

Decision of the Election Committee on a due impartiality and due weight complaint brought by Vote Leave Limited in relation to ITV's coverage of the EU Referendum

1. On Friday 10 June 2016, Ofcom's Election Committee ("the Committee")¹ met to consider and adjudicate on a complaint made by Vote Leave Limited ("Vote Leave") in relation to ITV's coverage of Vote Leave and those campaigning to leave the European Union (the "EU") in the EU Referendum taking place on 23 June 2016 (the "Complaint").
2. The Complaint was about whether ITV has preserved, in its coverage of the EU Referendum, due impartiality in relation to the 'Leave' outcome and given due weight to Vote Leave.
3. The Committee consisted of the following members: Nick Pollard (Chair, Member of the Ofcom Content Board); Janey Walker (Member of the Ofcom Content Board); and Tony Close (Ofcom Director with responsibility for Content Standards, Licensing and Enforcement and Member of the Ofcom Content Board).
4. For the reasons set out in this decision, having considered all of the submissions and data before it under the relevant provisions of the Broadcasting Code ("the Code"), the Committee decided not to uphold Vote Leave's complaint. In particular, the Committee decided that there was nothing before it which demonstrated that ITV's coverage of the EU Referendum in the period between 15 April 2016 and 29 May 2016 (the "Programming") had failed to comply with the relevant Code Rules.

Background

The Complaint

5. On 23 June 2016, a referendum will be held which asks whether the United Kingdom should remain a member of the EU or leave the EU (the "EU Referendum").
6. On 14 April 2016, the Electoral Commission designated the two "designated organisations" for the purposes of the EU Referendum; namely, Vote Leave for the 'Leave' outcome and The In Campaign Limited (known as 'Britain Stronger In Europe') for the 'Remain' outcome².
7. Vote Leave's complaint concerned the coverage it, and those campaigning to leave the EU, have received from ITV during the EU Referendum campaign. In particular, it raised issues concerning ITV's compliance with the "due impartiality" requirements in Section Five of the Code and some of the specific requirements relating to "referendums" in Section Six of the Code.
8. Vote Leave made the following points in the Complaint:
 - a) "ITV's coverage of the referendum campaign so far has been weighted heavily towards those campaigning for a remain vote in both airtime and how the packages are framed".

¹ Link to the Committee's Terms of Reference: <http://www.ofcom.org.uk/about/how-ofcom-is-run/committees/election-committee/terms-of-reference/>

² See <http://www.electoralcommission.org.uk/i-am-a/journalist/electoral-commission-media-centre/news-releases-referendums/electoral-commission-designates-vote-leave-ltd-and-the-in-campaign-ltd-as-lead-campaigners-at-eu-referendum>

- b) On airtime, Vote Leave submitted a spreadsheet laying out "media monitoring" it had carried out in relation to three specific programmes (the *ITV Evening News Bulletins*, the *News at Ten* and *Peston on Sunday*, together the "Monitored Programming") between 6 April 2016 to 29 May 2016. It complained that "we...lag considerably behind the 'remain' campaign which have been awarded 51 minutes and 14 seconds of air time since we began media monitoring while leave has been given 39 minutes and 29 seconds minutes on screen".
- c) On how the packages are framed, "ITV's news bulletins consistently lead on stories from the remain campaign, with our contribution limited to responding to their key message that day or, at best, having second billing with our own story".
- d) "[t]hose campaigning for each outcome must be given approximately equal weight in coverage". In particular, Vote Leave asserted that:
 - i. whilst it is true in certain circumstances that due impartiality does not mean an equal division of time has to be given to every view, "it does not follow that there is not an obligation on broadcasters to give approximately equal airtime to opposing sides in a national referendum".
 - ii. "ITV's reliance on guidance applicable to elections [i.e. Ofcom's guidance on Rules 6.1 and 6.2 of the Code] in this context is misplaced". In particular, "whilst it is impossible for a broadcaster to give equal coverage to dozens of political parties in a general election campaign, this is not necessarily the case in a national referendum" where there are "only two possible outcomes of policy" and, as in this case, where there is "only one designated organisation on each side".
- e) Rule 6.3 of the Code requires "manifestly greater weight in coverage" to be given to designated organisations than is given to permitted participants and anyone else with significant views and perspectives. In interpreting Rule 6.3, ITV has wrongly elided the two limbs of Rule 6.3 whereby "due weight must be given to designated organisations in coverage during the referendum period" and "broadcasters must also consider giving appropriate coverage to other permitted participants with significant views and perspectives" [complainant emphasis added].
- f) "ITV's obligations to be duly impartial must be satisfied in the case of each of [the *ITV Evening News Bulletins*, the *News at Ten* and *Peston on Sunday*]...it is artificial for ITV to suggest that it can meet its requirements under the [Code] by giving one campaign greatly more prominence on the main news bulletins, while seeking to compensate for this by giving the other campaign some airtime in other programmes of lesser prominence".

