



Consultation on Ofcom guidance on the definition of control of media companies

Consultation

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Section 1

Executive Summary

1.1 This draft guidance sets out Ofcom's proposed approach to determining whether a person "controls" a company holding a broadcasting licence or a company running a newspaper, under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 percent of the equity share capital in the body nor possesses more than 50 per cent of the voting power in that body. A "person" can be an individual, or a company or other legal entity.

Ofcom's duty

- 1.2 Under the Communications Act 2003 (CA)¹, Ofcom has a duty to publish guidance setting out its intentions concerning the inclusion of particular matters that it will take into account when determining whether a person has "*de facto*" control of a body, within the meaning of paragraph 1(3)(b) of Part 1 of Schedule 2 to the BA.
- 1.3 Ofcom published draft guidance for consultation on 12 February 2004 in its consultation document entitled "OFCOM Guidance on the definition of control of media companies" ("the original consultation"). Ofcom received five responses to this consultation. The respondents were Five, The Christian Broadcasting Council, the Commercial Radio Companies Association, SMG and GCap Media plc (formerly Capital Radio plc) ("GCap"), whose comments can be viewed on the Ofcom website at www.ofcom.org.uk
- 1.4 Ofcom has made a number of control determinations during 2004 and 2005. In light of our experience of making control determinations since the original consultation document was published, and having regard to the responses that we received to that consultation, we think that it is appropriate for us to publish a redraft of the guidance for consultation.
- 1.5 Comments are invited on this amended guidance by 5pm on 5 January 2006. In particular, comments are invited on the procedure for making control determinations. Please refer to Annex 1 for further information on how to respond and for information on Ofcom's consultation process.

The statutory definition of control

- 1.6 The statutory definition of control is contained in Part 1 of Schedule 2 of the BA².
- 1.7 It should be noted that the statutory definition of control of media companies is different from the definition of control for mergers contained in Part 3 of the Enterprise Act 2002 (EA). In particular the EA extends the concept of control to "material influence" over a company's policy (Section 26 (3) and 26(4) EA) as a precursor to establishing whether there is an effect on competition in the market whereas the definition addresses whether a person is able to have the affairs of a body conducted in accordance with his wishes.

¹ Section 357(2) of the CA

² Paragraph 1(3) of Part 1 of Schedule 2 of the Broadcasting Act 1990 as amended by section 357 of the CA

- 1.8 The BA definition of control is also used in different circumstances from the definition of control in the EA. Control in the EA is relevant to the OFT's consideration of whether a merger situation has arisen; whereas, control in the BA is a concept applied by Ofcom to ensure compliance with statutory media ownership rules, and to see whether the need for a statutory 'change of control' review has been triggered.
- 1.9 The definition of "control" set out in the BA is applied principally in three situations:-
- To ensure that applications from companies for BA licences comply with the relevant media (including cross-media) ownership rules.
 - To ensure that existing licensee companies would not be in breach of media ownership rules after there has been a change in control.
 - In the case of a Channel 3, Channel 5 or local analogue radio licence, to determine whether a "relevant change of control" has occurred to trigger the 'change of control' regime set out in sections 351 to 356 of the Communications Act 2003. A review may also be triggered on being notified of proposals that may give rise to a relevant change of control.

Section 2

The meaning of control

2.1 A person may be deemed to “control” a radio, television or newspaper company in any of the following three scenarios:-

'Majority interest'

2.2 A person controls a company if he holds, or is beneficially entitled to, more than 50 per cent of the equity share capital, or possesses more than 50 per cent of the voting power in the company.³

2.3 Five suggested that we should preface the definition of majority interest with the words “In the absence of constitutional agreements between the shareholders of a company which provide to the contrary.” However, we are unable to do so as majority interest is a statutory definition, defined under paragraph 1(3)(a) of Part 1 of Schedule 2 to the BA.

