



Ofcom guidance on the definition of control of media companies

Consideration of responses to the second
consultation paper issued on 27 October 2005

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Introduction

- 1.1 On 12 February 2004 and again on 27 October 2005 (“the 2005 Consultation”), Ofcom consulted on draft guidance on its proposed approach to determining whether a person “controls” a company holding a broadcasting licence or a company running a newspaper, under the statutory definition of “control” in the Broadcasting Act 1990 (as amended) (“the BA”) in circumstances where he neither holds nor is beneficially entitled to more than 50 per cent of the equity share capital in the body nor possesses more than 50 per cent of the voting power in that body. A “person” may be an individual, company or other legal entity for these purposes.
- 1.2 Ofcom received a single response to the 2005 Consultation, from SMG plc (“SMG”). In this document, we set out how Ofcom has taken account of the issues raised by SMG. We are simultaneously publishing final guidance that illustrates Ofcom’s approach to determining whether a person “controls” a company holding a broadcast licence or a company running a newspaper for the purposes of paragraph 1(3)(b) of Part 1 of Schedule 2 to the BA.
- 1.3 The issues identified by SMG in its response may be summarised as follows:
- the relationship between informal guidance and a determination of control;
 - the circumstances in which Ofcom is prepared to provide informal guidance;
 - factors to be taken into account before making a determination of control;
 - consultation periods on draft determinations; and
 - publication of determinations.

Relationship between informal guidance and a determination of control

- 1.4 In the 2005 Consultation, Ofcom set out a number of principles relating to the provision of non-binding informal guidance for parties where a transaction is in contemplation. In particular, Ofcom indicated¹ that, where informal guidance is provided, we would not expect to alter our view in the final determination provided the parties had made full disclosure of all relevant facts and these facts had not changed materially.
- 1.5 In its response, SMG indicated that it was reassured by Ofcom’s approach.

Circumstances in which Ofcom is prepared to offer informal guidance

- 1.6 SMG is concerned that the decision to offer informal guidance remains at Ofcom’s discretion. SMG believes that, where parties can demonstrate a real intent to carry out the proposed transaction, informal guidance must be offered in all cases where requested, and should not be subject to Ofcom’s discretion.

¹ Paragraph 4.17 of the 2005 Consultation

- 1.7 Ofcom recognises the desire of parties to obtain absolute certainty at an early stage of a proposed transaction and, in the majority of cases, we will offer informal guidance once a real intent to carry out a proposed transaction can be demonstrated. However, informal guidance offered by Ofcom is a non-statutory service offered free of charge and will therefore place a burden on Ofcom resources. In such circumstances, Ofcom is not prepared to fetter its own discretion on whether or not to offer informal guidance where such service may place an undue burden on Ofcom resources. Ofcom does not consider that the informal guidance procedure is indispensable in circumstances where expert legal counsel are likely to have been retained.

Factors to be taken into account in determining control

- 1.8 SMG recognises in its response that Ofcom must look at all circumstances of the case before reaching a determination. SMG therefore broadly supports the consideration by Ofcom of the factors set out at paragraph 3.13 of the 2005 Consultation. The final guidance published by Ofcom therefore includes all such factors in relation to shareholdings and voting rights, constitution and management rights, and funding arrangements.

Consultation periods on draft determinations

- 1.9 SMG supports Ofcom's proposal in the 2005 Consultation that parties should be offered 20 days in which to make comments on a draft determination and considers the period to be reasonable.

Publication of determinations

- 1.10 In the 2005 Consultation, Ofcom indicated that it proposed to publish determinations on the Ofcom website subject to confidentiality restrictions². SMG has requested that Ofcom provide further guidance upon how it will determine what information it considers confidential. SMG considers that any evidence submitted by an applicant or licence holder which is submitted on a confidential basis should be treated as such. Furthermore, SMG considers that all informal guidance should be treated as confidential.
- 1.11 Section 393(1) of the Communications Act 2003 provides that "information with respect to a particular business which has been obtained in exercise of a power conferred by [the BA] is not, so long as that business continues to be carried on, to be disclosed without the consent of the person for the time being carrying on that business." Under section 393(2), disclosure is permitted, however where it is made for the purposes of, *inter alia*, facilitating the carrying out of Ofcom's functions.
- 1.12 Therefore, where information is obtained during Ofcom's investigation and pertains to the business of an undertaking, it will not be disclosed in the determination on control published on the Ofcom website without the consent of the relevant party.

² at paragraph 4.14 of the 2005 Consultation.