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Dear Sirs

Off-payroll working in the Public Sector: reform of the intermediaries legislation

We welcome the opportunity to respond to this consultation document. Our commentary on the consultation is set out in the attached appendix. We would like to confirm that we remain committed to working with HMRC in this complex and challenging area of employment tax to ensure that all workers engaged by the BBC pay the correct amount of tax at the correct time.

If you require any further information, please do not hesitate to contact me on

Yours faithfully

Enc.

Appendix – Responses to off-payroll working in the Public Sector consultation document

Executive summary

We have responded in full to each question, but we would like to summarise four key points that we have made:

1. The BBC is committed to ensuring that all our workers pay the correct amount of tax at the correct time. However, as a publicly-funded public service broadcaster competing with private sector production companies and other public service and privately owned broadcasters the BBC strongly objects to being the only broadcaster required to comply with this new IR35 legislation as set out in the consultation document. At a time when the BBC's income is flat, the additional costs that it will incur in implementing the systems to comply with the new legislation and the increase in fees that will be required in order to secure on and off-air freelance workers will unfairly discriminate against the BBC and put the BBC at a competitive disadvantage. The BBC considers that the new legislation should be limited to core Public Sector bodies, not to organisations like the BBC that compete with the private sector.
2. Due to the lead times which would be involved in creating the systems to make the necessary technical changes, we doubt very much that accounting and payroll systems would be ready by April 2017 in order to implement the proposed new legislation. There would also be in-house BBC systems to update and training to undertake across the BBC's workforce, all at a time when the legislation has not been finalised. If the legislation is to apply to the BBC, we are therefore recommending that the implementation of the legislation is delayed until at least April 2018 in order to allow it to be brought in effectively and efficiently. In the meantime the new Employment Status Indicator (ESI) tool for TV and Radio could be brought in in April 2017, allowing this to bed into the organisation whilst the system changes for the IR35 legislation are implemented.
3. If the BBC is required to comply with this legislation, in order to create a level-playing field across both Public Sector and private companies we recommend that all end-engagers are brought within this new legislation at the same time to avoid potential discrimination and distortion of competition. If it is not possible to do this, then an alternative, which would reduce the adverse impact on the Public Sector would be to set a specific timescale for private sector organisations to be included; ideally no more than 12 months after the Public Sector.
4. We believe that a simpler and fairer solution would be to subject all payments to PSCs to a withholding deduction similar to that used in the construction industry scheme (CIS). This deduction would be held on account of tax and could then be set against the Personal Service Company's (PSC's) corporation tax, PAYE or NIC liabilities. This would also reduce the costs involved in transitioning to the new legislation and handling appeals against 'employment' decisions made by engagers. In HMRC's response to the 2015 consultation on this subject, it was stated that they thought that this solution was too administratively complex, but we believe that this is a simpler solution, with many accounting systems already set up for CIS.

BBC background

Following the Public Accounts Committee's (PAC) examination of the level of *Off Payroll Appointments* within the Public Sector the BBC committed to ensuring a high level of compliance in the engagement of all off payroll workers. In 2012 the BBC commissioned Deloitte to review its freelance engagements and specifically to consider the use of PSCs by on-air 'talent'.

Deloitte made a number of recommendations, which the BBC accepted and actioned. These included ensuring greater consistency when engaging individuals who are performing largely equivalent roles and activities; establishing and applying a new employment status test which was developed and agreed with HMRC; reviewing a number of priority cases identified as part of the review; and reducing the overall number of PSCs with which the BBC engages.

Following the Deloitte review the BBC developed a revised approach to the engagement of freelancers. Policies, guidelines and frameworks were all updated. Specifically the BBC has:

- Developed and made available new Policies and Guidelines for those involved in the booking, contracting and authorisation of on-air and off-air freelancer engagements. Training courses (including classroom based) are available for bookers.
- Rolled out a new Employment Status Assessment (ESA) tool developed in conjunction with HMRC. We are committed to and continue to work closely with HMRC in developing their ESI tool for both on and off air talent.
- Implemented the SmartBook framework for *Production Freelancers*, that helps bookers identify the most appropriate engagement type for a booking and ensure terms and conditions are accepted prior to payments being made.