'De facto control'

2.4 Even where a person does not have a majority interest, he is regarded as controlling a company where it is reasonable, having regard to all the circumstances, to expect that he would (if he chose to) be able in most cases or in significant respects, by whatever means and whether directly or indirectly, to achieve the result that affairs of the body are conducted in accordance with his wishes.⁴

'Control arrangement'

2.5 A person also controls a company where he holds, or is beneficially entitled to, 50 per cent of the company's equity share capital, or possesses 50 per cent of the voting power in the company, and has an arrangement with any other participant in the company as to how any voting power possessed by either of them is to be exercised or not.⁵

2.6 'Arrangement' includes any agreement or arrangement, whether or not it is, or is intended to be, legally enforceable.⁶

2.7 GCap queried whether Ofcom would determine that both parties have control in a situation where Ofcom may determine a person has control under the Act even if another person holds over 50% and therefore has control under paragraph 1 (3)(a) of Part 1 of Schedule 2 to the BA. Five suggested that where Ofcom determined that a party had *de facto* control, then in some cases a company holding the majority interest or being subject to a control arrangement may not in some cases also be held to control the company. Five suggested that this be determined on a case by case basis by reference to all the relevant circumstances.

2.8 As already noted, the statutory test for control based on a majority interest or based on a control arrangement is set out in the BA and does not depend on that company holding the majority interest or the control arrangement also having *de facto* control.

³ Paragraph 1(3)(a) of Part 1 of Schedule 2 to the BA

⁴ Paragraph 1(3)(b) of Part 1 of Schedule 2 to the BA

⁵ Paragraph 1(3)(c) of Part 1 of Schedule 2 to the BA

⁶ Paragraph 1(3A)(a) of Part 1 of Schedule 2 to the BA

It is possible that more than one party can be determined to have control for example where one party has control by the majority interest but another has *de facto* control (from the factors listed in the following pages). This may be similar to a determination in merger cases that there is joint control by more than one party, but under the BA 1990 would also apply when a company having a majority interest does not have *de facto* joint control.

- 2.9 In these circumstances and for the purpose of determining control in respect of the holder of a radio licence, Ofcom will ascribe the relevant points to each party found to have control (i.e. to the party with a majority interest or a control arrangement and to the party with *de facto* control) in determining the statutory assessments.
- 2.10 Section 357 of the CA requires Ofcom to publish guidance on our intentions concerning the inclusion of particular matters that we will take into account when determining whether a person has '*de facto*' control of a body (i.e. control within the meaning of paragraph 1(3)(b) of Part 1 of Schedule 2 to the BA 1990). This draft guidance accordingly focuses on the parameters for '*de facto*' control, rather than any other form of control.

Section 3

Matters considered when assessing *de facto* control

3.1 The definition of *de facto* control in Part 1 of Schedule 2 of the BA is as follows:-

“For the purposes of this Schedule a person controls a body corporate if although he does not have [a *majority*] interest in the body, it is reasonable, having regard to all the circumstances, to expect that he would (if he chose to) be able in most cases or in significant respects, by whatever means and whether directly or indirectly, to achieve the result that affairs of the body are conducted in accordance with his wishes.”⁷

It is possible that two or more persons may be regarded as controlling a company under this provision where they are acting together in concert.⁸

3.2 A message that we took from the responses to the original consultation on this issue was that whilst there was support for our original approach, some stakeholders were looking to Ofcom to provide clarity about our view on the meaning of *de facto* control. This was of particular interest to stakeholders in light of the fact that the definition of *de facto* control was amended by section 357 of the Communications Act 2003. We agree with respondents that it is appropriate for us to provide greater clarity on our general approach to *de facto* control.

3.3 At the outset, it is worth considering what is meant by 'affairs of the body'. Ofcom's view is that this means the matters pertaining to the body's business as a licence holder (or potential licence holder) or newspaper proprietor. This means that where a body has a number of different business interests, only those directly relating to its business as a broadcasting licensee or a newspaper proprietor (as the case may be) will be considered under a *de facto* control determination.

3.4 GCap commented that the factors which Ofcom take into account must be limited to those rights which enable a person actually to exercise control over a company's affairs within the meaning of the Act and believed that some of the factors listed in our previous consultation at paragraph 15 may allow a party to influence day-to-day operational decisions, but were not sufficient to allow control over strategic commercial behaviour of the licence holder. Ofcom notes that a person does not have to ensure that all of the body's affairs are conducted in accordance with his wishes.

3.5 Ofcom's view is that control over “affairs” refers to decisions affecting the company's business as a television or radio licensee or as a newspaper proprietor (as the case may be). Such decisions may not necessarily be confined to those taken formally at board or shareholder level nor, for the reasons explained in paragraph 3.3 above, be confined to decisions about the company's strategy. For example, relevant decisions may include those taken by a manager on a day-to-day basis about the operation of the business or its assets that could directly or indirectly affect the company's business or strategy as a broadcasting licensee or a newspaper proprietor (as the case may be).

