



National Audit Office

Report

by the Comptroller
and Auditor General

BBC

Investigation into the BBC's engagement with personal service companies

Our vision is to help the nation spend wisely.

Our public audit perspective helps Parliament hold government to account and improve public services.

The National Audit Office scrutinises public spending for Parliament and is independent of government. The Comptroller and Auditor General (C&AG), Sir Amyas Morse KCB, is an Officer of the House of Commons and leads the NAO. The C&AG certifies the accounts of all government departments and many other public sector bodies. He has statutory authority to examine and report to Parliament on whether departments and the bodies they fund, nationally and locally, have used their resources efficiently, effectively, and with economy. The C&AG does this through a range of outputs including value-for-money reports on matters of public interest; investigations to establish the underlying facts in circumstances where concerns have been raised by others or observed through our wider work; landscape reviews to aid transparency; and good-practice guides. Our work ensures that those responsible for the use of public money are held to account and helps government to improve public services, leading to audited savings of £741 million in 2017.



National Audit Office

BBC

Investigation into the BBC's engagement with personal service companies

Report by the Comptroller and Auditor General

Ordered by the House of Commons
to be printed on 14 November 2018

This report has been prepared under Section 6 of the
National Audit Act 1983 for presentation to the House of
Commons in accordance with Section 9 of the Act

Sir Amyas Morse KCB
Comptroller and Auditor General
National Audit Office

13 November 2018

This investigation sets out the facts in relation to the nature of, and associated issues relating to, individuals the BBC hires on a freelance basis, particularly those it hires through personal service companies. It also sets out how the BBC handled two developments in 2017 that altered its relationship with many individuals it hires on a freelance basis.

Investigations

We conduct investigations to establish the underlying facts in circumstances where concerns have been raised with us, or in response to intelligence that we have gathered through our wider work.

© National Audit Office 2018

The material featured in this document is subject to National Audit Office (NAO) copyright. The material may be copied or reproduced for non-commercial purposes only, namely reproduction for research, private study or for limited internal circulation within an organisation for the purpose of review.

Copying for non-commercial purposes is subject to the material being accompanied by a sufficient acknowledgement, reproduced accurately, and not being used in a misleading context. To reproduce NAO copyright material for any other use, you must contact copyright@nao.gsi.gov.uk. Please tell us who you are, the organisation you represent (if any) and how and why you wish to use our material. Please include your full contact details: name, address, telephone number and email.

Please note that the material featured in this document may not be reproduced for commercial gain without the NAO's express and direct permission and that the NAO reserves its right to pursue copyright infringement proceedings against individuals or companies who reproduce material for commercial gain without our permission.

Links to external websites were valid at the time of publication of this report. The National Audit Office is not responsible for the future validity of the links.

Contents

What this investigation is about 4

Summary 6

Part One

Background 10

Part Two

The BBC's historical relationship
with freelancers 18

Part Three

Government reforms in 2017 26

Part Four

Impact of the 2017 reforms
on the BBC 32

Appendix One

Our investigative approach 36

The National Audit Office study team consisted of:
Marili Boufounou, Helen Hodgson,
Adil Jamil and Howard Revill,
under the direction of Louise Bladen
and Tim Phillips.

This report can be found on the
National Audit Office website at
www.nao.org.uk

For further information about the
National Audit Office please contact:

National Audit Office
Press Office
157–197 Buckingham Palace Road
Victoria
London
SW1W 9SP

Tel: 020 7798 7400

Enquiries: www.nao.org.uk/contact-us

Website: www.nao.org.uk

Twitter: @NAOorguk

What this investigation is about

1 This investigation examines the nature of, and associated issues related to, individuals the BBC hires on a freelance basis, particularly those hired through personal service companies (PSCs). A PSC is commonly understood to mean a limited company that typically has a sole director who owns most or all of the shares of the company and who provides their services to clients via a contract between the client and the PSC. PSCs are a legitimate way of contracting for services and are commonplace across many sectors, including the media industry. PSCs can offer both advantages and disadvantages to the individual and hiring body.

2 If not operated correctly, PSCs can pose a risk to the Exchequer. In the late 1990s, the government was concerned that some people were using intermediaries, such as PSCs, to avoid paying the correct amount of tax. The government's concerns centred on 'disguised employees' – people who do the same job in the same manner as an employee, but who avoid paying income tax through PAYE¹ and national insurance contributions because they are hired through an intermediary such as a PSC. This situation is possible because there are different tax regimes for personal and business income.

3 To address these concerns, the government introduced legislation in the Finance Act 2000. This legislation, commonly known as IR35, sought to eliminate tax avoidance by 'disguised employees', by ensuring that people who work in the same manner pay broadly similar amounts of income tax and national insurance, whether they are employed directly or work through a PSC. HM Revenue & Customs (HMRC) undertakes compliance work to enforce the legislation, which can involve investigations into the tax affairs of PSCs.

4 Central to the application of IR35 is the assessment of an individual's employment status for tax purposes. Assessing employment status is complicated as there is no precise statutory test of what constitutes an employment relationship. Instead, each individual's case must be assessed on its own merits against a number of factors. Prior to April 2017, responsibility for assessing the employment status of individuals engaged via PSCs and ensuring the correct tax was paid rested with the PSC themselves. The PSC therefore bore the risk of incorrectly assessing employment status and the risk of associated tax liabilities as a result of such misclassification.

¹ PAYE (pay as you earn) is a system of paying income tax in which an employer pays an individual's tax directly to the government, and then takes this amount from the individual's salary or wages.

5 In April 2017, the government introduced reforms whereby public bodies, including the BBC, became responsible for determining the employment status for tax purposes of all those it hired through PSCs. The government introduced this change to strengthen the public sector's role in ensuring that the individuals it hires comply with the IR35 rules. In May 2016, HMRC estimated that only 10% of the PSCs that should have been operating the IR35 rules on at least part of their income were actually doing so, and that this non-compliance would cost the Exchequer an estimated £440 million in 2016-17.

6 The Committee of Public Accounts first addressed the BBC's use of PSCs in 2012 as part of a wider enquiry into off-payroll working across the public sector. The issue then became public again in 2018, when an open letter from a group of presenters in March 2018 expressed dissatisfaction with how the BBC handled the April 2017 changes. There were also questions about the BBC's use of PSCs raised by the Department for Digital, Culture, Media & Sport Select Committee in March 2018 and the Committee of Public Accounts in April 2018.

7 The chair of the Digital, Culture, Media & Sport Select Committee asked the National Audit Office to examine the BBC's engagement of PSCs. We focused our investigation on four areas:

- the context of the BBC's use of PSCs;
- why the issues with PSCs have arisen now and the scale of these issues;
- how the BBC has managed its use of PSCs; and
- relevant interactions between the BBC and HMRC.

8 We have not examined the specific affairs of freelancers hired by the BBC, nor do we make any judgement on whether the correct amount of tax has been paid by the BBC or any individual it hires.

9 In this report we refer to freelancers as any individual who is not a staff member of the BBC. This can include individuals who are employed or self-employed for tax purposes and who are hired as individual sole-traders, or through an intermediary such as a PSC.

Summary

Key findings

The BBC's historical relationship with freelancers

1 In order to meet its business needs, the BBC hires thousands of freelancers every year, covering a number of different roles both on-air and off-air. In 2017-18, the BBC hired some 60,000 freelancers, including actors, entertainers and off-air workers, such as camera operators. Hiring freelancers is common practice in the media industry and gives broadcasters the flexibility to make changes quickly that reflect programming and audience needs. For freelance roles, individuals can operate as sole-traders or through a personal service company (PSC), and may be employed or self-employed for tax purposes. In 2017-18 the BBC had contracts with 5,145 PSCs, on which it spent a total of £84 million (paragraphs 1.5 and 2.2, and Figures 3 and 7).

2 Before 2013, the BBC based its decisions on whether roles were employed or self-employed for tax purposes on its understanding of HM Revenue & Customs' (HMRC) guidance and, for on-air presenters, of industry practice. According to the BBC, correctly assessing employment status for tax purposes is crucial in order to help it determine what contracting models can be used to hire freelancers. At this time, the BBC bore the risk of incorrectly assessing the employment status of individuals it hired directly, either as employees or as freelance sole-traders, and of the associated tax liabilities of such misclassification. For those it engaged indirectly through PSCs, the responsibility for assessing employment status and for paying the correct tax rested with the PSC. The BBC made use of HMRC's general guidance on employment status and media-specific guidance covering most on-air and off-air roles. The latter set out what roles HMRC considered to be self-employed for tax purposes and therefore what the correct tax treatment was. However, there was a lack of clear media-specific HMRC guidance for on-air television, and for radio presenters on long-term engagements. The BBC considered these roles to be self-employed in line with its understanding of industry practice (paragraphs 1.7, 1.11 and 2.3 and Figure 5).

3 Between 2004 and 2013, the BBC developed policies for what contracting method could or should be used when hiring freelancers in on-air roles.

In the early 2000s, the BBC had no preference as to whether it engaged freelancers directly as sole-traders or indirectly through PSCs. It considered presenting roles to be self-employed, and therefore it did not deduct PAYE or employee's national insurance contributions, or pay employer's national insurance contributions. However, when the BBC became uncertain about the employment status for tax purposes of, in particular, the BBC's news presenters in 2004, following an HMRC review of 100 BBC cases, and its other television and radio presenters in 2008, after an HMRC review of the commercial radio industry in 2007. It then introduced policies requiring freelancers engaged in longer-term or higher-value presenter roles to be hired through PSCs. This reduced the risk for the BBC (paragraphs 2.3 to 2.6 and Figure 8).

