

# Presentation to Advertisers

## The Operation of the Undertakings

October 2004

# Purpose of The Meeting

“The ITC and Ofcom believe that this remedy will work most effectively if all parties understand their rights and obligations and if advertisers & media buyers exercise their rights fully”

Ofcom Technical Guide, December 2003

# Purpose of The Meeting

- Next deal season is approaching – important to seek views on effectiveness of the Undertakings
- Where possible, to provide clarity on areas of doubt
  - Similar to Ofcom meetings prior to the introduction of the Undertakings
  - Continuous education process
- To update Advertisers on the Office of the Adjudicator
  - Including First Report`

# Agenda

- **Background to the ITV Merger**
- Key Objectives of CRR
- The Team & Key Duties
- The Dispute Process
- First Report
- Guidance Enquiries

# Background to the ITV Merger

- ITV Objectives of the merger
  - To remove the current dysfunctionality within ITV
  - To allow ITV to remain an effective player in the competition for viewers and advertisers.
  - Significant cost savings would be realized by merging



- Secretary of State For Trade & Industry referred merger to Competition Commission under Fair Trading Act 1973

# Background to the ITV Merger

- Fair Trading Act 1973

- Will this merger operate against the public interest?



- Concluded that the **key issue** against merger would be an adverse effect on the future competition for the sale of airtime

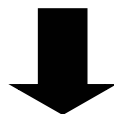


- Could they devise an effective remedy?

# Background to the ITV Merger

- Four Potential Remedies

- Prohibition of Share Deals
- Commoditisation of airtime
- Divestment of one or both ITV Sales Houses
- Contracts Rights Renewal (CRR) – Chosen by Secretary of State



- Carlton & Granada agreed to abide by a number of Undertakings, including the CRRA Scheme, CRRA Rules and the appointment of an Adjudicator to rule on Disputes

# Background to the ITV Merger

- Since June 2003, mergers come under the Enterprise Act 2002
  - Over 25% share of a relevant market
  - Turnover of company being taken over in excess of £70m
  - OFT then asks ‘Would there be a substantially lessening of competition if the merger is allowed to progress?’



- If a competition problem is identified then it is referred by the OFT to the Competition Commission



- Competition Commission assesses, and if concludes that there would be a ‘Substantial Lessening of Competition’, would seek to devise an effective remedy



# Agenda

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# Key Objectives of CRR Remedy

- Advertisers & Media Agencies should be no worse off as a result of the merger
- All terms and conditions in current contracts in relation to ITV1 are fully protected
- This ‘Protected Contract’ is your fall-back right – but you may negotiate a variation or an entirely new contract
  - ITV must offer fair & reasonable terms

# Key Objectives of CRR Remedy

- The ARM ensures that your SoB to ITV can automatically decline in line with ITV's loss in share of commercial impacts
- Advertisers should have the flexibility to move between Media Agencies
- If not satisfied with ITV's offer, you can bring it as a Dispute to the independent Adjudicator

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- **The Team & Key Duties**
- The Dispute Process
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# The Office of The Adjudicator



**David Connolly**  
Adjudicator



**Asha Pankhania**  
Research Analyst



**Gayle Noah**  
Senior Advisor – TV Sales



**Julian Gregory**  
Legal Advisor

# Our Duties

## **1. To Adjudicate on Contract Disputes between ITV and Advertisers/ Media Agencies**

- Set up a Process for Disputes
  - Make decisions on Fair & Reasonable
- Handle factual Guidance Enquiries related to the Undertakings
- Make decisions whether ITV is materially overtraded
  - Aware of state of ITV Trading Balance by month by Region
- Regular contact with other broadcasters
  - Keep abreast of general market changes

## **2. Make Written Reports to OFT and Ofcom**

- Determinations of Disputes
  - Views on the Operation of the Undertakings
  - Views on ITV Compliance with the Undertakings
  - Evolution of the Advertising Airtime Sales market
  - Include views of IPA, ISBA and other Broadcasters
- Ofcom & OFT decide which sections to make public
- Confidentiality guaranteed

