

**Decision of the Election Committee on a Due Impartiality Complaint Brought by
Siobhan Benita in relation to *The Battle for London – The Mayoral Debate*,
ITV1, 24 April 2012**

On Monday 30 April 2012, Ofcom’s Election Committee (“the Committee”)¹ met to consider and adjudicate upon a complaint made on behalf of Siobhan Benita, the independent candidate in the London Mayoral Election. The complaint was about the broadcast of *The Battle for London – The Mayoral Debate* (“the Mayoral Debate”) broadcast on the ITV1 network (in all its English regions) at 22:35 on 24 April 2012. The complaint was made by email dated 25 April 2012 (the “Complaint”) from Siobhan Benita.

The Committee consisted of the following members: Tim Gardam (Chairman of the Committee, Chairman of the Ofcom Content Board); Anthony Lilley (Member of Ofcom’s Content Board); Glyn Mathias (Member for Wales of Ofcom’s Content Board); Janey Walker (Member of Ofcom’s Content Board); and Christopher Woolard (Ofcom Group Director with responsibility for Content, International and Regulatory Development and Member of Ofcom’s Content Board).

For the reasons set out below, having considered all the submissions and evidence before it under the relevant provisions of the Broadcasting Code (“the Code”), the Committee decided that Siobhan Benita’s complaint should not be upheld, that the broadcast of the Mayoral Debate complied with the requirements of the Code and that no remedial action was required on the part of ITV licensees.

Background

The Battle for London – The Mayoral Debate

The Mayoral Debate was a 65-minute live factual programme featuring the candidates in the current London Mayoral Election of the Conservative, Labour, Liberal Democrat and Green parties in debate on policy matters affecting London based on questions put by members of the

¹ The Committee’s Terms of Reference are available at: <http://www.ofcom.org.uk/about/how-ofcom-is-run/committees/election-committee/terms-of-reference/>

studio audience and moderated by the presenter, Alastair Stewart. The programme was produced by ITV Studios for the ITV1 network, was broadcast in ITV1's English regions, as well as on ITV HD and on ITV1+1, and compliance was carried out by ITV Broadcasting Limited ("ITV").

Siobhan Benita's Complaint

In the Complaint, Siobhan Benita complained that the broadcast of the Mayoral Debate breached the requirements for due impartiality set out in the Code.

In detailing the grounds of her complaint, Siobhan Benita made the following points:

- a) ITV misapplied Rule 6.10 of the Code by interpreting the "significant current support" referred to in that rule to mean significant current electoral support, wrongly excluding Siobhan Benita from the Mayoral Debate:
 - (i) ITV wrongly based its decision to include Jenny Jones in the Mayoral Debate based on assessment of the Green Party's previous electoral performance in the 2008 London Assembly Elections, despite (Siobhan Benita argued) these elections and those for the London Mayor being separate.
 - (ii) ITV failed to take account of measures of Siobhan Benita's "current support". For example, the 22 April YouGov poll showed Siobhan Benita polling 3% compared with Jenny Jones on 2%. In addition to the poll, Siobhan Benita asserted that she gets "excellent press coverage, high social media activity, and remain the bookie's third favourite".
- b) ITV misapplied Rule 6.9 of the Code by inviting Jenny Jones, the Green Party candidate, to participate in the Mayoral Debate. Jenny Jones was included in the Mayoral Debate despite the Green Party not being 'a major party' (as defined by the Code).

- c) ITV should have ensured that, in line with Rule 6.8 of the Code, due impartiality was strictly maintained in the Mayoral Debate if it is an electoral area report or discussion covered by Rules 6.8 to 6.10 of the Code.

ITV was in breach of its obligation of impartiality in excluding Siobhan Benita from the Mayoral Debate. Further, Siobhan Benita considered the Mayoral Debate was “such a pivotal event and so important for democracy” that the Mayoral Debate had to be looked at “in isolation” when considering the preservation of due impartiality by ITV.

- d) When Siobhan Benita was asked if she could “be joined by a camera crew from ITV” on 24 April 2012, Siobhan Benita “was told that [she] was not allowed to talk about [her policies] at all – [she] was only allowed to comment on how [she] felt at being excluded from” the Mayoral Debate. Siobhan Benita considered that this did not constitute an opportunity for Siobhan Benita to represent her campaign “as part of the wider coverage of the debate”.

