



CANADA

PRIVY COUNCIL • CONSEIL PRIVÉ

P. C. 2009-2008  
December 10, 2009

Whereas, on October 29, 2009, the Canadian Radio-television and Telecommunications Commission ("the Commission") rendered Telecom Decision CRTC 2009-678, *Review of Globalive Wireless Management Corp. under the Canadian ownership and control regime*, amended by Telecom Decision CRTC 2009-678-1 on November 4, 2009 (collectively, "the Decision");

Whereas, in the Decision, the Commission determined that Globalive Wireless Management Corp. ("Globalive") has not met the Canadian ownership and control requirements set out in section 16 of the *Telecommunications Act* ("the Act") and is therefore not currently eligible to operate as a Canadian telecommunications common carrier;

Whereas, in the Decision, the Commission identified four areas of concern relating to control in fact, namely, corporate governance, shareholder rights, commercial arrangements and economic participation of non-Canadians;

Whereas, in the Decision, the Commission identified changes required to Globalive's corporate structure and documents, namely, the composition of the boards of directors, the definition of "Eligible Purchaser" and the threshold for veto rights, in order to address the Commission's concerns;

Whereas, in the Decision, the Commission concluded that, despite the changes made to Globalive's corporate structure and documents and provided the additional required changes are made, the remaining levers of influence by a non-Canadian, namely, the fact that it holds 65% of the equity financing, is the principal source of technical expertise and provides access to an established wireless trademark, would not have caused it to conclude that Globalive did not meet the Canadian ownership and control requirements if it was not for the fact that the same non-Canadian entity is providing the vast majority of Globalive's debt financing;

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Whereas Canadian telecommunications policy objectives include rendering reliable and affordable telecommunications services of high quality accessible to Canadians in both urban and rural areas in all regions of Canada, promoting the ownership and control of Canadian carriers by Canadians and enhancing the efficiency and competitiveness, at the national and international levels, of Canadian telecommunications;

Whereas the Minister of Industry took measures in the context of the Advanced Wireless Spectrum auction in 2007-2008 to encourage the emergence and participation of new entrants in order to foster greater competition in the Canadian wireless telecommunication market and further innovation in the industry and to respond to the requirements of Canadian users of telecommunication services with a goal of lower prices, better service and more choice for consumers and business;

Whereas Globalive, as a new entrant, was a successful bidder in the Advanced Wireless Spectrum licensing process and was issued spectrum licences by the Minister of Industry;

Whereas, in order to operate as a telecommunications common carrier in Canada, Globalive must satisfy the Canadian ownership and control requirements set out in the Act;

Whereas the Governor in Council considers that, when possible, the Canadian ownership and control requirements should be applied in support of the Canadian telecommunications policy objectives set out in the Act, including enhancing competition in the telecommunications market;

Whereas the Canadian ownership and control requirements of the Act restrict the ownership of voting shares by non-Canadians, but the Act does not impose limits on foreign investment in telecommunication common carriers and should be interpreted in a way that ensures that access to foreign capital, technology and experience is encouraged in a manner that supports all of the Canadian telecommunication policy objectives;

Whereas the test for Canadian ownership and control under the Act is comprised of both a legal and a factual requirement;

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Whereas the Governor in Council agrees with the Commission that the legal requirement is met by Globalive;

Whereas the Governor in Council considers that, as a matter of construction, it is significant that, when assessing control in fact, the Act does not require the Commission to determine that a telecommunications common carrier is controlled by Canadians but rather that it not be controlled by persons that are not Canadian;

Whereas the Governor in Council agrees with the Commission that the correct test for assessing control in fact was set out in the Canadian Airlines decision of the National Transportation Agency, as cited in paragraphs 34 and 35 of the Decision;

Whereas the Governor in Council recognizes that the Commission came to its conclusion on Globalive's non-compliance with the ownership and control requirements based on an assessment of various factors that provide influence to the non-Canadian shareholder which in its view, when taken together, amount to control;

