Fair Trading Policy Review
A report for the BBC Trust
Executive Summary

Due to its unique funding position, the BBC is under special obligations in relation to its conduct in the markets in which it operates. The BBC’s funding means it must comply with European State Aid law also. The BBC, like any organisation, is subject to UK and European competition law. Broadly, these requirements comprise the BBC’s Fair Trading Obligation.

The Trust, which is responsible for ensuring the BBC complies with the Fair Trading Obligation, must establish a Fair Trading Policy and Framework and review it every three years. The Fair Trading Policy and Framework sets out how the BBC is expected to achieve compliance with the Obligation in practice.

For its current review, the BBC Trust commissioned Fingleton Associates to undertake an independent review of the regime. The Trust set the following research questions:

• Design: “Has the BBC Trust established an appropriate policy framework to deliver its obligation in relation to fair trading?”

• Implementation: “Has the BBC established effective fair trading arrangements to implement the Trust’s fair trading policy framework?”

• Effect: “How well are the BBC’s arrangements working in practice, and are there areas for change or improvement?”

In addressing these questions, we have conducted interviews with over 30 individuals within the BBC Executive and 14 third party organisations. In addition, we have reviewed various BBC internal documents, data, and third party evidence, and conducted our own desk-based research.

This report summarises our findings and recommendations to the BBC Trust.

Findings

Design

• Overall, the BBC’s Fair Trading Policy and Framework is comprehensive. It includes a number of mechanism for the Trust to ensure the Executive meets the Fair Trading Obligation, and it also ensures the Executive adopts controls and processes to achieve on-going compliance. There is a mechanism for redress should third parties feel the Executive is failing to comply with the Fair Trading Obligation, and the framework is subject to transparency requirements. Through structural separation of the BBC’s commercial subsidiaries from its Public Service divisions it meets European Commission best practice.

• In practice, the Executive self-assesses a significant volume of activity. The Trust’s ex-ante review mechanisms tend to be used for more significant changes in activity and do not always capture potentially material changes; for example, changes in transfer pricing agreements.
between the BBC’s Public Service divisions and its commercial subsidiaries. The Trust’s ex-post review mechanisms are not used often in practice. For example, the Trust has not historically undertaken an own-initiative investigation on Fair Trading grounds. The Trust has considered few complaints appeals in recent years. The appeals mechanism can provide assurance the Executive is compliant with the Fair Trading Obligation, although the lack of appeals may itself be a sign of such compliance.

- **Some terms in the Policy are unclear to individuals within the Executive and to third parties, and the set of documents can be difficult to navigate.** Several third parties highlighted the number of documents across which the Policy and Framework is set out fully as being a challenge when it comes to holding the Executive to account. Various stakeholders do not understand fully the practical meaning of the Competitive Impact Principle and of ‘operational separation’, which are parts of the Policy the Trust imposes on the Executive over and above competition and State Aid law.

- **There are apparent gaps in the Executive’s and Trust’s consideration of market impact.** Several third parties expressed concern at the lack of formal mechanisms through which to express views on the impact of the BBC’s activity on the market, although we understand there is regular informal contact between third parties and the Trust. The cumulative impact of incremental changes in the BBC’s online activity does not appear to be systematically reviewed. In addition, there is evidence that the Executive’s model of internal checks and balances to ensure robust self-assessment may not be working as effectively as it could.

### Implementation

- **The Executive has a number of well-established measures in place to ensure compliance with the Fair Trading Obligation, and awareness and training appear extensive.** 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 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.

- **Most third parties were critical of aspects of the complaints mechanism – particularly Executive involvement in handling complaints – and it is often bypassed.** However, there appears limited scope for change. It has not been possible for us to determine conclusively why there has been a fall in the number of Fair Trading complaints in recent years. Individuals within the Executive told us this emphasised a high level of compliance. Most third parties disagreed – they told us the fall in complaints and appeals reflects dissatisfaction with the complaints mechanism, rather than greater compliance by the Executive. Both are probably true to a certain degree. We understand some issues are resolved through informal dialogue between third parties, the Trust and the Executive, but this is not recorded. Most third party concerns relate to Executive involvement in complaints handling, but there is limited scope for the Trust to change this.

- **The Executive has made significant changes to its Fair Trading advice team in recent years, a**

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1 In February 2015 the BBC Trust published its Final Report on the 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. To our knowledge, this represents the first such ‘own-initiative’ investigation the BBC Trust has undertaken on Fair Trading grounds.
key control to achieve on-going compliance with the Fair Trading Obligation. Of themselves, these changes are not remarkable but the Trust may have concerns with 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 and the potential weaknesses we have identified in the Executive’s system of internal checks and balances. In particular, the Trust may need to reflect on whether its current level of oversight is appropriately calibrated.

Effect

• We did not find evidence of the Framework having any unintended consequences, either for the Executive or for third parties. While several individuals within the Executive expressed frustration with the practical impact of the Framework on their work, they could not identify any activity which had been unnecessarily prevented due to the design or implementation of the Policy and Framework. Such frustration may imply the Framework is working appropriately.

• The principles underlying the Fair Trading Obligation do not appear to be as well understood as those underpinning the BBC’s Editorial Guidelines, and individuals within the Executive do not appear to demonstrate the same degree of pride in ensuring compliance with them.

  There is an emphasis within the Executive on ‘hard’ competition law and State Aid law principles rather than the elements of the Policy that go beyond such legal obligations. Individuals within the Executive told us an emphasis on legal principles helped increase traction of Fair Trading issues, and may also reinforce compliance with competition and State Aid law. However such an emphasis may reduce the likelihood of compliance with the parts the Policy imposed by the Trust which are not derived from law, specifically, the Competitive Impact Principle and ‘operational separation’.

• Third parties lack trust in the arrangements between the BBC’s Public Service divisions and its commercial subsidiaries, due in large part to a perceived lack of transparency. Some third parties believe more detailed information about the relationships between the Public Service divisions and its commercial subsidiaries should be published, but the Executive has legitimate concerns about the ability of its commercial subsidiaries to compete effectively. The Executive puts into the public domain only the information about these relationships that it is required to, even where providing more information may help improve trust without having a negative impact on the commercial success of the subsidiary.

• The Executive is inconsistent in its interpretation of ‘operational separation’ across its commercial subsidiaries. Potentially due to the lack of clarity over what the Trust means by ‘operational separation’, the Executive interprets this requirement differently in respect of each of its commercial subsidiaries. BBC Global News is the most integrated with the Public Service. It is not clear the Trust would be comfortable with the same degree of integration with BBC Worldwide, although the policy applies equally to all commercial subsidiaries. Nor has the Trust explicitly set out whether and why BBC Global News should be treated differently.

• The Executive sees the BBC as a small player in an increasingly global marketplace, which may result in it underestimating its impact in some of the domestic markets in which it operates. In our interviews with individuals within the Executive, recent changes in some of the markets in which the BBC operates were repeatedly emphasised; for example, the increase in strength of programme suppliers relative to broadcasters and the increasingly popularity of services such as Netflix. It appears that the Executive focuses on the relative size and strength
of the BBC in international markets rather than the UK. This gives rise to a risk that the Executive may underestimate its impact in some of the domestic markets in which it operates; for example, radio.

**Recommendations**

As part of the scope of our review, we are required to give recommendations to the Trust for potential changes to its Fair Trading policy and framework. Below we set out a summary of the recommendations we believe follow from the findings of our review.

In making these recommendations, we recognise that:

- There may be more than one way of addressing any concerns we have identified.

- The Trust has a number of duties, of which ensuring compliance with the Fair Trading obligation is just one. It is a matter for the Trust as to how it prioritises these recommendations.

- There are, effectively, less than two years left until the next Charter, and debate about the BBC’s governance beyond the current Charter period has already begun. This may affect the Trust’s assessment of the relative costs and benefits of any given recommendation.

**Improve the clarity of the Fair Trading Policy**

To address concerns about the clarity and complexity of the Fair Trading Policy, we recommend that:

- The Trust provides additional guidance on the practical application of the Competitive Impact Principle and ‘operational separation’;

- The Trust simplifies its Policy document, or produces a brief, plain-English guide to the Framework for third parties; and

- The Trust improves sign posting in its Policy document such that links to other documents are clearer.

**Counter-balance the framework away from Executive self-assessment**

To ensure the Trust can be confident that the Framework is delivering the right outcomes, we recommend that the Trust counter-balance the framework away from Executive self-assessment. We consider it can achieve this by:

- Using its ex-post tools more frequently, particularly ‘own-initiative’ investigations;

- Considering, as part of its forthcoming review of the arrangements between the BBC’s Public Service divisions and its commercial subsidiaries, whether regular monitoring of such arrangements is necessary, particularly in respect of transfer pricing arrangements;
• Making some minor modifications to the complaints mechanism (relating to the timeframe within which appeals will be heard) and to its reporting of decisions; and

• Having more regular formal contact with the Executive Fair Trading Committee.

Increase confidence that the Executive is compliant through additional and clearer public reporting

To address concerns relating to the relationship between the BBC’s Public Service divisions and its commercial subsidiaries, we recommend that:

• The Trust states explicitly the information it expects the Executive to publish on a regular basis, including more detailed information relating to the key agreements between the Public Service divisions and its commercial subsidiaries; and

• Both the Trust and the Executive improve the Fair Trading sections on their respective websites to ensure simpler and easier access to relevant information.
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5 Recommendations

5.1 Improve the clarity of the Fair Trading Policy

5.2 Counter-balance framework away from Executive self-assessment

5.3 Increase confidence that the Executive is compliant through additional and clearer public reporting
## Glossary of terms

<table>
<thead>
<tr>
<th>Term</th>
<th>Definition</th>
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<tbody>
<tr>
<td>Agreement</td>
<td>The Agreement between Her Majesty’s Secretary of State for Culture, Media and Sport and the BBC, a complement to the Charter</td>
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<tr>
<td>Charter</td>
<td>The Royal Charter, which provides the constitutional basis for the BBC</td>
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<tr>
<td>Executive</td>
<td>The BBC Executive, which is used to describe the management of those parts of the BBC which do not relate to the BBC Trust</td>
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<tr>
<td>Framework</td>
<td>The Trust’s Fair Trading Framework</td>
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<td>Guidelines</td>
<td>The Executive’s Fair Trading Guidelines</td>
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<td>Policy</td>
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<td>Obligation</td>
<td>The Fair Trading Obligation</td>
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<tr>
<td>Trust</td>
<td>The BBC Trust, the governing body of the BBC</td>
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<tr>
<td>Trust Unit</td>
<td>The BBC Trust Unit, the unit which provides administrative support to the Trust</td>
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1 Background

1.1 Context

The Fair Trading Obligation

The BBC’s Charter and Agreement set out the BBC’s Fair Trading Obligation. In broad terms, this places a special responsibility on the BBC in relation to the impact it has in the markets it operates, which is the consequence of its unique funding position. Like any other enterprise, the BBC is subject to UK and European competition law. Due to its public funding, the BBC is also subject to European State Aid law requirements.

Charter requirements

The Charter stipulates that the Trust must ‘have regard to the competitive impact of the BBC’s activities on the wider market’ and must '[adopt] a statement of policy on fair trading and holding the Executive Board to account for compliance with it'.

The Charter also stipulates that a function of the BBC Executive Board is to '[ensure] compliance with requirements placed upon the Executive Board by the Trust; for example, through Protocols or the Trust’s statement of policy on fair trading'.

Agreement requirements

Sections 65 to 67 of the Agreement set out the requirements placed on the Trust and the Executive in relation to fair trading and competitive impact. In particular:

- Section 65 of the Agreement specifies the requirements on the Trust in relation to a statement of policy on fair trading, including the requirement for the Trust to review its policy every three years.

- Section 66 obliges the Trust to adopt and publish a statement of its policy on competitive impact, and to adopt codes dealing with aspects of the operation of the BBC’s public services which could ‘raise significant issues regarding competitive impact’.

- Section 67 mandates the Executive to adopt and publish fair trading and competitive impact guidelines, subject to approval by the Trust.