⁷ Paragraph 1(3)(b) of Part 1 of Schedule 2 of the BA as amended by section 357 of the CA

⁸ Paragraph 1(5) of Part 1 of Schedule 2 of the BA

- 3.6 The statutory definition provides that *de facto* control can arise in two situations. The first situation is where a person is able 'in most cases' (by whatever means and whether directly or indirectly) to achieve the result that affairs of the body are conducted in accordance with his wishes. By 'in most cases', Ofcom interprets this as referring to a causal link between the totality of the factual circumstances which would lead to the person concerned being able to have the affairs of the body conducted in accordance with his wishes.
- 3.7 The second type of *de facto* control is where a person 'in significant respects' can be expected to achieve the result that affairs of the body are conducted in accordance with his wishes. Ofcom's view is that this would generally mean that a person is able to achieve the result he wishes to in respect of high-level decisions about the company's business and strategy of a type normally taken at board or shareholder level.
- 3.8 A person may have *de facto* control over a company even where another person controls the company by virtue of having a majority interest in it. This would mean that where the company is a radio licensee, both persons would be regarded as holding the licence in question and would be allocated the full number of points attributable to that licence under the ownership rules set out in the Media Ownership (Local Radio and Appointed News Provider) Order 2003⁹ (see comments above at paragraph 2.7 in response to Five and GCap's comments in this regard).
- 3.9 In our original consultation we proposed that a minority shareholder should be presumed, in absence of evidence to the contrary, to have *de facto* control if:-
- he held at least 30 per cent of the shares;
 - was the largest shareholder; and
 - could outvote the next two largest shareholders.
- 3.10 We did not receive any negative responses to this proposal, and we have no reason to revise this proposal from our experience to date of making *de facto* control determinations. We therefore propose that this presumption should remain. Five proposed that we clarify whether Ofcom should still consider all the surrounding circumstances in such cases. We confirm that Ofcom would of course consider any evidence put forward by the parties in relation to the control determination. However, it will be for the parties to demonstrate other factors to rebut the presumption of *de facto* control with a shareholding of 30% or more. GCap indicated that it would be helpful to know what will trigger an examination of control in circumstances where a person holds less than a 30% interest in a company. However, it is not possible to give an example of every scenario when this is the case. It is certainly the case that when there is an acquisition of a company there is likely to be a review of all the shareholdings currently held by the acquired company. However, this is not the only circumstance. For example, there may be an examination of control where a person acquired a minority interest in a company.
- 3.11 *De facto* control can exist regardless of the percentage level of shareholding held by the person concerned. There is no minimum level of shareholding below which Ofcom will refrain from investigating whether *de facto* control exists. In an extreme case, a person may have *de facto* control of a company even without having a shareholding in the company or being represented on the company's board.

⁹ SI 2003/3299

- 3.12 It is not possible to set out in advance a comprehensive list of the circumstances in which Ofcom will investigate whether *de facto* control exists. However, it will generally be the case that where Ofcom has found that a person controls a company (under any of the three limbs of the control definition) and for a regulatory reason the person is required to cease to control the company, any new arrangement under which the person retains a shareholding in the company, at any level, will be investigated by Ofcom.
- 3.13 Whether a person has *de facto* control of a company may depend on a number of relevant circumstances. It is not possible for Ofcom to set out an exhaustive list of factors that it will take into account, as each case will depend on its individual circumstances. Ofcom will consider all relevant circumstances including some or all of the following particular matters:-

Shareholding/voting rights

- the value and percentage of shares and/or voting power of shareholders
- the ownership and distribution of the remaining shares in the company
- any options that have been granted in respect of shares and the terms of those options
- the size of the economic interest of each of the shareholders in the profits of the company
- the existence of any connections between shareholders

Constitution and Management

- rights of veto and any special provisions in the constitution or other documentation of the company (such as restrictions on voting rights, provisions made for weighted voting rights, casting votes, veto rights over budget and/or business plan)
- quorum requirements relating to general and board meetings
- board representation and provisions for the appointment and removal of directors, including the chairman
- powers of the chairman
- relative expertise of the directors
- extent and nature of any protections accorded to minority shareholders
- the terms of shareholders' agreements
- pattern of attendance, voting and conduct at meetings
- management contracts
- arrangements for the appointment of senior personnel
- connections and arrangements between senior staff and other companies
- programming sources and arrangements
- sales and service arrangements
- ownership or other interests over material assets
- countervailing factors such as non-executive directors

