



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

Consultation

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Section 1

Introduction

Comments on this guidance are welcomed from the broadcasting and newspaper industries, consumer groups and any other interested parties. Any comments will be considered by the Ofcom Board before final guidance is issued.

The deadline for responses to this consultation is **5pm on 22 April 2004**.

Responses should be sent to:

Peter Davies
Market Intelligence
Office of Communications
Riverside House
2a Southwark Road
London SE1 9HA

Tel: 020 7981 3000

Fax: 020 7981 3333

Email: peter.davies@ofcom.org.uk

If you have general comments on how Ofcom consults, you can call our Consultation Helpdesk on 020 7981 3003, or email us on consult@ofcom.org.uk

Ofcom's current champion for consultation is Philip Rutnam, Partner, Competition and Strategic Resources. His contact details are 020 7981 3585 and philip.rutnam@ofcom.org.uk

We think it is important for everyone interested in an issue to see the views of others during a consultation. We would usually publish all the responses we have received on our website. But if you wish any of your response to stay confidential, we will respect this. Please indicate clearly if you wish all or part of your response to remain confidential.

Summary

1. This 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 definition of "control" contained in the Broadcasting Act 1990 (BA).¹ A "person" can be an individual, or a company or other legal entity.
2. Ofcom has a duty to publish this Guidance under the Communications Act 2003 (CA).²
3. This Guidance applies from publication. However, Ofcom is also consulting on this Guidance and welcomes any comments on it.
4. The definition of "control" will only be applied in three situations.
 - To ensure that applications from companies for BA licences comply with the relevant 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.
 - To determine whether a "relevant change of control" has occurred to trigger the 'change of control' regime.³
5. A person controls a company if he has a majority interest in it.
6. Ofcom will presume a minority shareholder has 'de facto' control if he holds at least 30 per cent of the issued share capital, is the largest shareholder and can outvote the next two largest shareholders.
7. Where a shareholder has less than 30 per cent of a company, Ofcom may still find that he has control after looking at all the relevant circumstances including:
 - shareholding/voting rights
 - funding arrangements
 - constitution and management.
8. A finding of control does not of itself necessarily require any regulatory intervention.
9. Comments are invited on this Guidance by 22 April 2004. Responses should be sent to:

Peter Davies
Market Intelligence
Office of Communications
Riverside House
2a Southwark Road
London SE1 9HA

¹ Paragraph 1(3), Part 1, Schedule 2, BA.

² Section 357, Communications Act 2003.

³ Sections 351 to 356, Communications Act 2003. A different definition of control applies to the consideration of mergers under the Enterprise Act's merger regime. Control in the BA is used in a different context and for a different purpose.

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Or via email to peter.davies@ofcom.org.uk

Or via Ofcom's website (www.ofcom.org.uk).

Section 2

The meaning of control

10. A person may be deemed to “control” a company in any of three circumstances:

a. 'Majority interest'.

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.

b. 'De facto control'.

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.

A person does not have to be able to ensure that all of a company's affairs are conducted in accordance with his wishes in order for the person to have control of the company.

c. 'Control arrangement'.

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 more than 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.

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

Section 3

Matters considered when assessing de facto control

11. This guidance focuses on the matters that Ofcom may take into account when considering questions of de facto control.
12. Ofcom will presume a minority shareholder has de facto control if:
 - he holds at least 30 per cent of the issued share capital in a company
 - he is the largest shareholder, and
 - he can outvote the next two largest shareholders.
13. Even if a person owns less than 30 per cent of the equity share capital, or possesses less than 30 per cent of the issued share capital in the company, Ofcom may deem that he has control. There is no minimum shareholding under which Ofcom may not consider questions of control.
14. Ofcom may determine that a minority shareholder has control even though another shareholder may hold over 50 per cent of the company's shares. For example, this may be the case where the shares held by the smaller shareholder are voting shares and those held by the larger shareholder are not.
15. Whether a person has de facto control of a company may depend on a number of relevant circumstances. Ofcom may consider any circumstances including some or all of the following:

Shareholdings/voting rights

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

Funding arrangements

- vi. sources of funding
- vii. the nature and terms of any loans or charges
- viii. rights to participate in profits including rights to payments of dividends
- ix. liens on shares and rights associated with those liens

