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10 DOWNING STREET  
LONDON SW1A 2AA

cc PU

*From the Private Secretary*

14 November 1989

*Dear Sara,*

**BROADCASTING BILL: CONTIGUITY**

The Prime Minister was grateful for the Home Secretary's minute of 9 November. She is content with the proposed approach.

I am copying this letter to the Private Secretaries to members of MISC 128 and to Trevor Woolley (Cabinet Office).

*Yours,  
Paul*

**PAUL GRAY**

Ms. Sara Dent,  
Home Office

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LONDON SW1A 2AA

From the Private Secretary

14 November 1989

Dear Sara,

**BROADCASTING BILL: INDEPENDENT PRODUCTION**

The Prime Minister was grateful for the Home Secretary's minute of 9 November.

The Prime Minister welcomes the proposed statutory provisions and the change to relate the 25 per cent target for the BBC to programmes transmitted rather than those commissioned. She continues to have some concerns about the exclusion of news and news-related daily current affairs programmes from the categories of programming covered by the initiative. But she is content for the Home Secretary to proceed as he proposes with the categories of programmes covered remaining as at present if it is made clear that the exclusion of news is not a loophole through which the 25 per cent target can be avoided.

The Prime Minister also welcomes the proposed annual report by the OFT and suggests that there would be advantage in this being regularly published.

I am copying this letter to the Private Secretaries to members of MISC 128 and to Trevor Woolley (Cabinet Office).

Yan.  
Pd

PAUL GRAY

Ms. Sara Dent,  
Home Office

Handwritten mark





Prime Minister  
I have discussed with  
Brian Griffiths the merits of  
it in with your commenting on this  
issue. Content to go along with the  
Home Secretary's proposal?

PRIME MINISTER

BROADCASTING BILL: CONTIGUITY

Re 6 / es  
13/11 no

Before leaving the Home Office, Douglas Hurd had been giving thought to our proposal that no company should be permitted to hold two contiguous regional Channel 3 licences. I have now had the opportunity to review the arguments.

2. One of the principal reasons for adopting this rule was the fear that if Grampian Television and Scottish Television were jointly owned, the owners might effectively create a single region by transmitting identical programmes in both regions. This would undermine the objective of regionality inherent in our proposals for Channel 3 and could be particularly detrimental to Grampian viewers. But the same point also arises in relation to some of the English regions.

3. The proposal has run into a good deal of criticism from those who say that it will effectively preclude exactly those combinations of regions which would make most economic sense, and could actually be detrimental to the prospects of

some of the smaller regions which might stand in need of a financial link with a contiguous neighbour. In addition, the IBA have indicated that the regionality proposals in the White Paper would be sufficient to enable the ITC to maintain the separate identity of two contiguous licences even if they were under the same ownership. I realise that this is a sensitive point, particularly in Scotland, and I am not inclined to propose that we drop the contiguity rule completely. But I think that we ought to leave some room for manoeuvre in the event that licence areas which attracted positive bids at the bidding stage proved to be unviable later in the licence period, and no other company was prepared to take them over. It would seem rather perverse under those circumstances not to allow a takeover by a contiguous licensee.

4. What I therefore propose is that no company should be allowed to hold two contiguous licenses either at the competitive tender stage, or, in normal circumstances, through subsequent takeover. The ITC could, however, exceptionally permit a takeover by an adjacent licensee where they were satisfied:

- (a) that the licence area had become unviable;



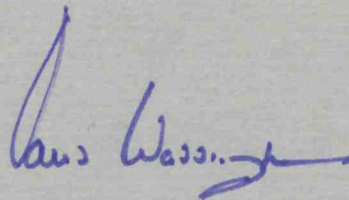
(b) that no company would be interested in owning the licence either by takeover or through a further competitive tender process;

(c) that the separate regional identity of the two licences could be maintained even though they were under the same ownership.

5. I would propose to regard as contiguous for these purposes all licence areas which shared a land border.

6. I understand that Malcolm Rifkind would be prepared to go along with a proposal of this kind, and it would be helpful to know if you and other MISC 128 colleagues are also content.

I am copying this minute to members of MISC 128 and to Sir Robin Butler.



9 November 1989







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cc/o

PRIME MINISTER

BROADCASTING BILL : INDEPENDENT PRODUCTION

On 21 June 1989, MISC 128 decided that the Broadcasting Bill should impose a statutory duty on the BBC to satisfy the Office of Fair Trading (OFT) each year that 25% of original programme production was coming from independent producers. A similar quota will be imposed on Channels 3 to 5, and the Committee saw a need to ensure equity of treatment as between the BBC and its commercial competitors.