4 In response to a Committee of Public Accounts report in 2012, the BBC revised its policies.

From November 2013, the BBC began to use a new test for assessing the employment status of freelance television presenters and radio news presenters, while continuing to use the radio industry guidelines for non-news radio presenters.² It developed this new test, with Deloitte and in liaison with HMRC. The BBC also adopted a new policy for freelance television and radio news presenters, under which it offered those it assessed as employed for tax purposes the option of one of two new on-air talent (OAT) employment contracts. According to the BBC, all its news presenters who had previously been engaged through PSCs moved onto an OAT employment contract. By March 2018, the BBC had 90 OAT contracts (paragraphs 2.7, 2.10 to 2.12 and Figures 9 and 10).

Government reforms and the BBC's response

5 A change in responsibilities in 2017 altered the BBC's relationship with some of its freelancers. In April 2017, the government transferred responsibility for determining the employment status for tax purposes of people hired through PSCs from PSCs themselves to the public sector bodies hiring them. This meant that the BBC became responsible, for the first time, for deducting income tax and national insurance from payments to PSCs if it determined that the individual hired through the PSC was employed for tax purposes. The BBC had raised concerns about this in a consultation response to HMRC in August 2016, stating that it doubted whether its accounting and payroll systems would be ready, and its staff trained, for the 2017 changes. Others responding to the consultation also raised similar concerns. The BBC also raised concerns in March 2017 about the number of potential determinations it faced, the associated resource implications and the potential impact on the individuals concerned (paragraphs 3.4 to 3.7 and 4.2 and Figure 13).

² The radio industry guidelines were published in 2008 after HMRC's 2007 review of the commercial radio sector.

6 The BBC used HMRC's new Check Employment Status for Tax (CEST) tool to assess the status of its freelancers. HMRC introduced CEST in March 2017 to help users to assess employment status for tax purposes in all sectors of the economy. The BBC was involved in discussions with HMRC about the tool's development from August 2016. The first version of the tool that HMRC said it would stand behind was available to the BBC on 20 February 2017. This left the BBC with less than two months to test, give feedback and adopt the tool prior to the introduction of its new responsibilities in April 2017. Although its use is not mandatory, the BBC adopted the tool as HMRC had made it clear that it would stand behind CEST. The BBC's use of its 2013 test for TV and radio news presenters was only meant to be temporary, until HMRC introduced its own revised tool, and in 2015-16 HMRC had queried the BBC's use of this test in certain cases. HMRC had also told the BBC of its intention to replace the radio industry guidelines with a revised tool, although, as at October 2018, the guidelines were still in place. HMRC had questioned the BBC's application of these guidelines in summer 2016 (paragraphs 2.10, 2.13, 3.2, 3.3, 3.6 and 3.8).

7 Use of HMRC's CEST tool generated a different employment status for tax purposes in many cases, compared to the BBC's use of its own assessment test and HMRC guidance. The BBC's use of CEST initially produced an 'unable to determine' employment status result in almost half of 255 on-air cases assessed, which reduced to zero following discussions with, and more guidance from, HMRC. It was not until August 2017, following these discussions and guidance, that the BBC felt sufficiently confident to rely on CEST. Between August 2017 and June 2018, the BBC assessed 663 on-air freelancers using CEST, 92% of whom received an 'employed for tax purposes' determination. This contrasts with the situation before April 2017 where the BBC had assessed the majority of on-air freelancers as self-employed, using either its own assessment test or the radio industry guidelines. For on-air roles, the BBC has continued to use the additional guidance it received from HMRC along with CEST. According to HMRC, CEST is a live tool that it is committed to keeping under review. To improve guidance available to those working in the media industry, the BBC, alongside commercial media organisations, is currently working with HMRC on updating HMRC's employment status manual (paragraphs 3.2, 3.9, 3.11 and 3.13).

The impact of the BBC's response

8 Between April and September 2017 the BBC paid £8.3 million of tax on account to HMRC to avoid any penalty charges for not paying tax that was potentially due. The BBC made payments of income tax and national insurance contributions on account to HMRC totalling £8.3 million, to cover any potential tax that it should have paid between April 2017 and the time at which an individual's status became clear later in the year. Once the BBC had sufficient confidence in CEST, from August 2017, it started to recoup this money when it was certain about an individual's employment status for tax purposes. It has not yet fully done so, in part because of concerns raised by individuals. By June 2018, it was yet to recoup £2.9 million (paragraphs 4.6 and 4.7).

9 Implementation of the 2017 reforms has adversely affected the BBC's relationship with some of its presenters. Some individuals disagreed with the determination CEST gave and an open letter from a presenters group in March 2018, representing over 170 presenters, expressed dissatisfaction with how the BBC handled the April 2017 changes. Some individuals claim that the BBC bears some responsibility in relation to HMRC's tax demands relating to before April 2017, as they only started operating through PSCs because the BBC required them to. They also feel that they received misleading or limited information from the BBC at this time. According to the BBC, it required these people to set up PSCs as they had most knowledge of their own circumstances and were best placed to ensure the correct payment of tax. We have seen evidence of the BBC telling those it asked to form PSCs to seek independent advice from a professional financial advisor, but cannot say whether it did this in every case as we have not undertaken a detailed audit of individual cases. Individuals have also expressed a fear that a change in their assessed employment status as a result of CEST could open them up to retrospective HMRC investigations (paragraphs 2.14, 2.15 and 4.9 to 4.11).

10 The BBC has taken steps to help affected individuals. By August 2018, the BBC paid bridging loans to three people, totalling £2,550, to enable them to overcome short-term cash-flow problems and has given a contribution towards additional book-keeping fees arising from the IR35 compliance changes to 33 people with PSCs, totalling almost £12,000. In addition, in March 2018, the BBC announced its intention to set up an independent mediation process for cases where on-air presenters, who were hired through PSCs, believe the BBC bears some responsibility in relation to HMRC demands for employers' national insurance contributions relating to before April 2017. It has yet to finalise this process as it has approached HMRC to discuss the possibility of an alternative approach to resolving historical cases, which may potentially offer advantages over the mediation process (paragraphs 4.8 and 4.10).

11 Issues relating to the BBC's relationship with its freelancers remain unresolved and may have financial implications for the BBC. In its *Annual Report and Accounts 2017-18*, the BBC recognised potential financial consequences as a result of issues surrounding freelancers' employment status as a contingent liability. However, it did not recognise a provision for this matter because the process and outcome were uncertain.³ This uncertainty remains and could be affected by other possible actions taken by affected individuals. By May 2018, the BBC estimated that some 800 presenters, nearly 300 of whom were hired through PSCs, warranted further review as they were at risk of being challenged by HMRC. This could involve tax arrears for the BBC and for the PSCs. According to HMRC, as at October 2018, there were about 100 open investigations into BBC-related PSCs. All of these concerned arrears of tax before the April 2017 changes. All open cases relate to tax years prior to 2017 and the vast majority of these were opened prior to the reform (paragraphs 3.11, 4.11 and 4.12).

³ A liability is a present obligation of an entity arising from past events, which is expected to result in an outflow of economic benefits for the entity. A contingent liability is a possible liability that may occur depending on the outcome of uncertain future events. A provision is a liability of uncertain timing or amount.

Part One

Background

1.1 This part of the report covers the general background to our investigation. It describes:

- employment status and how this affects what tax people pay;
- different ways of hiring freelancers; and
- relevant tax legislation and guidance.

Employment status

1.2 An individual's employment status for tax is either employed or self-employed, and this determines the tax regime that applies to that individual's income. There is a distinction between employment income and business income, as these are subject to different legislation and different tax rates (**Figure 1**). The government taxes dividend income at a lower rate than employment income, to support entrepreneurship and encourage shareholder investment.⁴

Figure 1
Current tax rates

Personal Income		Business Income
Employee	Self-employed	
Income tax (20%/40%/45%)	Income tax (20%/40%/45%)	Corporation tax (19%)
Employee national insurance contributions (12%/2%)	Self-employed (class 4) national insurance contributions (9%/2%)	Either:
Employer national insurance contributions (13.8%)	Not applicable	<ul style="list-style-type: none"> • Dividend tax on dividends taken (7.5%/32.5%/38.1%) • Capital gains tax when company is wound up (20%/10%)

Note

1 The percentages applicable depend on the value of the income, dividend or capital gain. See Gov.UK for current monetary thresholds.

Source: HM Revenue & Customs

4 A dividend is a distribution of a portion of a company's earnings paid to its shareholders.

1.3 An individual's employment status for tax purposes is different from their employment status for the purpose of determining what employment rights, such as sick pay, they are entitled to. Our investigation does not cover the issue of an individual's status for employment rights purposes.

1.4 The financial impact of an individual's employment status for tax can be significant as the income tax and national insurance payments made if assessed as employed for tax purposes can reduce the person's net income, compared to being self-employed for tax purposes, because different tax rates apply. There is no precise statutory test of what constitutes an employment relationship. Each individual's case must be assessed on its own merits against a number of factors and in reference to case law. Although there are many factors in determining employment status (**Figure 2** overleaf), three are key, according to case law:⁵

- whether there is a personal service (that is, an individual will provide his or her own work and skill in performing a service for a hiring body);
- whether the hiring body has control over the individual and to what degree; and
- other provisions of the contract.