## 3. Non Compliance by ITV

- The Adjudicator must bring to Ofcom & OFT's attention any matter that gives rise to any reasonable suspicion that ITV are not complying with the Undertakings
- This would be made in writing
- Ofcom & OFT would then decide whether & how to investigate the issue



# Outside of Our Remit

- Investigating complaints regarding ITV's behaviour that are not submitted as Disputes
  - These can be passed on by Adjudicator to Ofcom & OFT
- Giving advice on cases or potential Disputes
  - We can only direct people to the pertinent clauses in the Undertakings and the Technical Guide

# The Dispute Process

- When To Bring A Dispute
  - After all efforts to reach agreement with ITV have been exhausted
- Dispute Form
  - Located on the Adjudicator's section of the Ofcom website
  - Entitled 'Notice of Adjudication' - It is a very simple form
  - It must be sent to ITV as well – they will then reply
  - The nature of the Dispute should be clear, and a case compiled that is backed by **strong evidence**
  - Confidential information. should be redacted from the ITV submission

# The Dispute Process

- Timing
  - The process from submission to determination should take about two weeks
- Explanation
  - A detailed explanation of the decision is given to both parties

# The Dispute Process

- Next Steps

- If found in favour – ITV must offer ‘fair & reasonable’ terms
  - If Advertiser / Agency still not satisfied with new offer – submit another Dispute
- If found against – Could look to re-negotiate OR appeal to Ofcom in limited circumstance

- Confidentiality

- All parties must maintain confidentiality on any aspect of a Dispute
- To Date – this has been adhered to

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# Key Issues In First Six Months

- The Operation of the Undertakings
- Disputes
- ITV plc Compliance

# Operation of the Undertakings

- Generally well understood and well implemented
- However, Advertisers and Agencies should be fully aware of their rights and form their own interpretations
  - And be willing to challenge ITV where there is doubt
- Fairly even split between agencies who accepted CRR, varied their contract or negotiated a new contract
  - Line by line advertisers were more likely to accept their CRR position, although they tended to negotiate new contracts when business moved

# Has CRR created more rigidity in the TV market ?

Our view is that CRR has created more negotiation flexibility and opportunity for Agencies and Advertisers

- Share out of ITV can now follow impacts
- ITV must offer fair & reasonable terms for varied or new contracts
- ITV2 must be offered separately if requested
- Advertisers can take a 'holiday' from ITV and pick up their previous terms
- Advertisers under less pressure to accept terms in December in order to guarantee presence on ITV in January



# Disputes

- There were three Disputes in the first quarter
- Each was judged on it's own merits and the evidence provided
- The process simple and followed by all parties
- They took between five days and two weeks to reach a decision
- Confidentiality was adhered to

On the whole ITV's compliance was good

- ITV extended deadlines to allow people to fully come to terms with their rights under CRR
- Delivered the necessary information to the Office of the Adjudicator

# The Areas Of Concern Relating To ITV's Compliance

- Bundling ITV2 as the solution to an ITV1 issue
- Calculation of the CRR numbers
- Advertisers switching between Media Agencies

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- **Guidance Enquiries**

# Guidance Enquiries

- **‘Fair & Reasonable’ + ‘Material’**
- ITV1 Only Deals
- Advertisers Switching Between Media Agencies
- Advertisers Acquiring Other Brands
- ARM Calculations
- Taking A Holiday From ITV

## ‘Fair & Reasonable’ + ‘Material’

- Clause 10a) “ITV must offer Commercial Airtime on fair & reasonable terms to any person, including any person seeking to vary a contract.”
- If Advertisers and Media Agencies do not agree with ITV’s interpretations of ‘fair & reasonable’ OR ‘material’, then they are within their rights to challenge them
- Every attempt should be made to reach mutual agreement

# ‘Fair & Reasonable’

- Adjudicators View on ‘Fair & Reasonable’

“Fair and reasonable does not mean that it will become the lowest price in the market, nor does it mean it will become the average price in the market.