The present initiative

2. Since it has a bearing on some of the matters discussed below, I will first remind colleagues that, following agreement with the Government in 1987, both the BBC and the ITV companies are voluntarily working towards a target of 25% independent production by the end of 1992. Both have interim targets as well and seem likely to meet them: on the most recent available figures, ITV are now at about 9% independent production and the BBC about 8%.

The broadcasters are co-operating in detailed work by the Home Office and DTI to establish proper guidelines and monitoring arrangements; OFT also receive monitoring returns and are available to any independent producers who feel aggrieved by their treatment with regard to terms of trade.

### Statutory obligations

3. Attached is a report by Home Office and DTI officials proposing what form the requirements on the BBC and powers for the OFT should take. In essence, they propose that the BBC should be required to achieve the 25% in a comparable form to the obligation on the commercial broadcasters; that the OFT should be able to investigate whether the target is being met and call for such papers and information as they need for that purpose; that although the target will be in terms of hours produced the OFT should also be able to monitor expenditure on independent production; that the OFT should submit an annual report to the Secretary of State which may include comment on the extent to which the underlying philosophy of the initiative is being met; and that the detailed criteria and definitions should be set out in an order subject to negative resolution (which would set common



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standards for the BBC and commercial television in this respect). I commend those proposals to the Committee.

#### Commissions or transmissions

4. In the case of the BBC, the target accepted by MISC 128 was that they should be commissioning at the rate of 25% by 1 January 1993 (my predecessor's minute of 16 October 1987, discussed at MISC 128(1987) 5th meeting). Now we come to legislate, I think it is appropriate that the requirement should be expressed in terms of programmes transmitted. This will establish the point that the initiative is not just about spending money on programming but also about getting it shown. Because it takes a year to 18 months between commissioning and transmission, to translate the present non-statutory target for 1 January 1993 into a transmissions one would actually move the goalposts compared with the BBC target we have previously accepted. I do not believe we have any reason to set a tighter target now; and therefore propose that the 25% transmissions target for the BBC should be given statutory effect from 1 January 1994.

#### Exclusion of news and news-related daily current affairs

5. Both you and Nicholas Ridley have questioned the exclusion of these categories of programming from the

initiative. This exclusion was clearly spelt out in my predecessor's minute of 16 October 1987, accepted by MISC 128 and subsequently announced publicly. The independent producers' organisations accepted it at the time; but they have begun to argue this year that the exclusion should cease. Their reasoning is that

it represents a substantial proportion of total programming - by our estimates 45% for ITV and 35% for BBC - and thus excludes the independents from a substantial sector of the market. They also contend that the news etc proportion of total output has actually been increasing.

6. Again I do not think this suggestion justifies moving the goalposts. The exclusion is confined strictly to those programmes which are central to broadcasters' editorial control and house style, establishing their identity, rapport and links with their customers; which require established infrastructures to service them; which handle stories which develop progressively during the day and could not be passed from producer to producer; and which are not contracted out even in the USA. Thus, for example it includes the news and "Newsnight" but excludes one-off programmes such as Panorama. It is not a viable proposition for broadcasters to contract out substantial portions of these programmes; if they contracted out the



whole, they would effectively lose the right to run the central part of their own businesses; and contracting out would probably destroy the viability of ITN (who cannot be treated as independent because of significant broadcaster shareholdings).

7. I should add that the amount of news etc programming has only been increasing because the broadcasters are transmitting for more of the day (the ITV companies in particular have now moved to 24-hour services); the total hours available (on the basis of 25%) to independent producers actually increased by 2.5% between 1987/88 and 1988/89 from 2861 to 2933. The real effect of including news etc programmes within the initiative would not be to enable news programmes to be contracted out but to rig the arithmetic so that in order to contract out 25% of their total output, the broadcasters would have to commission from independent producers about 40-45% of their non-news output (and in the case of regional ITV companies virtually all of their original non-news output). I think we must therefore make it clear that we stand by the publicly-announced agreement with the broadcasters and that this, together with the prospect of new channels, already offers very generous opportunities to the independents.