How freelancers work for organisations

1.5 Freelancers are individuals who are not employees of a hiring body, but work as a self-employed sole-trader or via a company, such as a personal service company (PSC) or an agency. The use of freelancers brings advantages and disadvantages, both for the individual concerned and the body hiring their services (**Figure 3** on page 13). PSCs are common in a number of sectors, including oil and gas, engineering, construction, teaching, and the entertainment and media industry. Individuals working through their own PSC can be treated as employed or self-employed for tax purposes, depending on the nature of the work they are doing, and pay different amounts of tax accordingly (**Figure 4** on page 14).

⁵ The seminal case is *Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance* (1968).

Figure 2

Factors considered when determining employment status

Factor	Description
Mutuality of obligation	The individual will be under a duty to do the work and the employer/hiring body will be obliged to pay for that work.
Personal service	The individual provides their skill to do the work. If they can substitute another person to do the work, they are likely to be self-employed.
Control	For an individual to be employed, the hiring body must have a right to exert a sufficient degree of control over what the individual has to do, and where, when and how it has to be done.
Financial risk and opportunity to profit	Extent to which the individual can make a profit or lose money (for example, whether they are required to correct their errors at their own expense). The greater the financial risk, the more likely they are to be self-employed.
Basis of payment	Typically, employees tend to be paid a fixed wage or salary by the week or month and self-employed individuals are often paid a fixed sum for a particular job.
Provision of equipment	If an individual is required to, and does, provide major items of equipment that are fundamental to and necessary for the work, then this is usually an indication that they are self-employed.
Personal factors	If the individual regularly works for a number of different hiring bodies, it is more likely that they are self-employed.
Length of engagement	The longer an engagement, the more it is suggestive of employment.
Part and parcel	Extent to which the individual is integrated into the hiring body's organisation, with more integration suggestive of employment.
Benefits	Statutory entitlements to benefits, such as paid leave, are due to employees and not to the self-employed.
Termination	A self-employed engagement would usually be for a specific piece of work or a specific period of time. A contract of employment requires a period of notice by both parties.
Intention of the parties	What the parties call their relationship, or what they consider it to be, is not conclusive. It is the reality of the relationship that matters.

Notes

- 1 This is not an exhaustive list.
- 2 Employment status has to be determined on a case-by-case basis, looking at the contract and the reality of the engagement as a whole. These factors help paint an overall picture on which a determination of employment status can be based.

Source: HM Revenue & Customs

Figure 3

Comparison of different freelance contracting models

Personal service company (PSC)

Advantages to the individual:

- can earn income from more than one hiring body;
- can split shareholdings with others, so any dividends received from the PSC are taxed at a lower rate than if received by one shareholder;
- using company structure limits personal liability; and
- can deduct business expenses from income.

Advantages to the hiring body:

- flexibility to add extra capacity in peak periods or for specific projects; and
- does not have to offer employment benefits, such as sick pay.

Disadvantages to the individual:

- incurs extra costs administering the company; and
- has to make their own arrangements for employment benefits.

Disadvantages to the hiring body:

- may have to pay higher fee to freelancer who is seeking to cover the costs of their own employment benefit arrangements.

Sole-trader

Advantages to the individual:

- can earn income from more than one hiring body;
- can deduct business expenses from income; and
- administratively simpler than a PSC.

Advantages to the hiring body:

- flexibility to add extra capacity in peak periods or for specific projects; and
- does not have to offer any employment benefits, such as sick pay.

Disadvantages to the individual:

- personally liable; and
- has to make their own arrangements for employment benefits.

Disadvantages to the hiring body:

- may have to pay higher fee to freelancer who is seeking to cover the costs of their own employment benefit arrangements.

Note

1 This figure assumes that individuals hired directly as sole traders or through PSCs are assessed as self-employed for tax purposes.

Source: National Audit Office

Figure 4

Tax implications of an individual's employment status

The tax implications of an individual's employment status differs if their status is employed or self-employed

	Employee	Freelancer working through an intermediary company, such as a PSC (employed for tax purposes) ⁴	Freelancer working through an intermediary company, such as a PSC (self-employed for tax purposes) ⁵
	(£)	(£)	(£)
Illustrative costs to the hiring body ²	50,000	50,000	50,000
Income tax and national insurance contributions deducted	(16,047) ³	(15,041)	(2,119)
Corporation tax payable by intermediary company, such as a personal service company (PSC)	–	–	(7,899)
Net income received by the individual	33,953	34,959	39,982

Notes

- Figures in brackets are deductions.
- This figure covers the tax implications only. It does not consider the costs of the employment benefits (for example, pensions) a company pays to its employees or the higher fees a company usually has to pay to freelancers to make their own arrangements for such benefits.
- Includes employer's national insurance contributions.
- The figures reflect the application of the 5% expenses deduction allowable.
- Assumes the individual pays themselves in accordance with an income tax and national insurance efficient strategy.

Source: National Audit Office representation of HM Treasury's *Off-payroll working in the private sector* consultation document, May 2018

Intermediaries legislation

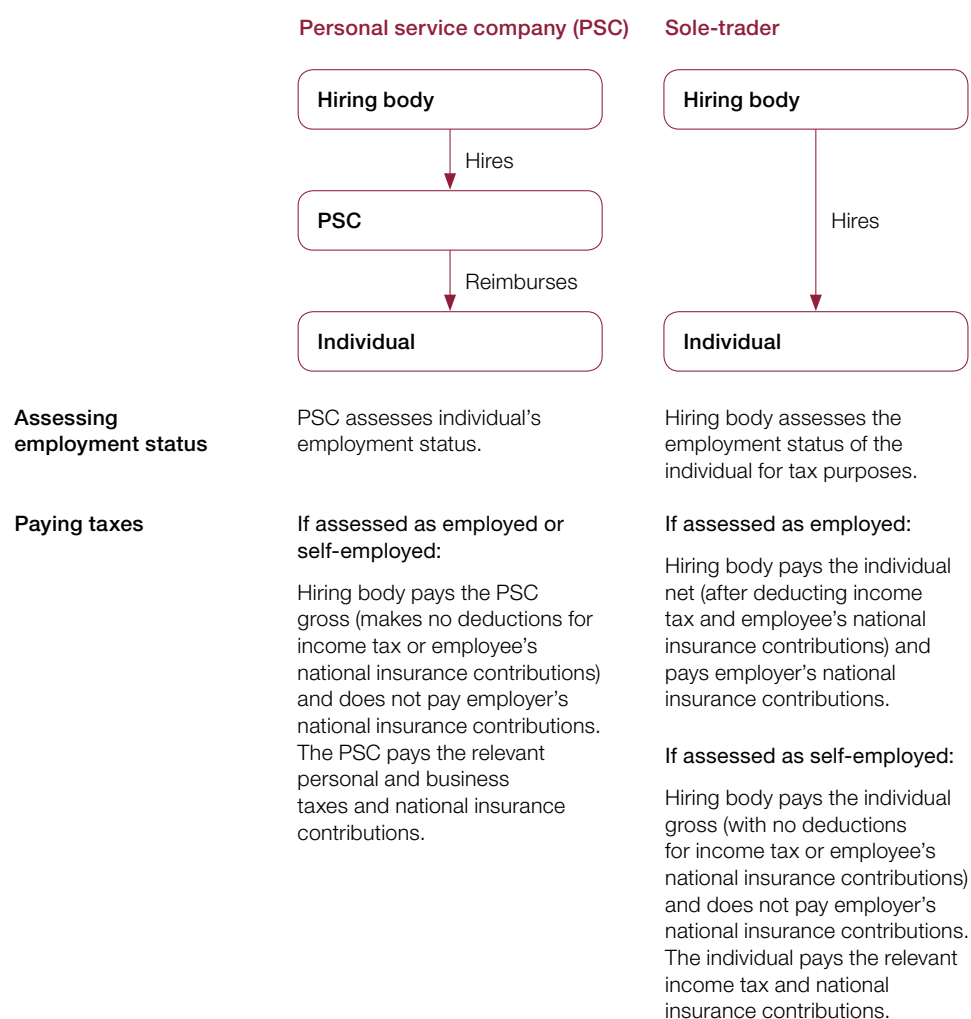
1.6 The intermediaries legislation, introduced in the Finance Act 2000 and commonly known as IR35, aims to ensure that people who do the same job in the same manner pay broadly similar amounts of income tax and national insurance, whether they are employed directly or work through a PSC.

1.7 Determining whether an individual is employed for tax purposes under IR35 is complex (paragraph 1.4). In the public sector, until April 2017, responsibility for deciding if the tax legislation applied and for paying the correct tax and national insurance contributions rested with the PSC. The PSC, therefore, bore the risk of misclassification, that is, an incorrect assessment of an individual's status, and liability for any resulting outstanding income tax and national insurance payments and any interest charges and penalties levied on these payments. In contrast for self-employed sole-traders, responsibility for deciding if the tax legislation applied and the related risk of misclassification rested with the hiring body (**Figure 5**).

1.8 HM Revenue & Customs (HMRC) can undertake investigations into whether IR35 has been applied correctly, and, if it determines that the legislation has been incorrectly applied, it can demand past underpaid tax and national insurance and charge interest and penalties. HMRC's decision can be appealed to a first tier tax tribunal for a judge's decision.