- Sections 68 to 74 set out the requirements placed on the BBC in respect of its commercial subsidiaries, including that they are ‘organisationally separate’, and that they must meet certain commercial criteria and reporting requirements.

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2 Section 23(e) of the BBC’s Royal Charter.
3 Ibid., Section 24(2)(k).
4 Ibid., Section 38 (1)(e).
5 http://downloads.bbc.co.uk/bbctrust/assets/files/pdf/about/how_we_govern/agreement.pdf
The Agreement also sets out some additional considerations in relation to the handling of fair trading complaints at Sections 90(7) to 90(10) inclusive.

### Competition and State Aid law requirements

Like any organisation, the BBC is subject to UK and EU competition law – the ‘hard’ elements of the Obligation. In broad terms, this means:

- the BBC must not enter into any anti-competitive agreements, including cartels;

- to the extent the BBC is found to have a dominant position in any market, it must not abuse that dominant position;

- mergers involving the BBC (or its commercial subsidiaries) may be subject to review by the relevant competition authority;

- if the competition authorities believe any market in which the BBC operates is not functioning competitively, they have the power to carry out a review of the operation of those markets and to propose remedies.

As it is a recipient of public funds, the BBC is under a special obligation to use those funds only for the purpose(s) for which they are intended, and not to use them to distort markets. This obligation derives from European State Aid law. The European Commission has sole responsibility to decide on the compatibility of State Aid with the internal market.

In the UK, the communications regulator, Ofcom[^6^], has concurrent competition powers with the primary competition authority, the Competition and Markets Authority.[^7^] The European Commission typically only considers issues which have the potential to affect trade within the Internal Market (including mergers which meet certain turnover thresholds).

### The Fair Trading Policy and Framework

#### Policy

In accordance with the demands of the Charter and the Agreement, the Trust adopted a statement of fair trading policy in 2007, which it revised in 2011 following its first triennial review.[^8^]

In its Fair Trading Policy, the Trust sets out several high-level fair trading principles:

- **Compliance with competition law.** A strict requirement for both the BBC’s public service and commercial activities.

- **Separation.** Licence fee funds should not be used to fund the BBC’s commercial activities, and public service and commercial activities should be financially and operationally separate.

[^6^]: [www.ofcom.org.uk](http://www.ofcom.org.uk)
[^7^]: [www.gov.uk/cma](http://www.gov.uk/cma)
• **Competitive Impact Principle.** A requirement on the BBC to ‘endeavour to minimise’ its competitive impact on the wider market when carrying out its public service activities.

• **Commercial criteria.** The BBC’s commercial activities must fit with the BBC’s public purposes, exhibit ‘commercial efficiency’, not jeopardise the good reputation of the BBC or its brand, and avoid distorting the market.

• **Brand protection.** The BBC should preserve its brand in such a way that it maximises the value of the BBC to the licence fee payer.

The Trust considers that all principles except the Competitive Impact Principle are legal requirements on the BBC, deriving either from either competition law or the provisions of the Charter and Agreement.

The Trust’s fair trading framework also comprises codes on competitive impact. Currently there is only one such code: a code on cross-promotion.

**Other aspects of the Framework**

Various documents, along with the Trust’s Fair Trading Policy, comprise the Fair Trading Framework. Key documents include: the Executive’s Fair Trading Guidelines and the Trust’s Fair Trading Complaints Framework.

**Changes in funding**

An agreement with the government as part of the Comprehensive Spending Review in 2010 resulted in the licence fee being frozen in nominal terms for the remainder of the current Charter period, in addition to the BBC assuming funding responsibility for a number of services including the World Service, BBC Monitoring and S4C (in part). Taking into account inflation, this has resulted in the BBC having a more constrained real-terms funding envelope in recent years.

As a consequence of the licence fee settlement, the BBC initiated its ‘Delivering Quality First’ strategy, which resulted in the BBC committing to do ‘fewer things better’. Simultaneously, the demands on the BBC’s commercial subsidiaries to generate profits to return to the BBC in the form of a dividend, in part to offset the impact of the licence fee settlement, have increased in recent years.

**Market changes**

Since the introduction of the current Fair Trading Policy and Framework in 2007, and modifications in 2011, there has been considerable change in the markets in which the BBC operates. Among other things:

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[^12]: [http://www.bbc.co.uk/aboutthebbc/insidethebbc/howwework/reports/deliveringqualityfirst.html](http://www.bbc.co.uk/aboutthebbc/insidethebbc/howwework/reports/deliveringqualityfirst.html)

• **Digital switchover is complete.** Analogue television broadcasts in the UK ceased in 2012. With greater broadcast capacity, digital terrestrial, cable, digital satellite and IPTV provide consumers with a greater choice of television services. The BBC has retained its public service broadcaster status, but faces more intense competition for audience share.

• **Technology has evolved.** The increased penetration of broadband internet, and the proliferation of smartphones and tablets, have increased the number of potential sources of entertainment available to audiences. These changes have also enabled audiences to choose when they access content, for instance via on-demand services. This is clearly demonstrated in the increasing popularity of content on the BBC’s catch-up service, iPlayer, in addition to third party services such as Netflix.

• **Audiences are fragmenting.** The penetration of different technologies differs by demographics, such as age. Moreover, different age groups engage with content in different ways, with younger audiences less likely to watch linear television and more likely to access content online or via social media.

1.2 **Scope and purpose of this review**

The Trust has commissioned Fingleton Associates to undertake an independent review of its Fair Trading Policy and Framework, to inform its current triennial review.

The Trust set the following research questions for this review:

• **Design:** “Has the BBC Trust established an appropriate policy framework to deliver its obligation in relation to fair trading?”

• **Implementation:** “Has the BBC established effective fair trading arrangements to implement the Trust’s fair trading policy framework?”

• **Effect:** “How well are the BBC’s arrangements working in practice, and are there areas for change or improvement?”

As part of the review, the Trust requires recommendations ‘as to how the policy framework and code might be refined in light of experience and changing market factors’ and ‘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’.

A detailed scope is provided in Appendix A.

1.3 **Approach**

Our review employed the following methods:

• Stakeholder interviews with members of the Executive and third parties. We also met Trustees and members of the Trust Unit as part of our review. A full list of the stakeholder we interviewed is provided in Appendix B;
• Review of internal documents;
• Review of relevant data, where available; and
• Desk-based research.
2 Design: “Has the BBC Trust established an appropriate policy framework to deliver its obligation in relation to fair trading?”

2.1 Summary

- **Overall, the BBC’s Fair Trading Policy and Framework is comprehensive.** It includes a number of mechanisms for the Trust to ensure the Executive meets the Fair Trading Obligation, and it also ensures the Executive adopts control and processes to achieve on-going compliance. There is a mechanism for redress should third parties feel the Executive is failing to comply with the Fair Trading Obligation, and the framework is subject to transparency requirements. Through structural separation of the BBC’s commercial subsidiaries from its Public Service divisions it meets European Commission best practice.

- **In practice, the Executive self-assesses a significant volume of activity.** The Trust’s ex-ante review mechanisms tend to be used for more significant changes in activity and do not always capture potentially material changes; for example, changes in transfer pricing agreements between the BBC’s Public Service divisions and its commercial subsidiaries. The Trust’s ex-post review mechanisms are not used often in practice; for example, the Trust has not historically undertaken an own-initiative investigation on Fair Trading grounds. The Trust has considered few complaints appeals in recent years. The appeals mechanism can provide assurance the Executive is compliant with the Fair Trading Obligation, although the lack of appeals may itself be a sign of such compliance.

- **Some terms in the Policy are unclear to individuals within the Executive and to third parties, and the set of documents can be difficult to navigate.** Several third parties highlighted the number of documents across which the Policy and Framework is set out fully as being a challenge when it comes to holding the Executive to account. Various stakeholders do not understand fully the practical meaning of the Competitive Impact Principle and of ‘operational separation’, which are parts of the Policy the Trust imposes on the Executive over and above competition and State Aid law.

- **There are apparent gaps in the Executive’s and Trust’s consideration of market impact.** Several third parties expressed concern at the lack of formal mechanisms through which to express views on the impact of the BBC’s activity on the market, although we understand there is regular informal contact between third parties and the Trust. The cumulative impact of incremental changes in the BBC’s online activity does not appear to be systematically reviewed. In addition, there is evidence that the Executive’s model of internal checks and balances to ensure robust self-assessment may not be working as effectively as it could.

2.2 The Trust’s policy and framework is comprehensive

Overall, the Trust’s Fair Trading Policy and Framework is comprehensive.

- It contains a range of ex-post and ex-ante tools for the Trust to be sure the Executive is
compliant with its Fair Trading Obligation;

- It requires the Executive to adopt a range of controls to ensure it takes into account the Fair Trading Obligation in its decision-making, thereby facilitating on-going compliance;

- Both the Trust and the Executive are subject to transparency requirements, and there is reporting on compliance with the obligation at least annually;

- Third parties have an independent mechanism for redress if they consider the Executive is non-compliant.

The Policy and Framework are well designed to achieve compliance with competition and State Aid law. In our experience, 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.\(^\text{14}\)

The Charter and Agreement clearly set out the requirements placed on the BBC Trust in respect of the BBC’s Fair Trading Obligation. A review of the relevant documentation does not reveal any material omissions: the Fair Trading policy and framework reflect the obligations in the Charter and Agreement, in addition to the requirements competition and State Aid law place on the BBC.\(^\text{15}\)

**Competitive Impact Codes**

As part of its review, the Trust must consult with Ofcom, the communications regulator, to establish whether (a) its existing Competitive Impact Codes require modifying or repealing, and (b) any additional Codes are required.

We understand that Ofcom has provided the following views to the Trust\(^\text{16}\):

- The existing Code on Cross Promotion remains valid;

- It is not clear why the Trust’s Syndication Policy is not a Competitive Impact Code;

- The cumulative impact of incremental changes in BBC activity is ‘a continuing question’, and a Competitive Impact Code may be a means of addressing this.

Few stakeholders we spoke to had views on the scope and content of the Competitive Impact Codes. In general, third parties who expressed an opinion were supportive of Ofcom’s position. Some individuals within the Executive questioned the continued need for the existing Code on Cross Promotion.

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\(^\text{14}\) Paragraph 86, Communication from the [European] Commission on the Application of State Aid rules to Public Service Broadcasting. The BBC first established a commercial subsidiary for the purposes of exploiting content produced for the Public Service in 1979 (BBC Enterprises Limited, which was restructured to form BBC Worldwide Limited in 1995).

\(^\text{15}\) The documentation does not reflect fully recent changes in relevant legislation and changes to funding of the World Service. Such changes would result in relatively minor updates to the text of the Policy and the Guidelines, for example, replacing references to the Office of Fair Trading, and removing sections discussing use of Grant-In-Aid funds.

\(^\text{16}\) Letter from Ofcom to the BBC Trust, 21 October 2014
As we discuss in Section 2.5 below, the issue of cumulative impact may only relate to the BBC’s online activities. It is not clear that a Competitive Impact Code is the best mechanism for assessing the cumulative impact of incremental changes in BBC activity, particularly because the Trust may already have mechanisms through which it could address such issues.

2.3 **The framework is difficult to navigate and some aspects of the Policy are unclear**

While comprehensive, many third party stakeholders and some individuals within the Executive suggested to us that the Policy and Framework lacks a certain degree of clarity. This arises in two ways:

- First, a variety of stakeholders, including some third parties and several individuals within the Executive, told us that some terms in the Policy are unclear. The area of most complexity was the practical interpretation of those aspects of the Policy determined by the Trust – those terms which go beyond competition and State Aid law. Specifically, the ‘competitive impact principle’ and ‘operational separation’ (as distinct from organisational and financial separation).

