EXPLANATORY MEMORANDUM TO

THE BROADCASTING (INDEPENDENT PRODUCTIONS) (AMENDMENT) ORDER 2014

2014 No. 3137

1. This explanatory memorandum has been prepared by the Department for Culture, Media and Sport and is laid before Parliament by Command of Her Majesty.

2. Purpose of the instrument

2.1 To amend the Broadcasting (Independent Productions) Order 1991 in order to prevent the vertical integration of UK broadcasters and producers.

3. Matters of special interest to the Joint Committee on Statutory Instruments

3.1 None.

4. Legislative Context

4.1 The Communications Act 2003 ("the Act") imposes programming quotas on the BBC, S4C, other public service broadcasters and providers of other digital television programme services. Certain percentages of the total amount of time allocated to the broadcasting of "qualifying programmes" must be allocated to the broadcasting of "independent productions"[1]. The Secretary of State may specify by order the description of programmes that are "independent productions" for these purposes.

4.2 The Broadcasting (Independent Productions) Order 1991 (originally made under the Broadcasting Act 1990 and amended a number of times) defines "independent productions" for the purposes of the quotas set out in the Act. Article 3(4) defines an independent producer as a producer:-

- who is not employed by a broadcaster;
- who does not have a shareholding greater than 25% in a broadcaster; or
- in which any one UK broadcaster has a shareholding greater than 25% or any two or more UK broadcasters have an aggregate shareholding greater than 50%.

4.3 This definition must be read in accordance with article 3(5). A reference to a broadcaster or producer includes a reference to a person connected with, respectively, a broadcaster or producer. This means that any person connected to a producer must also not be employed by a broadcaster, own more than 25% of a broadcaster, or be more than 25% owned by one UK broadcaster in order for the producer to be considered as

[1] Sections 277 and 309 of, and paragraphs 1 and 7 of Schedule 12 to, the Communications Act 2003 replaced the powers under which the Order was originally made.

independent. Article 3(5) can lead to production companies being excluded from the definition of independent producer if they are in the same group of companies as a broadcaster.

4.4 Both "broadcaster" and "UK broadcaster" are defined in article 3(7).

5. Territorial Extent and Application

5.1 This instrument applies to all of the United Kingdom.

6. European Convention on Human Rights

The Minister of State, Ed Vaizey MP, has made the following statement regarding Human Rights:

"In my view the provisions of the Broadcasting (Independent Productions) (Amendment) Order 2014 are compatible with the Convention rights".

7. Policy background

7.1 Public Service Broadcasters in the UK (the BBC, S4C, and Channels 3, 4 and 5) are an important part of the broadcasting landscape. Distinctly from other commercial broadcasters (like BSkyB), they have a unique set of obligations set out in legislation which requires them to show particular programming such as news and current affairs. These obligations are over and above the normal licensing conditions which are applied to all broadcasters in the UK.

7.2 UK Public Service Broadcasters must commission 25% of their broadcast time from "independent producers". The policy aim behind the mandatory quota for the public service broadcasters in the Broadcasting Act 1990 (now set out in the Act) was threefold:

-to promote cultural diversity and to open up the production system to new energies and voices;

-to stimulate the growth of small and medium sized enterprises, promoting creativity and fostering new talent; and

-to tackle vertical integration within the UK programme supply market.

7.3 The independent production sector, which supplies a range of content to national broadcasters in the UK, forms a well-established and successful part of the UK's media market. It makes around 50% of qualifying UK television programmes, making the independent production sector now a bigger employer than the combined broadcasting divisions of the BBC, ITV, Channel 4 and Five. Flourishing independent companies include Endemol (the makers of *Big Brother* for Channel 5 and *The Million Pound Drop* for Channel 4) and Tinopolis (makers of Question Time for the BBC). In 2013 independent producers received over £1.6 billion for original productions from public service broadcasters alone. [2]

[2] PACT Independent Production Sector Financial Census and Survey 2014

7.4 Annex 1 shows the current position under the 1991 Order (as amended in 2003) and also how the amendments in this Order affect the position. Annex 2 shows the amendments in this Order in context, as "track changes". There are presently a number of producers which are part of a group of companies which also includes a broadcaster (e.g. the holding company at the head of the group also owns a broadcaster) in another country which does not aim any broadcasts at the UK. The existing law as described above means that these producers cannot be classified as 'independent' and so those programmes may not count towards the public service broadcasting independent producer's quota. This was not the policy intent which is to prevent vertical integration in the UK production market. The Government does not wish to prevent a producer which is owned by a non-UK broadcaster, or is part of the same group of companies as a non-UK broadcaster, from being classified as an independent producer.

