to day trading as was normally expected. The matter was referred to Ofcom and, as far as the Adjudicator is aware, was swiftly resolved to the satisfaction of the complainant. It is imperative moving forward that ITV plc is scrupulous in its conduct towards an agency when a dispute has been brought.

An issue that was highlighted by Media Agencies was ITV plc's potential to leverage its power in relation to ITV1 by demanding that more share should be invested into its digital channels. However, it is worth noting that those Agencies who 'CRR'd' their ITV1 contracts were then in a strong negotiation position with ITV plc, when discussing terms of business on the ITV digital channels.

The Adjudicator has noted that a relatively high proportion of Guidance Enquires have come from Regional Media Agencies, indicating that these companies are as familiar with their rights under CRR as their London counterparts. It is important that ITV plc is as rigorous in ensuring consistent behaviour towards all Agencies, regardless of their size or locality.

4.2 Contracts

In the report published in October 2005, the Adjudicator expressed his concern that a large number of contracts received by his office were in draft form which ITV plc informed him was partly due to Advertisers and Media Agencies failing to sign and return the draft contracts they sent out. The Adjudicator reported that this situation was leading to uncertainty as to the precise agreements that had been contracted between parties. This could potentially have made the determination of disputes more difficult, as the Office might have to base its analysis on draft contracts and summaries of key terms.

Shortly after the October Report was published, the Adjudicator raised this issue with the Head of Legal Affairs at ITV plc. The ITV legal team took the initiative to devise a formalised timetable to cover the due process covering contract agreement. The Adjudicator welcomes any initiative that removes ambiguity from the process of contract agreement and this is a measure that will benefit all parties concerned.

5.0 IPA and ISBA views of the operation of the Undertakings and the CRR Scheme

5.1 IPA's view of the operation of the Undertakings and the CRR Scheme

As with earlier reports, the following represents a consolidated picture from a cross-section of our media members.

1. Contract Rights Renewal and the Undertakings

After two year's experience in the marketplace, the vast majority of IPA members continue to support CRR and want it to remain in place.

All respondents to the IPA ad hoc questionnaire that informed this letter felt CRR to have played a vital role in "governing" the activities of the ITV salesforce - and believed it essential that it should be maintained as long as ITV plc retains a high percentage of TV revenue across ITV's 1, 2, 3 and 4, Men and Motors, and GMTV.

However, while CRR has certainly controlled ITV's behaviour in its Channel 1 negotiations, some IPA members did point out that instead of encouraging competition among other broadcasters, the device may actually have reduced it.

By way of illustrating this, it has been indicated that rather than seeking to build its share across the market, Channel 4 - for example - has aggressively pursued a single-minded sales policy aimed simply at acquiring 50% of CRR movement.

Although the success of this approach has been undeniable in generating an estimated revenue share increase for the broadcaster of about 1.8% - or around £60m - £65m in incremental income - according to a number of our agencies, the vigour with which this sales policy has been applied, would have been banned to ITV1.

There is evidence that CRR flexibility has encouraged a similar laziness in the approach of some of the other broadcasters who have likewise focused their sales policies simply on acquiring a share of CRR movement.

Against this backdrop - and given the success of the Undertakings in mollifying ITV1's negotiating behaviour - at least one respondent wistfully expressed regret that a set of conditions governing the negotiating behaviour of *all* the television sales points did not exist.

2. How has CRR worked in the last 12 months?

It will be recalled from earlier submissions that agencies had reported that the imposition of CRR had led to ITV operating more tightly to the letter of its trading agreements, particularly with regard to implementing cancellation/amendment policies.

This, in turn, it was suggested, had resulted in something of a battle of wills - with agencies constantly looking out for what they perceived as attempts to "bend" the rules, leading to an overriding sense that any relaxation would be viewed as weakness and open them to exploitation.

Nothing has changed to alter this viewpoint.

While several members have commented that greater experience of the "rules of engagement" has made the process of working to CRR easier this year - there are indications from some quarters that the significant revenue loss that ITV1 suffered over the last 12 months as a result of CRR - may have resulted in a "toughening up" in the broadcaster's stance - and the emergence/re-emergence of a range of tactics to strengthen further its negotiating position.