Funding arrangements

- sources of funding
 - the nature and terms of any loans or charges
 - rights to participate in profits including rights to payments of dividends
 - liens on shares and rights associated with those liens
- 3.14 Ofcom's determination may be based on a combination of factors. Ofcom do not prioritise or 'weight' factors and each case will be assessed in the light of all the relevant circumstances.
- 3.15 GCap, supported by the Commercial Radio Companies Association, made a number of detailed comments on the precise factors to be considered and the weight to be attached to such factors. It argued that Ofcom should indicate which factors it considered would be sufficient by themselves to establish *de facto* control, and which were only relevant where another factor indicated that *de facto* control might exist. While we accept that some factors will be more significant than others in particular cases, the significance attached to each factor will depend on the facts of the case under consideration. We do not, therefore, think it is appropriate or possible for Ofcom to attempt to 'rank' factors in order of significance, or for Ofcom to fetter its discretion in making a control determination by stating that a particular priority will be placed on any particular factor. Every case will be viewed on its own merits and depend on the particular circumstances of the case.
- 3.16 Ofcom addresses GCap's detailed comments as follows:-

Shareholding/voting rights

- 3.17 In relation to shareholding and voting rights, GCap commented that the value or percentage of shares is irrelevant to the issue of control and that the only relevant factor is the percentage of voting rights. In general we agree however, we would need to assess rights accruing to particular shares. For example, we may look at convertible preference shares if there is a shareholder who has the right to take over the company at some point. This could mean that the directors may well act in a way which deems *de facto* control on the shareholder as the threat of conversion is there if the directors do not take that shareholder's wishes into account. A main focus of our determination would be to assess voting rights but each case would be determined on its own facts and circumstances.
- 3.18 GCap commented that the existence of options should only be taken into account if they are exercised in the near future according to legally binding arrangements. Otherwise, the exercise of control would be too uncertain and contingent on other factors and should not be taken into account in our assessment. We note GCap's comment and would review the precise arrangements relating to options in each individual case and by reference to other factors relevant to a control finding as set out above.
- 3.19 GCap contends that although the size of a shareholder's economic interest in the profits of a company may incentivise that shareholder to exercise control, it would not in itself confer a right to exercise control and that this should only be taken into account if combined with the shareholder being able to exercise control within the meaning of the Act. Even if this is so, then it should only be used as evidence that

such control is likely to be exercised. Ofcom would agree broadly that in most cases the size of the shareholder's economic interest in the profits may not of itself confer control. However, this will remain a factor for review amongst other relevant factors in individual cases.

- 3.20 GCap seeks clarification of when connections between shareholders, and what sort of connections, may give rise to control. Ofcom would clarify that connections in this sense are where shareholders are likely to act in concert due to some sort of relationship between them. For example as identified by GCap, this may be due to a voting arrangement giving two or more shareholders the majority of voting rights or strong particular common economic interests which result in an alignment of voting rights in practice. Family connections and common ownership are other examples of possible connections.¹⁰ Such connections will be a factor which will be taken into account in any control determination.

Constitution and Management

- 3.21 In relation to veto rights, GCap proposed that Ofcom should list the rights which we consider as sufficient to confer control as well as the minority protection rights which we consider do not confer control.
- 3.22 We would note that usually, the normal minority protection rights given to shareholders such as a veto right which prevents the sale or winding up of a company would not be sufficient to infer control. Veto rights which are likely to be considered as important rights are rights over the appointment of the management, determination of the budget, business plan, major investments and/or strategic decisions on business policy. However, Ofcom cannot fetter its discretion by setting out a list of veto rights will always be regarded as conferring control. Each case would be examined on its merits and the review would focus as noted at paragraphs 3.3 – 3.5 above on the extent of rights relating to the affairs of the company relating to its business as a broadcasting licensee or a newspaper proprietor (as the case may be).
- 3.23 GCap seeks clarification on which particular terms in shareholders agreements might give rise to control. Again this will depend on the precise circumstances of each case but will include any veto rights set out in a shareholders agreement and any voting arrangements for joint exercise of voting rights.
- 3.24 GCap wants Ofcom to be more specific regarding the relevance of the pattern of attendance, voting and conduct at meetings. They question whether Ofcom are suggesting that *de facto* control would be conferred if a party is likely to achieve a majority at shareholders' meetings following the pattern of attendance, voting and conduct at previous meetings. Ofcom confirms that this is likely to be the main relevance of this factor. In appropriate cases, Ofcom may seek information as to any changes in pattern of attendance and voting at meetings.
- 3.25 As regards arrangements for the appointment of senior personnel and connections and arrangements between senior staff and other companies, GCap wonders whether these factors should be taken into account because in their opinion, it is unclear how these factors could allow control over the affairs of the company within the meaning of the Act given that they are more closely linked to day-to-day operations, rather than strategic control. Ofcom again notes the purpose of its review as set out at paragraphs 3.3 – 3.5 above, namely the extent of control over the affairs of the company relating to its business as a broadcasting licensee or a newspaper