7.5 The Broadcasting (Independent Productions) Order 1991 was amended in 2003, with the stated policy intention of delivering this outcome. To this end, article 3(4) of the Order was amended to restrict the definition of an independent produce by providing that a UK broadcaster could own no more than 25% of a producer if the producer was to remain "independent" and that two or more UK broadcasters could own no more than 50% of the producer. It also included a new definition of "UK broadcaster" to include those broadcasters who aimed broadcasts at the UK, even if they were not based in the UK.

7.6 However, the 2003 amendment did not amend article 3(5), which states that any reference to a 'broadcaster' or 'producer' includes any person "connected to" that broadcaster or producer. As a result, article 3(4) effectively reads "In this article "independent producer" means a producer (or any person connected with the producer)". This means that if a person *connected to* the producer fails any of the tests in article 3(4) which define "independent producers", then the producer cannot be considered "independent". This has the effect of disqualifying producers which are part of a group of companies where the group also includes a broadcaster operating anywhere in the world.

7.7. This Order will rectify the problem identified above, by removing the references to "producer" in article 3(5). This means that only the producer will have to meet the test, rather than both the producer and any person or company connected with the producer. This should lead to more producers being able to satisfy the test of being an independent producer, although that test will still exclude producers which are owned by UK broadcasters. This should assist in achieving the policy objective of avoiding vertical integration in the UK programme supply market and should also assist in achieving the other policy objectives for the independent production market as set out at paragraph 7.2.

7.8 This Order also redefines "broadcaster" for the purposes of article 3 of the 1991 Order. While the 2003 amendments added in "UK broadcasters" to part of the test (if UK broadcasters own producers, those producers may not be independent), the amendments did not change all references to "broadcaster". This continued to exclude from independent status producers with links to broadcasters who aimed no transmissions at the

UK. Given the policy objectives, excluding such producers from being considered to be independent producers seems contrary to that objective. Therefore, we have amended the definition of "broadcaster" in article 3(7), to incorporate the definition of "UK broadcaster" from the 2003 amendments, so that all references in article 3 to "broadcaster" are references to UK broadcasters.

8. Consultation outcome

8.1 The DCMS wrote to all public service broadcasters and other broadcasters on the 23 July 2013 to inform them of our intention to introduce legislation at the earliest opportunity to amend the definition of an independent producer to reflect Parliament's original intention. At the same time we consulted with the Welsh Authority and the regulator, Ofcom, as the Act required. We also invited views from Harbottle and Lewis, a law firm who first brought the problem with the current definition of independent producers to our notice.

8.2 Simultaneously, Ofcom wrote to all broadcasters notifying them of the Government's intentions to amend the Order, and stating that no action would be taken against broadcasters for breach of their licence conditions in respect of 2012 or the years before, and stating that they would take Parliament's original intentions and the Government's plans to remedy the situation fully into account in dealing with any shortfalls in meeting independent production quotas that may arise in 2013 and 2014.

8.3 Neither the DCMS nor Ofcom received any comments from those bodies consulted.

8.4 The DCMS prior to laying this Order before Parliament also sought comments on the draft Order from Ofcom, the public service broadcasters and from PACT – the representative body for independent producers in the UK. The BBC, PACT and Harbottle and Lewis were all supportive to the amendments we proposed to make through this Order.

