

NEC Secondary Option X28 Change of Control

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Organisational Control

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Explanation and context

This is the capacity to control or influence the direction and operation of an organisation.

In principle this should be relatively easy to determine, although the way in which an organisation is structured can make this task more difficult.

There are many ways in which a 'change' of control could occur, including;

- Change to the senior executive appointments,
- Change of organisation location,
- Re-structuring of the organisation group,
- Change to the financial arrangement,
- A merger or acquisition,
- A split or division.

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Statutory Regulation



The Companies Act 2006 (CA 2006) received Royal Assent on 08 November 2006, although some parts did not come into force until late 2009.

The CA 2006 codified existing legislation and company law and sets out governance requirements as to how companies are formed and operate.

Of particular interest is Parts 26 to 28 which contain the following;

- Part 26 - Arrangements and Reconstructions,
- Part 27 - Mergers and Divisions of Public Companies,
- Part 28 – Takeovers etc.

Since 1968 takeover regulation in the UK had been overseen by the Panel on Takeovers and Mergers which administered rules and principles.

CA 2006 placed the 'Panel' within a statutory framework.

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Notable Examples



Recent high profile 'takeovers' include the following;

- MGM Studios - Acquired by Amazon for \$8.45 Bn in March 2022.
- Twitter - Acquired by Elon Musk for \$44 Bn in April 2022,
- Chelsea FC - Acquired by Todd Boehly led consortium for \$5.24 Bn in May 2022,

The biggest takeover to date, in financial terms, occurred as far back as February 2000 when Vodafone acquired German telecoms company Mannesmann for around \$190 Bn.

Following the Covid pandemic there is notable increased interest in healthcare companies.

One of the main issues with a 'takeover' is how the process is financed and whether this creates significant debt for the newly merged company.

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NEC Suite

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NEC Suite

Secondary option X28 can be found in the following forms of contract;

- Facilities Management Contract (FMC),
- Facilities Management Subcontract (FMS).

As secondary option X28 only features in the Facilities Management suite of contracts, which were published in 2021, this option did not appear in NEC3.

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X28 – Change of Control

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X28.1 - Defined Terms

A Change of Control is where an individual, company or partnership, other than the *Service Provider*, has taken control of the *Service Provider* after the Contract Date so that the individual, company or partnership

- exercises,
- is able to exercise or
- is entitled to acquire

direct or indirect control over the *Service Provider's* affairs.

The above wording closely resembles that within the following legislation;

- S 416 - Income and Corporation Taxes Act 1988,
- S 450 - Corporation Tax Act 2010.

Unlike the above legislation, however, X28 doesn't provide examples of how such control may be obtained.

Would a Change of Control occur with a change of company structure?

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X28.2 – Change of Control



The *Service Provider* notifies the *Service Manager* and the *Client* if a Change of Control is expected to occur, unless if it is prevented from doing so by a regulatory authority.

A notification is particularly required as this may not constitute a reason for any other communication, including giving an early warning.

A regulatory authority may be one of the following;

- Competition and Markets Authority (Enterprise and Regulatory Reform Act 2013),
- Panel on Takeovers and Mergers (Companies Act 2006),
- Financial Conduct Authority (Financial Services Act 2012),
- Prudential Regulation Authority (Financial Services Act 2012).

The *Service Provider* notifies the *Service Manager* and the *Client* immediately if a Change of Control has occurred.

The requirement is to notify immediately although there is no corresponding 'sanction'.

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X28.3 - Termination



The *Client* may terminate within eight weeks of becoming aware of a Change of Control if ...

- The financial position of the individual, company or partnership which has taken control of the *Service Provider* does not meet the financial position stated in the Contract Data,

The required financial position of the controller of the *Service Provider* is in

The financial position of a company is represented by the 'balance sheet' which details the assets, liabilities and equity at a particular point in time.

The balance sheets for the current and recent years can be used to apply specific calculations to determine the financial position of a company.

This assumes, however, that the balance sheet represents a 'true account' of the company's financial position, re: Carillion.

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X28.3 - Termination



The *Client* may terminate within eight weeks of becoming aware of a Change of Control if ...

- The Change of Control contravenes the ethical principles of the Client or

The *ethical principles* of the *Client* are in

Ethical principles guide the manner by which a business undertakes its operations.

A code of ethics may be either compliance based or value based, depending upon the type and intent of the organisation.

Common principles applying today include a focus on climate change and a commitment to sustainability.

Many business's intention is to operate by working with 'like minded' organisations.

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X28.3 - Termination



The *Client* may terminate within eight weeks of becoming aware of a Change of Control if ...

- There is a conflict of interest that cannot be resolved.

The CA 2006 requires directors of a company to be proactive in relation to a conflict of interest, imposing specific duties.

X28 doesn't state who the conflict of interest involves, or what it is, which may be between one or more of the following;

- Client and Service Provider,
- Client and party proposing take over of the Service Provider,
- Service Provider and party proposing take over of the Service Provider.

Whoever the conflict of interest is between, however, the Client retains the right to terminate.

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X28.4 – Termination procedure



If the *Client* terminates for a Change of Control the termination procedures followed are P1 and P4 ...

Procedure P1 provides for the following;

- *Client* may complete the *service*,
- *Client* may use any Plant and Materials,
- *Service Provider* provides information and other things in its possession.

Procedure P4 provides for the following;

- *Service Provider* leaves the Service Areas,
- *Service Provider* removes Equipment.

X28.4 – Termination amount



... and the amount due on termination is A1 and A2.

Amount A1 includes the following;

- an amount due as assessed for normal payments,
- Defined Cost for Plant and Materials retained by the *Client*,
- Defined Cost incurred in anticipation of completing the *service*,
- any amounts retained by the *Client*,

Amount A2 includes the following;

- forecast Defined Cost of removing Equipment.


The A1 and A2 payment amounts due recognise that this is a 'neutral' reason and not due to a 'failure' on the part of any Party.



Things to Consider...

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Things to Consider...

Detailed understanding of the Contract Data requirements for;

- 'required financial position of the controller',
- 'the *ethical principles* of the Client'.

What conflicts of interest would be a particular issue for the Client?

Detailed research and analysis on the Service Provider to understand their organisation structure, financial position and business risks.

If a Change of Control occurs via a debt finance structure, will this change the way in which the Service Provider manages the contract?

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