¹⁰ Paragraph 2(3) of Part 1 of Schedule 2 of the BA

proprietor (as the case may be). This may include a review of control over certain day-to-day operations in certain cases.

- 3.26 GCap maintain that it should be very exceptional that sales and service or programming arrangements are deemed to give a party rights over the strategic commercial behaviour of the licence holder. They suggest that these arm's length arrangements may relate to the operations of the company, but do not confer strategic control over the affairs of the company within the meaning of the Act unless combined with other factors such as a large shareholding, board representation and veto rights. Ofcom accepts that there will be circumstances where such arrangements do not confer strategic control but equally, there will be circumstances where such arrangements do confer strategic control in light of other factors in the case. Ofcom again notes the purpose of its review and notes that each case will be reviewed on its merits in the light of all relevant factors.

Funding Arrangements

- 3.27 GCap contend that the sources of funding and nature and terms of any loans or charges should not be relevant other than in very exceptional and defined circumstances i.e. where the debt-holder is granted significant rights which would effectively put it in the same position as the controlling shareholder. We would agree in general with this comment but note that funding arrangements will remain a factor for Ofcom's review subject to the individual circumstances of each case.
- 3.28 GCap also noted its previous comments on the size of an economic interest in the profits of a company and the relevance of options. These have been dealt with above.

Section 4

Procedure

Investigation and decision-making

- 4.1 Ofcom will only investigate whether *de facto* control exists where it considers an investigation is necessary or desirable for the fulfilment of one or more of Ofcom's regulatory purposes. Ofcom does not expect to make *de facto* control determinations if those determinations would have no regulatory relevance.
- 4.2 In order to determine where control lies Ofcom may seek sight of all relevant documents (including documents containing commercially confidential material). This may include:-
- Memorandum and Articles of Association
 - Shareholders' agreements
 - Option agreements
 - Loan agreements
 - Sales agreements
 - Service agreements
 - Programme supply contracts
 - Minutes of board and general meetings and any extraordinary meetings
 - Management and employment contracts
- 4.3 Ofcom may also seek information about relevant non-written agreements and information on the parties' action and behaviour where relevant. Ofcom will use information gathered from other regulators and will expect cooperation from the parties.
- 4.4 Where third parties provide evidence to Ofcom on a control determination subject to considerations of confidentiality, Ofcom will give the applicant or licence holder an opportunity to see and comment upon such evidence. Equally, if Ofcom gathers other evidence on its own initiative, this will also be brought to the attention of the applicant or licence holder.
- 4.5 Ofcom would expect the applicant or licence holder to submit written evidence as to whether or not control exists. Ofcom will invite the applicant or licence holder at the beginning of the procedure to submit evidence and make representations which it will consider in reaching its determination. In circumstances in particular where there is a presumption that a minority shareholder has *de facto* control (see Para 3.9 above), the onus is on the applicant or licence holder to provide evidence to Ofcom which demonstrates that *de facto* control is not present.

Time Frames

- 4.6 Time periods set out in this procedure are the times which Ofcom will usually follow. However, in exceptional cases Ofcom may adopt a different time frame. For

example, where additional key information comes to light at a late point during the procedure, a longer period may be adopted. Further, in urgent cases Ofcom may at the request of the parties adopt a shorter period.