9. Guidance

9.1 No guidance is required.

10. Impact

10.1 There is a positive impact on business, charities or voluntary bodies.

10.2 There is no impact on the public sector.

10.3 An Impact Assessment has not been prepared for this instrument.

11. Regulating small business

11.1 The legislation applies to small business. However, it is not considered to have any detrimental impact on small or micro-businesses (who may be producers). This Order should assist small businesses as it will continue to foster competitive markets in the independent production sector.

12. Monitoring & review

12.1 Ofcom is required to ensure that the quotas for independent productions are met, and will keep that under review.

13. Contact

13.1 Sam Haylen at the Department for Culture, Media and Sport Tel: 020 7211 6986 or email: sam.haylen@culture.gsi.gov.uk can answer any queries regarding the instrument.

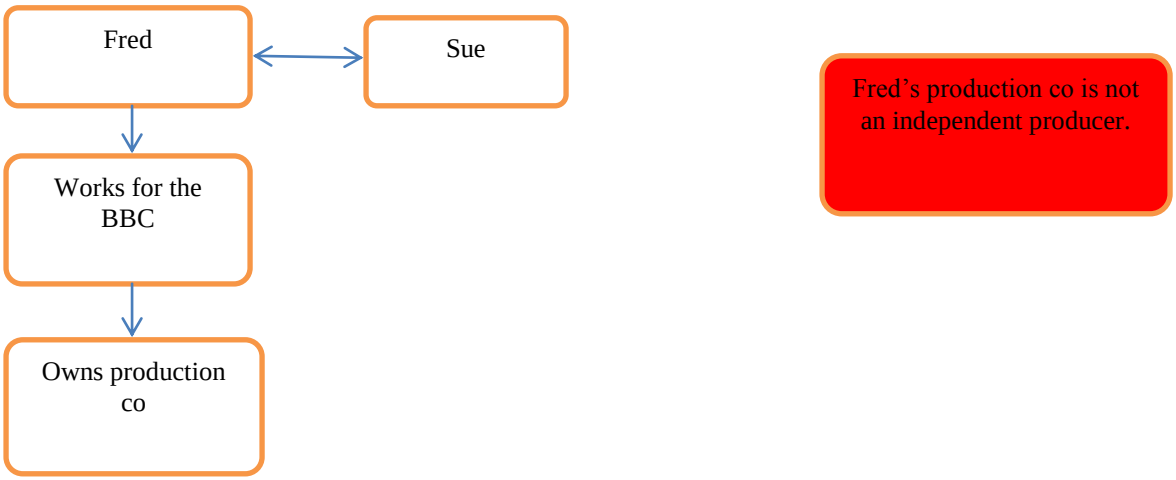
Annex 1

This Annex shows the current position and also the effect of the amendments.

Current position under the 1991 Order

A person is an independent producer if:-

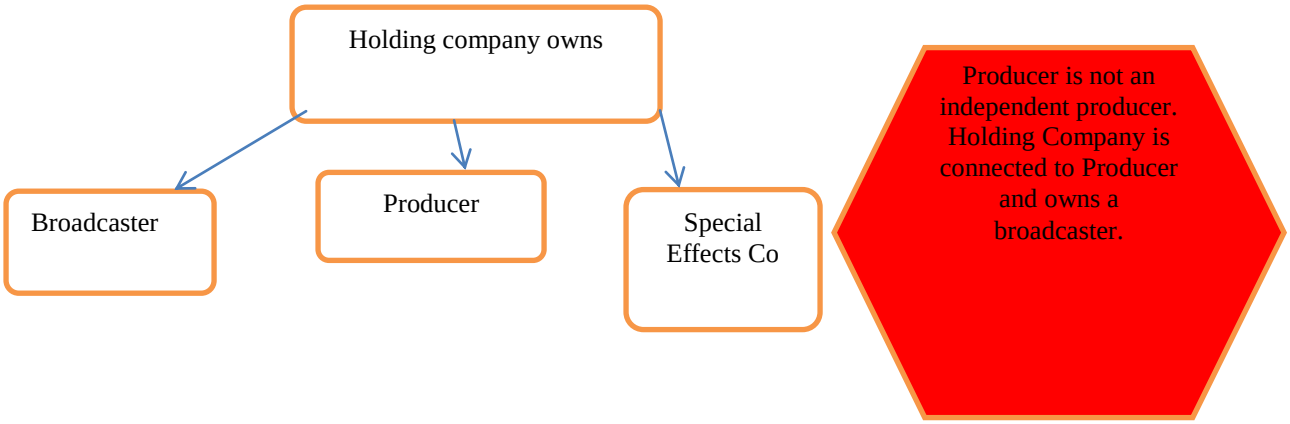
(a) they are not employed by a broadcaster



