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MEDIA OWNERSHIP RULES – DETERMINING WHO 'CONTROLS' MEDIA ENTITIES

My submission of 11 July suggested clarifying the definition of 'control' in three ways (recommendations A, B and C below). You asked for some further exploration of the practical implications.

I have tried to identify the effect that each change might have. I have also summarised the opinions of the ITC and the Radio Authority. Their views on the matter are divergent. My recommendations, however, remain unchanged.

Recommendation '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."

Practical example of effect

If, for instance, a political organisation were to have a 21% stake in a company acquiring a local radio licence, and the station in question put out content produced by a separate subsidiary of the same political organisation:

- Under the ITC's existing approach, the licence would not be deemed to be controlled by the political body unless there was a clear structural relationship (for example on the board of directors).

- With the proposed change, OFCOM would always have to look at the nature of such a stake, and its relationship to the content of the station, not just the board of directors, to satisfy themselves that no control existed.

ITC view

Focussing specifically on shareholdings might detract attention from other, more subtle means of control.

There could be perverse effects – investors might, in an effort to prove they held no control over a licence, relinquish the sort of influence they could be perfectly entitled to as minority shareholders.

Radio Authority view

The burden of proof would lie with OFCOM, not investors. The Radio Authority operates a similar policy at present, and it has not deterred investors, but rather inspired them to make sure that companies are properly and clearly structured, so that control is not a murky issue. Other forms of influence can still be scrutinised (see recommendation B):

Recommendation 'B'

"OF COM 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."

Practical example of effect

The Radio Authority's existing guidelines on *de facto* control list the sort of factors that they will take into account. These include not only shareholdings, board structure and voting rights, but also funding arrangements, sources of programming, and the arrangements for senior appointments.

The Authority makes clear that these are not the only issues they will investigate, and that they are not 'weighted' in any way. The effect, however, is to forewarn companies of the rigorous approach that will be taken, so there are no misapprehensions.

ITC view

The list of factors could never be exhaustive, and would therefore have to be continually updated as new 'tricks' came to light, creating uncertainty.

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Radio Authority view

It could easily be made clear that such guidance would not be exhaustive, but only a set of principles, to be reviewed in the light of experience. Guidance would demystify OFCOM's judgements on control by making clear the grounds on which they were made without compromising commercial confidentiality.

Recommendation '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' [to control the company] 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 when he that the affairs of the body will be conducted in accordance with his wishes."

Practical example of effect

To ensure, for instance, that Sky are considered to be controlled by News Corporation. If they were not (as at present) Sky and News Corporation could separately acquire local media assets that put together would transgress our rules.

The concept is by no means limited to, or aimed at Sky, however. It attempts to prevent any scenario where a company can appoint senior staff, sell advertising for and provide programming to a broadcaster, yet not be deemed to 'control' it because not all Board decisions have gone their way.

ITC view

Agree there is some advantage in tweaking the definition

Radio Authority view

Also agree.

There is some debate over the precise wording of the necessary amendment, but that is a matter for Parliamentary Counsel.

Alex Towers
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