Response from ITV

In response to Siobhan Benita’s complaint, ITV (by letter dated 26 April 2012) set out detailed submissions on behalf of ITV, arguing that the broadcast of the Mayoral Debate was legitimate and in compliance with the requirements of the Code (together with other programming).

Siobhan Benita made further submissions by email dated 27 April 2012, which were considered by the Committee.

Statutory Framework & the Code

Under section 319 of the Communications Act 2003, Ofcom has a duty to set standards objectives for the content of programmes included in television (and radio) services, which are set out in the Code.

Specifically, the standards objectives include the objective that “*the impartiality requirements of section 320 are complied with*”: section 319(2)(c).

Section 320 imposes special impartiality requirements in respect of “*matters of political or industrial controversy*” and “*matters relating to current public policy*”. In particular, section 320(1)(b) requires “*the preservation, in the case of every television programme service..., of due impartiality, on the part of the person providing the service, as respects all of those matters*”.

Section 320(4)(a) provides that the requirement in section 320(1)(b) “*may be satisfied by being satisfied in relation to a series of programmes taken as whole*”.

Section 320(5) provides that Ofcom’s standards code shall contain provision setting out the rules to be observed in connection with: (a) the application of the requirement specified in section 320(1)(b); and (b) the determination of what, in relation to that requirement, constitutes a “*series of programmes*”.

Section 320(6) then provides that any provision made for the purpose of section 320(5)(a) must, in particular, take account of the need to ensure the preservation of impartiality in relation to the following matters (taking each matter separately) – (a) matters of major political or industrial controversy, and (b) major matters relating to current public policy, as well as of the need to ensure that the requirement specified in section 320(1)(b) is satisfied generally in relation to a series of programmes taken as a whole.

Applicable provisions of the Code

Section Five of the Code makes provision in relation to “*Due Impartiality and Due Accuracy and Undue Prominence of Views and Opinions*”.

The Committee considered that the Mayoral Debate, as a (non-news) factual programme featuring debate between politicians on policy matters affecting London in the London Mayoral Election, was properly to be regarded as a programme relating to “*matters of major political and industrial controversy and major matters relating to current public policy*”. Such matters are defined in Section Five as being “*...generally matters of political or industrial controversy or matters of current public policy which are of national, and often international, importance...*”.

As such the Committee considered that the following provisions of Section Five were specifically relevant.

Rule 5.11: “...*Due impartiality must be preserved on matters of major political and industrial controversy and major matters relating to current public policy by the person providing a service... in each programme or in clearly linked and timely programmes*”.

Rule 5.12: “*In dealing with matters of major political and industrial controversy and major matters relating to current public policy an appropriately wide range of significant views must be included and given due weight in each programme or in clearly linked and timely programmes. Views and facts must not be misrepresented*”.

For the purposes of these rules, the Committee also considered the meaning of “due impartiality” as defined at the beginning of Section Five: “*‘Due’ is an important qualification to the concept of impartiality. Impartiality itself means not favouring one side over another. ‘Due’ means adequate or appropriate to the subject and nature of the programme. So ‘due impartiality’ does not mean an equal division of time has to be given to every view, or that every argument and every facet of every argument has to be represented. The approach to due impartiality may vary according to the nature of the subject, the type of programme and channel, the likely expectation of the audience as to content, and the extent to which the content and approach is signalled to the audience. Context, as defined in Section Two: Harm and Offence of the Code, is important*”.

Furthermore, given that this complaint was made by Siobhan Benita in the course of the current London Mayoral Election campaign (which began, for the purposes of the application of the Code, with the last date for the publication of notice of the election on 20 March 2012 and ends with the close of the poll on 3 May 2012), the Committee also considered the application of Section Six of the Code: “*Elections and Referendums*”.