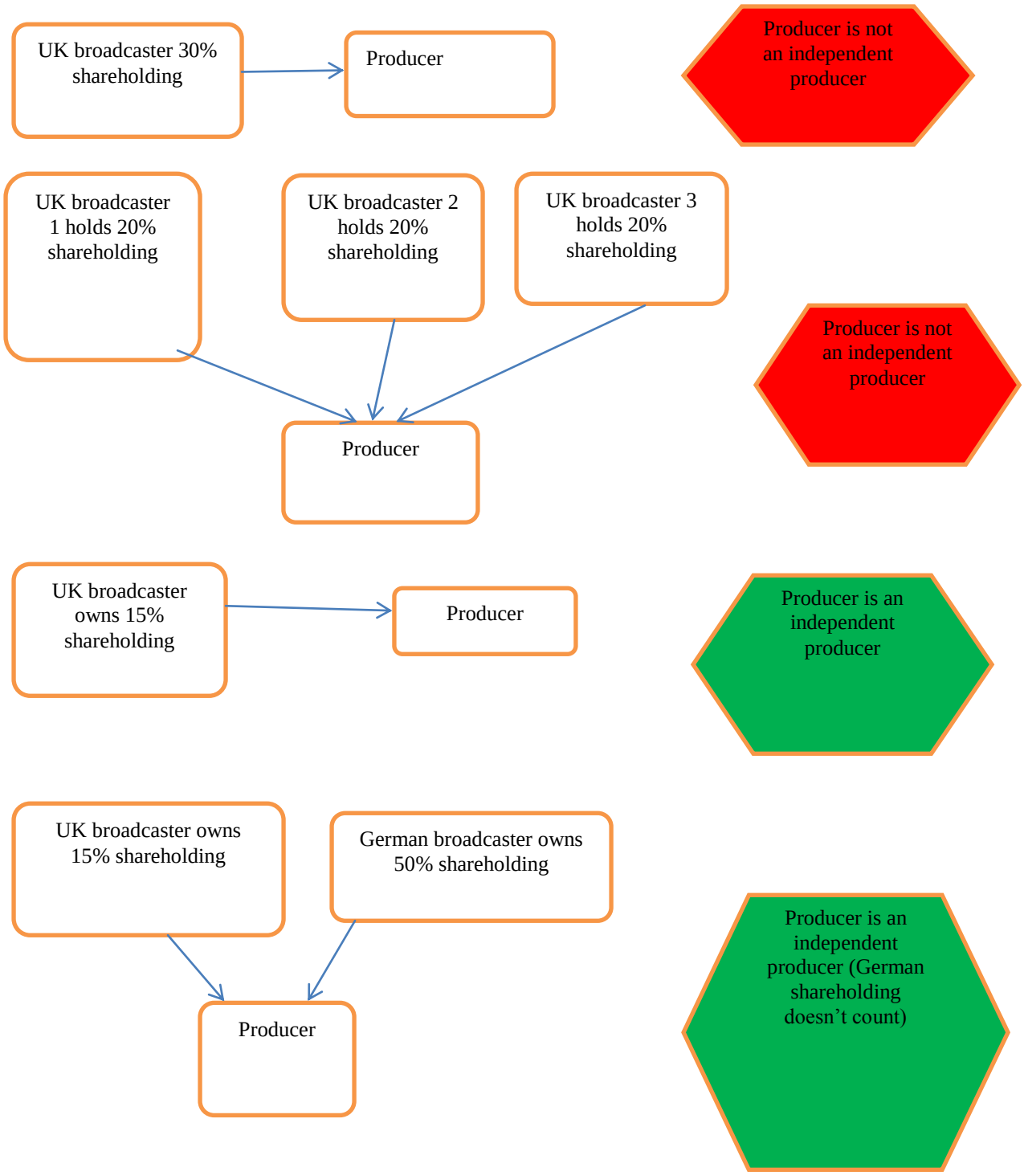
(b) producer holds less than 25% shareholding in broadcaster



