



Ofcom guidance on the definition of control of media companies

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Section 1

Executive Summary

1.1 The present guidance sets out Ofcom's 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 ("the 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.

The statutory definition of control

1.3 The statutory definition of control is contained in Part 1 of Schedule 2 of the BA².

1.4 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 ("the 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.

1.5 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. The present guidance is limited to Ofcom's approach to determining control for the purposes of paragraph 1(3) of Part 1 to Schedule 2 of the BA and should not be taken to reflect Ofcom's view on the definition of control under the EA.

1.6 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.

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

- 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

'De facto control'

2.3 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'

2.4 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

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

2.6 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. 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, it would also apply when a company having a majority interest does not have de facto joint control.

2.7 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.

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

- 2.8 Section 357 of the CA requires Ofcom to publish guidance on its intentions concerning the inclusion of particular matters that Ofcom 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 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 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. Ofcom notes that a person does not have to ensure that all of the body's affairs are conducted in accordance with his wishes.
- 3.3 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 3.2 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).
- 3.4 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.
- 3.5 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

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

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.

- 3.6 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.
- 3.7 In the absence of evidence to the contrary, Ofcom will presume that a minority shareholder holds de facto control if he:
- holds at least 30 per cent of the shares;
 - is the largest shareholder; and
 - can outvote each of the next two largest shareholders.
- 3.8 Ofcom will 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. Where a minority shareholder holds less than 30%, it is not possible to give an example of every scenario in which Ofcom would seek to conduct an examination of control. 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.
- 3.9 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.
- 3.10 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.
- 3.11 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:-

⁹ SI 2003/3299

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

3.12 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. Nevertheless, Ofcom considers it appropriate to provide further clarifications in respect of certain of the factors set out above.

Shareholding/voting rights

- 3.13 In relation to shareholding and voting rights, the value or percentage of shares held is generally irrelevant to the issue of control, the principal relevant factor being the percentage of voting rights held. However, Ofcom will need to assess rights accruing to particular shares. For example, Ofcom 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 such as to grant de facto control to the shareholder due to the threat of conversion if the directors do not take that shareholder's wishes into account. Similar issues may also arise when assessing the effect of option arrangements. In each case, a main focus of Ofcom's determination would be to assess voting rights but each case would be determined on its own facts and circumstances.
- 3.14 Control may also be conferred on one or more parties as a result of connections between shareholders. "Connections" in this sense are where shareholders are likely to act in concert due to some sort of relationship between them. For example, 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

- 3.15 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 in most cases. 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 will be examined on its merits and the review would focus (as noted at paragraphs 3.2 and 3.3 above) on the extent of rights relating to the affairs of the company as a broadcasting licensee or a newspaper proprietor (as the case may be).
- 3.16 Whether or not terms in shareholders agreements will give rise to control will depend on the precise circumstances of each case but the analysis of control will include any veto rights set out in a shareholders agreement and any voting arrangements for joint exercise of voting rights.
- 3.17 The assessment of attendance, voting and conduct at meetings will focus primarily upon whether or not a party is likely to achieve a majority at shareholders' meetings following the pattern of attendance, voting and conduct at previous meetings. In appropriate cases, Ofcom may also seek information as to any changes in pattern of attendance and voting at meetings.
- 3.18 As regards arrangements for the appointment of senior personnel and connections and arrangements between senior staff and other companies, Ofcom considers this to be of relevance in establishing the extent of control over the affairs of the company

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

relating to its business as a broadcasting licensee or a newspaper proprietor (as the case may be). Such assessment may also include a review of the level of control over certain day-to-day operations enjoyed by the relevant party in certain cases.

Funding Arrangements

- 3.19 Sources of funding and the nature and terms of any loans or charges are unlikely to be relevant other than in exceptional circumstances where the debt-holder is granted significant rights which would effectively put it in the same position as a controlling shareholder. However, funding arrangements will remain a factor for Ofcom's review in all cases, subject to the individual circumstances of each case.

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.

Publicity

- 4.10 Once adopted, control determinations will be published 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

- 4.11 Informal 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.
- 4.12 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.
- 4.13 Where Ofcom has determined that a person does not have de facto control of a company, Ofcom may review its 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

- 4.14 Ofcom recognises that, in certain situations, a determination of control could compromise the position of a licence holder in the short term. In the majority of cases, Ofcom expects to be able to offer the relevant party a reasonable period of time in which to rectify the situation before any enforcement action is taken, depending upon the relevant circumstances.
- 4.15 For example, where a licence applicant would be disqualified by virtue of a determination of de facto control, 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. Ofcom would also be prepared to offer a “grace period” for a 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. The length of any such period would depend on the particular factors of each case.

Review of control determinations by Ofcom

- 4.16 Ofcom will be prepared to review a decision if factors on which previous determinations were based change 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.