[GB] Regulator Clarifies the Definition of “Control” of Media Companies

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The UK regulator, Ofcom, has issued new guidance to clarify the circumstances in which a person (or company) controls another. The guidance applies in relation to the question of *de facto* control; in other words, where the basic test of either 50% ownership of share capital or 50% of voting power is not satisfied. The concept of control (which is different from that in the general competition legislation) is important to secure that licence applications from companies comply with media ownership rules (including those on cross-ownership); to ensure that existing licensees are not in breach of these rules after there has been a change in control; and to decide whether, in the case of the major terrestrial broadcasters, a change of control has taken place which will result in a review of the effects of the change by the regulator.

The Broadcasting Act 1990 provides that de facto control will exist where a person or company can, in most cases or in significant respects, achieve the result that the affairs of the media company are conducted in accordance with his (or its) wishes (Schedule 2, Part 1, para. 1(3)(b) as amended by the Communications Act 2003). The guidance states de facto control will be presumed where a shareholder holds at least 30% of the shares, is the largest shareholder and can outvote each of the next two largest shareholders. There is, however, no minimum level of shareholding below which de facto control cannot exist; indeed in an extreme case such control may exist even without a shareholding or representation on the company’s board. Relevant circumstances in the regulator’s assessment include shareholding and voting rights, constitution and management of the media company (including rights of veto, board representation, and patterns of attendance, voting and conduct at meetings) and funding arrangements (including the nature and terms of any loans). The guidelines clarify these issues, whilst making it clear that each case will depend on its individual circumstances and that it is not possible to set out an exhaustive list of relevant factors. They also clarify the procedures Ofcom will adopt for investigating the question of control, and state that informal guidance may be sought from the regulator in advance, although it will not give advice on hypothetical transactions nor assist in structuring a deal to secure compliance.

Ofcom, ‘Ofcom Guidance on the Definition of Control of Media Companies’, 27 April 2006

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http://www.ofcom.org.uk/consult/condocs/media2/statement/media_statement.pdf

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