- Second, our interviews revealed that some individuals within the Executive and most third parties find the documentation difficult to navigate. In addition to the Fair Trading Policy, the Competitive Impact Code, and the Executive’s Fair Trading Guidelines, the Fair Trading Obligation is regulated, amongst other things, by: Service Licences, the BBC’s Editorial Guidelines, the BBC’s brand/marketing guidelines, procurement guidance, the Trust’s Syndication Policy, the Terms of Trade, and the Trust’s Commercial Framework. In addition, ad-hoc reviews undertaken by the Trust, such as its reviews of talent costs and its reviews of content supply, inform the BBC’s approach to Fair Trading compliance. Some third parties told us a lack of resources meant that the documentation was a deterrent to engaging with the Framework.

In practice, the Guidelines are the main document for the Executive and for complainants (complaints must specify which part of the Guidelines or Policy the complainant believes the BBC is in breach of). Some individuals within the Executive and some third parties do not consider the Guidelines to be user-friendly. The Framework specifies that this is an Executive document and it has a mechanism by which the Executive can propose changes, although it has not chosen to do so in recent years.

The consequence of this lack of clarity is that managers and employees within the Executive and third parties may struggle to understand what behaviours the Trust expects from the Executive. This may increase the amount of dedicated resource the Executive requires to ensure its divisions comply with the Obligation – if the Policy was clearer, the Executive may not require the same number of specialist Policy Advisors to provide guidance to the BBC’s divisions. It may also be an obstacle to third parties using the complaints mechanism to hold the BBC to account.
2.4 In practice, the Executive self-assesses a significant amount of its activity

The regime has a variety of ex-ante and ex-post tools to ensure the Executive’s compliance with its Fair Trading Obligation (see Figure 1 and Figure 2). However, in practice, we believe the Fair Trading regime is weighted towards ex-ante intervention by the Trust, with significant amounts of activity being self-assessed by the Executive.

**Figure 1: Trust's Competitive Impact Framework**

![Diagram showing Trust's Competitive Impact Framework]

**Source: BBC Trust Fair Trading Policy**

**Figure 2: Ex-ante and ex-post tools available to Executive and Trust**

<table>
<thead>
<tr>
<th>Ex-ante tools</th>
<th>Ex-post tools</th>
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| BBC Executive | • Fair Trading Guidelines  
|               | • Specialist policy advisors  
|               | • Internal approvals processes  
|               | • Training  
|               | • Complaints handling  
|               | • Annual report and accounts  
| BBC Trust     | • Fair Trading Policy  
|               | • Public Value Tests  
|               | • Significance Assessment  
|               | • New service approvals  
|               | • Commercial approvals  
|               | • Complaint appeals  
|               | • Investigations  
|               | • Sanctions  
|               | • Fair Trading audit  
|               | • Service licence reviews  

**Source: Fingleton Associates interpretation of the Trust Policy Framework**

The threshold for certain ex-ante Trust intervention, specifically Public Value Tests and Commercial Service Approvals, is high. The threshold for a Significance Assessment is not high, but
it is initially a matter for the Executive to determine whether a proposal ought to be sent to the Trust for a Significance Assessment. The Trust does not determine which matters are subject to its review. For activity that does not meet the threshold for ex-ante intervention, the Trust relies on ex-post measures. In practice, these ex-post measures are infrequently used: there is formal interaction between the Trust and the Chair of the Executive Fair Trading Committee only once a year; the Trust has not historically undertaken an ‘own-initiative’ investigation on Fair Trading grounds; and the Trust does not systematically use Service Licence reviews to consider questions of competitive/market impact. There have been few complaints and the Trust has considered even fewer complaints appeals in recent years. The appeals mechanism can provide assurance the Executive is compliant with the Fair Trading Obligation. Equally, the lack of appeals may itself be a sign of such compliance.

As a consequence of this imbalance, the Trust has limited evidence available to it to be sure that the BBC is compliant with its Fair Trading obligation across the broad range of its activity, particularly activity which falls below the formal threshold for ex-ante Trust scrutiny.

While the Executive commissions two independent audits of its Fair Trading processes, these are controls audits and are not capable of providing assurance to the Trust on the substance of the Executive’s decision making.

We note that in many instances where the Trust has reviewed Executive proposals ex-ante, it has suggested modifications or additional work from the Executive, on Fair Trading grounds. In addition, Ofcom has previously questioned the approach of the Executive in assessing potential market and competitive impacts; for example, its advice to the BBC Trust in respect of the BBC Store proposal and the BBC’s Radio1 iPlayer proposal. We believe this ex-ante intervention reinforces the need for the Trust to use its ex-post review tools more frequently.

For some types of activity, particularly transfer pricing arrangements between the BBC’s Public Service divisions and its commercial subsidiaries, the Executive commissions external expert reports to support its assessment, which should lead to more robust outcomes. However, in one example we saw during this review, the external advice appeared to be conditional and the Executive was not able to demonstrate to us that those conditions had been met. The Trust does not routinely assess transfer-pricing arrangements despite the fact such agreements can be material to the operation of the BBC’s commercial subsidiaries; for example, the supply of content for World News to BBC Global News Limited.

Several third parties told us they believed the Trust had limited resources available to it, which could explain, at least in part, why the regime is weighted towards Executive self-assessment.

17 See footnote 1.
18 The Trust specifically excluded consideration of market impact from the scope of its Service Licence reviews into: News and Current Affairs, the review of the BBC’s Television Services, and its current Music Radio review.
19 The main Fair Trading audit is undertaken annually by a specially appointed auditor. The auditor is required annually to provide an opinion as to whether the BBC has complied with the requirements of the Fair Trading Policy in that financial year, though this focuses on controls and not on the substance of the decisions taken by the BBC. The BSI also audits the BBC annually to ensure its Fair Trading processes and controls continue to meet the ISO 9001:2000 standard.
20 See, for example, the Trust’s Public Value Test into iPlayer or the Trust’s Public Value Test into Local Video proposals or the Trust’s Public Value Test into the Trust’s Public Value Test into the BBC’s Radio1 iPlayer proposal.
21 Ofcom highlighted potential market players which could be impacted by the proposals which were not included in the Executive’s assessment and stated it believed the Executive underestimated the increase in iPlayer traffic likely to be driven by the proposals. See: http://www.ofcom.org.uk/static/bbc/BB/CBB_store.pdf.
22 Ofcom stated "we have reservations about some aspects of the [BBC Executive’s] forecast methodology." See: http://downloads.bbc.co.uk/bbctrust/assets/files/pdf/regulatory_framework/assessment/ofcom_radio1_iplayer.pdf.
2.5 There are apparent gaps in the Trust’s and Executive’s consideration of market impact

As part of the Fair Trading Obligation, the BBC must ‘endeavour to minimise its negative competitive impacts on the market’ in respect of Public Service activity, and must ‘not distort the market’ in respect of commercial activity. We have identified apparent gaps in the Trust and Executive’s consideration of market impact issues:

• Third parties feel they have limited opportunities to provide formal input to either the Executive or the Trust to ensure their views on market impact are adequately taken into account when the BBC develops proposals.

• The cumulative impact of incremental changes in Executive activity, specifically online activity, is not systematically assessed.

• Internal checks and balances designed to ensure robust self-assessment within the Executive may not be working as effectively as they could.

Third party engagement

The Trust only formally consults the market in Public Value Tests, for which the threshold is very high. The Trust is not formally required to consider third party views in Section 25 ‘significance assessments’, but it does consult Ofcom on its view of market impact (and thereby might be assumed to take account the views of the market indirectly). The Trust does not consult the market formally on commercial and non-commercial service approvals.

Many of the third parties we spoke to expressed frustration at the lack of formal opportunities to provide views on the impact of the BBC’s activity.

In the absence of formal consultation with the market, the Trust and Executive may find it difficult to gauge the potential impact of the Executive’s activity. Over time, lack of formal engagement with the market may weaken the Trust’s ability to hold the Executive to account.

However, the Trust Unit highlighted to us that it was in a constant process of informal engagement with industry such that it has a good working knowledge of the markets in which the BBC operates. In our stakeholder interviews, many third parties confirmed they are in regular informal contact with the Trust and the Executive.

While third parties appear to have a number of methods of making their views known to the Trust, it is not clear that these opportunities always coincide with the Trust’s consideration of specific proposals made by the Executive. For example, some of the comments made by third parties about the lack of formal opportunities to engage related to the recent consideration of the BBC Store proposals. Without formal mechanisms to make views known about specific aspects of proposals from the Executive, the potential exists for the Trust to misjudge the likely impact on third parties.

However, it is not clear to us whether this concern materialises in practice. Moreover, even if such concerns do materialise, it is not clear to us that any mechanisms to resolve the issues would be
proportionate to such concerns, particularly given the frequency of informal contact between the Trust and third parties. Engaging in more formal consultation with the market on a greater number of issues may result in approvals process for the Executive being extended significantly, for example.

However, the Trust may reflect, on a case-by-case basis, whether additional opportunities for third parties to provide formal input are necessary and proportionate.

**Cumulative impacts**

Some third parties felt particularly strongly about being unable to comment on cumulative changes to iPlayer. As iPlayer is covered by the BBC's Online Service Licence, and is not a service in its own right, changes to iPlayer do not typically meet the Trust's threshold for a Public Value Test. Accordingly, the Trust does not have to consult the market on changes to iPlayer.23

Any given incremental change to BBC activity may not have material impacts on the market, but over time the cumulative impact of small changes in BBC activity could materially affect a market. The Fair Trading framework does not appear to have a mechanism for systematically considering the potential for such impacts.

As noted above, Ofcom also highlighted the cumulative impact of incremental changes in Executive activity as ‘a continuing question’.24

It is unclear whether the issue of ‘cumulative impact’ would arise in respect of any BBC activity other than its digital offering. This is important for considering how the Trust may take into account such impacts on a more regular or systematic basis.

We believe service licence reviews or ‘own-initiative’ investigations could be suited to regular ex-post monitoring of the cumulative impact of the BBC’s online activity. Historically, the Trust has not systematically considered market impact as part of its programme of Service Licence reviews, nor has it undertaken an ‘own-initiative’ investigation25.

**Internal checks and balances**

The ‘hub-and-spoke’ model of advice within the Executive (described in more detail in Section 3.2 below) should ensure it makes a more robust assessment of whether activity is compliant with the Fair Trading Obligation, combining specialist policy knowledge in the centre with market knowledge in the BBC’s divisions.

The central advice team should act as a check on the divisions leading to more objective internal self-assessment. A clear tension exists where divisions undertaking activity, and the personnel involved with such projects, also have to assess compliance with the Fair Trading Obligation. Put another way, the divisions may have competing incentives if they are required to self-assess their own proposals.

A separate advice team also provides third parties with a means of raising concerns. This team is

23 See: [http://www.bbc.co.uk/bbctrust/governance/tools_we_use/new_services/pvt/on_demand.html](http://www.bbc.co.uk/bbctrust/governance/tools_we_use/new_services/pvt/on_demand.html)

24 Letter from Ofcom to the BBC Trust, 21 October 2014

25 See footnote 1.
independent from the division within the BBC undertaking the activity.

However, there was some evidence in our review that this model of internal checks and balances may not be working as effectively as it could:

- **The central Fair Trading advice team is reliant on the divisions to raise matters with it.** We understand that sometimes the advice team is made aware late in the project planning cycle of activity that may raise Fair Trading concerns.

- **Deep market knowledge sits within the divisions.** Accordingly, the central advice team is reliant on the divisions to understand the potential impacts that proposed activity may have in the market.

- **In practice, third parties tend to raise concerns with the divisions.** Some third parties told us their main contacts were with the division and not the central advice team, and, accordingly, concerns would typically be raised with the division in the first instance. We were provided with some limited evidence which indicated that the communication of such concerns from the divisions to the centre may not always work as effectively as it should. This may also reflect a lack of awareness among third parties of the formal processes the Executive has put into place to address Fair Trading concerns and complaints.

- **There is an increasing trend towards divisional self-assessment.** The Executive told us that, due to resource constraints within the central advice team, the divisions would be expected to increasingly self-assess activity in future.