Constitution and management

- x. 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, veto rights over budget and/or business plan)
 - xi. quorum requirements relating to general and board meetings
 - xii. board representation and provisions for the appointment and removal of directors, including the chairman
 - xiii. powers of the chairman
 - xiv. extent and nature of any protections accorded to minority shareholders
 - xv. the terms of shareholders' agreements
 - xvi. pattern of attendance, voting and conduct at meetings
 - xvii. management contracts
 - xviii. arrangements for the appointment of senior personnel
 - xix. connections and arrangements between senior staff and other companies
 - xx. programming sources and arrangements
 - xxi. sales and service arrangements
16. Ofcom's determination may be based on a combination of factors. We do not prioritise or 'weight' factors and each case may be looked at in the light of a number of relevant facts.

Section 4

Procedure

17. In order to determine where control lies Ofcom may seek sight of all relevant documents (including documents containing commercially confidential material). Ofcom may also seek information about relevant non-written agreements, and information on the parties' action and behaviour where relevant.
18. If the applicant or licence holder wishes to submit written evidence as to whether or not control exists, Ofcom will consider this as part of its determination. In circumstances where there is a presumption that a minority shareholder has de facto control (see above), the onus is on the applicant or licence holder to provide evidence to Ofcom which demonstrates that de facto control is not present.
19. If, after consideration of this evidence, Ofcom considers control does exist, and the applicant or licence holder disagrees with the outcome of Ofcom's decision, then the applicant or licence holder may appeal to Ofcom's main Board.
20. Any appeal must be made within reasonable time (normally three working days of receiving Ofcom's decision).
21. The applicant or licence holder should provide a full written statement of the grounds for appeal, which should be sent to Ofcom within 10 working days after the request for an appeal.
22. It is important to note that even if Ofcom deems that a person has control of the relevant enterprise, this does not of itself necessarily require any regulatory intervention.
23. General advice may be sought from Ofcom regarding policy, as set out in this Guidance. 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.
24. Where a transaction is in prospect, Ofcom may, in its discretion, indicate whether de facto control appears to exist under the arrangements proposed by the parties.
25. Any such advice given in relation to de facto control issues would not be binding and would be without prejudice to the ultimate decision of Ofcom on these matters.

Section 5

Further information

26. Further information can be obtained from:

Gwen Morgan or Caroline Smith
Competition and Markets
Office of Communications
Riverside House
2a Southwark Road
London SE1 9HA

Tel: 020 7981 3290,

Fax: 020 7981 3333

Email gwen.morgan@ofcom.org.uk or caroline.smith@ofcom.org.uk

and from Ofcom's website (www.ofcom.org.uk).

Annex 1

Ofcom's consultation process

How Ofcom approaches each formal consultation

There are seven principles which we will follow for each written consultation.

Before the consultation

A1.1 Where possible, we will hold informal talks with people and organisations before announcing a 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.

In this case, there was an urgency to have interim guidance in place as soon as possible as the Communications Act is now law.

During the consultation

A1.2 We will be clear about who we are consulting, why, on what questions and for how long.

In this case, we are consulting the broadcasting and newspaper industries, consumer groups and any other interested parties.

A1.3 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.

The document itself is only four pages long, and there is a summary at the front.

A1.4 We will normally allow 10 weeks for responses.

In this case the closing date for responses is 5pm on 22 April 2004. (10 weeks from the publication of this guidance)

A1.5 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.

The contact point in Ofcom is Philip Rutnam, Partner, Competition and Strategic Resources. His contact details are 020 7981 3585, and philip.rutnam@ofcom.org.uk

A1.6 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

A1.7 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.

We think it is important for everyone interested in an issue to see the views of others during a consultation. We would usually publish all the responses we have received on our website.

We would prefer people and organisations to give us views which they would be happy to see in public. But if those who have responded to a consultation tell us that some or all of their views must stay confidential, we will respect this.

We will also:

- list these seven principles in every consultation document that we publish;
- run a consultation helpdesk – to help organisations such as small businesses and consumer and community groups make their views heard in response to our consultations; and
- keep a table on our website at www.ofcom.org.uk listing all current consultations, those recently closed and (as far as possible) those we are planning in the near future. The table will include a brief summary of each document.