Effect of article 3(5) which leads article 3(4) to read "Person connected to producer owns more than 25% shares in broadcaster"

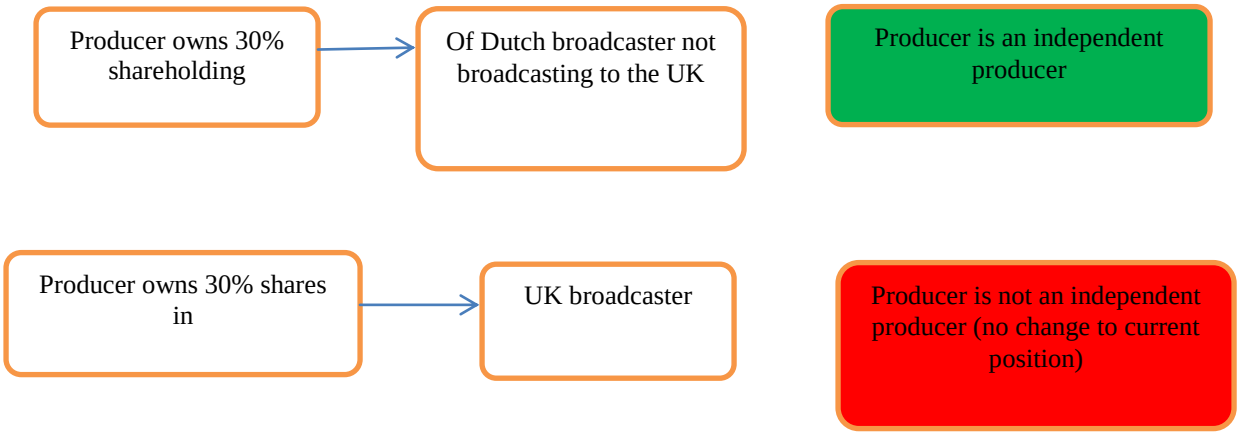


(c) a UK broadcaster holds less than 25% of the shares, or 2 or more UK broadcasters hold less than 50% combined.

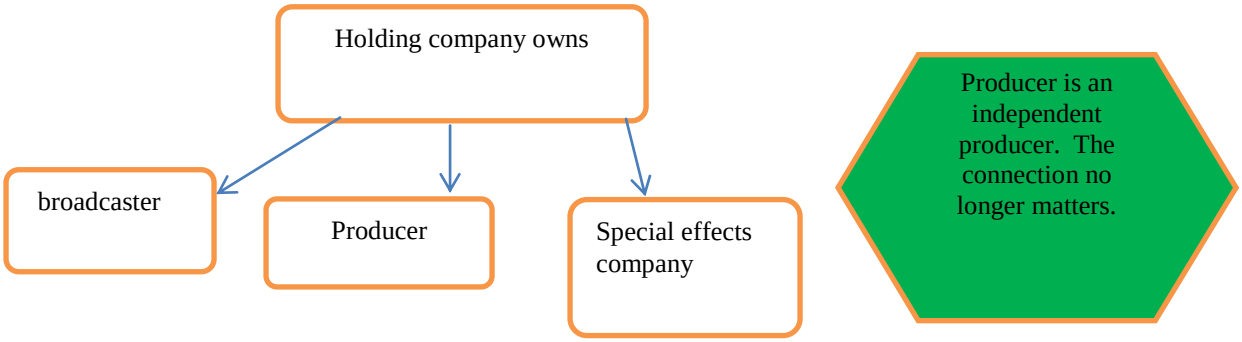


The amended position

The definition of "broadcaster" in article 3(7) is amended so that any reference in article 3 to "broadcaster" is a reference to a UK broadcaster (i.e. a broadcaster established in the UK) or to a broadcaster which directs its broadcasts wholly or mainly at the UK.