All BBC service company contracts with on-air talent include strong clauses placing an obligation on those individuals to comply with all legislation, to warrant that they were responsible for paying their own tax and National Insurance and that the service company was and would remain registered in the UK.

The BBC Trust recently published a review of freelancers. It found that steps had been taken to improve its control environment for freelancer and similar engagements and they were satisfied that action has been taken to address the findings of the 2012 review with processes significantly improved with enhanced and more transparent systems.

Consultation document questions

Question 1: Are there other easily understood definitions that work better than the FOI Act and the FOI (Scotland) Act (FOIAs)?

As a definition, we agree that this will be easily understood. However we are not convinced that all Public Authorities listed in the FOIAs should be included (see Question 4) as some compete with and operate within the private sector putting them at a significant commercial disadvantage and undermining the competitive level playing-field. In addition, if the underlying purpose of the new legislation is to introduce compliance with IR35, and together, the employment status of nurses, doctors, teachers etc. is the biggest concern, then a sensible option would be to introduce this legislation for core Public Sector bodies. This can be achieved by limiting the scope to FOIAs Parts I – V only.

Question 2: Are there any Public Sector bodies which are not covered by the FOI Acts which should be included in the definition for the proposed rules?

We have no comment to make on this.

Question 3: Should private companies carrying out public functions for the state be included in this definition? Why?

We agree that private companies carrying out public functions should be included in the definition, otherwise it would be too easy to outsource services to avoid the legislation. However, there is no definition of ‘public functions’ in either the consultation document or the FOIAs, and this needs to be addressed before any definitive comment can be made.

Question 4: Are there any public bodies caught by this definition who would face particular impacts which should be considered?

As discussed above, we do not believe the legislation should catch public bodies that compete with the private sector. The BBC operates in a commercial environment, competing with other broadcasters, content hubs (like Amazon and Netflix) and production companies for on and off-air talent (i.e. television and radio presenters and behind camera workers). Over the last eight years, overall talent spend at the BBC is down by 12.7% and the volume of performers/presenters engaged has fallen by 29%. In the event that the new legislation were to catch employment related to the BBC’s content services, people providing services to the BBC may fear that a different tax enforcement regime applying to the BBC would be disadvantageous. Until we see the final ESI tool we cannot know how engagements could be affected (i.e. will the new ESI test mean that more individuals are determined as employed than self-employed). For this reason, individuals may choose not to work for the BBC which would affect the BBC’s ability to create the critically-acclaimed programming and services for which it is world famous. A diminished talent pool would also ultimately reduce the BBC’s ability to provide licence fee payers with the best value for money.

The BBC and other Public Authorities (**using the definition in FOIA**) engage a number of individuals for their specialist professional skills. If a determination of their employment status under the new ESI tool indicates that they should be treated as employed they may choose to work outside of the Public Sector, which would jeopardise projects to which these Public Authorities have committed. Diverging tax enforcement rules affecting how public and private sector bodies can engage with professional service providers will distort the market for the provision of freelance services and risk skewing the level-playing field by creating a shortage of appropriate expertise available to the Public Sector. On this basis we believe that all engagers should be brought within this legislation, or at the very least, a start date for non-Public Sector bodies should be set out so that expectations can be managed from day one.

From a legal perspective, we fear that the unintended effect of the proposed legislation (if it were to apply to organisations such as the BBC) would be to distort competition and create an un-level playing field which confers an unfair advantage on the private sector as it seeks to impose differential taxation enforcement terms on different groups of undertakings operating in the same or equivalent markets.

This would be the case on various levels:

- I. Public Sector workers compared to private sector workers – where private sector workers would appear to gain an advantage from the effective lack of enforcement.