These issues have always existed to some degree. However, in general, we believe the recent changes to the central Fair Trading advice team (discussed in more detail in Section 3.4) are likely to have an adverse impact on the Executive’s assessment of the impact of proposed activity in the market, other things equal; for example, it will provide input on fewer matters, its advisors will be less close to the divisions and they will have less time and opportunity to develop market knowledge.
3 Implementation: “Has the BBC established effective fair trading arrangements to implement the Trust’s fair trading policy framework?”

3.1 Summary

- The Executive has a number of well-established measures in place to ensure compliance with the Fair Trading Obligation, and awareness and training appear extensive. 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 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.

- Most third parties were critical of aspects of the complaints mechanism, particularly Executive involvement in handling complaints, and it is often bypassed. However, there appears limited scope for change. It has not been possible for us to determine conclusively why there has been a fall in the number of Fair Trading complaints in recent years. Individuals within the Executive told us this emphasised a high level of compliance. Most third parties disagreed – they told us the fall in complaints and appeals reflects dissatisfaction with the complaints mechanism, rather than greater compliance by the Executive. Both are probably true to a certain degree. We understand some issues are resolved through informal dialogue between third parties, the Trust and the Executive, but this is not recorded. Most third party concerns relate to Executive involvement in complaints handling, but there is limited scope for the Trust to change this.

- The Executive has made significant changes to its Fair Trading advice team in recent years, a key control to achieve on-going compliance with the Fair Trading Obligation. Of themselves, these changes are not necessarily remarkable but the Trust may have concerns with 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 and the potential weaknesses we have identified in the Executive’s system of internal checks and balances. In particular, the Trust may need to reflect on whether its current level of oversight is appropriately calibrated.

3.2 The Executive has well-established and well-embedded compliance processes

The Executive has implemented a number of measures to ensure its compliance with the Fair Trading Obligation. These include, inter alia:

- The Fair Trading Guidelines;

- Mechanisms for providing expert advice to all parts of the BBC, including its commercial...
subsidiaries, on Fair Trading matters;

- Mechanisms for ensuring Fair Trading advice input into business proposals;
- A sub-committee of the Executive board, comprising non-executive directors;
- Significant resources dedicated to considering Fair Trading issues across the organisation;
- A training programme targeted at relevant staff; and
- Regular monitoring of Fair Trading procedures.

These processes are well-established. The external Fair Trading audit, in addition to the biannual BSI audit, provides a high level of assurance in the design and application of these controls.

We describe each control below briefly, and highlight any issues we discovered as part of our review.

**Fair Trading Guidelines**

The Executive has produced a set of Fair Trading Guidelines, which it has published on its external website. It supplements this with additional guidance in specific areas; for example in relation to the commercial trading activities undertaken by Public Service divisions. There are references to Fair Trading in other guidance documents and on the BBC’s intranet.

The changes we consider may be necessary to the Policy and Framework documentation, including the Guidelines, is set out in Section 2.

**Fair Trading Advice**

The Executive operates a ‘hub-and-spoke’ model of advice, whereby a group of policy experts and lawyers provide advice from the centre (BBC Legal) and trained Fair Trading ‘Reps’ and ‘Champions’ are embedded within the divisions and commercial subsidiaries. Fair Trading ‘Reps’ are the primary contacts within the divisions for the central advice team, and have a degree of responsibility for ensuring compliance with the Fair Trading Obligation within their divisions.\(^{26}\) The ‘Reps’ are supported by the Fair Trading ‘Champions’ within their division. We note that there is quite an extensive network of Fair Trading ‘Reps’ and ‘Champions’ within the divisions, as shown in Table 1.

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\(^{26}\) It is not always the case that the Fair Trading ‘Rep’ has overall responsibility for ensuring compliance with the Fair Trading Obligation within their division.
Table 1: Executive Fair Trading 'Reps' and 'Champions' by division

<table>
<thead>
<tr>
<th>Division</th>
<th>Number of Fair Trading 'Reps'</th>
<th>Number of Fair Trading 'Champions'</th>
</tr>
</thead>
<tbody>
<tr>
<td>Television</td>
<td>1</td>
<td>6</td>
</tr>
<tr>
<td>Radio</td>
<td>1</td>
<td>3</td>
</tr>
<tr>
<td>BBC North</td>
<td>1</td>
<td>8</td>
</tr>
<tr>
<td>Finance and Business</td>
<td>1</td>
<td>12</td>
</tr>
<tr>
<td>Strategy and Digital</td>
<td>1</td>
<td>9</td>
</tr>
<tr>
<td>News Group: News and English Regions</td>
<td>1</td>
<td>4</td>
</tr>
<tr>
<td>News Group: World Service</td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td>Nations: Scotland</td>
<td>3</td>
<td>0</td>
</tr>
<tr>
<td>Nations: Wales</td>
<td>1</td>
<td>2</td>
</tr>
<tr>
<td>Nations: Northern Ireland</td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td>Director General's Office</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Editorial Standards</td>
<td>1</td>
<td>0</td>
</tr>
<tr>
<td>BBC S&amp;PP Ltd</td>
<td>1</td>
<td>3</td>
</tr>
<tr>
<td>BBC Global News Ltd</td>
<td>1</td>
<td>2</td>
</tr>
<tr>
<td>BBC Worldwide</td>
<td>1</td>
<td>2</td>
</tr>
</tbody>
</table>

Source: BBC Executive (correct as of 5 August 2014)

In Section 3.4, we discuss recent changes to the central Fair Trading advice team in more detail.

**Project approval processes**

While there are differences between divisions, each one has developed a set of internal procedures for embedding Fair Trading checks into project approvals. These include prompts and checklists in the document templates used for project approvals.

While there have been changes to accountability within the Executive recently, specifically the move from a committee structure to ‘single points of accountability’, it does not appear, based on our interviews with individuals within the Executive, that this will have any material impact on the functioning of these controls.
Content-related activity

Some third parties questioned whether the Executive adequately considered its impact in relation to some content-related activity. Examples raised were: talent deals; scheduling decisions; decisions on format acquisitions; and the use of junction trails to cross-promote BBC public service content.

Individuals within the Executive argued that Service Licences provide the framework in which the BBC makes content-related decisions, and that the Fair Trading Obligation does not apply to this activity. The practical difficulty of interpreting the Competitive Impact Principle in relation to such activity, alongside the other obligations on the Executive in respect of its services, was also highlighted.

Our discussions with third party stakeholders and individuals within the Executive highlights the confusion over the extent to which the Fair Trading Policy and Framework should apply to such activity. A strict reading of the Policy suggests this activity is subject, among other things, to the Competitive Impact Principle. We are not aware of any Public Service activity that the Trust exempts from the CIP.

Given the uncertainty which exists in relation to such activity, the Trust may consider setting out more clearly in its Policy that the Service Licence and Service Licence review process sets the framework in which such content-related activity takes place. Moreover, it could state explicitly that it considers that the Executive can be assumed to be compliant with the Fair Trading Obligation in respect of such activity where it is compliant with the requirements of the Service Licences.

Executive Fair Trading Committee

The Executive Fair Trading Committee (EFTC) is formed of non-executive directors of the BBC and it is accountable for the Executive’s compliance with the Fair Trading Obligation. It meets regularly through the year, and its meetings are attended by relevant members of the Executive.

While there has been a degree of turnover in the membership of EFTC in recent years, membership of the Committee is now more stable and has been expanded to include more non-executive directors.

As part of our review, we considered whether the level of direct formal interaction between EFTC and the Trust was appropriate. Typically, the Chair of EFTC meets with Trustees once a year around the publication of the Annual Report and Accounts to discuss Fair Trading issues. There is little other formal engagement and EFTC is not directly involved with much of the day-to-day contact between the Trust (and Trust Unit) and the Executive.

The frequency of interaction between the Executive and the Trust (and Trust Unit), and the lack of formal interaction between the Trust (and Trust Unit) and EFTC means EFTC is largely reliant on the Executive to understand the Trust’s views on Fair Trading issues. This has the potential to create a conflict of interest.
Training

The BBC has an extensive Fair Trading programme, with three tiers:

- Tier 1, which applies to all BBC staff, is a basic awareness of the Fair Trading Obligation;
- Tier 2 is an online course for staff identified as being likely to need a deeper understanding of Fair Trading issues. The training lists for Tier 2 are produced by the Divisions, on the basis of grade or of the nature of the role.\(^\text{27}\)
- Tier 3 is a face-to-face training course. The training is delivered to those staff with the heaviest involvement with Fair Trading issues including Senior Management and the Executive Board.\(^\text{28}\)

As demonstrated in the table below, around 16 per cent of the Public Service is trained to at least Tier 2 – just over 3,000 individuals. We reviewed some training materials in the course of our review and considered them to be appropriately targeted.

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\(^{27}\) BBC Worldwide has produced a separate Tier 2 online module that focuses more heavily on those areas of relevance to its employees – specifically, the Four Commercial Criteria, Separation and Use of the BBC Brand.

\(^{28}\) Like with Tier 2, BBC Worldwide undertakes its own Tier 3 training modules, tailored to its business.
Table 2: Tier 2 training statistics (by division)

<table>
<thead>
<tr>
<th>Division</th>
<th>Number of staff trained to 'Tier 2'</th>
<th>Percentage of total staff trained to Tier 2</th>
</tr>
</thead>
<tbody>
<tr>
<td>Television</td>
<td>724</td>
<td>32%</td>
</tr>
<tr>
<td>Radio</td>
<td>145</td>
<td>14%</td>
</tr>
<tr>
<td>Future Media</td>
<td>287</td>
<td>24%</td>
</tr>
<tr>
<td>News</td>
<td>272</td>
<td>4%</td>
</tr>
<tr>
<td>Finance and Business</td>
<td>565</td>
<td>30%</td>
</tr>
<tr>
<td>Policy &amp; Strategy</td>
<td>32</td>
<td>43%</td>
</tr>
<tr>
<td>People</td>
<td>91</td>
<td>17%</td>
</tr>
<tr>
<td>North</td>
<td>324</td>
<td>35%</td>
</tr>
<tr>
<td>Marketing and Audiences</td>
<td>234</td>
<td>68%</td>
</tr>
<tr>
<td>Scotland</td>
<td>174</td>
<td>14%</td>
</tr>
<tr>
<td>Wales</td>
<td>80</td>
<td>7%</td>
</tr>
<tr>
<td>Northern Ireland</td>
<td>67</td>
<td>11%</td>
</tr>
<tr>
<td>Total BBC Public Service</td>
<td>3044</td>
<td>16%</td>
</tr>
<tr>
<td>BBC Global News Ltd</td>
<td>49</td>
<td>83%</td>
</tr>
<tr>
<td>BBC S&amp;B&amp;P Ltd</td>
<td>13</td>
<td>11%</td>
</tr>
</tbody>
</table>

Source: BBC Executive (correct as of 15 September 2014). Notes: (a) not all Public Service divisions reported in the Executive’s training system are shown in this table, so the total figure shown above is not equal to the sum of those divisions shown in the table (b) BBC Worldwide figures are not shown are they use a different training recording platform (c) a proportion of the staff identified as requiring Tier 2 training will also be trained to Tier 3 level.

Training of temporary staff

Some individuals within the Executive highlighted to us that temporary staff; for example, those seconded into the Public Service from consultancy or professional service firms – do not routinely undertake mandatory Fair Trading training even where they are working on projects which may require familiarity with the Fair Trading Obligation. We appreciate it may be difficult for the Executive to ensure, systematically, that temporary staff are trained to the same degree as permanent staff.

It has been difficult for us to assess the impact of these ‘gaps’ in training in our review.
Monitoring and reporting

The Executive reports publicly on its compliance with Fair Trading through various mechanisms: financial and operational statements in its Annual Report and Accounts; a published opinion from the independent Fair Trading auditor; and, quarterly complaints bulletins.

The opinion of the external auditor is published each year in the BBC’s Annual Report and Accounts, and this is supplemented with a statement from the Chair of the Executive Fair Trading Committee.

In Section 4.4 we make more detailed comments about the amount and nature of the information the Executive makes available publicly about the relationship between its Public Service divisions and its commercial subsidiaries.