Figure 5

Determining freelancers' employment status for tax purposes pre-April 2017



Note

1 The above figure does not cover individuals and PSCs hired through agencies.

Source: National Audit Office analysis of HM Revenue & Customs legislation

HMRC guidance

1.9 To assist individuals and bodies in assessing an individual's employment status, HMRC has made guidance available online, including its own detailed employment status manual, and an IR35 helpline. From April 2012, it offered a contract review service, under which its specialists review employment status under IR35 and provide the service user with a three-year certificate if they assessed them as self-employed for tax purposes.

1.10 HMRC issued an Employment Status Indicator (ESI) tool in 2005, which it periodically updated to reflect latest developments in case law. This tool was active between 2005 and 2017, and required the user to answer a series of questions, based on employment status factors. The answers to these questions determined whether a person was employed or self-employed for tax purposes. However, the tool was aimed at the construction industry, did not apply to the media industry, and was not designed to be used to determine if IR35 applied or not.

1.11 In addition to the above general tools and guidance, HMRC introduced media-specific guidance for radio and television (**Figure 6**). However, there was no specific guidance for on-air television presenters. In addition, the BBC considered that, although the radio industry guidelines were clear for the great majority of radio roles, there was some uncertainty over on-air presenters on longer-term engagements. For example, the BBC thought that the guidelines were unclear as to what constituted an appropriate period for a single engagement.

Figure 6

Media-specific guidance

HM Revenue & Customs (HMRC) introduced media-specific guidance for radio and television at various times

Medium	Roles	Guidance
Television	On-air: Artists and Entertainers	HMRC Employment Status Manual ¹
	On-air: Extras 'Show and Go' contributors	Film, Television and Production Industry Guidance Notes (1996 and 2012) ²
	On-air: Presenters	No specific guidance
	Off-air	Film, Television and Production Industry Guidance Notes (1996 and 2012) ³
Radio	On-air	Radio Industry Guidelines (2008) ^{3,4}
	Off-air	Radio Industry Guidelines (2008) ^{3,4}

Notes

- 1 When engaged in a specific role on a standard contract negotiated by their relevant trades union, actors and entertainers can be treated as self-employed for tax purposes, notwithstanding that the contract contains terms reflective of an employment relationship, and employed for national insurance contribution purposes. As a result, the BBC is obliged to deduct employee national insurance contributions from payments to these and to pay employer's national insurance contributions.
- 2 The Guidance Notes include only these two on-air roles among the roles that HMRC considered to be self-employed for tax purposes. Originally issued in 1996, they were revised in 2012.
- 3 Both the Radio Industry Guidelines and Film, Television and Production Industry Guidance Notes list the off-air roles that HMRC considered to be self-employed for tax purposes.
- 4 The Radio Industry Guidelines were produced jointly by HMRC and the commercial radio industry, and then shared with the BBC.

Source: National Audit Office analysis

Part Two

The BBC's historical relationship with freelancers

2.1 This part of the report describes the BBC's relationship with freelancers between 2000 and 2017, including those it hired through personal service companies (PSCs).

The BBC's use of PSCs

2.2 In 2017-18, the BBC hired some 60,000 freelancers, including actors, entertainers and off-air workers, such as camera operators. Hiring freelancers is common practice in the media industry and gives broadcasters the flexibility to make changes quickly to reflect programming and audience needs. In 2017-18 the BBC had contracts with 5,145 PSCs, on which it spent a total of £84 million. In general, over the past few years, roughly half the contracts with PSCs are for on-air roles and half are for off-air roles (**Figure 7**).

BBC policy pre-2012

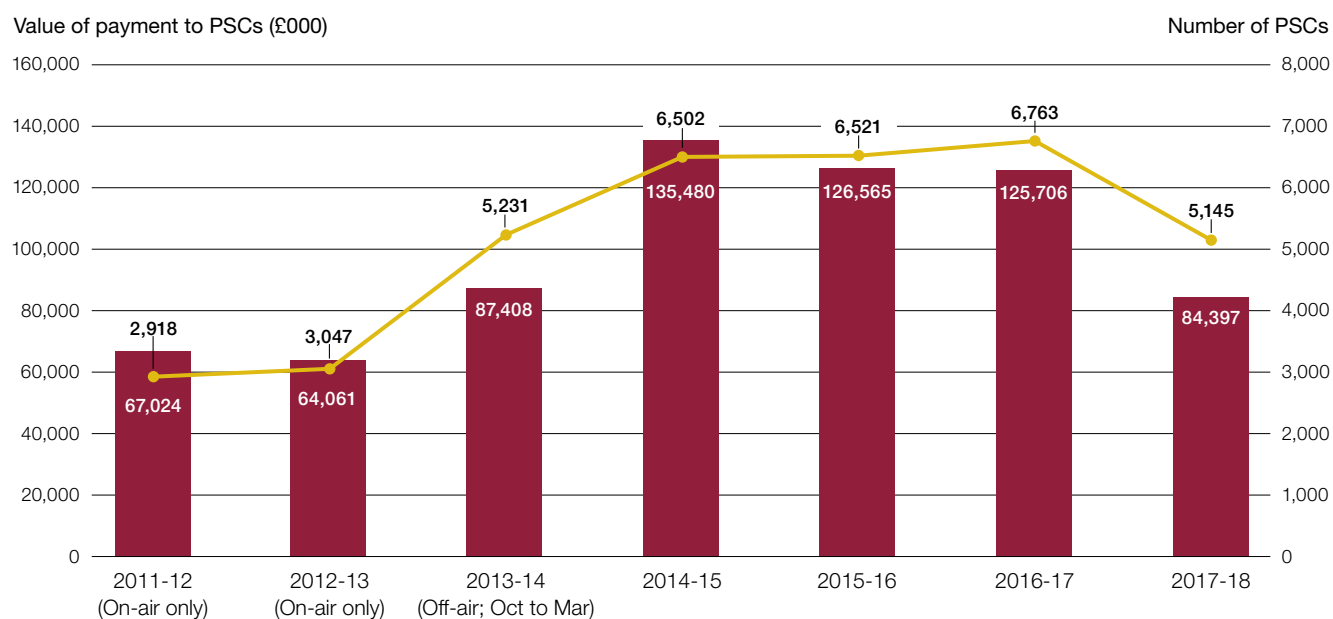
2000–2004

2.3 The BBC used HM Revenue & Customs' (HMRC's) media-specific guidance to determine the employment status for tax purposes of freelancers, wherever this was available (Figure 6 on page 17). As it considered the risk of misclassification to be low due to the existence of this guidance, it did not have a policy on whether to hire freelance individuals directly as sole-traders or indirectly through PSCs. With regard to on-air presenters, in the absence of media-specific guidance, the BBC deemed these to be self-employed for tax purposes in line with its understanding of case law and industry practice at the time. It therefore considered the misclassification risk for these roles to be low, and did not have a firm policy for how it hired people in these roles either.

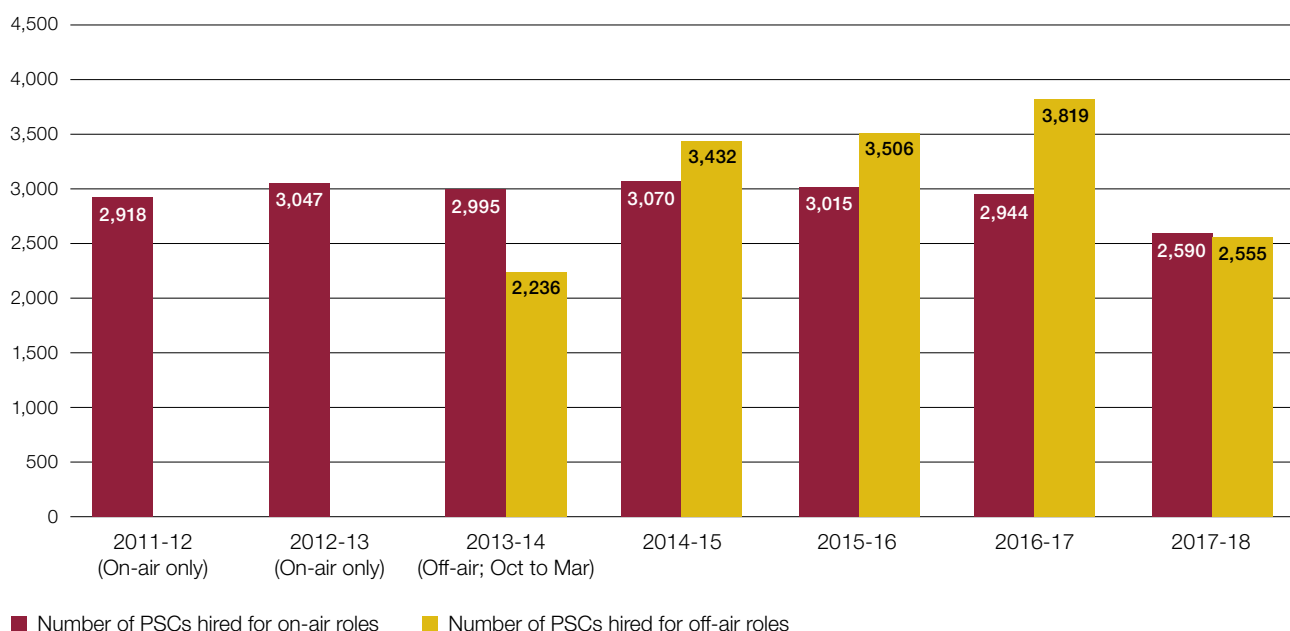
Figure 7

Number of, and BBC expenditure on, personal service companies (PSCs), 2011-12 to 2017-18

The number of PSCs the BBC has contracted with has remained at a similar level in recent years



Number of PSCs

**Notes**

- 1 The data for 2011-12 and 2012-13 are for on-air roles only and the off-air data for 2013-14 are partial, covering October to March.
- 2 All payments are at 2017-18 prices, with cash payments adjusted using the GDP deflator.