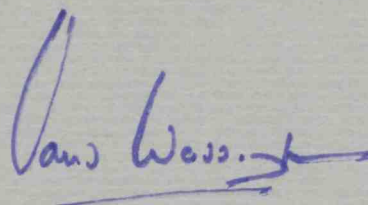
Summary

8. Colleagues are therefore invited to agree that -

- (i) the Broadcasting Bill should contain statutory provisions on the lines proposed in the Annex.
- (ii) the target for the BBC should be 25% of transmissions from 1 January 1994.
- (iii) for the BBC and the commercial companies, the categories of programming covered by the quota should be as in the present non-statutory initiative.

9. In view of the tight timetable for introduction of the Broadcasting Bill, it would be helpful if colleagues could respond on recommendation (i) within the next few days. If necessary we can take a little longer to reflect on recommendations (ii) and (iii).

10. I am copying this minute to other members of MISC 128.



9 November 1989



INDEPENDENT PRODUCTION : STATUTORY REQUIREMENT ON BBCNote by Home Office and DTI officials

1. Ministers have decided that the Broadcasting Bill should include provision to impose a statutory duty on the BBC to satisfy the Office of Fair Trading (OFT) each year that 25% of original programme production was coming from independent producers. The Bill will require the Independent Television Commission (ITC) to impose a similar quota on Channel 3, 4 and 5 companies through the licences it issues to them, and there was a need to ensure equity of treatment as between the BBC and its commercial competitors. This note proposes how the decision should be given effect in the Bill.

Statutory requirements and the BBC Charter

2. The first necessary ingredient is the placing of a duty on the BBC to take 25% from independent producers. In addition to the duties and responsibilities arising from its Royal Charter and Licence and Agreement, the BBC is bound to observe the laws of the land. There are already some statutory provisions alongside the Charter which lay specific responsibilities upon the BBC eg the Broadcasting Act 1981 makes it subject to the jurisdiction of the Broadcasting Complaints Commission. As to the sources from which the BBC may draw its programming, quite apart from independent producers the BBC already acquires a substantial proportion of its output from external sources. It would therefore be feasible, and not inconsistent with the BBC's existing powers or duties under the Charter and Licence and Agreement, to impose this new statutory duty directly on it. The precise form of the requirement is discussed later in the paper.

Powers of the OFT

3. The OFT will need new powers to investigate whether the BBC has fulfilled the new duties to be laid upon it in the Bill. Since it is clear that OFT's role in this initiative is likely to represent a significant departure from their existing remit, this should be achieved by free-standing provisions in the Broadcasting Bill, rather than by amendment to the Fair Trading Act. Therefore, the BBC should be required to provide the OFT with such information and material as the OFT requires to assess whether, and to what extent, the statutory requirement has been met. The DGFT should be required to report his findings annually to the Secretary of State, who may decide to publish the report. But the OFT may additionally submit such other reports as he may consider necessary or expedient. The DGFT's reports would extend both to the achievement of the target and the consequences for the objectives of the initiative (competition, efficiency and innovation).

Enforcement

4. The question arises whether special sanctions need to be established in case the BBC fail to meet the statutory quota. We do not think this is necessary or appropriate : it is not normal practice to establish formal sanctions for failure by a public corporation or a regulatory authority to carry out duties specifically entrusted to it by Parliament. There is no such sanction on the IBA, for example, nor will there be on the ITC. There is a general right at law for a failure to be challenged by anyone with sufficient interest: they could ask the Courts for a Declaration and an order to comply. If the situation arose court action could be taken by the Home Secretary, or an independent producer who could claim to have suffered. Although it too would have the general right at law to do so, we do not consider it would be appropriate for the OFT to initiate any such action because that body's remit is



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normally to investigate and take action in the public interest. Monitoring the independent production initiative is, by contrast, a more specialised requirement on them).

#### Commissions or transmissions

5. The BBC and the IBA are currently operating to a non-statutory quota which was negotiated with Government, endorsed by MISC 128 in December 1987 and formally announced in a written Parliamentary Answer in April 1988. Under that voluntary agreement, the presumed expectation is that the BBC will have achieved, by the end of 1992, its target of commissioning 25% of original television output drawn from a wide range of programmes, subject to satisfaction on the cost and quality of the programmes provided.

6. This is not the same as a transmission rate of 25%: it takes time for programmes to be made and scheduled and it could take a further year to 18 months before a 25% commissioning rate was reflected in a 25% transmissions rate. For the purposes of the statutory provision, we consider it important to establish the principle that independently commissioned work should actually be shown.