Article 3(5) is amended to remove references to "producer", so that producers need not be concerned with whether persons connected to them satisfy the test.



Annex 2

Article 3 of the Broadcasting (Independent Productions) Order 1991 with amendments made by this Order shown as deletions (~~strikethrough~~) and insertions (<u>underlined</u>).

3.— Meaning of "independent productions"

(1) In section 16(2)(h) of the 1990 Act the expression "independent productions" means any programme which-

(a) falls within the definition of "qualifying programmes" specified in article 2 above;

(b) in the case of a programme to which sub-paragraph (a)or (b) of article 2(1) above applies, has been made by an independent producer (as defined by paragraph (4) below) or, in the case of a programme to which sub-paragraph (c) of that provision applies, has been made, as respects that part of the programme referred to in paragraph (iii) of that sub-paragraph, by an independent producer;

(c) has been made in pursuance of a contract which complies, where appropriate, with the condition specified in paragraph (2) below, and

(d) has not been made in the circumstances specified in paragraph (3) below.

(2) The condition referred to in paragraph (1)(c) above is that any contractual obligations between a broadcaster and a producer which concern, directly or indirectly, the making of programmes (but not in respect of the use made of them) and which are capable of remaining in force for a period in excess of five years shall provide either side with the right to terminate those obligations at intervals of not more than five years (but without prejudice to any rights in respect of obligations that had not been discharged at the date of termination).

(3) The circumstances referred to in paragraph (1)(d) above are those where a broadcaster has required, otherwise than in pursuance of any contractual obligation arising from an earlier agreement that remains in force, the person to whom the contract to make the programme has been granted to agree, as a condition on which that contract is granted, to use the production facilities of that broadcaster or not to use the production facilities of some other broadcaster.

In this paragraph the reference to the production facilities of a broadcaster means-

(a) any premises or equipment which may be used to make a programme and which are owned or leased by that broadcaster or are otherwise under his control; and

(b) any person who is employed by, or has contractual obligations with, that broadcaster in connection with the making of programmes except any person who is employed, or has contractual obligations, to be seen or heard (or both) on programmes.

(4) In this article "independent producer" means a producer-

(a) who is not an employee (whether or not on temporary leave of absence) of a broadcaster;

(b) who, subject to ~~paragraphs (4A) and (4B)~~ paragraph (4B) below, does not have a shareholding greater than 25 per cent in a broadcaster; and

(c) which is not a body corporate in which any one ~~UK~~ broadcaster has a shareholding greater than 25 per cent or in which any two or more ~~UK~~ broadcasters together have an aggregate shareholding greater than 50 per cent.

~~(4A) A shareholding greater than 25 per cent which a producer has in a broadcaster shall not have the effect that the producer is not an independent producer if -~~

~~(a) the producer is incorporated under the laws of an EEA State (within the meaning given by Schedule 1 to the Interpretation Act 1978) or has his principal place of business in such a state; and~~

~~(b) the television services which the broadcaster provides are provided exclusively for reception in states other than EEA States and are not received directly or indirectly in any EEA State.~~

~~In applying sub-paragraph (a) above no regard shall be had to persons connected with the producer by virtue of paragraph (5) below or to the state under the laws of which a person so connected is incorporated or the state in which a person so connected has his principal place of business.~~

(4B) Subject to paragraphs (4C) and (4D), any shareholding which a producer has in a local television broadcaster is to be disregarded for the purposes of paragraph (4)(b).

(4C) Paragraph (4B) does not apply if the main activity of the producer is the provision of relevant regulated television services.

(4D) Paragraph (4B) does not apply if—

(a) the shareholding is in a person who is connected with the local television broadcaster by virtue of paragraph (5), and

(b) the person—
(i) is a broadcaster other than a local television broadcaster, or

(ii) is (within the meaning of paragraph (5)) connected with a broadcaster who is not a local television broadcaster.