It means that, based on your current contract, historical data, other contracts in the market, and the prevailing market conditions that the price that Carlton/Granada offer you is fair and reasonable within that contract”

•

# ‘Material’ Re. Overtrading

- When assessing ‘material’ in terms of extra discount, we have to consider the fine balance between allowing a degree of fluidity in the market against over-penalising ITV when they are running a healthy trading balance.
- Policy must not discriminate against the size of the advertiser



# Guidance Enquiries

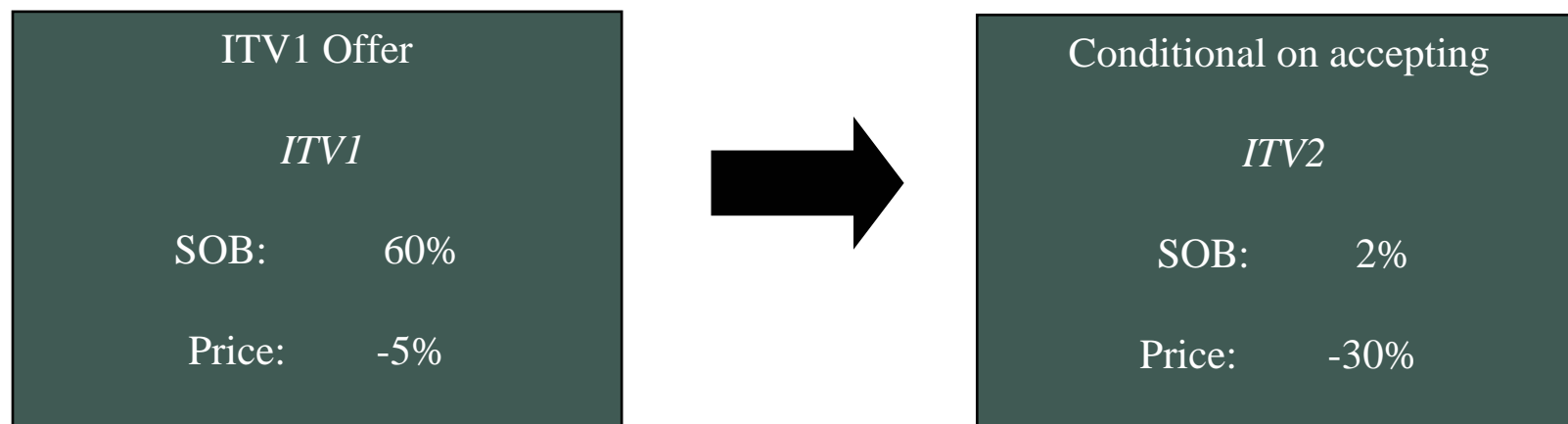
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# ITV1 only (Clause 11)

- The Undertakings apply to ITV1 only, and as such ITV must make a “fair & reasonable” offer on ITV1 as a stand-alone contract if requested
- This applies to CRR, Contract Variations and New Contracts
- ITV can propose a bundled offer – but the buyer does not have to accept this if they only want an ITV1 deal or if they want a separate deal for ITV1 and ITV2

# ITV1 only (Clause 11)

- ITV cannot only offer fair and reasonable terms on ITV1 conditional on accepting terms on ITV2



\*Assuming nothing else changes

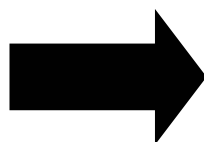
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- Assuming that in this instance one would expect circa -5% for a 60% investment on ITV1 for a particular advertiser

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- ITV cannot only offer fair and reasonable terms on ITV1 conditional on accepting terms on ITV2
- Assuming that in this instance one would expect circa -5% for a 60% investment on ITV1 for a particular advertiser
- The offer on ITV1 only may not be deemed as 'fair & reasonable'