Source: National Audit Office analysis of BBC data

News presenters (2004–2012)

2.4 In 2004, HMRC reviewed the employment status of 100 BBC news presenters, and was of the opinion that these 100 individuals were employed for tax purposes. This was, in part, a result of the increased editorial control that the BBC imposed on news presenters following the Neil Report. This report was published in June 2004 in the aftermath of the Hutton Inquiry, which criticised the BBC's editorial and management processes in relation to the events surrounding the reporting of the death of David Kelly. In line with the Report's recommendations, the BBC established stricter editorial guidelines and restructured editorial decision-making for news and current affairs content. These changes led HMRC to deem that the degree of BBC control was sufficiently significant to support an opinion that the 100 reviewed were employed for tax purposes. HMRC also informed the BBC that its opinion had no effect on the BBC's engagement of PSCs, but might lead to HMRC reviewing the status of the individuals engaged by the PSC, to ensure they were paying the correct tax under IR35.

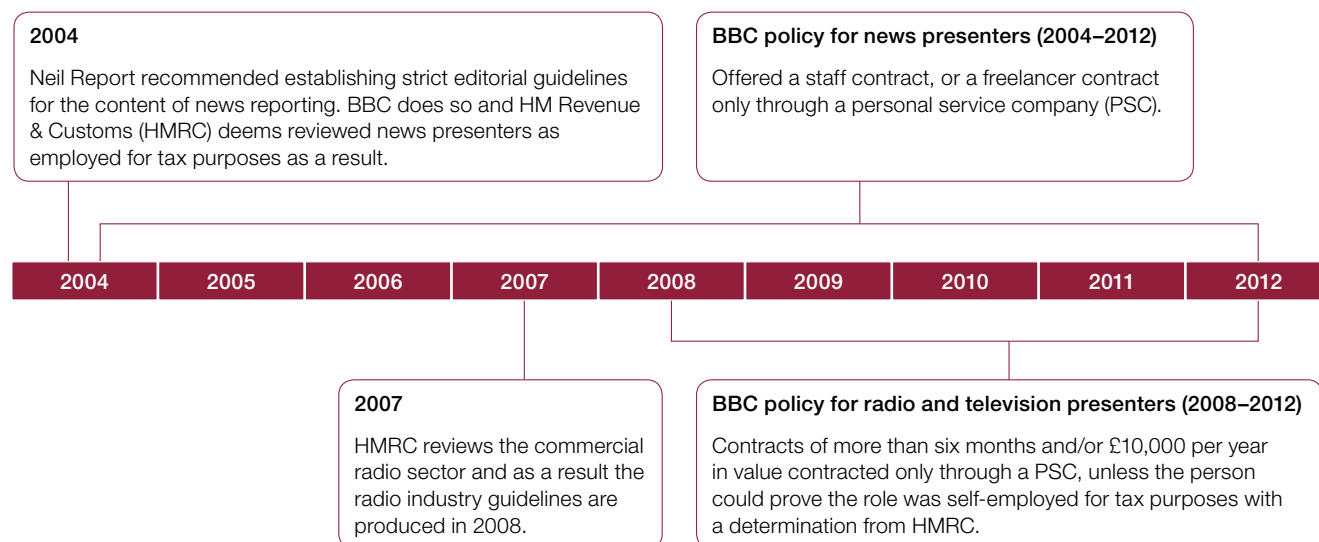
2.5 In response to these changes and their impact on the risk of misclassifying employment status, the BBC offered many freelance news presenters a choice as their contracts came up for renewal: to move onto an employment contract or to remain freelance and be hired through a PSC. The requirement to have a PSC reduced the risk to the BBC of incorrectly determining the individual's employment status for tax purposes and subsequently paying the wrong amount of tax as, before 2017, the risk sat with the PSC (Figure 5 on page 15). In contrast, the hiring body, in this case the BBC, is responsible for determining the employment status for tax purposes for sole traders. According to the BBC, the majority of the presenters offered the choice elected to continue as freelancers, setting up PSCs if they did not already have one.

TV and radio presenters (2008–2012)

2.6 Historically, the BBC hired television and radio presenters as self-employed freelancers, either as sole-traders or through PSCs. This meant that individuals who did similar freelance roles could be hired using different contracting models. HMRC carried out a review of the commercial radio sector in 2007, resulting in the publication of the radio industry guidelines in 2008. Owing to its concerns about the lack of clarity in aspects of these guidelines (paragraph 1.11), the BBC adopted a policy in 2008 of hiring freelance radio presenters through PSCs if they were on contracts lasting longer than six months and/or worth more than £10,000 a year, unless they produced a written determination from HMRC to say that they were deemed to be self-employed for tax purposes for the role in question, or met some other specific criteria. Unlike news presenters, it did not offer these people the option of a staff contract, as these presenting roles had traditionally been freelance. This policy avoided the risk of misclassification for the BBC, as the responsibility for determining employment status and paying the correct taxes rested with the PSC. This policy was extended to television presenters at the same time and was applied to all new contracts and to contracts as they came up for renewal (**Figure 8**).

Figure 8

BBC policy for presenters (2004–2012)



Source: National Audit Office analysis

BBC policy between 2012 and 2017

2.7 In 2012, following the discovery that the then chief executive of the Student Loans Company had been paid via a PSC for his services, the Committee of Public Accounts held a number of evidence sessions on the use of PSCs in central government and other public bodies. The Committee took evidence from the BBC on its use of PSCs in July and November 2012, as a result of which it produced a report that:

- queried the large number of freelance contracts at the BBC: there were approximately 25,000 in 2011-12, of which 13,000 were on-air and 12,000 were off-air roles;
- observed that 148 out of 467 of the BBC's presenters were hired through PSCs on long-term contracts that shared characteristics with typical PAYE contracts in which national insurance contributions and income tax are deducted at source; and
- noted the BBC's intention to carry out a review of its freelance arrangements and its use of PSCs.

2.8 The BBC commissioned Deloitte, alongside its own internal auditors, to review its freelancer engagement model. The review, published in October 2012, found that, while a flexible model was the prevalent model for the sector, others in the industry tended to hire freelancers via a PSC where the individual requested it. In contrast, the BBC had a more formal policy of requiring a PSC in certain circumstances. The Office for Tax Simplification set out, in March 2015, that one course of action taken by many businesses to manage employment status risk is to only hire freelancers via PSCs.

2.9 The Deloitte review made a number of recommendations that the BBC subsequently implemented, including:

- the development of a new policy to achieve greater consistency when hiring on-air freelancers. Deloitte noted examples of people who were doing similar work, but were hired in different ways, as staff, sole-trader, or through a PSC. Some freelancers appeared to have the characteristics of staff and might therefore be expected to be hired as employees; and
- the development of a new test for assessing the employment status of on-air freelancers in television and news to help those hiring these individuals to decide on the appropriate contract.

2.10 In order to determine the employment status of off-air freelancers, the BBC continued to use the 2008 radio industry guidelines and the 2012 television, film and production guidance notes. The BBC developed its own employment status test with Deloitte and in liaison with HMRC (**Figure 9**), which it started using for freelance television and radio news presenters from November 2013. The BBC continued to use the radio industry guidelines to determine the status of its non-news radio presenters. The BBC's new test went through a series of iterations, in liaison with HMRC, between April 2013 and its application from November 2013. In a letter to the BBC in September 2013, HMRC set out that, as long as the BBC used its test as intended and with the correct facts, the employment status of a television presenter resulting from the test would pose a low tax risk. Use of the test was to be temporary until HMRC issued a revised Employment Status Indicator tool (paragraph 1.10).