Whereas the Governor in Council recognizes that multiple levers of influence can, when combined, amount to control, but considers that that is not the case with Globalive;

Whereas the Governor in Council considers that, on the basis of a careful examination of the facts and submissions before the Commission, it is reasonable to conclude, for the reasons set out in this Order, that Globalive is not in fact controlled by persons that are not Canadian and therefore meets the Canadian ownership and control requirements under the Act and is eligible to operate as a telecommunications common carrier in Canada;

Whereas subsection 12(1) of the Act provides that, within one year after a decision by the Commission, the Governor in Council may vary the decision on its own motion;

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Whereas, in accordance with section 13 of the Act, the Minister of Industry has notified a minister designated by the government of each province of the Minister's intention to make a recommendation to the Governor in Council for the purposes of an order under section 12 of the Act and has provided an opportunity for each of them to consult with the Minister and has considered their comments;

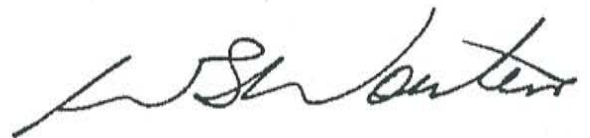
Whereas the Governor in Council has the benefit of extensive oral and written submissions made by Globalive and other parties during the Commission's public hearing on the matter of Globalive's eligibility under the Act, as well as additional submissions provided by other stakeholders, including other telecommunication common carriers, in the context of reviewing the Decision;

Whereas the Governor in Council considers that the Decision deprives Canadians of the possibility for a more competitive wireless telecommunication market by preventing the roll-out of service to the public by a Canadian-owned and controlled company;

And whereas the Governor in Council considers that this Order is based on the facts of this particular case and has a significant direct impact only on Globalive;

Therefore, Her Excellency the Governor General in Council, on the recommendation of the Minister of Industry, pursuant to subsection 12(1) of the *Telecommunications Act*, varies Telecom Decision CRTC 2009-678, amended by Telecom Decision CRTC 2009-678-1, as set out in the annexed schedule to this Order.

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CLERK OF THE PRIVY COUNCIL—LE GREFFIER DU CONSEIL PRIVÉ

## SCHEDULE

### Corporate Governance

#### COMPOSITION OF THE BOARDS OF DIRECTORS

1. In the present case, the revised board structure, including the role and composition of the selection committee, ensures that the nominees of Orascom Telecom Holding S.A.E. ("Orascom"), a non-Canadian shareholder, are insufficient in number to control the strategic or operational decisions of Globalive. Indeed, the board members nominated by the Canadian shareholder and the independent directors, as defined in the shareholders' agreement and corporate documents, ("Independent Directors") are sufficient in number to offset the influence of Orascom. As a result, no changes are required to the composition of the boards of directors in this case.
2. It is important to note that the Act does not require that a telecommunications common carrier be controlled by Canadians but rather that it not be controlled by persons that are not Canadian. With regard to the composition of the boards of directors, it is therefore sufficient that the boards cannot, under any circumstances, be controlled by the non-Canadian shareholders or their nominees. The influence of the non-Canadian can be offset by a combination of Canadian shareholder board nominees and directors that are independent from the non-Canadian, so long as they are Canadian residents.

#### QUORUM PROVISIONS

3. The revised quorum provisions ensure that the number of nominees of the Canadian shareholder and the Independent Directors appointed by the selection committee are sufficient to ensure that the non-Canadian cannot control the boards of directors.
4. It is notable that the shareholder AAL Holdings Corporation ("AAL") has a dominant voice on the selection committee for Independent Directors, given that two of the members of the committee are nominated by AAL. AAL will continue to have a dominant voice on this committee even after the initial Independent Director is replaced. As contemplated by the shareholders' agreement, in this event, the second longest sitting Independent Director will form part of the selection committee. At the time that this Independent Director was appointed, AAL nominees have two votes to Orascom's one. This level of influence by the Canadian shareholder will continue as long as the structure of the selection committee remains unchanged.