Bundled Offer		
	<i>ITV1</i>	<i>ITV2</i>
SOB:	60%	2%
Price:	-5%	-30%

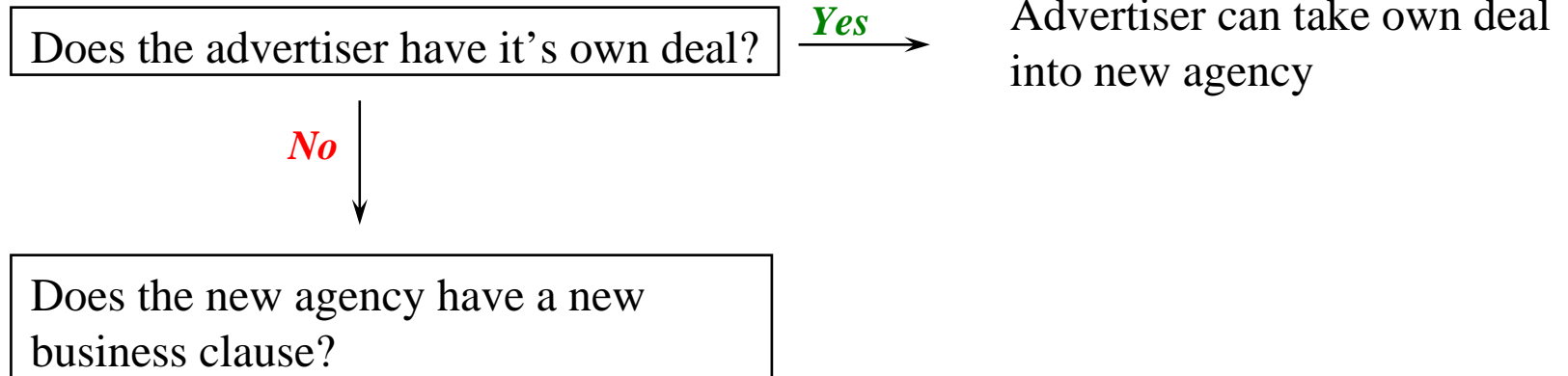


Alternative ITV1 only offer	
	<i>ITV1</i>