2.11 In April 2013, the BBC's Management Board introduced a new policy for freelance television and radio news presenters. Individuals that the BBC assessed as self-employed would be hired as either sole-traders or through a PSC, depending on the individual's preference. In contrast, those it assessed as employed could choose between one of two new on-air talent (OAT) employment contracts (**Figure 10**), with the BBC deducting income tax and national insurance contributions at source before paying the individual. Its policy for engaging non-news radio presenters remained unchanged. The BBC applied the new policy to new contracts and contract renewals, and, by March 2018, it had 90 OAT contracts with individuals.⁶

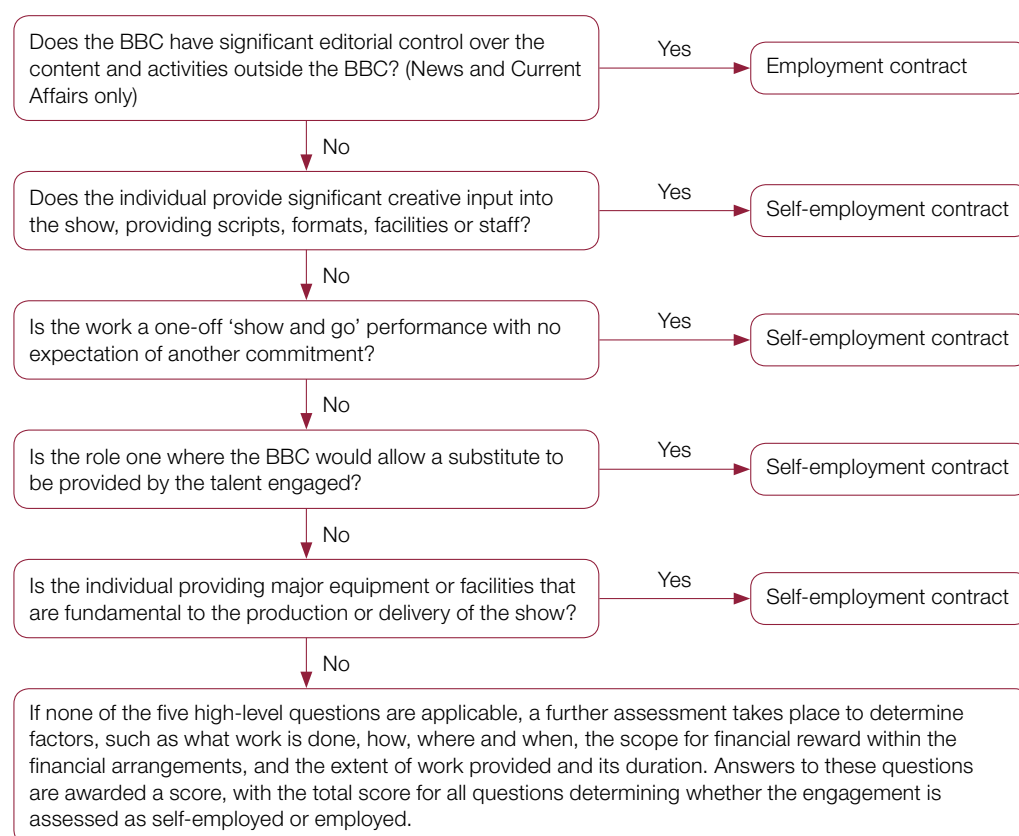
⁶ 18 OAT(B) and 72 OAT(S) contracts. The OAT(S) contract included statutory benefits and a higher cash payment, whereas the OAT(B) contract came with BBC benefits, but still allowed for the flexible use of on-air talent, and a lower cash payment.

Figure 9

Overview of the BBC's Employment Status Assessment tool

The BBC's assessment tool asked questions covering a number of issues that need to be considered in order to determine the relevant employment status

The test asks a series of five high-level questions, the responses to which determine whether the engagement should be contracted on a self-employed or employed basis:



Source: National Audit Office review

Figure 10

BBC policy for on-air freelancers, 2013–2017

Role	Television/radio news	Radio (non-news)
Employment status determination	BBC employment status test	Radio industry guidelines
Contract type offered	On-air talent (OAT) staff contract if employed for tax. Choice of PSC or sole-trader if self-employed for tax	Personal service company (PSC), if contract more than six months and/or £10,000. Choice of PSC or sole-trader, if not

Source: National Audit Office analysis

2.12 As a result of the new policy, there was no significant reduction in the number of PSCs used by the BBC. The new test assessed the majority of on-air roles as self-employed, producing more than 90% self-employed determinations between 2013-14 and 2016-17 (**Figure 11**). The exception was news presenters, which the BBC assessed as employed because of the enhanced editorial controls put in place in 2004. As a result, according to the BBC, all its news presenters who had previously been engaged through PSCs moved onto an OAT employment contract. The BBC continued to use the relevant guidance for on-air and off-air television roles and on-air and off-air radio roles, resulting in no significant changes in employment status for these.

2.13 Between 2013 and 2016 HMRC informed the BBC of its intention to replace the radio industry guidelines at some point with a revised Employment Status Indicator tool, although, as at October 2018, the guidelines were still in place. In 2015-16, HMRC queried the BBC's use of its new test for television and news presenters in certain cases. In summer 2016, it also queried the BBC's application of the radio industry guidelines in respect of radio presenters. The BBC considers that its use of the guidelines was consistent and in line with other media organisations during this period.

BBC freelancer experiences

2.14 A number of BBC presenters have publicly spoken about their experiences of working as freelancers through PSCs. Four individuals who have worked with the BBC gave evidence to the Department for Digital, Culture, Media & Sport Select Committee in March 2018. One of these individuals was speaking on behalf of a group of more than 170 presenters. Some of these presenters have alleged that the BBC forced them to create PSCs in order to continue working with it, even when they said that they did not want the expense and administrative burden of setting up and running a PSC. The presenters alleged that there was little explanation of the BBC's change in preference, and that most of the communication on the topic was carried out verbally, leaving them confused. Many of them felt unhappy about how the BBC handled the implementation of its policy between 2008-09 and 2013.

Figure 11

BBC assessment outcomes for on-air talent, 2013-14 to 2016-17

More than 90% of assessments for on-air talent put through the BBC's own assessment tool resulted in an 'employed for tax purposes' determination

	2013-14	2014-15	2015-16	2016-17
Percentage of cases assessed as:				
Employed	9	5	2	2
Self-employed	91	95	98	98

Source: National Audit Office analysis

2.15 We have not undertaken a detailed audit of individual cases, although we have spoken to a small number of affected individuals. We have seen evidence of the BBC telling those it asked to form PSCs to seek independent advice from a professional financial adviser, but cannot say whether it did this in every case. The BBC acknowledged in an email to freelancers in June 2018 that, in the past, it had adopted a policy of hiring certain presenters through PSCs, which did not, in some cases, give those individuals as much choice as they would have liked. The BBC says that it did this to limit its risk of misclassifying freelancers' employment status and the tax liabilities arising from any such misclassification. It also considered that it was not best placed to assess the status of freelancers as these individuals had most knowledge of their own circumstances and the multiplicity of engagements which are one of the factors to be considered when determining employment status (Figure 2 on page 12), and were best placed to ensure the correct payment of tax.

Part Three

Government reforms in 2017

3.1 This part of the report sets out government reforms to the administration of the IR35 regime for the public sector in 2017, and the impact of these reforms on the BBC's relationship with freelancers, including those hired through personal service companies (PSCs).

Check Employment Status for Tax tool

3.2 In March 2017 HMRC launched a new tool, Check Employment Status for Tax (CEST), to help assess employment status for tax purposes. It replaced the previous HMRC tool, the Employment Status Indicator, and was developed in consultation with a range of stakeholders, including tax specialists, employment agencies, contractors and engaging bodies, such as the BBC, and after testing by HMRC lawyers against live and settled cases. HMRC informed us that CEST is a live tool that it is committed to keeping under review.

3.3 HMRC designed the tool for use in all sectors of the economy. It comprises a series of 20 questions, with multiple choice answers, that the user completes in relation to the role being, or about to be, undertaken (**Figure 12**). Depending on the answers given, the tool determines the employment status of the role concerned: employed for tax purposes, self-employed or unable to determine. In the last case, an individual can contact HMRC for further help. Use of the tool is not compulsory, although HMRC strongly recommends it.

IR35 compliance responsibility change

3.4 In April 2017, the government transferred responsibility for determining the employment status for tax purposes of people hired through PSCs in the public sector, from PSCs themselves to the public bodies hiring them. As a result, public sector bodies became responsible for the first time for deducting income tax and national insurance from payments to PSCs if they determined the individual hired through the PSC to be employed for tax purposes under IR35 (**Figure 13** on page 28). There was no change in public sector bodies' responsibilities with regard to those individuals whom they hired directly as freelance sole-traders, where they continued to be responsible for assessing employment status. The change in responsibilities from April 2017 was designed to strengthen the public sector's role in ensuring that the individuals it hired complied with the IR35 rules.

Figure 12

Overview of the Check Employment Status for Tax (CEST) tool

After four introductory questions about the role and its background, CEST asks a sequence of questions in the following areas:

Personal service

- Has the worker's business arranged for someone else (a substitute) to do the work instead of them during this engagement?
- Did the worker's business pay the person who did the work instead of them?
- If the worker's business sent someone else (a substitute) to do the work and they met all the necessary criteria, would the end client ever reject them?
- Would the worker's business have to pay the person who did the work instead of them?
- Has the worker's business needed to pay a helper to do a significant amount of the work for this engagement?

Control

- Can the end client move the worker to a different task than they originally agreed to do?
- Once the worker starts the engagement, does the end client have the right to decide how the work is done?
- Can the end client decide the schedule of working hours?
- Can the worker choose where they work?

Financial risk

- What does the worker have to provide for this engagement that they cannot claim as an expense from the end client or an agency?
- What is the main way the worker is paid for this engagement?
- If the end client is not satisfied with the work, does the worker need to put it right at their own cost?

