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**MEDIA OWNERSHIP RULES - DETERMINING WHO 'CONTROLS' MEDIA ENTITIES**

**Issue**

Making sure that the media ownership rules we set work effectively and that OFCOM properly considers all the circumstances when deciding whether a *de facto* control situation may have arisen.

**Recommendations**

- That the Communications Bill should include a more detailed definition of *de facto* control than exists at present, for OFCOM to apply whenever any media ownership rule is relevant.
- That you provisionally approve a package of three measures that we feel could provide a proper degree of certainty. We will still, however, have to consult Parliamentary Counsel over these measures.

(We have also included an alternative option, based on the definition of control that the FCC apply to US media markets.)

**Timing**

Routine, although lawyers would like to have firm instructions in the next week.

## Background

1. For certain purposes, in the existing media ownership regime, someone is considered to be the 'owner' of a media interest (a licence, a newspaper or a company) if, according to rules set out in the legislation, the regulator determines that they 'control' it.
2. The present definition of 'control' has three parts. First, anyone with more than a 50% shareholding or voting rights is deemed to have control. Secondly, there are provisions which deal specifically with deadlocking arrangements where an arrangement exists between a shareholder of 50% of shares or voting rights and other shareholders as to voting arrangements. Thirdly, there is a definition of *de facto* control. This allows the regulators to conclude that although a person does not hold more than a 50% interest in a body:

"it is reasonable, having regard to all the circumstances, to expect that he will be able, by whatever means and whether directly or indirectly, to achieve the result that the affairs of the body are conducted in accordance with his wishes."

3. The intention behind this provision is to allow the regulators to look at a range of factors when determining whether a person has control of a body. This might include, for example, contractual or other arrangements between different shareholders, the nature of funding arrangements and the constitution and management of the company. However it has not worked perfectly, and we suggest it now needs further clarification.
4. The Bill will greatly reduce the number of specific media ownership rules that exist. Given the relative importance that we are attaching to these rules as the safeguard of democratic debate, it is important that they work as they are intended, and impinge directly upon anyone who can control a relevant company. The rules we will be left with are:
  - the ban on ownership by political parties
  - the ban on religious organisations owning national media or multiplexes
  - the radio ownership rules
  - the two 20% cross-media ownership rules (national and regional)

### Problems with the existing definition

5. The Radio Authority and the ITC have taken different approaches in deciding where an instance of *de facto* control exists. The Radio Authority's methods have been more rigorous and are contained in detailed guidance. They consider a wide range of circumstances that may affect the substance of the company's business, including:
  - who controls music policy; and
  - who has an ongoing economic interest in the running of the company.

6. The ITC have followed a far more laissez-faire approach, judging, for example, that Sky is not controlled by News Corp. They have considered that they should look only at the structure of companies to determine who controls their affairs. We understand that they may have received legal advice that suggests that 'he will be able' means 'he will always be able', allowing them to declare that a *de facto* control situation did not arise in cases where there was evidence that the body could act independently of 'him' on some occasions (however rare these occasions might be).
7. In legal terms, we consider that the Radio Authority's approach appears to be more consistent with the broad wording of the provision and that it is questionable whether the ITC's apparent approach is consistent with that wording. However, for policy reasons we consider that it would be appropriate to take steps to ensure that OFCOM adopts a suitably thorough and consistent approach to the issue, along the lines taken by the Radio Authority. Having slimmed down the number of ownership rules, we must make sure they are properly applied. We therefore suggest that the definition of *de facto* control be amplified on the face of the Bill

#### Recommended package of remedies

- A. There could be a presumption of *de facto* control in relation to any holding of 20% or more of shares or voting rights (the point at which the OFT take an interest in such matters) or 30% (the point the Radio Authority currently use as a trigger). One way of implementing this approach (which has a close precedent in the Broadcasting Act 1996) would be for the legislation to state that OFCOM is to be regarded as failing to discharge their duty if they grant (or do not revoke) a licence without being provided with information which satisfies them that a *de facto* control situation has not arisen.  
  
We recommend the 'trigger' is set at 20%, consistent with the application of the 20/20 cross-media ownership rule.
- B. OFCOM could be required to issue guidance as to when they would be likely to consider that a *de facto* control situation existed (along the lines of the guidance presently provided by the Radio Authority). There may be a case for saying that this alone could be enough to secure a rigorous approach to the *de facto* test, in that OFCOM's general interpretation and application of the test would be open to scrutiny.
- C. We could amend the definition of *de facto* control so as to meet the concerns arising from the legal advice apparently given to the ITC in relation to the Sky case, that 'he will be able' means 'he will always be able'. Such an amendment could make it clear that a *de facto* control situation arises where it can reasonably be expected that the alleged controller can normally achieve the result that the affairs of the body will be conducted in accordance with his wishes.

Alternative Option

In the US, there is a stricter, more quantitative definition of control:

- If one person holds more than 50% of the shares or voting rights in a media company, then that person only is considered to control it;
- If there is no such majority shareholder, any person holding more than 5% is deemed to have control.

Rather than seeking to clarify the definition of *de facto* control, we could impose an additional rule based on the level of percentage , stake held. This could mean either adopting the US definition or simply stating that a person with any shareholding above 20% would be deemed to have control of a company.

Such an approach would be easy to apply with impunity. However, However, it would be significantly more regulatory than the existing definition, would not be popular with the industry and is not deemed necessary by either regulator.

We therefore recommend some combination of measures A, B and C.