Draft determination and standard time frame

- 4.7 Once Ofcom determines a *de facto* control determination is necessary or desirable, it will inform the applicant or licence holder and give them 10 days to comment. From receipt of comment from the parties or an indication that they do not intend to comment, Ofcom will endeavour, subject to the complexity of the case, to provide the parties with a draft determination within 15 days. In cases where an applicant or licence holder shows evidence of a need for a quicker determination, then Ofcom will shorten these timetables as far as possible.
- 4.8 The draft determination will be taken by those members of Ofcom's Executive with delegated powers to make determinations on control. This draft determination will be communicated to the parties setting out the reasons for the determination.

Final determination and time frame

- 4.9 Following a draft determination, the applicant or licence holder will have 20 days to comment on the determination. If the applicant or licence holder does not accept this determination, then they may put forward further evidence and/or argument for a final determination within 15 days of the further evidence and/or argument being submitted. The final determination will be taken by those members of Ofcom's Executive with delegated powers to make determinations on control and will be communicated to the parties setting out the reasons for the decision.
- 4.10 SMG made various comments in relation to the previous draft that the procedure did not give applicants sufficient time (only three days to notify Ofcom that they would appeal the draft determination). GCap also commented on this point. GCap considered that 3 working days was too short a period in which to decide to appeal or not and recommended the period be at least 10 working days or longer if justified by the circumstances. They similarly thought that the period of 10 working days in which to submit a statement of grounds for appeal against a draft determination was too short given the likely complexity of the cases which will be considered and that this period should be extended to 28 days.
- 4.11 Ofcom considers that a period of 20 days to present submissions on a draft determination should be sufficient given the involvement of the parties in the draft decision making process.
- 4.12 GCap raised various additional comments on our investigation and decision-making procedures. In particular, GCap were concerned that Ofcom's proposed procedure as set out in Paragraph 18 of the previous draft did not formally offer persons the opportunity to make submissions on the issue of control and proposed that wherever Ofcom intended to examine control, that the party or parties involved would be asked for their view. As set out in the procedure detailed above, Ofcom can confirm that it will always notify parties when looking at the issue of control.
- 4.13 Ofcom confirms that those members of Ofcom's Executive who will make draft determinations on control will only be those with delegated powers to make determinations on control. We can confirm that the full reasons for any draft determination of control by the Executive which has been contested will be given to the parties concerned at the time the draft determination is communicated. Further,

a final determination will only be made by those members of Ofcom's Executive with delegated powers to make determinations on control.

Publicity

- 4.14 GCap questioned how decisions would be put into the public domain. We can confirm that we will publish control determinations on the Ofcom website subject to confidentiality restrictions. In the case of commercially sensitive determinations which could have stock exchange implications, Ofcom will where appropriate make a formal announcement on the result of its determination.

Guidance on proposed transactions

- 4.15 GCap and SMG commented that Ofcom should provide guidance to parties in advance of completing transactions. In particular, GCap requested that Ofcom provide advice if a party wishes to ensure that a proposed transaction does not trigger a determination of *de facto* control for proper commercial reasons, rather than as an attempt to evade regulatory intervention. It also recommended that Ofcom introduces a formal or semi-formal procedure for parties seeking guidance on Ofcom's likely views on *de facto* control in order to provide necessary market assurances. SMG suggested that guidance should be detailed and binding where applicants make full disclosure of all relevant facts that these facts do not change materially.
- 4.16 General guidance may be sought from Ofcom regarding policy, as set out in this document. However detailed advice will not be given on hypothetical transactions, nor will staff assist in structuring a deal to ensure compliance with the media ownership rules or to avoid invoking the change of control regime.
- 4.17 Where a transaction is in contemplation, Ofcom may, in its discretion, give non-binding informal guidance to indicate whether *de facto* control appears to exist under the arrangements proposed by the parties. If Ofcom is satisfied that the parties to the transaction have provided sufficiently detailed and certain information relating to *de facto* control, then Ofcom would normally expect to be able to make a *de facto* control determination in advance of the transaction completing. Further, Ofcom would not expect to alter its view on control given in informal guidance if parties have made full disclosure of all relevant facts and where these facts have not changed materially.
- 4.18 Where Ofcom has determined that a person does not have *de facto* control of a company, we may review our decision if there is any change to the company's structure or behaviour, or any other relevant change of circumstances which raises questions of control, or if material new evidence is presented.