Rule 6.1 of the Code makes clear that “*the rules in Section Five, in particular the rules relating to matters of major political or industrial controversy and major matters relating to current public policy, apply to the coverage of elections and referendums.*”

Further, Rule 6.2 provides that “*Due weight must be given to the coverage of major parties during an election period. Broadcasters must also consider giving appropriate coverage to other parties and independent candidates with significant views and perspectives.*”

As to the meaning of “major parties”, Section Six states that: “*At present in the UK major parties are the Conservative Party, the Labour Party and the Liberal Democrats...*”. This definition of “major parties” is not specific to particular elections (such as the present London Mayoral Election) but rather for elections generally.

The Committee also had regard to the rules in Section Six on “Constituency coverage and electoral area coverage in elections”. Section Six explains that an “*Electoral area (for example electoral division, borough, ward or other area) is the local government equivalent to the parliamentary term “constituency”*”. As the Mayoral Debate included candidates standing in the London Mayoral Election discussing policy matters related to this election, the Committee considered the Mayoral Debate to be a report or discussion in relation to an electoral area (i.e. an “electoral area discussion”).

Rule 6.8 requires that “*Due impartiality must be strictly maintained*” in an electoral area discussion.

Rule 6.9 and Rule 6.10 require that if a candidate takes part in an electoral area discussion, then “*candidates of the major parties*” (under Rule 6.9), and “*all candidates within the...electoral area representing parties with previous significant electoral support or where there is evidence of significant current support*” (under Rule 6.10), must be offered the opportunity to take part in the electoral area discussion. This also applies to independent candidates. In both cases, if a candidate refuses or is unable to take part in an electoral area discussion, the electoral area discussion may nevertheless go ahead.

Ofcom’s published Guidance to Section Six of the Code states the following with regard to Rules 6.9 and 6.10: “*Rule 6.9 requires that if a candidate takes part in an item about his/her constituency then the broadcaster must ensure that each of the major parties (as explained in the Broadcasting Code under Rule 6.2) is offered an opportunity to take part, as well as those with evidence of significant previous or current electoral support (Rule 6.10)*”.

The Committee's Decision

The Committee carefully considered all the submissions provided by both Siobhan Benita and ITV in their helpful and prompt correspondence to assist the Committee within a necessarily limited timeframe. In the light of those submissions, the Committee proceeded to consider the relevant heads of complaint made by Siobhan Benita.

A) ITV misapplied Rule 6.10 of the Code by interpreting “significant current support” as meaning significant current electoral support, wrongly excluding Siobhan Benita from the Mayoral Debate.

(i) ITV wrongly based its decision to include Jenny Jones in the Mayoral Debate based on assessment of the Green Party's previous electoral performance in the 2008 London Assembly Elections.

(ii) ITV failed to take account of measures of Siobhan Benita's “current support”. For example, the 22 April YouGov poll showed Siobhan Benita polling 3% compared with Jenny Jones on 2%. In addition to the poll, Siobhan Benita asserted that she gets “excellent press coverage, high social media activity, and remain the bookie's third favourite”.

The Committee considered that the Mayoral Debate was an “electoral area discussion”, and therefore Rules 6.8-6.10 applied.

As already noted, Rule 6.10 requires that if a candidate takes part in an electoral area discussion, then “*all candidates within the...electoral area representing parties with previous significant electoral support or where there is evidence of significant current support*”, must be offered the opportunity to take part in the electoral area discussion. This also applies to independent candidates.

Ofcom's published Guidance to Section Six of the Code states the following with regard to Rules 6.9 and 6.10:

“Rule 6.9 requires that if a candidate takes part in an item about his/her constituency then the broadcaster must ensure that each of the major parties (as explained in the Broadcasting Code under Rule 6.2) is offered an opportunity to take part, as well as those with evidence of significant previous or current electoral support (Rule 6.10)”.

The Committee considered that Jenny Jones of the Green Party is a candidate representing a party with “*previous significant electoral support*” which was demonstrated by the Green Party’s past performance in previous mayoral and London Assembly elections. In both the 2004 and 2008 London Assembly elections, the Green Party polled 8% and won two seats; in the 2000 London Assembly elections, it polled 11% and won three seats. Jenny Jones was elected on each of these occasions. Jenny Jones has also served as Deputy Mayor. The Committee considered that ITV acted in accordance with the Code in inviting Jenny Jones to take part in the Mayoral Debate on this basis.