Notable among these have been suggested as the following:

- The use of ITV1 as a tool in negotiations on the broadcaster's *overall* portfolio of stations - either demanding a "satisfactory" outcome re the ITV "family" as a pre-requisite for meaningful conversations on the main channel - or becoming deliberately over-bureaucratic in interpreting issues relating to ITV1 as a means of encouraging a more compliant attitude towards the broadcaster's other offerings;
- The maintenance of penalties for things like late approvals and amendments to campaigns, which - unlike other broadcasters - ITV continues to charge and over which it remains inflexible;
- Deliberate attempts to "muddy the waters" over existing terms when business is won from other agencies, despite contracts being in place;

- The calculated movement of rate-card booking deadlines - alterations to which, we are informed, have been made with little or no prior consultation.

(In this context, members reported the deadlines for April, May and June in 2005 as being the *first* Tuesday in February, March and April respectively - timings to which clients were accustomed, and upon which many had constructed their internal processes in expectation of the dates.

In 2006, however, we are informed the AB deadlines in April, May and June were brought forward by ITV to the *last* Tuesday in January, February and March respectively.

Given the sums of cash involved, such changes have major implications in the market and are seen as contrary to the spirit - if not the letter - of CRR.)

- A lack of programming information at the AB date, which means that agency deal programme access clauses come under threat. While agencies understand that programming schedules will inevitably be open to change, there is a concern that ITV may be deliberately using this as a means to ease pressure on highly demanded programming.

Faced with the above, it is perhaps understandable why agencies should continue to press for the protection afforded by CRR and the Adjudicator.

3. How has the Office of the Adjudicator performed across this period?

Just as respondents were united in support of CRR, so were they unanimous in their favourable playback re the Office of the Adjudicator.

To quote one agency:

"The Adjudicator's Office has continued to be an invaluable source of guidance and information in advising both formally and informally on the complex business of contractual interpretations."

Elsewhere other members complimented the operation on its speed and efficiency - while there was broad agreement that the number of referrals made to the Office was irrelevant as a performance indicator.

In this context, another member commented:

"David Connolly reminded the buying fraternity from the outset that CRR is a fallback position - and referrals should NOT replace normal negotiation..... We believe this has encouraged negotiation to continue where there have been disputes in order that all interested parties try to reach a negotiated settlement....."

As indicated in an earlier report, for those agencies that brought cases, the value of the Adjudicator has been underlined - for those which have not, there is still a strong belief the threat of bringing a case is a key component in reaching an eventual agreement.

5.2 ISBA's view of the operation of the Undertakings and the CRR Scheme

Advertiser support for CRR remains strong, arguably stronger than ever because :

- 1 CRR's effectiveness is now well understood by most advertisers and their media buying agencies

2 ITV1's audience continues to decline and the merged ITV becomes ever more commercial as the pressures it faces to grow its business increase.

3 ITV seeks to maximise revenues from its new channels as they become established

ITV1's continuing audience decline meant that the ratchet mechanism under CRR was engaged in the 2005 trading round, and to the best of our knowledge worked effectively.

Advertisers continue to seek a strong ITV1, and remain disappointed that even the threat of losing significant revenues under CRR does not appear to have spurred ITV to bolster its flagship ITV1's performance.

This contrasts with the encouraging performances of each of ITV's growing family of channels (though even combined these are not delivering sufficient audience to make up ITV1's deficit).

SECONDARY EFFECTS

The feedback we have suggests that the Office of the Adjudicator is effective not only in resolving issues raised under CRR, but also plays a welcome role in helping avert unnecessary escalations in negotiations between ITV and media agencies.

Some commentators have suggested that CRR constrains the short-term market for commercial TV airtime on ITV1, but this is a minor concern when balanced against the very widespread support amongst advertisers for CRR.

Reports continue to indicate that CRR has led ITV to tighten its terms and conditions and their application, particularly those concerning late commitment of budgets, and late delivery of advertisement copy: