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Introduction

Background

1. The BBC Trust is the sovereign body of the BBC and it is our responsibility, in overseeing the BBC Executive, to have regard to the competitive impact of the BBC’s activities. The BBC is funded by the public through the licence fee. This places a special responsibility on the BBC to act in a way that seeks to minimise any adverse competitive impact of its activities on the wider market and the Trust has a duty to have regard to such impact. The BBC is subject to general competition law, including the rules on state aid, in the same way as other broadcasters1. In addition to this the Trust requires the BBC, in any activities that involve trading or interacting with the wider market, to comply with Trust statements of policy on fair trading and competitive impact and a code on cross-promotion.

2. In practice, this is achieved by the Trust setting the policy framework and requiring the BBC Executive to draft detailed fair trading guidelines and comply with its requirements, effectively placing a greater level of scrutiny on the BBC’s licence fee funded activities than by relying on competition and State Aid Law alone. The Executive’s fair trading guidelines set out day-to-day operational guidance for BBC staff based on the principles and high level requirements contained in the Trust’s policy statements. These guidelines must be approved by the Trust. The Trust holds the BBC Executive accountable for compliance with both its statements of policy on fair trading and the BBC Executive’s detailed guidelines through a range of mechanisms including an independent annual audit of compliance and its role as final arbiter for complaints.

3. The Trust periodically reviews and consults on its fair trading policy to ensure that it remains up-to-date and relevant. We published the last such review in November 2011 and began the current review last summer. This document forms the basis of the BBC Trust’s public consultation on its statements of policy on fair trading and competitive impact and its competitive impact code on cross-promotion2. This review focuses on ensuring that the Trust’s fair trading policies continue to be relevant and effective, comply with the relevant general law, and reflect learning and best practice when dealing with fair trading issues.

4. The BBC Executive’s detailed fair trading guidelines do not form part of this review (the guidelines were reviewed by the BBC Executive, and after a public consultation, they were approved by the Trust and published by the BBC Executive in August 2012). However, because of the relationship between the Trust’s policies and the BBC Executive’s guidelines, changes identified as part of this current review of our fair trading policy may then need to be reflected in the BBC Executive’s fair trading guidelines.

5. Based on our review work so far, we have sought to identify areas where our policies may require clarification or changes. Our assessment and our proposals for areas of our policy requiring change or clarification is set out on pages 6 to 17 (check pp no same with final version).

6. This consultation is intended to seek the views of industry stakeholders and other interested parties regarding these potential changes or clarifications and any other suggestions for

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1 i.e. as other public service broadcasters (PSBs)
improvements to the Trust’s statements of policy on fair trading and competitive impact and its competitive impact code on cross-promotion.

Scope & methodology

Review scope

7. The BBC’s Framework Agreement with the Secretary of State requires the Trust to undertake a review of its statement of policy on fair trading, its statement of policy on competitive impact and any competitive impact codes, at least once every three years and to consult publicly on its policies and codes before adopting and publishing them.\(^3\)

8. This review, which we started in 2014 and which follows the review we concluded in November 2011, considers whether any changes or clarifications are required to our existing policies or to our competitive impact code on cross-promotion. We have also considered, in consultation with Ofcom, whether there are any specific areas of BBC activity that require the Trust to adopt and publish additional competitive impact codes.

9. The terms of reference for our review are:
   - To undertake a review of the Trust’s statements of policy on fair trading and competitive impact and the competitive impact code on cross-promotion (collectively the Fair Trading Policies and Framework) to ensure they are fit for purpose and remain compliant with all relevant legal requirements and wider BBC policies;
   - To make recommendations as to how the policy framework and code might be refined in light of experience and of changing market factors;
   - To understand what lessons can be learnt from the operation of the BBC’s fair trading regime to date and to make recommendations as to how these might be applied to the policy framework and code;
   - To consult with Ofcom to ensure its views are considered in the review of the Trust’s competitive impact code and to consider whether any further codes are required;
   - To consult publicly on the policy framework and codes to ensure public and industry feedback is given full and proper consideration before the final policy framework and codes are adopted and published.

Methodology

10. We have based our review on:
   - An independent review of the fair trading regime conducted for us by Fingleton Associates Ltd;
   - Findings from the fair trading audits conducted for the BBC by Deloitte LLP in each year since our last review;
   - Internal documentation covering the application of the Trust’s policies, including complaint and appeal cases.

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\(^3\)BBC Agreement, Clause 64
11. The Trust commissioned Fingleton Associates Ltd to undertake an independent review of the Trust's fair trading policy and its operation. We asked Fingleton Associates to address the following questions:

1. **Design:** “Has the BBC Trust established an appropriate policy framework to deliver its obligation in relation to fair trading?”
2. **Implementation:** “Has the BBC established effective fair trading arrangements to implement the Trust’s fair trading policy framework?”
3. **Effect:** “How well are the BBC’s arrangements working in practice, and are there areas for change or improvement?”

12. Fingleton Associates reviewed internal BBC documents, data, and third-party evidence, and conducted their own desk-based research. They also conducted interviews with over 30 individuals within the BBC Executive and 14 third-party organisations.

13. We are publishing their report, which includes a summary of findings and recommendations to the Trust, alongside this consultation document: [http://downloads.bbc.co.uk/bbctrust/assets/files/pdf/our_work/fair_trading/fair_trading_fingleton_jul15.pdf](http://downloads.bbc.co.uk/bbctrust/assets/files/pdf/our_work/fair_trading/fair_trading_fingleton_jul15.pdf)

14. We have considered the findings of the Fingleton Associates report and set out in this consultation our proposals to address the report’s recommendations. Our review identifies some areas where we consider that changes or clarifications may be required to the key documents that comprise the BBC Trust’s fair trading policy. We are required to consult on any such changes before we adopt them.

15. We have also reviewed the annual fair trading audit reports for the years 2011/2012, 2012/2013, and 2013/2014, commissioned by the Executive and performed by Deloitte LLP. In each of the reports Deloitte were satisfied that the Executive had established and applied a system of controls that provided reasonable assurance that it had complied with the requirements of the fair trading arrangements. Where the reports highlighted matters for further consideration, we have ensured that these are addressed within our review.

16. Further information about the Trust’s current fair trading policy framework can be found on the fair trading section of the Trust’s website.

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4BBC Agreement, Clause 65
5[http://www.bbc.co.uk/bbctrust/governance/regulatory_framework/fair_trading.html](http://www.bbc.co.uk/bbctrust/governance/regulatory_framework/fair_trading.html)
Summary of Trust conclusions

Overall assessment

17. While there are a number of improvements that we propose in this consultation, we have not identified any significant concerns about the design, implementation or effectiveness of our fair trading policy which appears overall to be operating effectively. In reaching this view we note that the report from Fingleton Associates concluded that the policy framework was comprehensive and well-designed to achieve compliance with competition and State Aid Law. It found implementation of the fair trading obligation adequate with the Executive having a number of well-established measures in place to ensure compliance and awareness, and it found no evidence of the framework having any unintended consequences, either for the Executive or for third parties.

Design

18. Fingleton Associates found the BBC’s fair trading policy and framework comprehensive. They noted that it included tools for the Trust to ensure the Executive meets the fair trading obligations and that it also ensured the Executive adopted controls and processes to achieve ongoing compliance. There was a mechanism for redress should third parties feel the Executive was failing to comply with the fair trading obligations and the framework was subject to transparency requirements.

19. They found the policy and framework were well-designed to achieve compliance with competition and State Aid Law. They remark that few businesses in the UK have as extensive a competition law compliance programme as the BBC, and structural separation of the BBC’s public service divisions and its commercial subsidiaries is considered best practice to ensure compliance with European State Aid Law.

Implementation

20. The report found the implementation of the fair trading obligation adequate with the Executive having a number of well-established measures in place to ensure compliance and awareness. These measures include: the fair trading guidelines, mechanisms for providing expert advice to all parts of the BBC (including its commercial subsidiaries), a sub-committee of the Executive Board composed of Non-Executive Directors, significant resources dedicated to considering fair trading issues across the organisation, an extensive training programme, and regular monitoring of fair trading procedures.

Effect

21. The report did not find evidence of the framework having any unintended consequences, either for the Executive or for third parties.
Our proposals for improving the existing policy

22. While concluding that overall the framework is comprehensive and well-designed, and the Executive’s implementation arrangements well-established, Fingleton Associates identified a number of areas where they saw scope for improving the policy and framework, and their implementation. We examine these areas in this section, using the three broad categories ‘design’, ‘implementation’ and ‘effect’ adopted in the report.

Design

23. Three themes emerge from Fingleton Associates’ consideration of the design of our fair trading policy framework; the balance between oversight from the Trust and the Executive, the way in which market impact is assessed, and the clarity of the documentation. We consider each of the areas in turn below.

Balance between the Executive and the Trust fair trading activities

24. The report comments that the Executive self-assesses a significant volume of activity. In particular the report notes that the Trust’s ex-ante tools of review\(^6\) tend to be used for more significant changes and do not always capture potentially material changes such as, for example, changes in transfer pricing agreements between the BBC’s public service divisions and its commercial subsidiaries.

25. The report also notes that the Trust’s ex-post review mechanisms are not used often in practice, giving the example that the Trust has not historically undertaken any ‘own-initiative investigation’ on fair trading grounds\(^7\) and also noting that few complaint cases reach the Trust for review on appeal.

26. The report suggests that the consequence of the current arrangement is such that the Trust has limited direct evidence available to it to verify that the BBC is compliant with its fair trading obligations across the range of its activity, particularly those activities which fall below the formal threshold for ex-ante Trust scrutiny. The report also notes that both the annual fair trading audit and the ongoing ISO9000 quality standard certification are essentially procedural checks that do not involve any in-depth review of the substance of decisions taken.

27. It is clear from the Royal Charter and Agreement that the role of the Trust is to set the framework while the role of the Executive is to implement it and apply it\(^8\). Assurance on compliance is secured primarily through non-executive oversight from the Executive Fair Trading Committee (EFTC) which holds the Executive to account for the operation and performance of its fair trading functions, through the operation of a formal and independently

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\(^6\) Primarily the Public Value Test

\(^7\) The Fingleton Associates report recognises however that in February 2015 the BBC Trust published its Strategic Framework for the BBC’s Commercial Services (http://www.bbc.co.uk/bbctrust/our_work/commercial/commercial_framework). In that report, the BBC Trust announced a review of the BBC’s separation and transfer pricing practices as part of its 2015/16 work plan

\(^8\) Royal Charter, Articles 23 and 24(2)(k), BBC Agreement Clauses 65-73.
audited quality control system and through an annual independent audit of fair trading arrangements. Performance is reported to the Trust on a quarterly basis and the Trust meets annually with the auditors and with the Non-Executive Director Chair of EFTC. The Trust also holds broad ex-post investigatory powers and acts as the final arbiter on complaints, which may be brought to it on appeal after they have been investigated by the Executive.

28. We do not consider that any fundamental change in the balance of fair trading oversight between the Trust and the Executive is necessary or appropriate in advance of the broader Charter Review process which will take place with Government between now and the end of next year. There are, however, some actions we can take in the short term to make clearer the respective roles of the Trust and the Executive and to improve the Trust’s oversight of the operation of the fair trading procedures.

29. We propose to clarify the respective roles of the Trust and Executive in our revised fair trading documentation and better explain the basis on which the Trust takes its assurance on the effective operation of the fair trading arrangements.

30. We also acknowledge that more may need to be done to assure the Trust and external stakeholders that the substance of decisions taken by the Executive is valid (for example in relation to separation between the public service and commercial service activities of the BBC and the transfer pricing arrangements between them). The report recommends that the Trust considers regular monitoring of such arrangements and while we do not think that such direct intervention is consistent with the Trust’s oversight role, we accept that there is a case for securing more assurance through some limited sampling. Consistent with the Trust’s role in overseeing the BBC Executive, we propose to instruct the Executive to include some sample testing of the substance of decisions to verify they are compliant with the fair trading framework in the terms of reference for future fair trading audits. We acknowledge that this will affect the cost of audit, but believe that with an appropriate sample size, a balance can be struck between value for money considerations and an appropriate degree of independent assurance that the Trust’s requirements are not only being correctly applied but are leading to appropriate outcomes.

31. The Trust has noted a growing level of concern from industry in the past year about separation between the BBC’s public service and commercial service activities and the transfer pricing arrangements between them, and has acted to initiate a review. We address this issue in more detail later in this consultation document (see paragraph 74). We note the more general observation in the report that the Trust has not historically undertaken any ‘own-initiative investigation’ on fair trading, and have considered whether there have been other instances where it should have done so. The Charter (Article 24 (2) (h)) requires the Trust, where appropriate, to conduct investigations into any activity of the BBC which it has grounds to suspect does not comply with requirements supervised by the Trust. We do not believe that the Trust should conduct own-initiative investigations without having evidence or cause of concern that the BBC may not be complying with requirements supervised by the Trust, but clearly the Trust must be willing to use these powers where it has sufficient evidence of concern to justify such an intervention. We do not think that such evidence has arisen or that the Trust has failed to conduct an investigation on fair trading matters where it should have done so. The Trust has not noted any unresolved or ongoing concerns arising from the annual fair trading audits, it has not received representations from third parties other than in the context of appeal cases which it has investigated, and it has not noted any common themes in the appeal cases it has reviewed.

32. Fingleton Associates also comment that complainants cannot complain directly to the Trust but must go through the Executive’s process first. We address this issue in more detail later in this consultation document (see paragraph 56).
33. As well as posing questions about the balance of fair trading oversight between the Executive and the Trust, Fingleton Associates make observations about what they describe as a 'hub and spoke' structure within the Executive itself, with a core of fair trading expertise held centrally overseeing nominated (and trained) individuals with fair trading responsibilities in the divisions around the BBC. The report notes that the central team is dependent on staff in the divisions to raise matters with them, and also for deep market knowledge. They also identify a trend towards 'self-assessment' within divisions as a consequence of resource constraints and note that third parties tend to deal first with divisions rather than the central advice team.

34. We do not think that this model is an unusual one for a large organisation like the BBC and note that it is a common way to manage compliance. We acknowledge that it is dependent on adequate training and good communication between divisions and the central team. The Executive’s training arrangements are examined regularly both through quality system procedures and through the annual audit. Our review of annual audit reports suggests that performance in terms of training has improved in recent years and we are satisfied that the Executive’s audit arrangements remain an appropriate control here.

Consideration of market impact

35. Fingleton Associates report that some third parties expressed concerns at the lack of formal process or opportunity through which to express views on the impact of the BBC’s activity on the market. They note that without formal consultation with industry, the potential exists for the Trust to misjudge the likely impact on third parties, although they did not find evidence that this has happened in practice. They acknowledge that the Trust maintains regular informal contact with third parties and that engaging in more formal consultation with the market on a greater number of issues may result in approvals processes for the Executive being extended significantly. For these reasons the report suggests that the Trust should consider, on a case-by-case basis, whether additional opportunities for third parties to provide formal input are necessary and proportionate.

36. We accept that there is scope to improve this aspect of the governance framework. The current Charter and Agreement provide for the Trust to apply a test of ‘significance’ to determine whether a Public Value Test (PVT) should be conducted. When the PVT is applied the Trust must consult the market (using Ofcom to conduct a market impact assessment) as part of the process. But the threshold for conducting such tests is quite high, so the wider market does not have the opportunity to express views or submit evidence on the impact of some BBC proposals. The Trust has only initiated the PVT on five occasions. There have been a number of occasions when the Trust has considered that change proposals from the Executive have fallen below the threshold for a PVT and, as a result, the Trust has made its judgements based on available evidence rather than consulting the market. We have already taken steps, within the terms of the current Charter, to address this concern but we believe that this is an issue that requires further thought in the context of the forthcoming Charter Review.

37. In July 2011 the Trust made a commitment to expand its relationship with Ofcom to take full advantage of Ofcom’s understanding of the wider communications sector.9 Specifically, we committed to seek Ofcom’s advice on market impacts when considering whether proposals referred to us by the Executive should be subject to a PVT. We know from this review, and from our more informal contacts with industry, that there is general concern that where, as is often the case, changes proposed by the BBC have not reached the threshold to trigger a

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9 See Trust Protocol C1 UK Public Services and non-service activities (C3.6); Trust Memorandum of Understanding with Ofcom, Dec 2011.
PVT, no information is published about the plans until the point where a decision is taken, and there is no opportunity for industry to submit evidence of market impact either to the Trust or to Ofcom.

38. We acknowledge that this issue needs to be addressed, and that a better balance needs to be found so that the views of industry on potential market impacts arising from BBC proposals can be taken into account without imposing a disproportionate regulatory burden on the BBC to the detriment of licence fee payers. These are matters that may involve changes to the Agreement. We will consider in the context of the forthcoming Charter Review what might be done to make the assessment of market impact arising from BBC proposals a more transparent and open process.

39. The report also noted that some third parties felt that there was no process through which they could comment on market impact arising from cumulative changes to the iPlayer service. This issue has also been raised by Ofcom.

40. We believe that this concern relates in particular to digital services which, by their nature, tend to evolve in terms of their presentation, functionality and scope as each new release takes place. While we acknowledge the concern, the procedures set out in the Agreement for determining whether a PVT should be conducted do provide for consideration market impact, and in some cases may involve the Trust seeking advice from Ofcom\(^\text{10}\). We also note that the nature of the digital media market is such that all services in the market tend to evolve over time on a similar basis. If every new release of iPlayer was subject to a formal regulatory process, development of the service would be likely to fall behind the market to the detriment of the licence fee payer.

41. We acknowledge, however, that there are arguments for a periodic check on market impact in the case of services such as iPlayer, which evolve over time. This happens to some extent already since the Trust engages with the market when it conducts its periodic service reviews. These currently take place at least once every five years. In those areas where the market and the service are subject to faster change, we propose to increase their frequency. There might also be scope for formalising in some way the inclusion of consideration of market impact in these reviews. These are matters that may involve changes to the Agreement and we will take them forward in the context of Charter Review.

**Improve the clarity of the fair trading policy**

42. Singleton Associates found some concerns both within, and beyond, the BBC regarding the clarity and complexity of the fair trading policy. In particular:

- Some stakeholders considered some terms in the policy were unclear. There were particular concerns about the interpretation of those aspects of the policy that potentially go beyond competition and State Aid Law and are determined by the Trust. Specifically, attention was drawn to the Competitive Impact Principle (CIP) and ‘operational separation’ (as distinct from financial or organisational separation).

- Some stakeholders found the documentation difficult to navigate. Some third parties made the point that resource constraints meant that the complexity of the documentation was a deterrent to engaging with it.

43. Their report makes a number of recommendations to address these concerns:

\(^\text{10}\) See BBC Agreement, Clause 20; Trust Protocol C1 UK Public Services and non-service activities (A4.25 and 4.26)
• The Trust should provide additional guidance on those aspects of the policy determined by the Trust, specifically the practical application of the Competitive Impact Principle and of operational separation.

• The Trust should simplify its policy document or produce a brief, plain English guide for third parties.

• The Trust should improve signposting in its policy document such that links to other documents are made clearer. The report also suggests that both the Trust and the Executive improve the fair trading sections on their respective websites to ensure simpler and easier access to relevant information.

Additional guidance

44. The Competitive Impact Principle is designed to require the BBC to endeavour to minimise its negative competitive impacts on the wider market, arguably imposing a more searching process than if the BBC were to comply with competition and State Aid Law alone.

45. The Trust considers the extra control on the BBC’s activities provided by the CIP reasonable and necessary because the BBC enjoys a unique funding position relative to the rest of the market through the licence fee and this places a number of special responsibilities upon it. The CIP is relevant whenever the BBC is carrying out its public service activities (although the CIP does not apply to the commercial activities of BBC Worldwide, the Trust applies the principle of greater scrutiny by requiring it to comply with four commercial criteria as set out in its statement of policy on fair trading). The CIP requires the BBC to endeavour to minimise its negative competitive impacts on the wider market whilst always having regard to the fulfilment of its public purposes and taking into account its other obligations in the Charter and the Agreement, such as value for money.

46. Guidance on the practical application of the CIP is currently included in the Executive’s fair trading guidelines approved by the Trust\(^\text{11}\). While we consider this guidance to be reasonably clear, we will consider once responses to this consultation have been received, whether there is a need to say more about the application of the CIP either in our policy or in the Executive’s guidelines.

Operational separation

47. Operational separation must ensure that the BBC’s commercial services do not gain any unfair advantage in the market as a consequence of their links to the BBC but should not inhibit any strategic alignment between the BBC’s public and commercial services that is necessary to maximise the benefit to licence fee payers. Operational separation is in part achieved through the requirement that the BBC’s commercial services are provided by separate companies.

48. The issue of clarity regarding the meaning of operational separation is a theme that emerged last year when we consulted on our proposed new framework for oversight of the BBC’s commercial services\(^\text{12}\). This framework came into effect in April this year and includes further explanation of the Trust’s requirements in terms of operational separation between the BBC’s publicly funded and commercial activities. The requirements set out in our framework cover the operation of the BBC’s commercial services as separate companies, and making clear

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\(^{11}\) Chapter 1, Section 2

distinctions between the roles of directors running those businesses and the public service responsibilities of the BBC Executive Board. They set out how any potential conflicts of interest must be addressed. We will ensure clear cross-referencing on this issue between our commercial framework and our revised fair trading policy.

Simplification, or plain English guide for third parties
49. We agree that understanding and clarity are crucial for the correct functioning and application of the fair trading policy and will focus on this aspect in particular when we redraft the policy following this consultation. We do not, however, agree that an additional, plain English guide would improve the situation. We think that having two separate documents could lead to confusion and so would prefer to address the concern by ensuring that the policy documents themselves are redrafted in the clearest and simplest form, and by improving signposting and links between the fair trading policy and other relevant documents.

The Trust and the Executive improve the fair trading sections on their respective websites
50. We accept the report’s suggestion that both the Trust and the Executive improve the fair trading sections on their respective websites to ensure simpler and easier access to relevant information. We will ensure that these are reviewed when we publish our revised policy.

Questions on fair trading policy framework design on which we are seeking your views
- Subject to the specific improvements we have suggested in this section, do you consider the balance between the fair trading activities assessed by the Executive and the Trust to be appropriate?
- What changes to the design of the BBC’s fair trading policy framework do you consider are necessary in the context of Charter Review?
- Do you have any other comments on the design of the Trust’s fair trading policy framework?
Implementation

51. Fingleton Associates found that the Executive had well-established measures in place to ensure compliance and that awareness and training on fair trading matters was extensive. They identified some areas where they saw scope for improving the implementation of the fair trading policy and framework. We examine these areas in this section.

Fair trading complaints and appeal framework

52. Fingleton Associates reported that some third parties they had consulted were critical of the BBC’s complaint handling arrangements but noted that there was limited scope for the Trust to significantly improve the current complaints model outlined in the BBC Agreement.

53. Commenting on the steady decline in the number of fair trading complaint and appeal cases, Fingleton Associates report that some third parties said they did not make complaints because of lack of confidence in aspects of the mechanism. The principal concern was about the Executive’s involvement in the complaint investigation (‘self-regulation’). Other reasons given for not using the complaint framework were time and cost, and lack of information on which to base a complaint. Some third parties were concerned that complaining could affect their ongoing relationship with the BBC; some preferred to resolve issues through informal dialogue with the Executive and in some cases the Trust.

54. The report recommends the Trust makes some minor modifications to the appeals mechanism relating to providing more detailed guidance on the timeframe within which appeals will be heard and the amount of information that is published on the Trust website about completed cases.

Executive involvement in handling complaints

55. We have considered whether it is appropriate for the BBC Executive to investigate complaints in the first instance rather than have this function performed by the Trust. The Agreement currently precludes the Trust from considering complaints before the Executive has considered them13. We consider that it is appropriate for the Executive to perform this activity as long as there is a right of appeal to the Trust where a complainant is dissatisfied with the handling of the investigation. We think this approach is consistent with the principle that the decision maker should be given an opportunity to revisit the decision under challenge because it may well immediately respond by changing or reversing its decision.

56. We think that there is scope to improve accountability and assurance without breaching this important principle. We are therefore proposing that when we publish our revised policy, complaints should be submitted in the first instance to the Trust. At the complaint stage, the Trust would require the Executive to investigate the complaint and respond to the complainant, copying their response to the Trust. If a complainant remained dissatisfied then the appeal route to the Trust would remain open to them. We believe this approach would simplify the process and provide reassurance that the body overseeing the handling of the complaint was not the BBC Executive itself. By ensuring that it did not play a role in determining the substance of the decision at the first stage, the Trust’s ability to take an independent view on appeal would not be compromised.

13 BBC Agreement, Clause 90 (3)
Informal resolution

57. The report notes that some third parties may prefer to use less formal approaches to resolve disputes. If this is happening, we do not necessarily take this as a sign that the more formal complaint mechanism is ineffective. It might equally be interpreted as a sign that there are good informal relationships between the BBC Executive, the Trust and third parties, meaning that concerns can sometimes be addressed without having to resort to formal complaint mechanisms, which tend to be time and resource intensive for all parties concerned.

Guidance on the timeframe within which appeals will be heard

58. Fingleton Associates are correct in their assessment that in some cases the Trust has taken longer than the 30 working days provided for in its guidance to reach appeal decisions. They note one case in particular which took four months. We acknowledge that having a clear timeframe can give certainty to stakeholders and may make them more likely to use the process. But we also note that there is a tension between the desire to give appellants the best possible indication of the length of an investigation and the need to maintain enough flexibility to ensure that an investigation is sufficiently thorough, since the scale and complexity of appeals varies considerably from one case to the next.

59. We think the Trust’s existing published guidance\(^4\) gives a reasonable sense of what to expect:

> The Committee will aim to consider your appeal within 30 working days from the date the Trust decides that your appeal qualifies to be considered (a further 10-20 days depending on whether a decision not to hear the appeal is challenged), although this may take longer depending on the nature of the Trust’s investigation. If the process is likely to take longer, you will be informed and told by when the Trust is aiming to reply to you

Publication of appeal decisions

60. Across all of its work the Trust seeks to act in a transparent manner, publishing decisions and supporting evidence unless there is a valid reason not to do so. But we are mindful of concerns that some complainants have about confidentiality, either about the detail of their complaint or even, in some cases, the fact that they are complaining, which they fear might affect their ongoing working relationships with the BBC. We would not wish to create an environment where complainants were put off using the process because of fears that the Trust would make public matters that they wished to keep confidential. We think it is right that we should continue to be guided by the principle that we publish details of our decisions unless there is a valid reason not to do so. We recognise, however, that in the particular case referred to in the report, we could probably have secured the appellant’s agreement to publish more information than we did.

Executive fair trading advice team

61. The report highlights that the Executive has made significant changes to its fair trading advice team in recent years, noting that, of themselves, these changes are not remarkable but that the Trust may have concerns arising from such changes in combination with other factors. For example, the Executive’s emphasis on ‘hard’ competition and State Aid Law principles, the high degree of self-assessment undertaken by the Executive, the potential weaknesses they identify in the BBC’s system of internal checks and balances, and its ‘hub and spoke’ approach.

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\(^4\) The BBC Complaints Framework

To address these issues the report suggests a review of current level of oversight and more regular formal contact between the Trust and the Executive Fair Trading Committee.

62. Structure and staffing are matters for the BBC Executive rather than the Trust. In its oversight role the Trust has a number of ways of assessing how well the Executive is implementing the fair trading requirements, including formal performance reporting, independent audit, and its own direct experience in areas such as market impact assessment and fair trading appeal cases. While the report airs some theoretical concerns, we do not think that there is evidence here of an issue requiring further intervention from the Trust.

**Formal contact between the Trust and the Executive Fair Trading Committee**

63. At present the Trust meets the Non-Executive Director (NED) who chairs the Executive Fair Trading Committee once a year and the Trust Unit has regular meetings with the Executive’s Head of Fair Trading and Competition Law. While we do not think it necessary to increase the frequency of formal contact with the NED of the Executive Fair Trading Committee, we think that the scope of that discussion, which has tended to focus on the annual audit, might usefully be broadened to encompass discussion of areas of fair trading risk, including those that may arise from planned new initiatives or structural changes within the BBC.

**Questions on the implementation of the fair trading policy framework on which we are seeking your views**

- Do you support our proposal that complaints should be submitted in the first instance to the Trust?

- Do you have any other comments on the implementation of the Trust's fair trading policy framework across the BBC?
Effect

64. Fingleton Associates did not find any evidence that the fair trading policy framework was having any unintended consequences either for the Executive or for third parties. They did, however, comment that the principles underpinning the fair trading obligations did not appear to be as well understood as those underpinning the BBC’s editorial policy. They also identified a lack of trust by third parties in the arrangements between the BBC’s public service divisions and its commercial subsidiaries. They commented that the Executive’s interpretation of the requirement for operational separation between the BBC public service and its commercial subsidiaries was not consistent. Finally, they observed that the BBC’s view of its position in the global market could result in it underestimating its impact in some of the domestic markets in which it operates.

Understanding of principles underpinning fair trading obligations

65. The report noted that the understanding of the principles underpinning editorial policy was more widespread amongst BBC staff than was the case for fair trading requirements. While the report does not expand much on this, we interpret this as a cultural observation. We can understand how, as a consequence of the particular pride the BBC has in its editorial and journalistic standards and the fact that this is the primary focus of employment for most staff, these values may be more embedded in the culture of the organisation than fair trading obligations. As fair trading issues are encountered less often by staff, the guidelines may well be viewed as additional compliance requirements and they may not have such an intuitive understanding of them. So long as staff receive adequate training to enable them to recognise fair trading issues in their day-to-day work and they are able to seek advice from specialist fair trading advisors – which appears to us to be the case – we do not regard this as an area of particular concern.

Third parties’ lack of trust in the arrangements between the BBC’s public service division and its commercial subsidiaries

66. Fingleton Associates found that, in the absence of more publicly accessible financial and operational information, some third parties lacked trust in the arrangements between the BBC’s Public Service divisions and its commercial subsidiaries. They considered that the Executive tended to publish only the minimum amount of information required by law, and questioned whether this was sufficient to demonstrate publicly that the Executive was meeting the Trust’s requirements on separation. They identify a particular risk that if third parties lack confidence in the separation arrangements between the BBC’s public service divisions and its commercial subsidiaries, this could lead to third parties complaining to the European Commission.

68. We agree in principle that the relationships between the BBC and its commercial subsidiaries should be as transparent as possible. Equally, we note that there are legitimate concerns about commercial sensitivities, both for the BBC itself and for the subsidiary businesses. Given its remit in relation to the wider market, we acknowledge that the Trust has an important role to play in providing assurance in these areas. Some of this assurance may be addressed
through transparency, requiring appropriate information about the relationships between the public service and commercial parts of the BBC to be published (e.g. benchmarking methodology, price sensitive information removed from copies of contracts), and some will need to come from the Trust itself through its examination of particular cases and its broader oversight of the operation of its fair trading requirements.

69. The feedback from third parties to Fingleton Associates in this review is consistent with feedback we received from third parties who commented on the new framework for strategic oversight of the BBC's commercial services which came into force in April.

70. We note observations in the report about inconsistencies in publicly available information across the BBC's commercial subsidiaries. When we revise our fair trading documents, we propose to make clearer what information we expect to be published by the Executive about its commercial service subsidiaries and about the relationships that exist between them and the public service side of the BBC.

71. Responding to this industry concern, and noting the BBC's increasing use of approaches where these relationships need to be carefully designed and overseen to ensure that they do not distort the market\(^1\), the Trust has already taken some significant steps to improve the level of assurance in these areas. The new commercial framework now in place sets out arrangements covering the requirements, boundaries and expectations for the operation of the BBC's commercial services, in particular their relationship with the licence fee funded services. It sets principles for the commercial services governing:

- strategic alignment between the licence fee funded and commercial services;
- how, where, and when commercial business can be conducted;
- how commercial performance will be assessed and how market distortion will be prevented and;
- how the necessary financial and operational separation between the publicly funded and commercial BBC activity will be maintained.

72. Under the new arrangements we will assess the performance of the commercial services against our framework every five years, bringing our oversight of the operation of the commercial parts of the BBC into line with the way that BBC TV, radio and online services are assessed.

73. Under the new framework, the Trust sets out how it will decide whether each commercial service is performing sufficiently to avoid any market distortion, along with annual review arrangements to ensure that this requirement is being met.

74. When we published our new framework we also announced that the Trust would commission an independent review of separation and transfer pricing practices, covering the levels of transparency and compliance when the BBC’s commercial services buy rights to BBC content or pay to use BBC premises or services. This review, which we intend to launch this autumn, will independently assess whether the necessary controls and procedures are being applied to ensure that fair market rates are being paid. We will ensure, in scoping the review, that it takes into account the concerns expressed in the Fingleton Associates report about the arrangements between the BBC’s Public Service divisions and its commercial subsidiaries, including how transparency around these arrangements might be improved. The findings from the review will be published.

\(^1\) In February 2014 the Trust approved plans for a commercially operated 'BBC Store' and more recently the BBC has announced plans to establish a production business on a commercial basis
Interpretation of ‘operational separation’ across commercial subsidiaries

75. The report observes that the Executive has, historically, interpreted the Trust's requirements for operational separation between the BBC's public and commercial services differently in respect of each of its commercial services.

76. We acknowledge that the Executive has not been consistent in its implementation of operational separation arrangements across its commercial subsidiaries.

77. The Trust's new framework includes further explanation of the requirements in terms of operational separation between the BBC's publicly funded and commercial activities. Having published clearer guidance on operational separation we will now monitor, through the annual audit process, how it is interpreted and implemented by the Executive.

The BBC's position in the global marketplace

78. Finally, the Fingleton Associates report observes that in viewing the BBC as a small player in an increasingly global marketplace the Executive risks underestimating its impact in some of the domestic markets in which it operates.

79. While we acknowledge a theoretical risk here, the evidence we have seen of the Executive's approach to identifying and defining the relevant markets when assessing potential market impacts suggests that it is professional and robust. There is a further control in that in cases where the Trust thinks that Executive proposals may be significant, it seeks advice from Ofcom on the markets affected and the impact on those markets. While we have in some instances noted differences between the Executive's and Ofcom's assessments, we have not found evidence of any systematic under-assessment of market impacts in the Executive's work. We believe that the actions identified elsewhere in this report relating to the assessment of market impact (see paragraphs 35-41) are sufficient to ensure that this risk is addressed.

Questions on the effect of the fair trading regime on which we are seeking your views

- Are the actions already announced by the Trust sufficient to address industry concerns to have more assurance about the relationships between the public service and commercial parts of the BBC?

- Do you have any other comments on the implementation of the Trust's fair trading policy framework across the BBC?
Competitive Impact Codes

80. The Trust is required to adopt and publish codes dealing with those aspects of the operation of the UK Public Services that in its view could raise significant issues regarding the competitive impact of the BBC’s activities. In doing so we are required to have regard to (i) any fair and effective competition codes issued by Ofcom and (ii) any views expressed by Ofcom as to matters that should be covered by the Trust’s codes. We currently have just one code, covering the cross-promotion of BBC services and the promotion of digital TV platforms.

81. As part of our review we consulted Ofcom last autumn about their views on the Trust impact codes. In their response to the Trust, Ofcom focused on issues potentially relevant to the Trust’s formulation of competitive impact codes and did not comment on the broader operation of the fair trading regime. Ofcom considered the objectives of the existing code on cross and digital TV promotion remained relevant, and that the original rationale behind the code remained valid. We accept this view, although we will consider, when revising our fair trading policy documents, whether the code itself requires any updating or clarification.

82. Ofcom also commented that the BBC’s activities in the provision of on-demand content had the potential to impact on the wider market, noting that the strength of the BBC’s VOD proposition in respect of UK-originated content means that access to its content could be very important for platform providers. They acknowledge that the Trust’s on-demand syndication policy addresses in some detail the framework under which the BBC can make its VOD content available to platforms but question how this policy sits in relation to the competitive impact code framework.

83. We accept that the BBC’s approach to syndication has the potential to impact on the wider market. Our existing syndication policy sets principles designed both to uphold the interest of audiences and also to ensure that the BBC’s approach to syndication is fair and non-discriminatory. The Trust recently consulted on a new framework for oversight of the BBC’s distribution activities which is intended to supersede the syndication policy. We are proposing that the principles we set out to ensure a fair and non-discriminatory approach should be carried forward into the new framework. We have considered whether the framework might be better presented as a competitive impact code but concluded that it would not as the framework serves a wider purpose than overseeing competitive impact. It sets the broad framework for effective Trust oversight and review of the BBC’s distribution arrangements and sets the Trust’s expectations in relation to audiences as well as the market. We will, however, consider how best to cross-reference and link the framework, once adopted, to our fair trading policy.

84. Ofcom also note a continuing question about how incremental changes to services are assessed. While individually each of these changes might be small, Ofcom observe that over time and cumulatively there is the potential for such changes to have a greater impact on the market. They invite the Trust to consider whether these concerns could be considered through a competitive impact code or some other alternative.

85. We acknowledge the need to take account of the cumulative effect of changes in relation to services like Online/iPlayer which, along with the market, tend to evolve through small incremental enhancements rather than major new service launches. Fingleton Associates

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16 BBC Agreement, Clause 66
comment on this but while they acknowledge the concern about cumulative impact they do not think it clear that a competitive impact code is the best mechanism for assessing this issue. They suggest instead that service licence reviews or ‘own-initiative’ investigations should be used for regular ex-post monitoring of the cumulative impact of the BBC’s online activity.\textsuperscript{18}

86. We accept that there are arguments for a periodic check on market impact in the case of services, such as iPlayer, that evolve over time. Our proposals are set out in our earlier section on market impact (see paragraphs 40-41).

Questions on the competitive impact codes on which we are seeking your view

- Do you consider that any changes to the existing code on cross and digital TV promotion are necessary?
- Do you believe the Trust should develop a code for any other area of BBC activity?
- Do you have any other comments on the competitive impact codes?

\textsuperscript{18} See section 2.5, page 21 of Annex II.
Taking part in this consultation

We would like to hear your views

87. Seeking the views of licence fee payers and industry forms an important part of the Trust’s work, and we’d like to hear from you. You may have first-hand experience of using the BBC’s fair trading complaints framework or you may simply be interested in how the BBC manages its activities in the wider market. We would be interested to hear your views on the specific changes proposed above as well as any more general comments or suggestions to other changes that might be made to the BBC’s fair trading regime.

What happens next

88. This consultation will run until Friday the 9th of October 2015. We will use your responses to decide whether we need to adopt changes to the Trust’s fair trading policies, including our competitive impact codes. A final report setting out our conclusions with any changes will then be published on the Trust website.

Submitting your response

89. You can take part in the review in a number of ways. To request an audio or Braille version of this document and/ or related documents, please call 0800 068 0116 or Textphone 03700 100 212.

90. You can send your response by email to fairtrading2015@bbc.co.uk or by post to: Fair Trading Policy Review, BBC Trust, 180 Great Portland Street, London W1W 5QZ

91. The following questions may help you to formulate your response:

Fair trading policy framework design

- Subject to the specific improvements we have suggested in this section, do you consider the balance between the fair trading activities assessed by the Executive and the Trust to be appropriate?

- What changes to the design of the BBC's fair trading policy framework do you consider are necessary in the context of Charter Review?

- Do you have any other comments on the design of the Trust’s fair trading policy framework?

Implementation of the fair trading policy framework

- Do you support our proposal that complaints should be submitted in the first instance to the Trust?

- Do you have any other comments on the implementation of the Trust's fair trading policy framework across the BBC?
The effect of the fair trading regime

- Are the actions already announced by the Trust sufficient to address industry concerns to have more assurance about the relationships between the public service and commercial parts of the BBC?

- Do you have any other comments on the implementation of the Trust's fair trading policy framework across the BBC?

Competitive impact codes

- Do you consider that any changes to the existing code on cross and digital TV promotion are necessary?

- Do you believe the Trust should develop a code for any other area of BBC activity?

- Do you have any other comments on the competitive impact codes?

Confidentiality/ Data protection

92. We do not intend to publish individual responses from the public; these will be analysed and a summary report produced and any specific quotes used in the report will be anonymous.

93. We do intend to publish responses from industry or from industry bodies, unless there are good reasons to withhold publication, which will be agreed on a case-by-case basis. Please be aware that the BBC Trust is subject to the Freedom of Information Act 2000 and may be required to disclose information.