2. Public Sector end-engagers compared to private sector end-engagers – where the amended legislation would not apply at all to the private sector, when there is no obvious reason why that should be the case.
3. Specifically, at a sectoral level, the BBC (and C4) on whom the obligations as end-engagers will be imposed, along with the consequent costs of compliance, as compared to private sector broadcasters including foreign media companies based in the UK where the legislation will not apply at all.

Question 5: Are rules needed to ensure that engagers have the information they need to make the decision? If so, what should they be?

We expect the default position for engagers who do not hold all the information required to make an assessment, will be to apply PAYE and NIC to the payments to the PSC. Therefore it will be in the interests of the PSC to provide all the necessary information.

Question 6: How would accounting for the 5% allowance work in practice?

We anticipate that it will be assumed that this would be an allowable tax deduction for all contract payments that fall within this regime, and that this part of the calculation would take place within the accounting or payroll software.

We do not understand why the PAYE and NIC calculation is not based on the deemed employment payment as per s54 ITEPA 2003. This will cause two problems:

1. There will be an additional secondary Class I NIC cost for the engager; and
2. The tax and primary Class I NIC accounted for will not match with the actual tax and NIC due by the PSC. Associated with this problem will be a mismatch between the form P45/P60 which we assume will be given by the engager to the PSC and the fees declared in the PSC's accounts.

In addition, the tax and employee Class I NIC accounted for under the proposed legislation will be higher than for a private sector worker applying s54.

In order to rectify this additional cost and mismatch of fees, tax and NIC we recommend that the deemed employment payment, in line with s54 is used instead.

Question 7: Are there business costs specific to PSCs that are covered by the 5% that aren't covered under the usual business expense rules?

We are not aware of any.

Question 8: Does the first part of the test work to quickly rule out engagements that are clearly out of scope?

Whilst in theory, the first part of the test will be quick to work through; it is unlikely that it will do more than eliminate tradesmen from the scope of the new legislation. Even then, it will not be effective if the Public Authority has purchased the materials or the purchasing of materials is split between the PSC and the Public Authority, which could be the case if they are able to obtain a bigger discount (the proposed 20% test). Across both private and public sector many people engaged via PSCs provide specialist professional skills, and at the BBC there are many behind camera

and on-air workers, it should be noted that these groups of people rarely provide materials and therefore this test will only eliminate a small number of people.

This test does not take into account the use of plant and machinery which is important in television and film production, as well as outside broadcasts, where a number of workers, for example cameramen, makeup artists provide equipment as part of their fee.

The final question regarding the worker owning their own company is not a straight forward question for anybody who does not come from a finance background, and the draft questions we have seen on this point will confuse the majority of people who make bookings. It would be more straight forward and less prone to error, if HMRC were to maintain a database where Public Authorities could verify that a company or partnership is/is not an intermediary – similar to verification of gross payment status for the CIS.

Question 9: Are these the right questions in the right order of priority?

We assume that you mean the questions in part two of the test (Diagram 4 on page 26).

We feel that this part of the test is flawed and these questions are not fit-for-purpose given that if this part of the test is not amended there could be workers who are genuinely self-employed but end up being subject to PAYE and Class 1 NIC simply because the person completing the test does not have a deep enough knowledge of employment status. Of particular concern are the sentences: “If the answer to both questions is ‘yes’, the worker is in scope for the off-payroll rules and the engager will need to account for tax and National Insurance. These questions are based on the current employment status tests.”

Whilst we agree that the right to personal service and control are two factors for self-employment they are not the only factors. Both questions are open to interpretation and in particular ‘control’ is very difficult to gauge and will mean many things to different people. In addition, by only asking these two questions, factors such as being able to choose where and when to work, being in business on one’s own account, advertising for work etc. are being ignored and the worker is being forced down an incorrect decision route with potentially severe financial implications. This will be a factor in dissuading workers from working with Public Authorities because where the Authority is risk averse and simply applies PAYE and Class 1 NIC where it may not actually be required, then they will be financially worse off than if they had engaged with a private sector body.