During the course of our review, we found the public Fair Trading websites of both the Executive and the Trust difficult to find and to navigate. Moreover, the information relating to the BBC’s Fair Trading Obligation published by the Trust and the Executive is not easily accessible.

3.3 The complaints mechanism is not considered effective by third parties, and is often bypassed

Almost all of the third parties we spoke to were critical of aspects of the complaints mechanism. In recent years, the number of Fair Trading complaints has fallen significantly. In part this reflects third parties seeking different and sometimes more consensual ways of resolving concerns (for which data are not recorded). We consider there is limited scope for the Trust to significantly improve the current complaints model.

Complaints data

The number of Fair Trading complaints has fallen in recent years: in the first four years of the current Charter, there were 24 fair trading complaints; in the following three years there were five. The number of appeals accepted by the Trust has also fallen: it accepted seven appeals in the first four years of the current Charter period, compared with just one in the following three years.
Figure 3: Fair Trading complaints (2007-2013)

Source: BBC Executive and BBC Trust

Data on the speed of complaints handling suggest that the Executive typically achieves the target set by the Trust, which is to respond to complaints within a 30 working day period.\(^{29}\)

On average, the Trust takes longer to consider appeals. The mean across the appeals it has considered is 57 working days. The longest appeal the Trust considered took 92 working days (over 4 months), while the shortest appeal it considered took 23 working days (an appeal which was rejected).\(^{30}\)

Reasons for drop in complaints

We asked third parties whether the fall in complaints is indicative of the Executive being more effective in complying with the Fair Trading Obligation, or whether it reflected other factors. The number of complaints across the whole Charter period is low in absolute terms, which makes it difficult to draw any firm conclusions about changes over time.

Individuals within the Executive attributed the fall in complaints to improved compliance with the Fair Trading Obligation. While we agree that this could partly explain the fall in complaints, it is clear from our interviews with third parties that it is not the only likely explanation.

In interviews, almost all third parties said they did not make complaints because they lack confidence in aspects of the complaints mechanism, rather than believing that the Executive is

\(^{29}\) This period begins when the Executive has been provided with all relevant information, and not from when a complainant makes initial contact.

\(^{30}\) The data suggest there was – technically – a shorter appeal. However, this appeal was related to an appeal the Trust was considering simultaneously which probably explains the speed of decision-making. The Executive appears to have joined these appeals for the purposes of its internal complaints reporting, resulting in a slight discrepancy between data provided to us by the Executive and the Trust Unit.
compliant with the Fair Trading Obligation. This included third parties which had used the complaints mechanism in the past.

Reasons for not engaging with the complaints mechanism include:

- **Executive involvement in the first phase of complaints handling.** Most believed it was inevitable any complaint would be rejected by the Executive – “marking its own homework,” in the words of one third party. Individuals within the Executive emphasised to us that it had a formal process for complaints handling which they consider meets public law principles. However, notwithstanding this fact, it is not clear there is trust in that process amongst many of the third parties we spoke to.

- **Time and cost.** Third parties perceived the appeals process to be lengthy and potentially costly, particularly given the expectation of having to pursue an appeal to the Trust to get a fair hearing.

- **Lack of information.** Some third parties believe the lack of information the Executive puts into the public domain makes it harder to put together an effective complaint, particularly on issues relating to its commercial subsidiaries.

- **Complexity of the regime.** A lack of resource to engage with the process, the complexity of the policy and framework, and, a lack of clarity over the standard to which the Executive is supposed to be held were also cited as reasons not to use the complaints mechanism.

- **Ongoing relationship(s) with the BBC.** Some third parties have partnership arrangements or other commercial arrangements with the Executive, which was cited by a small number of third parties as an additional factor weighing against engaging with the complaints process.

- **Quicker and less costly methods of resolution.** Many of the third parties we spoke to told us they routinely bypass the complaints mechanism for quicker and less costly methods of trying to get the Executive to adapt its behaviour. This includes more consensual resolution methods, such as informal engagement with the Trust and the Executive. These interactions are not recorded, so it is difficult to assess their impact. A couple of third parties also suggested use of the press and politicians can sometimes be a quicker and easier way of getting the BBC to change its behaviour.

The Agreement is explicit that the Trust cannot consider complaints made against the BBC in the first instance. This limits the scope for reform, in particular to address third party concerns that the Executive assesses complaints in the first instance.

**Appeals handling**

**Time to consider appeal**

While the Trust is explicit about the length of time it expects the Executive to take to consider a complaint, its Fair Trading complaints framework does not provide guidance on the time the Trust will usually take to consider appeals. As noted above, the Trust once took over four months to

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31 Section 90 (3). See: [http://downloads.bbc.co.uk/bbctrust/assets/files/pdf/about/how_we_govern/agreement.pdf](http://downloads.bbc.co.uk/bbctrust/assets/files/pdf/about/how_we_govern/agreement.pdf)
consider an appeal, but it generally considers appeals more quickly.

We understand from the Trust Unit that the longest appeal the Trust has considered was particularly complex. It emphasised to us the tension that can arise between ensuring that appellants have a fair hearing, and ensuring the process is completed as quickly as possible.

Given third parties are concerned about the total length of time it may take to complain and for an appeal to be heard, more detailed guidance from the Trust on the likely timeframe to consider appeals may increase the likelihood third parties engage with the complaints mechanism.

Publication of appeal decisions

The Trust has only considered one complaint appeal since the last triennial review of the Fair Trading Policy and Framework ‘in relation to the supply of television studio services in the London area’. The Trust published only a very brief summary of its decision in its Complaints and Appeals Bulletin ‘at the request of the appellant’. However, more detail about the nature of the complaint was published by the Executive at the time the original complaint was considered.

We were provided with access to documentation relating to the complaint as part of our review. The appeal was not upheld, but the Trust has not published its reasoning for that decision at the request of the appellant. As we are bound by the same reporting restrictions as the Trust, we limit our observations to the following:

- The evidence we have seen suggests the Trust and Trust Unit takes seriously its responsibility to third parties and its duty to enforce the Fair Trading Obligation.

- Third parties may have a legitimate interest in keeping details of complaints confidential. Indeed, one third party which had made an appeal to the Trust several years ago emphasised to us the importance of this protection in encouraging use of the complaints mechanism.

- Other regulators, such as the Competition and Markets Authority and Ofcom, have an obligation to publish reasons for decisions they take. Greater transparency of this sort could help the BBC and third parties better understand how the Trust will apply its Policy in practice, thereby potentially helping to resolve some of the concerns identified in Section 2.3 above.

- A significant amount of work was undertaken by the Trust in relation to BBC studio supply arrangements, and publication of this work, in part or in full, may help reassure the market that the BBC is compliant with the Fair Trading Obligation in relation to that activity.

- Publication of complaints findings does not need to be a binary choice. While the Executive and third parties have a legitimate interest in protecting confidential or commercially sensitive information, it does not necessarily follow that complaint decisions should be published either in full or not at all.

- While the Trust may want to encourage engagement with the complaints mechanism by offering complainants confidentiality, this could plausibly encourage vexatious complaints that may result in significant cost to the Executive. Some individuals within the Executive

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highlighted the resource implications to it of engaging with a full Trust appeal process.

On balance, we consider the overall functioning of the Fair Trading Framework may be better served if the Trust were to aspire to put reasoned decisions into the public domain irrespective of the outcome of the appeal, and while seeking to protect the legitimate interests of third parties.

**3.4 The Executive’s central advice team has changed significantly in recent years, which may impact on the functioning of the regime**

We understand the Trust considers the Executive’s central Fair Trading advice team as a ‘quasi-regulatory’ body within the Executive, and as such, a key component in the Executive’s system of Fair Trading controls. Consequently, the Trust may have set its level of ex-post intervention, which we consider low, taking into account the assurances this key control provides.

The evidence we have seen indicates that the advice team has changed significantly in recent years, which may reinforce the need for the Trust to increase its level of ex-post oversight. These changes are:

- A reduction in the number of advisors, resulting in:
  - An increase in the amount of advice given by competition lawyers; and
  - Increasing reliance on the divisions to self-assess compliance;

- Changes in the seniority of the Head of Fair Trading within the Executive; and

- Changes to the Executive’s decision-making processes.

Of themselves, these changes are not remarkable. Moreover, the Executive should expect a reasonable degree of latitude to configure its controls while still ensuring overall compliance with the Obligation.

However, the Trust may have concerns with these changes in combination with other factors; for example, the Executive’s emphasis on ‘hard’ competition and State Aid law principles (see Section 4.3); the high degree of self-assessment undertaken by the Executive (see Section 2.4); and given the weaknesses we have identified in the Executive’s system of internal checks and balances (see Section 2.5).

In particular, the Trust may be concerned that the cumulative effect of these changes is to weaken the Executive’s ability to achieve on-going compliance with the Obligation, especially those aspects of the Policy imposed by the Trust. In turn, this may necessitate a greater degree of Trust oversight.

Senior individuals within the Executive were clear they considered these changes would have no impact on the level of Fair Trading Advisor resource available to the divisions, the quality of advice, or the way in which advice was embedded in decision-making. However, not all individuals
we spoke to within the Executive shared this view.

More detail on the changes to the advice team is given below.

**Dedicated advisor posts have closed**

The number of full time equivalent Fair Trading advisors has fallen to three in the current financial year, from a high of more than five in 2010/11.

![Figure 4: Fair Trading Advice team headcount 2006/7 to 2014/15 (FTE)](image)

**Source:** BBC Executive. **Notes:** The Controller role/Head of Fair Trading and Competition Law and 1 FTE dedicated support have not been included below although they provide a percentage of resource which is flexible; from time to time additional flexible resource has been added to cover short term requirements and this is not reflected in the data; and, competition lawyers will also sometimes contribute on particular projects where Fair Trading issues have strong legal component. Since 2011/12, the Chief Advisor role has been shared by two individuals who overlap on one day in each week. Since 2011/12, the Compliance Advisor has split their time equally between Fair Trading and another part of the BBC.

This fall in advisors can be explained largely by the BBC’s reduced real-terms funding settlement since 2010:

- Cuts have disproportionately fallen on the BBC’s back-office functions, of which the Fair Trading advice team is a part.

- The reduced real-terms funding settlement has led to a refocusing of the BBC’s activity and, at least in general terms, a reduction in the amount of activity which may trigger Fair Trading concerns.

We are sceptical that the refocusing of the BBC’s activity in response to budgetary pressures has unambiguously reduced the amount of activity which may trigger Fair Trading concerns. Indeed, the evidence provided to us shows an increase in the number of queries to the central Fair
Trading advice team relating to separation, which was identified in stakeholder interviews as being one of the more difficult areas of the Policy and Framework to apply.

Recent external Fair Trading audits have highlighted the level of advisor resource as a potential concern, which was consistent with comments made to us by some individuals within the Executive about the ability of the central advice team to cope with peaks in demand.

As a consequence of the fall in advisor resource, competition lawyers have taken up some of this work\textsuperscript{34} and the divisions are expected to be more self-reliant. For example, we understand the Executive plans to supplement its Guidelines with additional guidance notes on specific issues so that divisions can ‘self-serve’.

The reduction in the Compliance Advisor resource does not appear to have adversely affected the Executive’s system of controls.

**Seniority of Head of Fair Trading within the Executive**

For a number of years, the Executive has been under pressure to reduce the total number of Senior Managers within the organisation. Prior to 2013, the head of the Fair Trading advice team was a ‘Controller’ within the Corporation and the position was a Senior Manager post.

The current Head of Fair Trading and Competition Law position is not a Senior Manager post within the Executive, and reporting lines have changed accordingly. There are now more layers of management between the Head of Fair Trading and the Executive board. Some individuals within the Executive suggested to us that the traction of the Fair Trading advice team had reduced as a consequence, but this was not the view of several senior individuals within the Executive, including some on its Board.

We note also that the Executive has combined the positions of Head of Fair Trading and Head of Competitive Law into a single position, which may reinforce the emphasis on ‘hard’ competition law principles (discussed further in Section 4.3)

**Single point of accountability**

Changes to the Executive’s governance model mean decisions will increasingly be taken by individuals, rather than by committee. This may result in the Fair Trading advice team having an advisory, rather than a gating function.