## Shareholder Rights

### LIQUIDITY RIGHTS

5. The liquidity rights in the revised corporate documents of Globalive are an improvement on the array of rights originally granted to Orascom as minority voting shareholder. While these types of provisions are customary commercial terms that are negotiated and included in agreements in order to deal with certain eventualities, such as a shareholder deadlock, they may nevertheless provide an indication of non-Canadian influence over a venture.

6. In this particular case, the liquidity provisions operate in a balanced way in regards to both AAL and Orascom, with the exception of the specified floor price and the cap on the proceeds generated in the event that AAL sells its shares. The cap on proceeds is consistent with the relative equity investment of the shareholders. The specified floor price reflects the investment of an established business in a high-risk venture and has little bearing on control.

7. Consequently, while the specification of a cap on any proceeds generated by AAL from the sale of its shares may point to an avenue for influence by Orascom over Globalive, such influence is not dominant and determining in and of itself. Nor do the mutual liquidity rights as a whole provide Orascom with control over day-to-day operations of the business.

### ELIGIBLE PURCHASERS

8. A significant issue with regard to liquidity is the ability of the exiting investor to find a suitable purchaser. While the "Eligible Purchaser" definition in the shareholders' agreement restricts the pool of potential purchasers, this restriction does not provide Orascom with an avenue for influence over the day-to-day operations or strategic decision-making activities of Globalive. This is an acceptable means of protecting the remaining shareholders from being forced into a relationship with a competitor. Not only do shareholders have the discretion to waive this restriction, but the eligible purchaser provisions apply equally to all shareholders and all sale provisions are subject to extensive rights of first refusal in favour of the non-selling shareholder. No changes to the definition of "Eligible Purchaser" in the shareholders' agreement are required.

## VETO RIGHTS

9. The modifications voluntarily made by Globalive to the veto rights are substantial. The addition of an ordinary course of business exception allays concerns that the veto rights grant Orascom influence over the operation of the wireless business. However, while a percentage of the value of the spectrum is an acceptable basis for the threshold at start-up, in the long term, Globalive's enterprise value would be a more appropriate measure in this particular case.

10. While no changes to the threshold for vetoes in the shareholders' agreement are required at this time, they should be revised by the end of the Globalive's first year of operation, and subsequently every two years, so that it be set at 5% of Globalive's enterprise value as determined by its board of directors, based on a third-party evaluation.

## Commercial Arrangements between Globalive and non-Canadians

### TECHNICAL SERVICES AGREEMENT

11. The Technical Services Agreement ("the TSA") is a dual-purpose agreement in that it allows Globalive access to Orascom's considerable wireless operating expertise, including access to its global, preferred purchasing power, and it provides Orascom with certain financial benefits. It is significant that the TSA is drafted in terms of non-binding advice and assistance; Globalive is free to accept or reject the advice provided under the TSA according to its own determination of its commercial interests. Under the revised TSA, Globalive must pay a fixed fee to Orascom irrespective of whether services are rendered; however, Globalive can terminate the TSA at any time and for any reason other than those specifically set out in the agreement, without penalty. It is only where the TSA is terminated following the occurrence of certain events, such as failure to pay amounts due, material breach of the agreement by Globalive, commencement of insolvency procedures or change of 51% of beneficial ownership of Globalive, that Globalive must pay Orascom an amount equal to \$100 million less fees already paid.

12. Moreover, the TSA provides Globalive with benefits that may operate as key determinants of its potential success.

13. Given the significant benefits that Globalive derives from the TSA, valid commercial reasons may exist for Globalive to maintain the TSA for the foreseeable future. Consequently, it is likely that the TSA will continue to provide Orascom with an avenue for influence over Globalive, however such influence is not dominant and determining in and of itself.