SOB:	60%
Price:	+15%

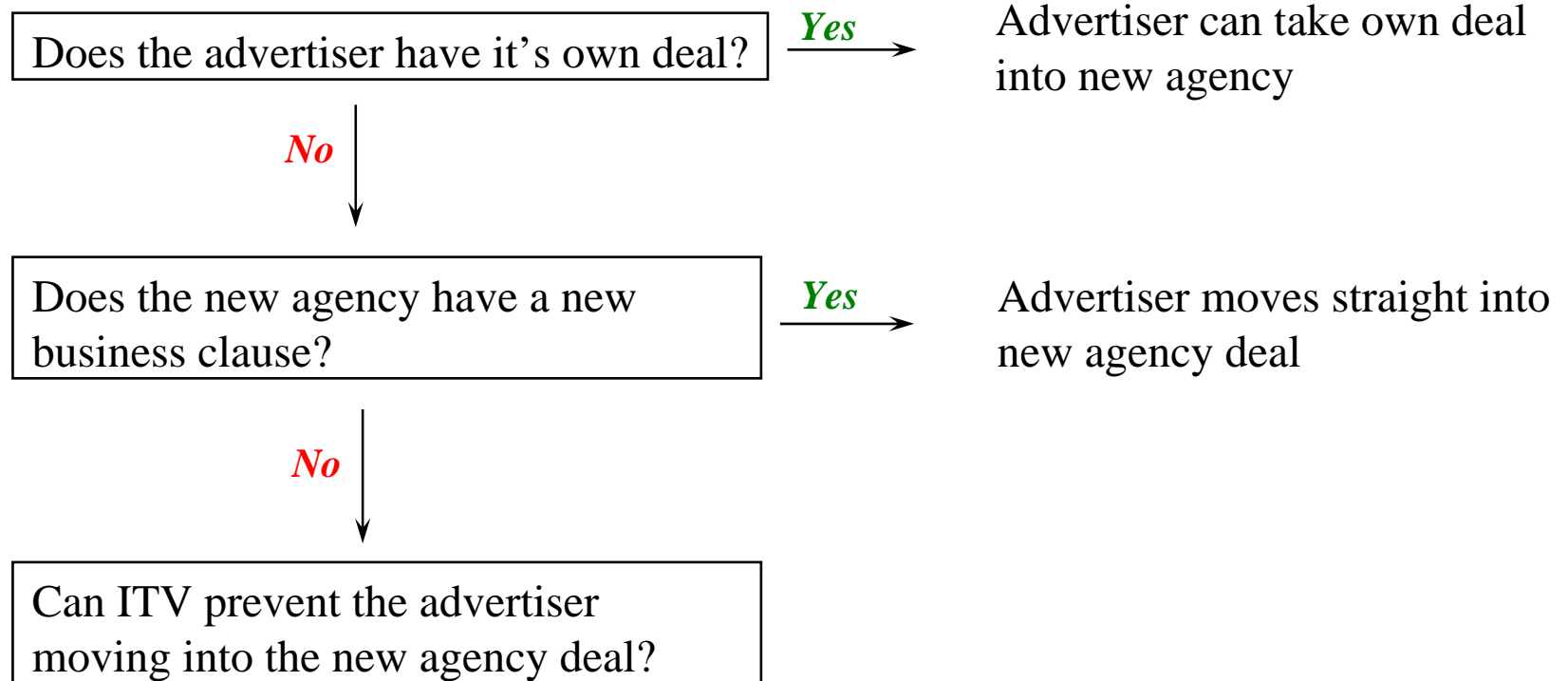
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# New Business (Clause 10b)