Part and parcel

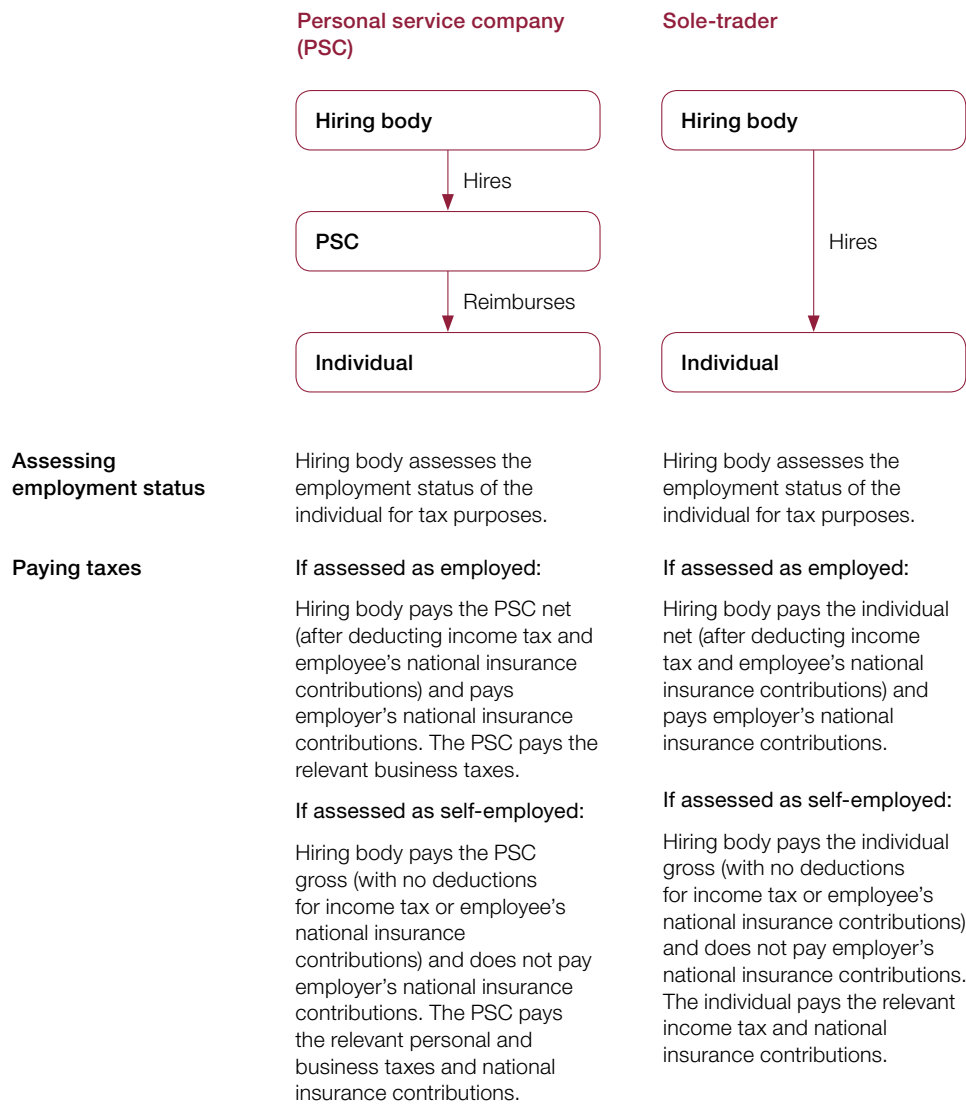
- Is the worker entitled to any employment benefits from the end client?
- Is the worker responsible for any management duties for the end client?
- Does the worker interact with the end client's customers, clients, audience or users?
- When the worker interacts with the end client's customers, clients, audience or users, how do they identify themselves?

The tool calculates the employment status at the end of the 'Personal service', 'Control' and 'Financial risk' areas, based on the answers given for that area only. If it produces a 'self-employed for tax purposes' outcome at the end of one of these areas, the tool will automatically close as there is no need to proceed to the next area. If it does not produce a 'self-employed for tax purposes' outcome, then a person completes the tool and the outcome it then produces takes account of answers given in all four areas.

Source: National Audit Office review of Check Employment Status for Tax tool

Figure 13

Determining freelancers' employment status for tax purposes from April 2017 – Public sector



Note

1 The above figure does not cover individuals and PSCs hired through agencies.

Source: National Audit Office analysis of HM Revenue & Customs legislation

3.5 In the media sector, only the BBC and Channel 4 were affected by the change in responsibility. The change had a greater impact on the BBC as the BBC makes much of its own content and thus hires many more freelancers. In contrast, Channel 4 commissions its content from independent, private sector companies. It therefore hires fewer freelancers itself, mainly in back-office functions, such as training and marketing. Commercial media organisations were not affected by the change.

3.6 The transfer to public sector bodies of responsibility for assessing employment status meant that, from April 2017, they became liable for any outstanding income tax and national insurance contributions, interest and penalties arising from an incorrect assessment on their part. The BBC applied HMRC's new CEST tool when carrying out these assessments in order to reduce the risk of this occurring. It also relied on CEST as, according to the BBC, HMRC had made it clear in discussions with the BBC that it would only stand behind CEST and its own determinations of employment status.

The BBC response

The lead up to April 2017

3.7 HMRC consulted in May 2016 on the government's proposal to transfer responsibility from April 2017, and the government confirmed that it would proceed with the transfer from this date in December 2016. This gave the BBC around four months to make the necessary changes to its systems and procedures and to provide staff with relevant training. In response to HMRC's consultation, the BBC told HMRC in August 2016 that it doubted whether its accounting and payroll systems would be ready, and its staff trained, for April 2017 and that it would be better for the transfer of responsibility to come into effect in April 2018. Others responding to the consultation also raised concerns about the April 2017 implementation date.

3.8 HMRC began discussing the CEST tool with stakeholders, including the BBC, in August 2016. The BBC saw draft questions in November 2016 and a draft decision logic for how the tool would operate in December 2016. This initial version of the tool underwent a number of changes before the BBC saw an updated version in January 2017. HMRC provided the BBC with a private beta form of the tool on 20 February 2017,⁷ stating that this was the first version of the tool that it would stand by. This left the BBC with less than two months to test the tool before it assumed its new responsibilities from 6 April 2017. HMRC released a public beta form on its website on 1 March 2017. It then made a number of wording revisions, including to the questions concerning personal service and the right of substitution, in response to user feedback. The tool went live on 5 April 2017, with small edits to the wording made after this date.

⁷ Beta form is a version of software in the last phase of its development prior to its finalisation and going live.

3.9 The BBC's testing of the CEST tool in March 2017 unexpectedly revealed that it gave an 'unable to determine' result in almost half of 255 on-air cases assessed. This was because HMRC and the BBC interpreted two of the CEST questions differently, producing different answers. After discussions with HMRC about this difference in interpretation, the number of unable to determine results reduced to zero. It also undertook more testing, of a sample of almost 300 cases, using the final version of CEST and HMRC guidance on how to answer the tool's questions. This testing produced an employed for tax purposes verdict for 97% of cases, a significant number of which, according to the BBC, involved radio presenters. This was a much higher percentage than the BBC had expected, based on its previous test for television and news presenters (paragraph 2.12) and its application of the radio industry guidelines.

After April 2017

3.10 Of the 60,000 freelancers the BBC hired in 2017-18 (paragraph 2.2), some 45,000 were on-air freelancers, and about 2,600 of these were hired through PSCs. According to the BBC, the employment status of some 42,000 of these on-air roles is clearly self-employed as they either have 'show and go' roles, for example a one-hour interview on a television or radio programme, or they are actors or entertainers, whom HMRC has agreed are self-employed for tax purposes (Figure 6 on page 17). Of the remaining 3,000 whose cases needed assessing, about 2,000 are individuals who are not resident in the UK or who are covered by the television, film and production guidance notes. According to the BBC, this left some 1,000 on-air roles that needed an employment status determination using CEST. This figure reduced to 663, following the receipt of additional guidance from HMRC regarding on-air television and radio roles, such as sports commentators and pundits, some entertainer roles, short-term factual specialists, talent show judges, and panel show guests. This additional guidance produced self-employed results.

3.11 The BBC did not feel sufficiently confident to rely on CEST until August 2017, following further discussions with and guidance from HMRC. Between August 2017 and June 2018, it assessed the remaining 663 on-air roles using CEST, 92% of whom received an 'employed for tax purposes' determination. This contrasts with the situation before April 2017 where the BBC had assessed the majority of those on-air freelancers requiring assessment as self-employed, using either its own assessment test or the radio industry guidelines (paragraph 2.12). This change in status has affected individuals previously hired either directly as freelance sole-traders or through PSCs. By May 2018, the BBC estimated that the assessed employment status of some 800 presenters, nearly 300 of whom were hired through PSCs, warranted further individual review as they were at risk of being challenged by HMRC. This could involve tax arrears for the BBC and for the PSCs.

3.12 The BBC's view, and that of representative bodies we spoke to in the media industry, is that CEST's multi-sectoral approach means that it is not suited to media and broadcasting roles. For on-air roles, the BBC has continued to use the additional guidance it received from HMRC along with CEST, while, for off-air roles, it continues to use the existing television, film and production guidance notes, and only uses CEST when these notes do not give a clear outcome for a certain role.

3.13 HMRC is consulting with the media industry about the employment status of freelancers with a view to updating its employment status manual and associated CEST guidance. This will replace the radio industry guidelines and the television, film and production guidance notes, and the BBC hopes it will set out clearly those on-air and off-air roles it deems to be employed and those self-employed, thereby reducing the need to use CEST. In July 2018, Deloitte submitted an industry-wide response to HMRC's approach.

Part Four

Impact of the 2017 reforms on the BBC

4.1 This part of the report sets out the impact of the 2017 reforms, and the actions the BBC took in response, on the BBC's operations, finances and reputation among its freelance workforce.