#### TRADEMARK AGREEMENT

14. The Trademark Agreement does not provide Orascom with a significant avenue for influence over Globalive. The term of and the termination rights set out in the agreement are not of concern. Furthermore, the terms and conditions of it do not allow Orascom to materially limit how the mark can be used.

#### Economic Participation of Globalive and non-Canadians

#### FINANCING ARRANGEMENTS

15. There are no statutory restrictions on the amount of debt that a non-Canadian entity can provide to a telecommunications common carrier. However, debt levels and debt financing arrangements can be an indicator of where influence lies under the control in fact test.

16. In the present case, Orascom, the significant non-Canadian shareholder, has provided the bulk of Globalive's current debt, which represents the vast majority of Globalive's total financing, though it has been able to secure substantial third-party vendor financing.

17. The concentration of debt and equity in the hands of a single entity is not determinative of control in and of itself. However, it can create an opportunity for influence. In cases such as this one, where a company is heavily debt financed, this opportunity can translate into significant influence over the venture by the debt holder. The terms and conditions attached to this equity and debt financing are of utmost relevance when assessing whether the level of influence associated with the financing, on balance, amounts to control in the hands of the non-Canadian, on its own or in combination with other levers of influence.



18. While the magnitude of the debt financing provided by Orascom, the relative debt to equity financing and the fact that the debt is concentrated in the hands of a single entity cause concern with the loans as a source of Orascom influence, the elimination of the positive and negative covenants, the lack of conversion rights, the lengthening of the term of the loan and renewal rights (thereby providing stability to Globalive), the right of Globalive to retire or replace the debt without penalty and the modifications to the default provisions of the loan go a long way toward minimizing this concern. The ability of Orascom to use the existing loans, or the terms attached to those loans, as levers of influence is sufficiently diminished.

19. The reliance on non-Canadians for future financing is not determinative of control in and of itself, but it can create an opportunity for influence. During the oral phase of the public hearing, Globalive noted that Orascom and AAL had planned to rely heavily on external financing to capitalize Globalive. However, following completion of the Advanced Wireless Spectrum auction, Globalive's efforts to obtain external financing to replace Orascom's coincided with a major downturn in the credit markets. Orascom indicated that it is not interested in remaining Globalive's major lender and is committed to transferring its loans to an outside party. While, at this time, Orascom remains the major source of debt financing for Globalive in the near term, it is expected that Globalive will be in a position to secure financing from third parties in the future.

20. In summary, such a significant concentration of debt in the hands of Orascom provides Orascom with influence over Globalive. However, given the exceptional terms and conditions of the lending instruments which severely restrict the protection afforded to the lender and the rights of Globalive to renew the debt for up to six years or to retire it at its entire discretion without penalty (so that the existence of those loans is not precarious), the debt financing provided by Orascom does not enable it to control in fact either the strategic or operational decisions of Globalive.

#### Conclusion

21. Globalive has voluntarily made numerous significant changes to its corporate structure and documents in order to address ownership and control concerns relating to corporate governance, shareholder rights, commercial arrangements and economic participation of non-Canadians.

**22.** Despite these changes, certain avenues for influence by Orascom over Globalive remain. However, given the current Globalive structure and shareholder arrangements, including the terms and conditions of the shareholders' and financing agreements, it is reasonable to conclude that, in the circumstances of this case, these elements taken together do not amount to influence that is either dominant or determining in Orascom's hands. In other words, Orascom does not have the ongoing ability to determine Globalive's strategic decision-making activities or to manage day-to-day operations.

**23.** In light of the above, Globalive is not controlled in fact by Orascom, a non-Canadian. Therefore, Globalive meets the requirements set out in section 16 of the Act and is currently eligible to operate as a telecommunications common carrier.

**24.** Any provisions in the Decision that are inconsistent with this Order shall be interpreted in accordance with this Order to the extent of the inconsistency.