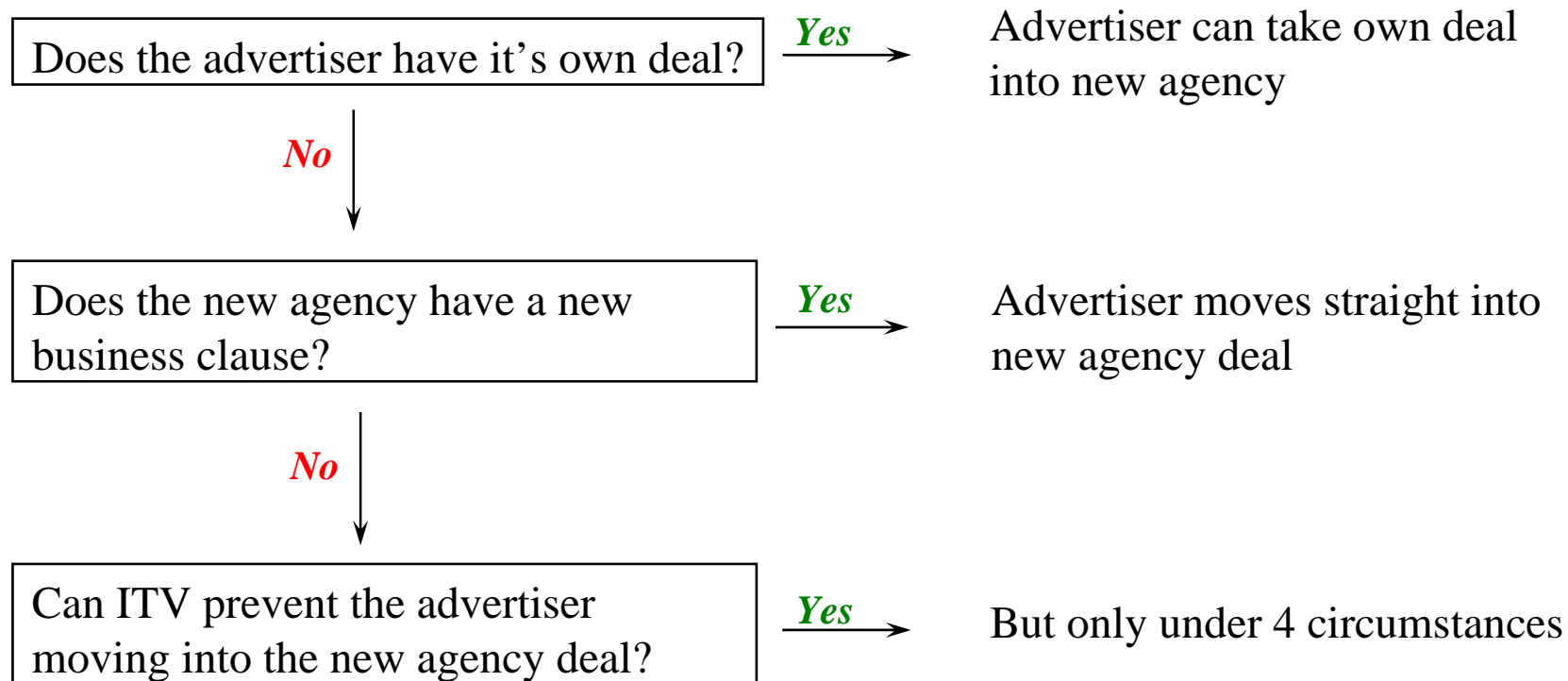


# New Business (Clause 10b)





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- ITV may withhold consent to new business moving into any Media Agency umbrella deal only
  - To avoid overtrading to a material extent
  - To avoid materially increasing existing overtrading
  - If the switch would cause ITV to breach previous contractual arrangements
  - If the switch results in a material reduction of the Advertiser's SOB
- ITV must make an alternative offer which is fair & reasonable.
- It is the Advertiser's and the Media Agencies right to challenge ITV's reason for withholding consent on any of the above

# Guidance Enquiries

- ‘Fair & Reasonable’ + ‘Material’
- Advertisers Switching Between Media Agencies
- **Advertisers Acquiring Other Brands**
- ARM Calculations
- Taking A Holiday From ITV
- ITV1 Only Deals

# Acquiring Other Brands (Clause 10f)

- Advertisers who have line by line agreements with ITV, that acquire / merge with another Advertiser may:
  - Apply the terms enjoyed by the larger spender of the two companies
  - Apply the weighted average by spend of the two companies
  - Maintain two separate contracts for the companies

# Acquiring Other Brands (Clause 10f)

- ITV may withhold consent to the Advertiser applying the terms enjoyed by the larger of the two companies only
  - To avoid overtrading to a material extent
  - To avoid materially increasing existing overtrading
  - If the switch would cause ITV to breach previous contractual arrangements
- ITV must make an alternative offer which is fair & reasonable.

# Guidance Enquiries

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# ARM Calculations

- It is ITV's obligation to provide the correct CRR figures
  - Each separately defined Share of Broadcast figure is adjusted by the ratchet (Annex 1 Note 2)
  - The SOB's are adjusted at their most specific level, ie regional or by audience
  - In the event of a dispute, the Adjudicator's view is likely to be that if you have both regional and national ITV SOB figures, then the regional SOBs are adjusted first and then totalled to get a revised national ITV SOB.