7. Thus we would prefer the statutory requirement to be expressed in terms of a transmissions rate; but if that is done we need to decide how to deal with the 12 to 18 months' time delay. We see 3 options:

- (i) 25% of commissions from 1 January 1993 and 25% of transmissions from, say, 1 January 1994. (This would conform broadly to the present agreed target for the BBC).
- (ii) 25% of transmissions from 1 January 1994. (This would be equivalent in practical effect to (i) but simpler in form).

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(iii) 25% of transmissions from 1 January 1993. (This would be stiffer than the present BBC target).

8. The drafting of (i) would be messy; it would be more satisfactory to have a target expressed simply in terms of transmissions from a specified date. It would need to be made clear when that chosen date is to be; the Home Office prefer 1 January 1994 and the DTI 1 January 1993.

#### Hours or costs

9. The existing 25% target is expressed in terms of programme hours and we think it is appropriate to maintain that approach in the Bill. Outputs provide a better focus than inputs; and measurement of hours would fit in well with the transmissions target discussed above. But as is understood under the present initiative, the legislation should make it clear that the independently commercial programmes should be spread across a range of programming - which in practice would include a range of costs as well as types of programme and transmission times. Expenditure should not therefore be ignored in the process of monitoring, and OFT should have the power to obtain material relevant to range and costs as well as hours.

#### Excluded categories of programming

10. MISC 128 agreed in 1987 that certain defined categories of programme should be excluded from the 25% target. These are news and news-related daily current affairs, continuity and Open University output (plus advertising and the Open College in the case of ITV). Independent producers' representatives have recently questioned whether the news/news related daily current affairs exclusions should continue. These categories are estimated to comprise some 45% of ITV programming (less the other excluded categories) and 35% of



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excluded; the DTI does not; the matter will need to be settled in MISC 128.

#### General definitions

11. It is necessary to consider in what level of detail the Bill should deal with the definition of independent producer and independent production for the purposes of the quota. Work which has been done in the context of the present non-statutory initiative shows that there are a number practical issues to grapple with: the various types of programme to be counted (or excluded), methods of commissioning, terms of trade, joint financing arrangements, ownership combinations and international operations. To cover all possible permutations and situations the rules would need to be quite detailed; and the more detailed they are the greater the likelihood that they would need to be modified in light of changing circumstances and company structures.

12. We therefore consider that it would be impracticable - in respect of the BBC and Channels 3, 4 and 5 alike - to define independent producers in detail on the face of the Bill. But legislation needs to include at least the key definitions establishing who and what qualifies towards the 25% target. We envisage that the primary legislation should include a brief reference to the purpose of the initiative (competition, efficiency, innovation) and say that not less than 25% of qualifying programmes shall be independent productions and make clear ranges of programmes must be involved. The Secretary of State would have power by order to define what is meant by qualifying programmes, independent production and range, and to vary the 25% target figure. The order would establish the same definitions for Channels 3, 4 and 5 as for the BBC. The Home Office and DTI would consult the OFT, BBC and ITC before drawing up such an order, though there is no need for such a procedure to be specified by statute.

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Comparability between BBC and commercial channels

13. These proposals envisage the OFT monitoring the BBC's compliance with the 25% initiative. But the ITC will be the regulatory body for Channels 3, 4 and 5, and will thus separately have responsibility for ensuring that the 25% quota is being met by its licence holders. It is important to ensure that the same standards and definitions are applied, but without the OFT substituting for the ITC in its policing of the independent television system.

14. Bearing in mind that there will probably be residual questions of definition which are too detailed to be dealt with in an Order by the Secretary of State, it would in theory be possible to provide in the Bill that the OFT should be the final arbiter on matters of definition (as distinct from supervision) covering the BBC and commercial television alike. However we believe that in consultation with the bodies concerned, it will be possible to make the Secretary of State's order sufficiently comprehensive that remaining questions can be satisfactorily resolved by discussion between the OFT and ITC.

Summary of powers needed

15. The Broadcasting Bill will accordingly need to include provisions:-

- (a) requiring the BBC to meet the 25% target (paragraph 2)
- (b) empowering the OFT to investigate whether the target is being met, and call for such papers and information as they need for that purpose (paragraph 3).



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- (c) expressing the target in terms of transmission hours  
(paragraph 9)
- (d) enabling the OFT to monitor expenditure as well  
(paragraph 9)
- (e) enabling the detailed definitions to be set by order  
(paragraph 12).

[31 October 1989  
Home Office and DTI].

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