(4E) For the purposes of paragraphs (4B) to (4D)—

"local television broadcaster" means a broadcaster which provides a local digital television programme service (within the meaning of article 3 of the Local Digital Television Programme Services Order 2012) and no other relevant regulated television service;
"relevant regulated television service" has the meaning given by section 13(1A) of the 1990 Act.

(5) In paragraphs (4) and (4B) above ~~and in paragraph (4A) above except as otherwise indicated,~~ any reference to a broadcaster ~~or producer~~ includes a reference to a person connected with, respectively, a broadcaster ~~or producer~~.
For these purposes the following persons shall be treated as connected with, respectively, a broadcaster ~~or producer~~, namely-

(a) a person who controls the broadcaster ~~or, as the case may be, producer~~;

(b) an associate of the broadcaster ~~or, as the case may be, producer~~ or of a person falling within sub-paragraph (a) above; and

(c) a body which is controlled by the broadcaster ~~or, as the case may be, producer~~ or by an associate of the broadcaster ~~or, as the case may be, producer~~.

In this paragraph "associate" ~~has the same meaning as in~~ shall be construed in accordance with paragraph 1(1A) of Schedule 2 to the 1990 Act~~, except that paragraph 1(2) of Part I of that Schedule shall not apply so as to construe the meaning of that word in relation to a producer (but not a broadcaster) in the context of sub-paragraph (a) of paragraph (4) above only~~.

(6) In ~~paragraphs (4) and (4A) above~~ paragraph (4), any reference however expressed to a person, or to two or more persons, having a shareholding in a body corporate greater than a percentage specified in that paragraph is a reference to the person or persons-

(a) holding or being beneficially entitled to more than the specified percentage of shares in that body, or

(b) possessing more than the specified percentage of voting power in that body.

For the purposes of this paragraph a person holds or is beneficially entitled to shares, or possesses voting power, in a body corporate whether he does so or is so entitled alone or jointly with one or more other persons and whether he does so or is so entitled directly or through one or more nominees.

(6A) For the purposes of this article, where a programme has been made by a producer (whether on his own or together with any other person) who would not, apart from this paragraph, be treated as an independent producer in relation to his part in the making of that programme, he shall be so treated if–

(a) he was commissioned to make the programme (whether on his own or together with any other person) by the relevant broadcaster,

(b) he was an independent producer when he was so commissioned,

(c) the relevant broadcaster so commissioned him in good faith in the expectation that he would be an independent producer when he performed his part in the making of the programme, and

(d) the programme was made within 2 years of the date on which he was so commissioned.

In this paragraph, any reference to a programme, in relation to a programme to which sub-paragraph (c) of article 2(1) above applies, is to that part of the programme referred to in paragraph (iii) of that sub-paragraph.

(6B) For the purposes of paragraph (6A) above, a producer is commissioned to make a programme on the date on which he becomes subject to a contractual obligation to make that programme (whether on his own or with another person) regardless whether that obligation is subsequently varied in any particular or supplemented by any further contractual provisions relating to the making of the programme.

(7) In this article-

"broadcaster" means , subject to paragraph (5) above, a person who provides a television service (that is to say a service which is primarily intended to be available for reception by members of the public in, or in any area in, the United Kingdom (whether or not that service is also intended for reception elsewhere); ~~providing to members of the public images or images and sounds for reception on television receiving apparatus, whether provided by broadcasting or by other means) whether in the United Kingdom or elsewhere;~~ but does not include a person who provides, in the United Kingdom or elsewhere, only a teletext service or any other service consisting wholly or mainly of visual images which are neither still pictures nor comprised within sequences of visual images capable of being seen as moving pictures, whether provided by broadcasting or by other means;

"control" has the same meaning as in Schedule 2 to the 1990 Act;

"producer" means , subject to paragraph (5) above, a person by whom the arrangements necessary for-(i) the making of a programme, or
(ii) in the case of a programme to which article 2(1)(c) above applies, part of a programme,
are undertaken; and

~~"UK broadcaster" means any broadcaster who provides a television service intended for reception in, or in any area in, the United Kingdom (whether or not that service is also intended for reception elsewhere).~~