# ARM Calculations

- Using The Correct ITV SOB Figures
  - Any adjustment is weighted by the spends across different audiences contributing to the overall SOB
  - If Agency require it, then Carlton and Granada SOB's should be calculated separately
  - You may mutually agree with ITV to use a different (simpler) method of calculation



# ARM Calculations - Example

*An advertiser has regional SOB's and a total ITV SOB for 2003. They spent across 3 audiences.*

Region	2003 SOB	Audience 1 (Spent 25%)	Audience 2 (Spent 25%)	Audience 3 (Spent 50%)	Weighted Share of Impact Change	ARM Factor (after Cap)	2004 SOB
LWT	13%	-2%	-4%	-1%	-2%	0.98	12.74%
Central	9%	-3%	-5%	+2%	-1%	0.99	8.91%
North	10%	-1%	-2%	+1%	-0.25%	0.9975	9.975%
Scot	3%	+10%	+6%	+5%	+6.5%	1	3%
HTV	3%	-9%	-10%	-3%	-6.25%	0.9375	2.8125%
Seast	11%	-10%			-7.5%	0.925	10.175%
WCTV	1%	+11%			+7.25%	1	1%
Ulster	1%	-8%			-5%	0.95	0.95%
Total ITV	51%	-3%	-5%	-1%	-2.5%	0.975	49.5625%

% Yoy Change in  
Share of Impacts  
By Audience  
(2003 vs 2002)

All shares and audience figures are hypothetical

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Scot	3%	+10%				1	3%
HTV	3%	-9%				0.9375	2.8125%
Seast	11%	-10%	-12%	-4%	-7.5%	0.925	10.175%
WCTV	1%	+11%	+8%	+5%	+7.25%	1	1%
Ulster	1%	-8%	-6%	-3%	-5%	0.95	0.95%
Total ITV	51%	-3%	-5%	-1%	-2.5%	0.975	49.5625%

Yoy Changes are weighted by  
audience expenditure over deal  
period

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Total ITV	51%	-3%	-5%	-1%	-2.5%	0.975	49.5625%

Regional ARM factors are applied to 2003 SOB commitments. Any positive Share of Impact Changes are capped at 1

All shares and audience figures are hypothetical

# ARM Calculations - Example

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Central	9%	-3%	-5%	+2%	-1%	0.99	8.91%
North	10%	-1%	-2%	<div> <p>Total ITV SOB is the sum of all revised regional SOB's.</p> <p>The total ITV SOB figure would be 49.725% if calculating Share of Impact Change on a Network basis.</p> </div>			9.975%
Scot	3%	+10%	+6%				3%
HTV	3%	-9%	-10%				2.8125%
Seast	11%	-10%	-12%				10.175%
WCTV	1%	+11%	+8%				1%
Ulster	1%	-8%	-6%	-3%	-5%	0.95	0.95%
Total ITV	51%	-3%	-5%	-1%	-2.5%	0.975	<b>49.5625%</b>

All shares and audience figures are hypothetical

# ARM Calculations (Clause 8)

- 2002 is the base year for any ARM calculations for existing PCs.
- If your contract variation or new contract becomes your protected contract, the base year for impacts will be 2003
- ARM can go up and down
- But it can never go above the amount specified initially in your current Protected Contract

	C&G's Share of Commercial Impacts	Share of Broadcast Commitment	Discount vs SAP
2003	40% (2002)	60.0%	5%
2004	38% (2003)	57.0%	5%
2005	42% (2004)	60.0%	5%

↑  
Capped at Initial SOB

# ARM Calculations

Media Agencies are free to agree a more simplified version of the Audience Ratchet Mechanism with ITV if they so choose

# Guidance Enquiries

- ‘Fair & Reasonable’ + ‘Material’
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- **Taking A Holiday From ITV**

# ITV1 “holiday” (Clause 6)

*“...Each such offer shall remain open until accepted or a new agreement for the sale of Commercial Airtime with Carlton and/or Granada enters into force.”*

- Can I take a “holiday” from ITV?
  - Yes, but only if you have not accepted CRR or a new contract
  - The “holiday” could be for any length of time
  - If you take a “holiday” from ITV, you are free to spend with other broadcasters with no obligation to ITV.
  - You can then choose to accept CRR in line with your Protected contract or negotiate a new agreement.
  - Either contract will then run from the date you ended your “holiday”, unless you choose to negotiate otherwise.



# QUESTIONS