Additional effects of control determinations

- 4.19 GCap also raised some general issues on control determinations in its comments. It wanted Ofcom to explain how it would respond if regulatory intervention was required after a determination of control in two given scenarios. The first was whether a licence applicant who would be disqualified by virtue of a determination of *de facto* control, would be given an opportunity to restructure, or whether he will be disbarred from the application process. Ofcom would not propose to disbar a licence applicant from the application process if they were able to show genuine plans for restructuring and were able to restructure in the time available.

- 4.20 The second scenario raised by GCap was whether Ofcom would be prepared to offer a “grace period” for the licensee to make necessary changes to avoid being treated as being in breach of its licence where as a result of a transaction, an existing licence holder is determined to have undergone a change of control which would make s/he in breach of the media ownership rules. Ofcom confirms that it would be prepared to offer a “grace period” in such circumstances. The length of any such period would depend on the particular factors of each case.

Review of control determinations by Ofcom

- 4.21 GCap’s final comment was in what circumstances an Ofcom decision on control would be reviewed once made and whether Ofcom would be receptive to requests for the procedure to be investigated from the licence holders themselves. Ofcom would be prepared to review a decision if factors on which previous determinations were based changed materially. This could be in response to a request from a licence holder to review the decision where the licence holder can demonstrate material changes. Ofcom notes its comments above in paragraphs 3.9 - 3.11 in relation to when Ofcom proposes to carry out control determinations.

Section 5

Further information

Further information can be obtained from:

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Tel: 020 7981 3000
Fax: 020 7981 3333
E-mail sarah.turnbull@ofcom.org.uk
and from Ofcom's website (www.ofcom.org.uk)

Annex 1

Responding to this consultation

How to respond

Ofcom invites written views and comments on the issues raised in this document, to be made by **5pm on 5 January 2006**.

Ofcom strongly prefers to receive responses as e-mail attachments, in Microsoft Word format, as this helps us to process the responses quickly and efficiently. We would also be grateful if you could assist us by completing a response cover sheet (see Annex 3), among other things to indicate whether or not there are confidentiality issues. The cover sheet can be downloaded from the 'Consultations' section of our website.

Please can you send your response to sarah.turnbull@ofcom.org.uk

Responses may alternatively be posted or faxed to the address below, marked with the title of the consultation.

Sarah Turnbull
Legal Director
Office of Communications
Riverside House
2A Southwark Bridge Road
London SE1 9HA

Fax: 020 7981 3333

Note that we do not need a hard copy in addition to an electronic version. Also note that Ofcom will not routinely acknowledge receipt of responses.

It would be helpful if your response explained why you hold your views, and how Ofcom's proposals would impact on you.

Further information

If you have any want to discuss the issues and questions raised in this consultation, or need advice on the appropriate form of response, please contact Sarah Turnbull on 020 7981 3000.

Confidentiality

Ofcom thinks it is important for everyone interested in an issue to see the views expressed by consultation respondents. We will therefore usually publish all responses on our website, www.ofcom.org.uk, ideally on receipt (when respondents confirm on their response cover sheet that this is acceptable).

All comments will be treated as non-confidential unless respondents specify that part or all of the response is confidential and should not be disclosed. Please place any confidential parts of a response in a separate annex, so that non-confidential parts may be published along with the respondent's identity.

Ofcom reserves its power to disclose any information it receives where this is required to carry out its legal requirements. Ofcom will exercise due regard to the confidentiality of information supplied.

Please also note that copyright and all other intellectual property in responses will be assumed to be licensed to Ofcom to use, to meet its legal requirements. Ofcom's approach on intellectual property rights is explained further on its website, at <http://www.ofcom.org.uk/about/accoun/disclaimer>.

Next steps

Following the end of the consultation period, Ofcom intends to publish final guidance around March 2006.

Please note that you can register to get automatic notifications of when Ofcom documents are published, at http://www.ofcom.org.uk/static/subscribe/select_list.htm.

Ofcom's consultation processes

Ofcom is keen to make responding to consultations easy, and has published some consultation principles (see Annex 2) which it seeks to follow, including on the length of consultations.

If you have any comments or suggestions on how Ofcom conducts its consultations, please call our consultation helpdesk on 020 7981 3003 or e-mail us at consult@ofcom.org.uk. We would particularly welcome thoughts on how Ofcom could more effectively seek the views of those groups or individuals, such as small businesses or particular types of residential consumers, whose views are less likely to be obtained in a formal consultation.