We have not been able to establish how material this issue is likely to be in practice, partly because the changes to the governance model have only recently been introduced.

\textsuperscript{34} We note that an increase of the advice given by competition lawyers may have the added effect of increasing the volume of advice covered by legal privilege, which may – in turn – impact on the functioning of the complaints mechanism.
4 Effect: "How well are the BBC’s arrangements working in practice, and are there areas for change or improvement?"

4.1 Summary

- We did not find evidence of the Framework having any unintended consequences, either for the Executive or for third parties. While several individuals within the Executive expressed frustration with the practical impact of the Framework on their work, they could not identify any activity which had been unnecessarily prevented due to the design or implementation of the Policy and Framework. Such frustration may imply the Framework is working appropriately.

- The principles underlying the Fair Trading Obligation do not appear to be as well understood as those underpinning the BBC’s Editorial Policy, and individuals within the Executive do not appear to demonstrate the same degree of pride in ensuring compliance with them. There is an emphasis within the Executive on ‘hard’ competition law and State Aid law principles rather than the elements of the Policy that go beyond mere compliance with existing legal obligations. Individuals within the Executive told us an emphasis on legal principles helped increase traction of Fair Trading issues, and may also reinforce compliance with competition and State Aid law. However such an emphasis may reduce the likelihood of compliance with the parts the Policy imposed by the Trust which are not derived from law, specifically, the Competitive Impact Principle and operational separation.

- Third parties lack trust in the arrangements between the BBC’s Public Service divisions and its commercial subsidiaries, due in large part to a perceived lack of transparency. Some third parties believe more detailed information about the relationships between the Public Service divisions and its commercial subsidiaries should be published, but the Executive has legitimate concerns about the ability of its commercial subsidiaries to compete effectively. The Executive puts into the public domain only the information about these relationships that it is required to, even where providing more information may help improve trust without having a negative impact on the commercial success of the subsidiary.

- The Executive is inconsistent in its interpretation of ‘operational separation’ across its commercial subsidiaries. Potentially due to the lack of clarity over what the Trust means by ‘operational separation’, the Executive interprets this requirement differently in respect of each of its commercial subsidiaries. BBC Global News is the most integrated with the Public Service. It is not clear the Trust would be comfortable with the same degree of integration with BBC Worldwide, although the policy applies equally to all commercial subsidiaries. Nor has the Trust explicitly set whether and why BBC Global News should be treated differently.

- The Executive sees the BBC as a small player in an increasingly global marketplace, which may result in it underestimating its impact in some of the domestic markets in which it operates. In our interviews with individuals within the Executive, recent changes in some of the markets in which the BBC operates were repeatedly emphasised; for example, the increase in strength of programme suppliers relative to broadcasters and the increasingly popularity of services such as Netflix. It appears that the Executive focuses on the relative size and strength
of the BBC in international markets rather than the UK. This gives rise to a risk that the Executive may underestimate its impact in some of the domestic markets in which it operates; for example, radio.

4.2 There is little evidence of the Framework having any unintended consequences

None of the individuals we spoke to within the Executive was able to provide an example of where the Framework had unintended consequences. Namely, where its delivery of the Public Purposes had been impacted or compromised by aspects of the Framework which were unnecessary to achieve compliance with the Fair Trading Obligation.

Only one third party gave an example where it considered the Executive’s desire to comply with its Fair Trading Obligation had unintended consequences. It suggested that the Executive makes significant demands of suppliers in tenders that fall below the European Public Procurement thresholds, which can be costly for them, both in terms of direct cost and opportunity cost. An individual within the Executive told us that it deals with a large number of suppliers and that standardised processes help it to reduce supplier management complexity and cost.

The Trust might consider this issue as part of its review of the BBC’s content supply arrangements. While procurement issues go beyond just the BBC’s content supply, we consider these issues to be likely to apply equally across different types of supply arrangement such that any insights from content supply arrangements might be applied more broadly.

4.3 There is an emphasis within the Executive on ‘hard’ competition law and State Aid law principles

While individuals within the Executive had a good general awareness and understanding of the Fair Trading Policy and Framework, there was particular emphasis on the ‘hard’ legal requirements of competition and State Aid law in the interviews we undertook. Understanding of the principles underpinning the Fair Trading Obligation was not consistent and they do not appear to be as well understood as those underpinning the BBC’s Editorial Guidelines – individuals within the Executive do not appear to demonstrate the same degree of pride in ensuring compliance with Fair Trading compared to Editorial Policy requirements.

In part, we consider this to be a result of the direct efforts of BBC Legal to emphasise to the broader Executive the statutory underpinning of the Fair Trading Policy, which it claims helps increase traction and awareness of Fair Trading within the Executive. This may also be caused by a lack of clarity on parts of the Policy implemented by the Trust, as highlighted in Section 2.3 above.

- In several interviews we undertook with individuals within the BBC, it was not clear that the difference between compliance with competition law and compliance with the Competitive Impact Principle was understood.

- ‘Transfer pricing’ was generally used as short-hand for separation requirements.

As set out in the European Public Contracts Directive (2004/18/EC), which sets the threshold at £172,514.
• While the brand requirements of the Fair Trading Policy did not arise often in our interviews, it was not clear to us that the locus between brand requirements and State Aid considerations was effectively understood. The ‘appropriate partner’ requirements appear to be better understood, perhaps because they also reflect requirements in the Editorial Guidelines.

This emphasis is also consistent with a desire expressed to us by some individuals within the Executive to have a ‘lighter-touch’ regulatory regime in which the BBC is held to a competition and State Aid law standard only.

The changes the Executive has made to its central Fair Trading advice team, highlighted in Section 3.4 above, may reinforce this emphasis on competition and State Aid law.

We note two possible effects of this emphasis on ‘hard’ competition and State Aid law principles:

• First, emphasising the hard legal requirements of the Fair Trading Obligation may increase the likelihood that compliance with Fair Trading is seen as just a legal requirement. This compares to a situation where the organisation demonstrates a culture of compliance with the underlying principles, and where individuals understand reflexively the behaviours expected of the Corporation. We make the contrast here with the BBC’s Editorial Guidelines, which appear more heavily engrained in the BBC’s culture.

• Second, over time, the emphasis on hard legal requirements may result in the Executive achieving compliance with only these requirements and not all aspects of the Policy, for example the Competitive Impact Principle and ‘operational separation’.

4.4 Third parties lack trust in the arrangements between the BBC’s Public Service divisions and its commercial subsidiaries, due in large part to a perceived lack of transparency

Third parties consistently expressed a lack of trust in the relationship between the BBC’s Public Service divisions and its commercial subsidiaries. Some third parties told us they had to ‘take it on trust’ that the Executive was compliant with the Fair Trading Obligation, and, in particular, with European State Aid law. We note, however, that the European Commission has never investigated a complaint in respect of the relationship between the BBC and its commercial subsidiaries.36 A few third parties considered the Executive should publish detailed financial and operational information, particularly in relation to the ‘first-look’ agreement between the BBC’s Public Service divisions and BBC Worldwide.

Some individuals within the Executive highlighted the large volume of information the BBC makes public each year, and the resources it dedicates to handling requests under the Freedom of Information Act (to which other broadcasters and rivals of the BBC’s commercial subsidiaries are not subjected).37 Several individuals within the Executive suggested that the BBC’s commercial

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36 The European Commission has investigated two complaints against the BBC on State Aid grounds: in relation to the establishment of BBC News 24 and in respect of the BBC Digital Curriculum. However, these complaints considered whether licence fee funds should be used to provide such services within the Public Service divisions, and did not relate to the relationship between the BBC and its commercial subsidiaries.

37 We note, however, that the Freedom of Information Act has specific exemptions designed to protect commercial interest, and upon which the BBC may be able to rely should requests be made about the relationships between its Public Service divisions and its commercial subsidiaries.
subsidiaries should not be obliged to publish information which amounts to business secrets and which may undermine their ability to operate successfully.

The relevant question for the purposes of our review is not whether the BBC makes a sufficient amount of information available in aggregate but whether the information it makes available is sufficient to demonstrate its compliance with European State Aid law and with the separation requirements imposed on it by the Trust.

While the Executive considers it is transparent in the relationships between its Public Service divisions and its commercial subsidiaries, we believe it has a tendency to be protective of such information, as described below. In general, the Executive appears to publish the minimum amount of information required by law. It is not clear to us that this level of information is sufficient to demonstrate publicly that the Executive meets the Trust’s requirements on separation, and our interviews with third parties suggest this level of information is not sufficient to ensure they are confident the relationships between the BBC’s Public Service divisions and its commercial subsidiaries are compliant with State Aid law.

Given the widespread lack of trust in the arrangements between the BBC and its commercial subsidiaries expressed to us by third parties, we consider the Executive could do more to demonstrate these relationships are compliant with the Fair Trading Obligation.

Financial reporting

Under European State Aid law, the BBC is required to maintain separate accounts in respect of its Public Service and commercial activities. This increases trust that public resources are not being used to illegally support commercial businesses.

Consistent with what the European Commission considers to be best practice, the Trust Unit has emphasised to us that the Trust’s preferred method of ensuring compliance with State Aid law is to separate the BBC’s commercial activities into separate subsidiary companies, operating on a transparent, arms-length basis with appropriate transfer pricing. Structural separation necessitates separate accounting. In respect of the commercial subsidiaries, the Executive complies with financial reporting requirements to a Companies Law standard.

The Executive considers it is appropriately transparent about the relationship between Public Service divisions and its commercial subsidiaries. It considers it publishes significant quantities of information and that it meets the requirements under applicable regulation; for example, the Transparency Directive. It questioned how useful additional information would be, and highlighted the potential cost implications of putting additional information into the public domain. The Executive was also concerned about the potential adverse impacts on its commercial subsidiaries of competitors having a more detailed knowledge of its cost base.

In practice, the Executive publishes relatively limited high-level financial and operational information in relation to the dealings between its commercial subsidiaries and its public service divisions.

- In its consolidated Annual Report and Accounts, the Executive publishes a basic profit and loss table for each of its main commercial subsidiaries (see Figure 5). This is supplemented with a

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38 This derives from the European Transparency Directive.
A brief written description of the activities of the business over the financial year, which can include additional financial information. For example, in the most recent Annual Report, the Executive reported total returns to the BBC Public Service in aggregate for the financial year.

**Figure 5: BBC commercial income reporting**

**Commercial trading**

The licence fee is supplemented by income from the commercial exploitation of licence fee funded content and infrastructure through three commercial subsidiaries – BBC Worldwide, BBC Global News and BBC Studios and Post Production (S&PP).

<table>
<thead>
<tr>
<th></th>
<th>Headline income</th>
<th>Headline result</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>£m</td>
<td>£m</td>
</tr>
<tr>
<td>UK PSB Group</td>
<td>269</td>
<td>277</td>
</tr>
<tr>
<td>BBC Worldwide</td>
<td>1,042</td>
<td>1,116</td>
</tr>
<tr>
<td>BBC Global News</td>
<td>101</td>
<td>92</td>
</tr>
<tr>
<td>S&amp;PP</td>
<td>29</td>
<td>38</td>
</tr>
</tbody>
</table>

*Source: BBC Annual Report and Accounts 2013/14*

- BBC Worldwide publishes an Annual Review on its website, including detailed financial accounts. However, the financial information is consolidated and so does not allow readers to understand the financial flows between BBC Worldwide and the Public Service divisions. This financial information is supplemented with a written description of the activities of Worldwide from its Chairman, Chief Executive and Chief Financial Officer, which can include additional financial information; for example, total returns to the BBC Public Service, separating out the dividend payment and investment in BBC Commissioned Content.

- BBC Studios and Post Production does not publish any financial information on its website. There is no corporate website for BBC Global News.