Siobhan Benita argued that she does have “*significant current support*” and therefore should have been included in the Mayoral Debate. She considers that “*significant current support*” should not be assessed solely by reference to electoral support, and ITV should for example, have taken account of public support from positive press coverage, high-profile supporters, high social-media activity and bookies’ odds in her favour.

The Committee believed that “*evidence of significant current support*” in Rule 6.10 should be interpreted in a straightforward way. In assessing evidence of “significant current support” broadcasters should take account of all relevant factors, and not only electoral support. However, more weight should understandably be given to evidence which is objective and measurable (such as opinion poll evidence). The Committee notes that the published Guidance to Rule 6.10 does not state that a broadcaster should base its decision as to whether to include a candidate (who cannot produce evidence of previous significant electoral support) **solely** on evidence of current electoral support. Rather the Guidance is pointing out that if a candidate does have evidence of either previous significant electoral support or current significant electoral support (i.e. opinion polls), he or she must be offered a chance to take part.

The Committee appreciated the importance of television as a medium and the potential of televised debates to increase or decrease support for individual candidates. However, in the

Committee's opinion, Siobhan Benita was not able to show that she did have evidence of "significant current support" such that ITV was required to offer her the opportunity to take part.

A number of opinion polls were conducted during the election period for the London Mayoral Election before 24 April 2012. These showed various levels of support for Siobhan Benita: less than 1% (ComRes, 2-5 April); 2% (YouGov, 13-15 April); and 3% (YouGov, 23 April). The Committee also noted the 3% support indicated in the ComRes poll conducted 23-25 April was published after the Mayoral Debate was broadcast². In the Committee's view the opinion poll results cited above did not either indicate evidence of significant current electoral support for Siobhan Benita, or indicate in themselves (either in the form of one poll alone or collectively) evidence of significant current support.

The Committee went on to consider whether there was evidence of significant current support for Siobhan Benita based on the polling evidence when taken together with the other factors Siobhan Benita put forward such as positive press coverage, high-profile supporters, high social media activity, positive tweets, and bookies' odds. In the Committee's view Siobhan Benita failed to demonstrate sufficient evidence of "significant current support" on this basis. Although this additional evidence indicated that her candidacy was supported by certain individuals, in the Committee's view it lacked sufficient consistency and objectivity. In deciding whether a candidate is receiving "significant current support" broadcasters must rely on objective and measurable evidence of the levels of support of a candidate. This will help ensure that a broadcaster treats all candidates in an election with the due impartiality required by the Code, and that a broadcaster can demonstrate it has done so, when applying Rule 6.10.

For these reasons, the Committee concluded that ITV had complied with Rule 6.10.

B) ITV misapplied Rule 6.9 of the Code by inviting Jenny Jones, the Green Party candidate, to participate in the Mayoral Debate.

² The Committee noted that it is widely acknowledged that most opinion polls of intentions to vote in the UK are subject to a margin of error of plus or minus 3%. See: <http://labs.yougov.co.uk/news/2011/11/21/understanding-margin-error/>

ITV informed Ofcom that it had included Jenny Jones in the Mayoral Debate on the basis of the application of Rule 6.10. It was therefore not necessary for the Committee to consider the application of Rule 6.9.

The Committee agreed that as ITV had not included Jenny Jones on the basis of Rule 6.9, it was not necessary to consider Rule 6.9 in relation to this complaint.

C) ITV should have ensured that, in line with Rule 6.8 of the Code, due impartiality was strictly maintained in the Mayoral Debate if it is an electoral area report or discussion covered by Rules 6.8 to 6.10 of the Code. ITV was in breach of its obligation of impartiality in excluding Siobhan Benita from the Mayoral Debate. Further, Siobhan Benita considered the Mayoral Debate was “such a pivotal event and so important for democracy” that the Mayoral Debate had to be looked at “in isolation” when considering the preservation of due impartiality by ITV.

D) When Siobhan Benita was asked if she could “be joined by a camera crew from ITV” on 24 April 2012, Siobhan Benita “was told that [she] was not allowed to talk about [her policies] at all – [she] was only allowed to comment on how [she] felt at being excluded from” the Mayoral Debate. Siobhan Benita considered that this did not constitute an opportunity for Siobhan Benita to represent her campaign “as part of the wider coverage of the debate”.