If you would like to discuss these issues, or Ofcom's consultation processes more generally, you can alternatively contact Vicki Nash, Director, Scotland, who is Ofcom's consultation champion:

Vicki Nash
Ofcom (Scotland)
Sutherland House
149 St. Vincent Street
Glasgow G2 5NW
Tel: 0141 229 7401
Fax: 0141 229 7433
E-mail: vicki.nash@ofcom.org.uk

Annex 2

Ofcom's consultation principles

A2.1 Ofcom has published the following seven principles that it will follow for each public written consultation:

Before the consultation

A2.2 Where possible, we will hold informal talks with people and organisations before announcing a big consultation to find out whether we are thinking in the right direction. If we do not have enough time to do this, we will hold an open meeting to explain our proposals shortly after announcing the consultation.

During the consultation

A2.3 We will be clear about who we are consulting, why, on what questions and for how long.

A2.4 We will make the consultation document as short and simple as possible with a summary of no more than two pages. We will try to make it as easy as possible to give us a written response. If the consultation is complicated, we may provide a shortened version for smaller organisations or individuals who would otherwise not be able to spare the time to share their views.

A2.5 We will normally allow ten weeks for responses to consultations on issues of general interest.

A2.6 There will be a person within Ofcom who will be in charge of making sure we follow our own guidelines and reach out to the largest number of people and organisations interested in the outcome of our decisions. This individual (who we call the consultation champion) will also be the main person to contact with views on the way we run our consultations.

A2.7 If we are not able to follow one of these principles, we will explain why. This may be because a particular issue is urgent. If we need to reduce the amount of time we have set aside for a consultation, we will let those concerned know beforehand that this is a 'red flag consultation' which needs their urgent attention.

After the consultation

A2.8 We will look at each response carefully and with an open mind. We will give reasons for our decisions and will give an account of how the views of those concerned helped shape those decisions.

Annex 3

Consultation response cover sheet

- A3.1 In the interests of transparency, we will publish all consultation responses in full on our website, www.ofcom.org.uk, unless a respondent specifies that all or part of their response is confidential. We will also refer to the contents of a response when explaining our decision, without disclosing the specific information that you wish to remain confidential.
- A3.2 We have produced a cover sheet for responses (see below) and would be very grateful if you could send one with your response. This will speed up our processing of responses, and help to maintain confidentiality by allowing you to state very clearly what you don't want to be published. We will keep your completed cover sheets confidential.
- A3.3 The quality of consultation can be enhanced by publishing responses before the consultation period closes. In particular, this can help those individuals and organisations with limited resources or familiarity with the issues to respond in a more informed way. Therefore Ofcom would encourage respondents to complete their cover sheet in a way that allows Ofcom to publish their responses upon receipt, rather than waiting until the consultation period has ended.
- A3.4 We strongly prefer to receive responses in the form of a Microsoft Word attachment to an email. Our website therefore includes an electronic copy of this cover sheet, which you can download from the 'Consultations' section of our website.
- A3.5 Please put any confidential parts of your response in a separate annex to your response, so that they are clearly identified. This can include information such as your personal background and experience. If you want your name, address, other contact details, or job title to remain confidential, please provide them in your cover sheet only so that we don't have to edit your response.

Cover sheet for response to an Ofcom consultation

BASIC DETAILS

Consultation title:

To (Ofcom contact):

Name of respondent:

Representing (self or organisation/s):

Address (if not received by email):

CONFIDENTIALITY

What do you want Ofcom to keep confidential?

Nothing

Name/contact details/job title

Whole response

Organisation

Part of the response

If there is no separate annex, which parts?

If you want part of your response, your name or your organisation to be confidential, can Ofcom still publish a reference to the contents of your response (including, for any confidential parts, a general summary that does not disclose the specific information or enable you to be identified)?

DECLARATION

I confirm that the correspondence supplied with this cover sheet is a formal consultation response. It can be published in full on Ofcom's website, unless otherwise specified on this cover sheet, and I authorise Ofcom to make use of the information in this response to meet its legal requirements. If I have sent my response by email, Ofcom can disregard any standard e-mail text about not disclosing email contents and attachments.

Ofcom seeks to publish responses on receipt. If your response is non-confidential (in whole or in part), and you would prefer us to publish your response only once the consultation has ended, please tick here.

Name

Signed (if hard copy)