- We acquired the Annual Report and Financial Statements for both BBC Studios and Post Production Limited and BBC Global News Limited for the year ending 31 March 2014 from Companies House, but the financial information provided was consolidated and does not allow readers to understand the financial flows between either BBC Studios and Post Production Limited or BBC Global News Limited and the BBC’s Public Service divisions.

A key risk for the Executive is that third parties complain to the European Commission because they lack confidence in the arrangements between the Public Service divisions and its commercial subsidiaries. Even where the Executive could clearly demonstrate its compliance with State Aid law, it seems desirable to avoid any such complaints in the first instance. This may require the Executive putting a different level of information into the public domain than the law requires.

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**Notes:**


40 We note that the BBC Worldwide Annual Review is a comprehensive document and provides substantial detail on the broad range of its trading activities, both in the UK and overseas. However, for the purposes of our review, we are concerned with information relevant to the trading activities between the BBC Public Service divisions and BBC Worldwide.


42 [https://www.gov.uk/government/organisations/companies-house](https://www.gov.uk/government/organisations/companies-house). There was a fee for accessing this report.
The Trust does not appear to have outlined its expectations in terms of the amount and type of information it considers the Executive should make available on a regular basis. The Executive has at times provided additional information about key agreements between the BBC’s Public Service divisions and its commercial subsidiaries. For example, in 2009, the Executive suggested, and the Trust agreed, that it should be more transparent in the operation of its ‘first look’ agreement between the BBC and BBC Worldwide. This included a recommendation of a note in the BBC Annual Report of the operation of the first look agreement ‘during the year’.43 While this could be interpreted as ongoing commitment, the BBC published a note during the 2010/11 financial year and has not done so since.

This type of information, if published regularly, may help reduce some of the concern amongst third parties about the relationship between the BBC’s Public Service divisions and BBC Worldwide. Evidently the Executive does not consider such information would undermine the commercial success of BBC Worldwide, as it has previously made it available publicly.

We also note the BBC publishes less detailed financial information about its commercial activities than some other European Public Service Broadcasters, such as RTÉ in Ireland.44

Transfer pricing and other trading agreements

The BBC’s commercial subsidiaries, as members of the BBC group of companies, are reliant on the Public Service for the supply of certain support services; for example, IT services, payroll and HR, legal support, and accommodation. In addition:

• BBC Worldwide has a ‘first-look’ agreement with the Public Service, under which it gets first refusal to invest in the majority of co-production deals the Public Service enters into;

• BBC Studios and Post Production has a preferred supplier agreement with the Public Service for the provision of studio space for certain types of programming; and

• BBC Global News has agreements with the Public Service for the supply of content for World News and in relation to the international commercialisation of the BBC News website.

In all cases, based on the evidence we have seen, these agreements are conducted on an arms-length basis and, where applicable, are subject to transfer pricing arrangements. Establishing correct transfer pricing is crucial to ensure the effectiveness of the Trust’s separation requirements. Prices that are too low legitimise the kind of subsidy the Policy is designed to prevent. The Executive recognises this and, for some agreements, the Executive has obtained external legal and transfer pricing advice.

In some cases, these agreements are material to the operations of the BBC’s commercial subsidiaries; for example, the supply of content to BBC World News and bbc.com/news. However, the Executive does not systematically make available details of the agreements that exist between its Public Service divisions and its commercial subsidiaries. Audits of transfer pricing agreements

43 http://downloads.bbc.co.uk/bbctrust/assets/files/pdf/our_work/commercial/commercial_review.pdf
44 RTÉ has a similar structure to the BBC in that it has a separately constituted commercial subsidiary through which it undertakes most of its commercial activity. However, RTÉ’s public service channels accept advertising, so not all commercial activity is undertaken in its commercial subsidiary, and this also complicates RTÉ’s reporting requirements compared to that of the BBC, which does not accept advertising. Nonetheless, the RTÉ Annual Report and Accounts allocates commercial income to each of its public service channels and the Annual Return of RTÉ Enterprises Limited provides the aggregate value of the support services acquired from its parent company.
check to ensure the agreed method is complied with, but not that the method itself is compliant with the Trust’s Policy. Even where the Executive is acting in a compliant way, this lack of transparency can create confusion and suspicion amongst third parties.

The BBC’s Genre Boards provide a good example of the lack of transparency relating to the arrangements between the BBC’s Public Service divisions and its commercial subsidiaries. The Genre Boards are fora in which new programme commissions are discussed and, from time to time, the Genre Boards benefit from the expertise of distribution companies to understand the commercial potential of programme formats. The Genre Boards were designed to ensure that BBC Worldwide would be amongst a number of distributors which could be invited to attend Genre Board meetings. However, we understand in practice only one other distributor has attended any Genre Board meeting. There was little awareness amongst third parties we spoke to of the existence of the Genre Boards, despite the steps the Executive had taken internally to ensure they were designed to achieve compliance with the Fair Trading Obligation. It appears the Executive has not publicised the existence of the Genre Boards.

Management

A further example of the lack of transparency in relation to the arrangements between the BBC’s Public Service and its commercial subsidiaries relates to their respective management.

The Trust’s Fair Trading Policy requires the BBC’s Public Service divisions and its commercial subsidiaries to be operationally separate. The Executive is not consistent in the information it makes available publicly about the board composition of its commercial subsidiaries:

- The members of the board of BBC Worldwide are listed clearly on the BBC Worldwide website;

- The management team of BBC Studios and Post Production is listed on its website, but details of its statutory directors are not listed. This information is available from Companies House, but is not made freely available by the Executive.

- As there is no corporate website for BBC Global News, the Executive makes very limited information available about the statutory directors of the business. This information is available from Companies House. However, the BBC does not appear to make it clear in public that some of the directors of BBC Global News are shared with the Public Service and that the salary costs of those directors are split between them.

4.5 The Executive is inconsistent in its interpretation of ‘operational separation’ across its commercial subsidiaries

The Trust’s Fair Trading Policy states, inter alia, that there should be ‘financial, operational and structural separation between the BBC’s Public Service activities and its Commercial Services’. While this makes it clear that ‘structural’ and ‘operational’ separation are different requirements, several individuals within the Executive and several third parties have suggested the meaning of ‘operational separation’ is unclear.

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45 Page 7, Trust Fair Trading Policy.
Due partly to lack of clarity over its meaning, the Executive has interpreted the requirements for ‘operational separation’ in three different ways in respect of its three main commercial subsidiaries, as outlined below.

We consider that the extent of operational integration may compound the lack of trust third parties have in relationships between the BBC’s Public Service divisions and its commercial subsidiaries. As described in Section 4.4 above, the lack of trust arises mainly from the limited financial and operational information the BBC puts into the public domain.

Some third parties expressed concerns about cross-Directorships between the BBC’s Public Service divisions and its commercial subsidiaries, which we consider in more detail below.

**Differences across commercial subsidiaries**

The Executive has adopted the following broad approaches to operational separation in respect of each of its main commercial subsidiaries:

- **BBC Global News** is the most operationally integrated commercial subsidiary. It is heavily reliant on the Public Service divisions for its content and three of the seven directors of the Global News holding company are jointly paid by the commercial subsidiary and the Public Service.  

- **BBC Worldwide** largely operates on an arm’s length basis, but its non-Executive Directors are members of the BBC Executive board, its Chief Executive sits on the BBC’s Executive Board and it works with the BBC’s public service divisions to offer perspectives on international markets in the content commissioning process, via the ‘Genre Boards’.

- **BBC Studios and Post Production** has the highest degree of operational separation, relative to the other commercial subsidiaries, although two of its three statutory directors sit within the Public Service.

The Trust may consider any and all of these models consistent with its requirement for the BBC Public Service divisions and its commercial subsidiaries to be operationally separate, but this is not clear from its published documentation.

The extent of operational integration of BBC Global News is justified within the BBC Executive by the different nature of its activities compared to BBC Worldwide and BBC Studio and Post Production, specifically that the provision of news content is most aligned to the core remit of the BBC (in comparison to the activity of the other commercial activities). While the Trust may agree that the nature of BBC Global News is a special case within the Trust’s policy framework, it has not publicly articulated that to our knowledge.

The Policy applies equally to all commercial subsidiaries. If the Trust is content with the degree of operational integration between the Public Service and BBC Global News Limited, but would not be content with a similar degree of integration between the Public Service and BBC Worldwide, it should consider setting out why a different approach is justified.

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86 The directors which are shared with the Public Service divisions do not participate in the Global News bonus scheme, so are personally incentivised differently to other directors on the BBC Global News Limited board.
Cross-directorships

Some third parties expressed concerns to us about the sharing of directors between Public Service divisions and commercial subsidiary boards; for example, the position the CEO of BBC Worldwide holds on the BBC Group Board and the position the Director General of the BBC holds on the BBC Worldwide board. These third parties felt that BBC Worldwide would obtain an unfair advantage from the sharing of directors. Other third parties were less concerned about sharing of management compared to their concerns about the transparency of the trading arrangements between the BBC’s Public Service divisions and its commercial subsidiaries.

Concerns about cross-directorships were addressed by the Trust in its recent review of the Strategic Framework for the BBC’s Commercial Services. The revised Strategic Framework sets out clearly the Trust’s position on the extent to which cross-directorships are acceptable. The Trust requires the Executive to be clear on which organisations the Directors are primarily accountable to, and that it puts into place arrangements for managing any potential conflicts which might arise.

Implementing these requirements should go some way towards alleviating the concerns expressed to us by third parties. However, based on the evidence available to us in the course of our review, we note that where the Executive has shared directorships, it does not yet appear to have published details of the responsibilities for each of the directors for each of their roles, nor to have established formal processes setting out how it intends to manage conflicts if and when they arise.

4.6 The Executive sees the BBC as a small player in an increasingly global marketplace, which may result in it underestimating its impact in some of the domestic markets in which it operates

Most of the individuals we spoke to in the Executive gave the impression that the Corporation no longer considers itself dominant in a number of its key markets. The increasingly global nature of broadcasting markets, and the pressures this puts on the BBC, were repeatedly emphasised to us. For example, several individuals within the Executive highlighted the importance of streaming services, such as Netflix and Amazon Prime, and the rise of the ‘super-indie’. Consequently, the Executive portrays the BBC as a small player in a global market.

The pressures on the BBC’s commercial subsidiaries, particularly BBC Worldwide, to increase dividend returns to the BBC may also have resulted in a greater focus on international markets within the BBC’s Public Service divisions.

In interviews, few of the individuals within the Executive we spoke to framed their consideration of the strength of the BBC with respect to its audience share in the UK. In some cases, individuals defined the BBC’s competitor set more broadly than would be the case in a standard economic analysis. For example, we understand the success of its online assets is measured against sites such as Facebook and Google in terms of the amount of time audiences spend on the site, rather than solely in relation to providers of similar content.

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47 http://www.bbc.co.uk/bbctrust/our_work/commercial/commercial_framework
We also noticed an emphasis on the BBC’s largest operations, to the apparent detriment of a considered assessment of the market context of its ‘smaller’ operations. Radio in the UK, for example, has changed much less than television in recent years. Similarly, BBC Global News and BBC Studios & Post Production may be small relative to BBC Worldwide, but each still has the potential to distort the markets in which they operate. One third party suggested to us that the Trust also has a tendency to focus on BBC Worldwide in its oversight of the BBC’s commercial activity, to the detriment of effective oversight of its other commercial subsidiaries.

Irrespective of whether the BBC is ‘dominant’ in any given market, Ofcom has highlighted, and we agree, that the BBC still commands a significant share of audiences in all of its UK content markets.

We believe this focus on the BBC’s international presence and on its largest operations has the potential to adversely affect the Executive’s assessment of its compliance with the Fair Trading Obligation.

Taken in the round with the other issues highlighted in our review, we believe this further reinforces the need for more active Trust oversight.
5 Recommendations

As part of the scope of our review, we are required to give recommendations to the Trust regarding potential changes to its Fair Trading Policy and Framework. This section sets out the recommendations we believe follow from the findings of our review.

However, we recognise that:

• There may be more than one way of addressing any concerns we have identified.

• The Trust has a number of duties, of which ensuring compliance with the Fair Trading obligation is just one. It is a matter for the Trust as to how it prioritises these recommendations.