The Committee considered heads C and D together.

As noted above, the Committee considered the Mayoral Debate was an electoral area report or discussion so the Rules in 6.8 to 6.10 applied.

The Committee considered whether, although ITV had not breached Rule 6.10 in failing to invite Siobhan Benita to take part in the Mayoral Debate, it had breached Rule 6.8, the requirement that “*Due impartiality must be strictly maintained in ... an electoral report or discussion*”.

The Committee noted the qualification imported by the word “*due*” in relation to impartiality (as defined in Section Five of the Code) was an important consideration. “*Due impartiality*” did not mean that an equal division of time had to be given to every view (or set of views) within a

programme, or within clearly linked and timely programmes. Its meaning varied according to a variety of contextual factors, including the extent to which the content and approach of a programme is signalled to the audience.

The Committee also noted that: a graphic with Siobhan Benita's picture and her name (along with those of the other candidates who had not been invited to take part in the debate) was displayed, along with an indication that contributions from the other two candidates would be included in editions of ITV London's *London Today* and *London Tonight*, to be broadcast on 25 April; and that one member of the studio audience made what appeared to be an unprompted and positive reference to Siobhan Benita and her policies during the Mayoral Debate.

As the Committee considered that Siobhan Benita did not have "*significant current support*", and therefore ITV was not required to invite her to take part in the Mayoral Debate (and that ITV had included her picture, signalled that contributions from the other candidates would be broadcast in programmes the next day), the Committee considered that the Mayoral Debate had complied with the due impartiality requirements of Rule 6.8, in respect of Siobhan Benita. The Committee acknowledged there are a range of editorial techniques by which broadcasters can comply with Rule 6.8, and that ITV had adequately reflected the viewpoint of Siobhan Benita, within the Programme, in a manner commensurate with her profile and indicators of support to that point in the campaign.

The Committee then considered the application of Rules 6.2, 5.11 and 5.12 of the Code. In the Committee's view, it was important to bear in mind that the Mayoral Debate was broadcast during an election period, so that the Rules in 5.11 and 5.12 had to be considered together with Rule 6.2.

When reading those provisions together in these circumstances, it was clear that:

- (i) due impartiality could be achieved by broadcasters in "*clearly linked and timely programmes*" included in their services over the election period (Rule 5.11);
- (ii) it required an "*appropriately wide range of significant views*" to be included and "*given due weight*" in each programme, or in clearly linked and timely

programmes, over the course of the election period, and required views and facts not to be misrepresented (Rule 5.12); and

- (iii) the qualification imported by the word “*due*” in relation to impartiality (as defined in Section Five of the Code), as noted above, was significant.

The Committee noted that Rule 6.2 requires: “*Due weight must be given to the coverage of major parties during the election period. Broadcasters must also consider giving appropriate coverage to other parties and independent candidates with significant views and perspectives*”.

The Committee considers that Rule 6.2 concerns the coverage a candidate receives over the course of an election. The Committee noted that ITV had provided evidence of the coverage that Siobhan Benita’s campaign had received during the election period to date. In particular, as signalled in the programme, on 25 April the three candidates who did not participate in the Mayoral Debate were given coverage on the *ITV News* and *London Tonight* (in two separate broadcasts). In particular, Siobhan Benita was given the opportunity to put forward her policies on transport, crime and housing. The Committee considered that, given Siobhan Benita’s levels of support, this level of coverage constituted “*appropriate coverage*”, and therefore Rule 6.2 was not breached.

The Committee noted that Rule 6.8 required due impartiality to be strictly maintained within an electoral area discussion. As the Committee has already determined that this requirement has been satisfied, and that Siobhan Benita has received “*appropriate coverage*” pursuant to Rule 6.2, it follows that the requirements of due impartiality and due weight contained in Rules 5.11 and 5.12 have also been complied with.

For the above reasons, the Committee therefore concluded that ITV had complied with Rules 6.8, 6.2, 5.11 and 5.12 in relation to Siobhan Benita.

Conclusion

For the reasons set out above, the Committee therefore decided that Siobhan Benita’s complaint should not be upheld and that ITV has complied with the requirements of the Code.

Ofcom Election Committee

30 April 2012