

Department for Culture, Media and Sport
Broadcasting Policy Division

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To Tessa Jowell
Patricia Hewitt

cc Kim Howells
Baroness Blackstone
Stephen Timms
Andrew Ramsay

From



Bill Bush
Kitty Ussher

Date 15 October 2002



FOREIGN OWNERSHIP OF UK BROADCASTERS – NEGOTIATING RECIPROCITY

Issue

We are committed to removing the existing restrictions on the non-EEA ownership of broadcasting licences through the Communications Bill. We do not propose to make this liberalisation dependent on other countries removing their own barriers to investment from UK companies. We have, however, undertaken to attempt to negotiate such reciprocity. Preliminary enquiries have been made. You must now decide how you want negotiations to proceed.

Recommendation

That you opt for bilateral negotiations with those countries UK companies are interested in (ie English-speaking nations) rather than using the WTO/GATS route.

Timing

Routine. It would be useful to know by the end of October what approach you would like to take to the GATS process.

Considerations

1. As you informed the Joint Committee, we have already initiated a process of negotiation. Officials at our embassy in Washington have raised the matter informally in discussion with their American counterparts, and we have sought advice from the DTI officials who oversee the GATS negotiations.
2. To take negotiations further, we could adopt either or both of two routes:
 - Attempt to get the issue on the table for the WTO GATS negotiations, with the aim of getting all nations to remove all similar restrictions.
 - Engage in bilateral talks, at Ministerial level, with English-speaking nations, to try to convince those countries in particular to follow our lead.

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3. Trade in services falls under the shared competence of the European Community and Member States. In GATS negotiations, we are represented by the EC, with the Commission acting as spokesman and negotiator, even in areas of Member State competence. To put forward a proposal, therefore, we first have to convince our European partners, who would have to agree unanimously, of its merits. Despite the fact that several EC Member States have already removed foreign ownership rules (eg. Germany, Spain, the Netherlands, Portugal), broadcasting and audio-visual policy is extremely sensitive particularly to key players, such as the French and even the Germans, who we are advised are very unlikely to agree to the EC tabling a liberalisation proposal in this sector. Indeed, in terms of negotiating strategy, for the UK to attempt to convince the EC to lobby for liberalisation in this area might be to risk significant embarrassment.
4. In bilateral talks we would try to promote the merits of what we are doing, and encourage similar policies in other countries. Talks would need to be undertaken through embassy officials and Ministerial visits. We would want to focus first on English-speaking countries, where UK businesses would have obvious opportunities to invest – the US, Australia and Canada.
5. The basis of such talks would have to be the complete removal of foreign ownership rules. Even if we were able to negotiate strictly reciprocal arrangements, for example opening our market only to those countries which gave free reign to UK companies, we are advised that they would be difficult to operate under WTO rules. The most-favoured nation (MFN) principle applies across-the-board, meaning that if we opened our market to one WTO Member country, we would have to do the same for all WTO Members, unless we were able to obtain a waiver, which requires agreement by 75% of the WTO Membership (and so is virtually unachievable).
6. The chances of success in bilateral talks may be low (especially with regard to the US) but there would be no risk of the embarrassment within the EC that the GATS route could represent. We could be quite clear and unashamed of our role as free trade evangelists.
7. Although we would have to act consistent with Community law, we would not be encroaching on the Commission's role as the EC's trade negotiators. Media ownership is still regarded as a matter for individual countries to resolve in their own way, and our legal advice (see Annex) is that the UK should be free to hold its own talks with other nations until such time as the EC passes legislation in this area. This is not likely in the near future.

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8. We would be grateful for your advice on whether you want us to exhaust all avenues, even at the risk of embarrassing ourselves with our European partners by going down the GATS route, or whether you would rather concentrate on our best chance of success through more informal talks. We recommend the latter.





The Treasury Solicitor

ANNEX

To

[REDACTED]

cc

[REDACTED]

From

[REDACTED]

File Ref

Date 4 October 2002

UK Competence to enter into Media Ownership Negotiations - Draft

1. With the assistance of COLA we have been considering whether the Secretary of State would have competence, under EC law, to negotiate (bilaterally) the relaxation of media ownership rules in non-EC countries.
2. On balance, we do not think that the EC could or would claim competence in this field. It therefore seems unlikely that the type of negotiations contemplated would prove controversial. However, this advice is subject to certain caveats. I set out below a preliminary note of our conclusions - as you will see, it is somewhat abbreviated but please let me know if you need further details.

Quality of the "negotiations"

3. In our correspondence with COLA we did note that the so-called "negotiations" in question would actually be more in the nature of cajoling. This was not considered to be significant in terms of the outcome of the legal advice.

AETR doctrine

4. In summary, the effect of the AETR doctrine is that the EC will gain competence over the media ownership field as and when the EC passes legislation that affects that field. No such legislation has yet been passed. However, this is something that needs to be watched. Clearly if legislation is made, or is in the offing, this could affect the extent to which the UK may act in this area.

Common Commercial Policy (CCP)

5. Prima facie, the CCP grants the EC exclusive competence over the cross-border provision of services. As far as we can see, this could only impinge on one relatively minor aspect of media ownership, namely the ownership of broadcasting licences by non-EC persons who are not established in the UK.
6. According to COLA, there are good legal arguments why the UK could claim competence, even in respect of the CCP element noted above. In addition, there

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are certain more practical factors which suggest that the EC would not want to claim competence in any case.

7. However, the Secretary of State should be aware that there *could* be a problem (however unlikely) if the EC *did* decide to claim competence. The upshot would be that we might have to renegotiate an agreement or treaty that we had entered into (although talking to [REDACTED] I'm not now sure that it is intended that the "negotiations" should result in a written document of any sort - we may have to revert to COLA to ask what difference this would make) on pain of paying a fine. However, any renegotiation would only be in respect of that small element of media ownership that falls within the CCP.
8. Please contact [REDACTED] if you have any comments or queries whilst I am away.

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