• There are, effectively, less than two years left until the next Charter, and debate about the BBC’s governance beyond the current Charter period has already begun. This may affect the Trust’s assessment of the relative costs and benefits of any given recommendation.

5.1 Improve the clarity of the Fair Trading Policy

One of our findings is that aspects of the Policy determined by the Trust are unclear to a number of individuals within the Executive and to several third parties. In addition, the full Fair Trading Policy and Framework is contained across a number of documents and some third parties find it difficult to navigate these documents. We believe there are some steps the Trust can take to help improve the clarity of the Fair Trading Policy.

To achieve this, we recommend that:

• The Trust should provide more guidance on those aspects of 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 to the Policy and Framework for third parties, specifying what behaviours the Policy and Framework seeks to prevent.

• The Trust should improve signposting in its Policy document, such that dependencies with other Trust Policies and documentation are clearer.

We note that some of the other recommendations we make relating to complaints handling and other ex-post tools available to the Trust may also indirectly improve clarity of the Fair Trading Policy.
5.2 Counter-balance framework away from Executive self-assessment

A key finding was that the overall Fair Trading framework was, in practice, weighted towards Executive self-assessment. We believe the Trust should counter-balance the framework away from self-assessment. This recommendation is reinforced by other findings, such as potential gaps in assessment of market impact and the risk that the Executive may underestimate its potential market impact in certain of its domestic markets given its increasingly international focus, the recent changes to the advice team, and the emphasis on ‘hard’ competition and State Aid law principles.

Use of the ex-post tools available to the Trust may also increase confidence among third parties that the BBC is compliant with the Fair Trading Obligation.

To achieve this, we recommend that:

• The Trust should utilise its ex-post tools of review with greater frequency, specifically:
  ○ It should undertake more ‘own-initiative’ investigations; and
  ○ It should consider using Service Licence reviews or ‘own-initiative’ investigations (or another mechanism) to systematically consider the cumulative impact of changes to the BBC’s online services.

• We believe the recently announced ‘own-initiative’ investigation by the Trust into the relationships between the BBC’s Public Service divisions and its commercial subsidiaries will help address third party concerns about such relationships. We believe the Trust, as part of that review, should reflect on whether regular monitoring of such arrangements is necessary, particularly in respect of transfer pricing arrangements.

• The Trust should make certain changes to the complaints mechanism:
  ○ Establish an explicit target length of time in which it aims to consider Fair Trading complaint appeals.
  ○ Commit to publishing reasoned decisions in all appeals, irrespective of the outcome.
  ○ State clearly how it will treat confidential information in appeals, recognising the importance of reasoned decisions to the functioning of the Framework and the legitimate interests of third parties and the Executive in respect of confidential information.

• The Trust and the Executive Fair Trading Committee should interact more frequently or otherwise establish more direct channels of communication (for example, using the BBC’s Company Secretary).
5.3 Increase confidence that the Executive is compliant through additional and clearer public reporting

A key finding is that third parties, in general, lack confidence that the relationships between the BBC’s Public Service divisions and its commercial subsidiaries comply with the Obligation. We recommend that the Trust provide greater clarity on what reporting it expects from the Executive and increases the amount of relevant information the Executive publishes on a regular basis.

Given the amount of information which the BBC already publishes, we also consider the Trust and Executive may benefit from making relevant information more easily accessible via its website, which we found difficult to navigate.

To achieve this, we recommend that:

- The Trust should explicitly state the information it expects the Executive to publish on a regular basis in respect of the relationship between in Public Service divisions and its commercial subsidiaries. Any additional reporting requirements should be balanced against ensuring business secrets of the BBC’s commercial subsidiaries are protected. Such information could include:

  - A clear statement, at a high-level, of the financial flows between the BBC’s Public Service divisions and the commercial subsidiaries, recognising that the nature of the agreements differ across the commercial subsidiaries. The Trust should consider making the Executive publish this information on a segmental basis, for example the total value of BBC Worldwide investment in Public Service commissions by genre.

  - A schedule of the key agreements that exist between the Public Service and each of its commercial subsidiaries, including ‘first-look’ or preferred supplier agreements. We believe the Trust should consider publishing high-level details of the value of such agreements, recognising the nature of the agreements varies across the commercial subsidiaries.

  - An annual statement on the functioning of the ‘first-look’ agreement that exists between BBC Worldwide and the Public Service, similar to that published in the 2010/11 Annual Report and Accounts.

  - Full details of the management teams and statutory directors of each commercial subsidiary, highlighting:

    - Those individuals who work for both the Public Service and a commercial subsidiary, and their key duties in respect of each;

    - Those individuals whose remuneration is split between Public Service and a commercial subsidiary; and

    - A clear public statement of how conflicts will be managed, if and when they arise.
• Both the Trust and the Executive should improve the Fair Trading sections on their respective websites to ensure simpler and easier access and navigation to relevant information, including that currently published in the BBC's Annual Report and Accounts and the Trust and Executive Complaints Bulletins.
### Appendix A – Detailed scope

<table>
<thead>
<tr>
<th>Trust research question</th>
<th>Key considerations</th>
</tr>
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| Has the BBC Trust established an appropriate policy framework to deliver its obligations in relation to fair trading? | a) Does the policy framework meet the obligations set out in the Charter and Agreement?  
b) Do the policies and framework reflect current legislation and/or regulation?  
c) Can the policy framework be simplified?  
d) Does the Trust’s competitive impact code on cross promotion continue to remain relevant? Is there a need for new codes?  
e) What are the views of key external stakeholders on the policy framework?  
f) Is the policy framework clear on how the Trust considers the BBC should comply with its fair trading obligations? Is any ambiguity justified?  
g) Is the Trust’s balance of ex-ante guidance and scrutiny and ex-post review appropriately calibrated (taking into account resource constraints)?  
h) Have the 2011 amendments to the policy framework been effective? |

| Has the BBC established effective fair trading arrangements to implement the Trust’s fair trading policy framework? | a) Has the BBC implemented its fair trading arrangements in accordance with the Trust’s policies and code?  
b) Are the arrangements the BBC has in place clear and well communicated to relevant staff?  
c) Are the BBC’s fair trading obligations well embedded in the organisation, with adequate levels of resource and senior management commitment?  
d) Is staff training in fair trading issues adequate?  
e) Is the Fair Trading advice team used effectively to manage risk?  
f) Is the complaints mechanism working effectively?  
g) Is the BBC effective in ensuring it embeds learning from complaints, interaction with the BBC Trust and market developments in its approach to meeting its fair trading obligation? |
<table>
<thead>
<tr>
<th>Trust research question</th>
<th>Key considerations</th>
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<tbody>
<tr>
<td>How well are the BBC’s arrangements working in practice, and are there areas for change</td>
<td>a) Does the BBC have a clear understanding of its fair trading obligations and risks and is it taking the appropriate action to meet these?</td>
</tr>
<tr>
<td>or improvement?</td>
<td>b) Are plans based on a sound understanding of the possible impacts on the wider industry, technological developments and trends in audience behaviours?</td>
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<td></td>
<td>c) When viewed as a whole, do the BBC’s fair trading arrangements provide adequate assurance that the fair trading obligations as set out in the Charter and Agreement are being met?</td>
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<td>d) Is advice from the Fair Trading advice team acted upon?</td>
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<td>e) Does the policy framework have any unintended consequences which makes it harder for the BBC to deliver its public purposes? Or on third parties?</td>
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<td></td>
<td>f) Is the BBC and BBC Trust sufficiently transparent such that the public and third parties can be confident that the BBC is meeting its fair trading obligations?</td>
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## Appendix B – List of interviewees

### BBC

<table>
<thead>
<tr>
<th>Area / Division</th>
<th>Job Title</th>
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</table>
| Executive Board | Managing Director Finance and Operations  
|                 | Senior Non-Executive Director  
|                 | Company Secretary |
| Television      | Finance Director, Television  
|                 | Commercial Director, Television  
|                 | Head of Business Development & Commercial Manager, Publishing |
| Radio           | Finance & Business Director, Radio (and Strategy & Digital)  
|                 | Finance Business Partner, Radio  
|                 | Head of Commercial & Business Development, Rights & Business Affairs, Radio |
| Online          | COO, BBC Future Media and BBC Online |
| News            | Controller of Legal and Rights, BBC World Service Group  
|                 | Chief Operating Officer, BBC World Service Group  
|                 | Finance Director, News |
| Operations      | Director of Risk and Assurance  
|                 | Director of Corporate Finance  
|                 | Director, Policy & Charter Review  
|                 | Controller of Strategy: Commercial, Production, Global & Operations  
|                 | Group General Counsel  
|                 | Deputy General Counsel  
|                 | Head of Competition Law and Fair Trading  
|                 | Fair Trading Advisors  
|                 | Senior Advisor, Editorial Policy and Standards |
| Commercial Subsidiaries | Company Director, Studio & Post Productions  
|                           | Head of Finance and Business Operations, Studio & Post Productions  
|                           | CEO, Global News  
|                           | Director of Finance, Global News  
|                           | Director of Regulatory Affairs, BBC Worldwide |
Third parties

- Ofcom
- British Sky Broadcasting
- ITV
- Virgin Media
- Sony Pictures Television UK
- COBA
- PACT
- Global Radio
- talkSPORT
- RadioCentre
- Pinewood Studios
- Somethin' Else
- UKIE
- Deloitte
Appendix C – Other issues

Some issues that have relevance to the Fair Trading Policy Review could be considered more fully by the Trust in the context of other reviews, or broader policy discussions.

Overall governance of the BBC

Many third parties expressed views on the over-arching governance of the BBC, particularly the ‘dual-role’ of the Trust as champion and regulator of the BBC. Third parties emphasised, in particular, the tension between these roles, and their perceptions on the impact of the dual-role of the Trust on the way in which it governs the BBC.

These issues are clearly beyond the scope of our review, and are likely to be discussed in detail during the next Charter renewal process.

BBC Production

Several third parties were interested in the BBC’s plans to put its in-house production arm into a commercial subsidiary. The plans were announced during the course of our review. Notwithstanding the fact that the BBC is still working through how this plan might be achieved in practice, our understanding of the plans is that they would not be delivered within the current Charter period. In any event, the plans would likely require detailed Trust scrutiny.

Consequently, we consider issues relating to this specific proposal outside the scope of our review. However, to the extent the current Fair Trading regime continues beyond this Charter period, our review may have an indirect impact on BBC Production.

Talent deals

Third parties raised several issues in respect of the BBC’s approach to talent:

• **Talent pay.** While third parties recognised the BBC has moderated its approach to talent remuneration, they still felt the BBC set the market rate for talent.

• **‘Bundling’ of talent opportunities.** Third parties in certain sectors suggested the ability for the BBC to offer exposure across a range of media acted as a barrier to attracting talent in their sector.

• **Ancillary restraints on talent.** One third party suggested the BBC imposed restraints on the ability of its talent to work for other broadcasters, with the specific example being the ability for talent to take part in charitable activities linked to other broadcasters.
The Trust has recently published an independent review of the BBC’s talent costs where such issues were examined in more detail.48

Terms of trade

The Terms of Trade the BBC agrees with its suppliers are one way of it ensuring compliance with its Fair Trading Obligation.

Some third parties suggested the current Terms of Trade in radio and online had two potential adverse effects:

- First, the secondary rights terms prevented suppliers from obtaining value in secondary markets, even where they perceived demand, and where the BBC had not shown interest in attempting to exploit the rights they retained; and

- Second, it meant that fewer resources were used in the production of content for the BBC as suppliers sought to preserve margin, the implication being that if there was an opportunity to exploit secondary rights, suppliers may dedicate resources of a greater value than the cost to the BBC.

Conversely, one third party believed that the changes in the independent television production sector (i.e., consolidation) meant the Terms of Trade for television supply should be reconsidered, so that less protection is offered to large, international ‘super-indies’.

The Trust is currently examining the BBC’s content supply and production, and these issues are better examined in more detail in that review.49