We recommend that this part of the test is abandoned and instead everyone would move straight to the ESI tool from test one. The test as set out is too simplistic to accurately represent a very complex area of law.

Question 10: Are the questions simple to understand and use?

Please see Question 9.

Question 11: Do the two parts of the test give engagers certainty on day one of the hire?

We don’t think that it does. Please see Question 9.

Question 12: How can the organisation completing the tests ensure they have the information to answer the questions?

It will be relatively straight forward to set up a pro-forma system so that all the questions are asked and information obtained. The difficulties will arise where:

1. The question is not objective, i.e. the question in test two regarding control, we refer back to Question 9, or
2. The person making the booking is not fully aware of the working arrangements.

There will also be problems where a role changes over time. It will be time consuming to re-assess engagements to ensure that the role has not changed or if any changes compromise the original tax treatment.

Question 13: How could the new on-line tool be designed to be simple and straight forward to use?

In order to give the correct tax analysis of an engagement the on-line tool will need to take into account all the case law in this area, and be flexible enough to be amended should there be any further relevant clarifications in case law. As determination of employment status is a complex area, this is likely to mean that the on-line tool will not be simple or straight forward to use, in fact if it is too simple one would have to question whether it is providing accurate results or simply being used as a method to include more workers within PAYE and Class 1 NIC.

We must not forget that the deductions being applied to the PSC fees will affect the net finances of the worker and if the on-line tool does not provide an accurate answer this will unfairly affect them if they are genuinely self-employed. We therefore believe that a simpler and fairer solution would be to subject all payments to PSCs to a withholding similar to that used in the CIS. This deduction would be on account of tax and could then be set against the PSC's corporation tax, PAYE or NIC liabilities. This would also reduce the costs involved in transitioning to the new legislation and handling appeals against 'employment' decisions made by engagers, see Question 15.

On a practical level it would be helpful if the new ESI tool allowed a user to retrieve an earlier test (either complete or part completed) using the ESI reference number; currently the user has to save the pdf document.

Question 14: Where should the liability for tax and NIC (and penalties and interest if appropriate) fall when the rules haven't been applied correctly?

The liability for tax, NIC, penalties and interest should sit where the fault arose. So if the PSC has provided inaccurate information which has been instrumental in creating an inaccurate answer the liability should sit with the PSC; if the fault lies with the engager then the liability should sit with them.

Question 15: Should the liability move to the PSC where the PSC has given false information to the engager?

Until we have access to the new ESI we cannot determine the type of information that would be requested from the PSC. But if the PSC has given false information which leads the engager to make an incorrect assessment we agree that the liability should be moved to the PSC.

Question 16: What one-off and ongoing costs and burdens do you anticipate will arise as a result of this reform?

We have taken advice from across the BBC and understand that the cost of implementing the IT system changes which would be necessary to underpin the requirements of the new legislation would be in the region of £2-3 million of licence fee payers' money. We are currently working with our system partners to understand how long they anticipate the development process will take and when the new systems will be ready to use. They have indicated that until the draft legislation (which we still have not had sight of) is finalised and passed into law, they will not be in a position to start development work on the software that supports their services. Not only does the BBC have interfaces between the HR information system and payroll it has its own interfaces into accounts payable for *Artists and Contributors* and *production workers* and these would also need updating to allow for the new legislation. This is likely to take some time. Under the BBC's internal governance it is unlikely that we would be able to incur expenditure until there is absolute certainty that the legislation will be passed into law.

In addition to the IT system changes, the BBC would need to amend internal training and guidance for the staff who book presenters and production workers, and roll out training on the new ESI and system changes, to around 1,000 people.

Other costs would arise in relation to the Apprenticeship levy; employment law challenges where it is concluded that an engagement comes within the new legislation; additional costs of recruitment for specialist roles; and the cost of dealing with appeals where an individual believes that they are self-employed but the engager has treated them as falling within the new legislation.