Operational impact

4.2 The BBC wrote to HM Revenue & Customs (HMRC) in late March 2017, saying that it needed to assess a substantial number of contracts using Check Employment Status for Tax (CEST) in order to pay individuals through payroll if required and to work through contract negotiations and renewals. At this time, the BBC estimated that some 3,000 contracts were involved, requiring significant BBC resources. The BBC was also concerned about the potential impact on the individuals concerned. Further analysis reduced this initial figure to 663 (paragraphs 3.10 and 3.11) and did not include news presenters who had all moved to employment contracts before 2017 (paragraph 2.12).

4.3 To meet its new responsibilities, the BBC had to update its freelancer booking and payment systems and processes to allow it to record and make the necessary tax and national insurance deductions for those roles that it now deems employed for tax purposes. It did not complete these updates until August 2017. It has also had to update its guidance and training so that all those involved in the processes are aware of the change in responsibilities and can execute them correctly. According to the BBC, as at October 2018 its costs directly attributable to the work required to meet the April 2017 reforms totalled £1.5 million.

4.4 According to the BBC, some off-air freelancers, mostly in IT and some other roles, such as project managers, have left the BBC to work in the commercial sector where they remain responsible for assessing their personal service company's (PSC's) income tax and national insurance liabilities.

Financial impact

4.5 Before April 2017, the BBC paid all those it hired through a PSC a gross payment, without deducting any tax or national insurance (Figure 5 on page 15). Since April 2017, the BBC has been responsible for making the necessary deductions from its payments to PSCs for all those it deems to be employed for tax purposes (Figure 13 on page 28). The BBC wanted, as far as possible, for gross payments made to a PSC before April 2017 to equal, all other things being constant, net payments to the PSC plus the income tax and national insurance deducted by the BBC after April 2017. The BBC told us this is an on-going principle that it is monitoring. In regard to on-air roles, the cost for the BBC has increased, as it is now paying employer's national insurance contributions for those assessed as employed for tax purposes. However, overall budgets have not increased, so departments have had to manage this by reducing spending on other things. For off-air roles, the BBC deducts income tax and employee national insurance contributions from the agreed fee, which can fluctuate up and down for a variety of reasons.

4.6 In March 2017, the BBC asked HMRC for a six-month grace period during which it would not have to deduct income tax and national insurance and would not be liable for interest and penalty charges while it worked with HMRC to finalise the CEST tool (paragraph 3.9). Its request was unsuccessful as HMRC has no powers to grant such a grace period. The BBC therefore made payments of income tax and national insurance contributions, totalling £8.3 million, on account to HMRC from April to September 2017. These payments were for individuals operating as sole-traders and PSCs that the BBC initially assessed as 'employed for tax purposes' or 'unable to determine'. The BBC did this in order to avoid interest and penalties on any late tax payment.

4.7 Once the BBC had sufficient confidence in CEST (paragraph 3.11), from August 2017, the BBC began to recoup the tax and national insurance it had paid on account for all those deemed to be employed for tax purposes. It aimed to recoup all the tax paid on account by 31 March 2018. In response to complaints from the individuals affected, the BBC introduced longer time periods for collection and repayment. The BBC then paused some existing recoupment plans and the introduction of new ones as some people were suffering hardship or had already paid corporation tax on the relevant earnings through their PSC. Some presenters also challenged the BBC's legal right to make such recoupments, although the BBC disputes this challenge. In cases where an individual's status changed from 'employed' or 'unable to determine' to 'self-employed' following discussions with HMRC, and there was therefore no tax due, the BBC repaid any tax and national insurance it had deducted to the individual. It also offset the tax it had already paid to HMRC on account for these people against other taxes it owed. By June 2018, the BBC had yet to recoup £2.9 million.

4.8 Some people reported a short-term negative financial impact arising from the BBC's ongoing deduction of tax and national insurance and the recoupment of tax paid in advance. As a result, the BBC made short-term bridging loans of up to 60% of expected monthly pay, totalling £2,550, to three people to enable them to overcome short-term cash-flow problems. In June 2018, the BBC announced an ex-gratia payment of up to £500 to anyone earning less than £45,000 a year from the BBC as a contribution towards additional book-keeping fees arising from the IR35 compliance changes. By August 2018 it had paid out almost £12,000 on 33 claims.

Reputational impact

4.9 Implementation of the 2017 reforms has affected the BBC's reputation among its freelance workforce. Some individuals disagree with the employment status the BBC has reached for them using CEST. In March 2018, a group, consisting of more than 170 BBC radio and television presenters, wrote an open letter expressing dissatisfaction with how the BBC had handled the April 2017 changes, including the recoupment of the advance payments of income tax and national insurance. The BBC had informed those in on-air roles, both sole-traders and PSCs, in April 2017 of its intention to pay tax and national insurance contributions on account for those who were not assessed as self-employed and then recoup these from future payments to the individuals concerned over an appropriate period. Despite this, some individuals claim they had large sums deducted from their payments without sufficient warning and could not see clearly from their payment record why those amounts had been deducted, resulting in confusion and anger. Between November 2017 and July 2018, 146 out of 385 calls to the BBC's dedicated IR35 helpline were in relation to tax and CEST.

4.10 In March 2018, the BBC announced its intention to set up an independent mediation process under the supervision of the Centre for Effective Dispute Resolution (CEDR). This aimed to determine the right approach in cases relating to before April 2017 where individuals who were hired through PSCs believed that the BBC bore some responsibility in relation to HMRC's demands for employer's national insurance contributions from their PSC, because, they claim, they had received misleading or limited information from the BBC. The BBC has yet to finalise the details of this process as it is exploring other options for resolution. In May 2018, the BBC approached HMRC to discuss the possibility of an alternative approach, which potentially offers advantages over the above mediation process, for example, in terms of the amount of BBC management time involved. Discussions are still ongoing.

4.11 Some individuals fear that they are now more likely to be investigated by HMRC because the BBC has started to treat them as employed for tax purposes when they were previously treated as self-employed. This fear is driven by the fact that, in recent years, HMRC has started investigations into the employment status of presenters across the industry, including people who have worked for the BBC. In May 2015, the BBC understood that HMRC was investigating 23 cases involving current and former BBC presenters; by autumn 2015, this had increased to around 100. According to HMRC, as at October 2018, there were about 100 open investigations into BBC-related PSCs. All of these concerned arrears of tax before the April 2017 changes. All open cases relate to tax years prior to 2017 and the vast majority of these were opened prior to the reform. The BBC and a number of individuals are also awaiting the outcome of tax tribunals. While these are not test cases, they could shed new light on the employment status for individuals performing certain, predominantly on-air roles, and could add to case law, if appealed to a higher court.

4.12 The BBC recognised the potential financial consequences of the issues surrounding the employment status, and associated tax status, of freelancers as a contingent liability in its *Annual Report and Accounts 2017-18*. The BBC did not recognise a provision for this matter, because the scope and outcome of the mediation process were uncertain. The outcome of the process and the discussions with HMRC remain uncertain, and could be affected by the emergence of additional information, which BBC management is not currently aware of, and other steps taken by affected individuals. The BBC has an obligation, as set out in the Royal Charter, to spend public money in accordance with the principles of regularity, propriety, value for money and feasibility. The financial audit of the BBC will consider the regularity of any resolution proposals.

Appendix One

Our investigative approach

Scope

- 1 We conducted an investigation into four specific areas:
 - the context for the BBC's use of personal service companies (PSCs);
 - why the issues with PSCs have arisen now and the scale of these issues;
 - how the BBC has managed its use of PSCs; and
 - relevant interactions between the BBC and HM Revenue & Customs (HMRC).
- 2 We carried out our investigation between May and September 2018.

Methods

- 3 In examining the four specific areas, we drew on a number of evidence sources.
 - **We interviewed key individuals from the BBC** to identify the BBC's policy with regard to its use of PSCs, how this policy changed from 2000 to the present day and the reasons for this, its engagement with HMRC, the issues it is currently facing with regard to its use of PSCs and how it is managing these.
 - **We interviewed key individuals from HMRC** to gain an understanding of the tax regime covering PSCs, in particular the intermediaries legislation, commonly known as IR35.
 - **We interviewed other stakeholders** in the broadcasting field to understand their experiences of the use of PSCs, and the impact of IR35 on these, both across the industry generally and at the BBC. These interviews included BECTU, Channel 4, contractor.calculator.co.uk, the National Union of Journalists (NUJ), and the Producers Alliance for Cinema and Television (PACT).

- **We reviewed BBC documents**, including BBC policies and guidance on the use of PSCs and other freelancers, senior management papers and correspondence with HMRC in this area.
- **We reviewed publicly available documents**, including evidence published by the Committee of Public Accounts and the Digital, Culture, Media & Sport Select Committee, and relevant HMRC guidance on employment status and IR35.
- **We analysed BBC data** on its use of PSCs.

4 We also spoke to three individuals who were hired by the BBC via a PSC to discuss their experiences of this, and we have also reviewed submissions from a number of other individuals similarly contracted. We have not, however, examined the cases of specific individuals hired by the BBC in detail, nor do we make any judgement on whether the correct amount of tax has been paid by the BBC or any individuals it has hired.

This report has been printed on Evolution Digital Satin and contains material sourced from responsibly managed and sustainable forests certified in accordance with the FSC (Forest Stewardship Council).

The wood pulp is totally recyclable and acid-free. Our printers also have full ISO 14001 environmental accreditation, which ensures that they have effective procedures in place to manage waste and practices that may affect the environment.



National Audit Office

Design and Production by NAO External Relations
DP Ref: 006435-001

£10.00

ISBN 978-1-78604-224-8