ITV's response to the Complaint

- 9. By letter of 8 June 2016, ITV made representations on the matters raised in the Complaint. In summary, ITV accepted that Sections Five and Six of the Code were engaged in relation to the Programming but submitted that it had complied and continues to comply with its obligations under those Sections and, in particular, Rules 5.1, 5.11, 5.12, 6.1 and 6.3 of the Code.
- 10. In summary, ITV made the following points in its response:

- a) It disagreed with Vote Leave's assertion that its coverage was "heavily weighted towards those campaigning for a remain vote in both airtime and how the packages are framed".
- b) On airtime, ITV explained that it had not had time to fully analyse all of the records of its output, but provided its own media monitoring showing coverage in terms of both minutage and number of contributions from each side of the campaign and from the designated organisations. It suggested that its records "indicate that not only have the 'leave' and 'remain' campaigns been given roughly similar airtime, the 'leave' campaign has actually been given more airtime. Similarly, our records indicate that representatives of Vote Leave have been given more minutage and appearances than representatives of Britain Stronger in Europe in regional news programmes, ITV national news programmes and *Good Morning Britain*".
- c) On how packages are framed, Vote Leave had not provided any evidence to support its assertion that ITV news bulletins consistently led on stories from the 'remain' campaign. It added that due impartiality and due weight "does not rest on where stories appear in the running order of a news bulletin" and the Code does not "require parity of headlines between the different designated organisations or campaigns during a referendum period".
- d) "Ofcom has never said or suggested, either in the Code's Rules or in its Guidance, that 'approximately equal' airtime or weight must be given to designated organisations, or to the opposing sides of the argument in referendum coverage"; and that "to do so would be an unnecessary and disproportionate restriction on broadcasters' freedom of expression".
- e) When assessing compliance with the requirement to preserve due impartiality under Rules 5.1 and 5.11 of the Code, paragraph 1.7 of Ofcom's published Guidance on Rule 6.1 (which provides that "due impartiality during election campaigns does not mean that balance is required in any simple mathematical sense"- emphasis added) can be applied "in the same way for both elections and referendums".
- f) When assessing compliance with Rule 6.3, "it is reasonable for broadcasters to pay regard to Ofcom's Guidance on Rule 6.2 given the wording of the two Rules is almost identical in relation to elections and referendums respectively".
- g) Vote Leave's suggestion that Rule 6.3 requires that "manifestly greater weight" is given to coverage of the designated organisations than to other permitted participants is "flawed". In particular, it suggested that such an interpretation "would run directly against" Ofcom's published Guidance on Rule 6.2 regarding the respective weight to be given to larger parties.
- h) Whilst Rule 5.1 does require that all of its news programmes should observe due impartiality, given Vote Leave's complaint is stated as being about "ITV's coverage of the referendum campaign so far", and includes data on one of ITV's current affairs programme, ITV's "news and current affairs coverage should also be considered in its totality rather than considering only the three programmes selected by Vote Leave in isolation".
- i) Its coverage of the EU Referendum in other outlets (including its regional news bulletins, *Good Morning Britain*, *ITV Lunchtime News* "could be considered to be 'clearly linked and timely' for the purposes of Rules 5.11 and 5.12 of the Code"

and therefore due impartiality on the EU Referendum could be achieved across that range of programmes. However, "even if Ofcom was to take the view that *ITV Evening News*, *News at Ten* and *Peston on Sunday* were discrete - and not linked and timely - programmes, the data we have supplied clearly indicates that all three programmes have included and given due weight to an appropriately wide range of significant views on the EU Referendum and related issues".

Statutory framework

11. Under section 319 of the Communications Act 2003, Ofcom has a duty to set such standards for the content of programmes to be included in television and radio services as appear to them best calculated to secure a range of statutory standards objectives. Ofcom has discharged this duty by producing, and from time to time revising, the Code.
12. Specifically, the standards objectives include an objective that news included in television services is presented with due impartiality and that the impartiality requirements of section 320 are complied with: section 319(2)(c). Section 320 imposes certain "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 [the above] matters".
13. 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" (emphasis added).
14. 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".
15. Section 320(6) 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 of 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 Broadcasting Code

16. Section Five of the Code contains rules in relation to "Due Impartiality and Due Accuracy and Undue Prominence of Views and Opinions".
17. The Committee considered that some of the Programming (including some of the Monitored Programming) was properly to be regarded as "news".
18. The Committee also considered that the Programming was properly to be regarded as 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...". The Committee also noted, in this regard, that Rule 6.1 of the Code provides that the rules in Section Five of the Code relating to matters of major political or industrial controversy "apply to the coverage of elections and referendums".

19. As such, the Committee considered the following provisions of Section Five of the Code to be relevant.

- **Rule 5.1:** “News, in whatever form, must be reported with due accuracy and presented with due impartiality.”
- **Rule 5.11:** “...[D]ue 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 (listed above) 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.”

20. The Committee also considered the meaning of “due impartiality” as defined at the beginning of Section Five of the Code:

“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.”

21. In addition, the Committee considered Section Six of the Code relating to “Elections and Referendums” as the Complaint related to programming broadcast within the referendum period for the 2016 EU Referendum. Section Six sets out rules relating to, amongst other things, the preservation of due impartiality in coverage of referendums and the giving of due weight to designated organisations in coverage during the referendum period.

22. The Committee considered the following provisions of Section Six of the Code to be relevant.

- **Rule 6.3:** “Due weight must be given to designated organisations in coverage during the referendum period. Broadcasters must also consider giving appropriate coverage to other permitted participants with significant views and perspectives.”

23. The Committee noted that “designated organisations” are defined in Section Six of the Code as an organisation that is “designated by the Electoral Commission”, and that Vote Leave is so designated for the purposes of the EU Referendum.

24. It also noted that the “referendum period”, for the purposes of Section Six of the Code, is defined in Regulation 4 of the European Union Referendum (Date of Referendum etc.) Regulations 2016 commenced on 15 April 2016 and will end on 23 June 2016, i.e. the date of the EU Referendum.

The Committee's Decision

25. The Committee carefully considered the written submissions and representations made by Vote Leave and ITV respectively.
26. The Committee went on to consider each of the following issues:
 - a. the meaning of “due impartiality” in relation to referendum coverage in the context of Rules 5.1 and 5.11 of the Code;
 - b. the meaning of “due weight” in relation to referendum coverage in the context of Rules 5.12 and 6.3 of the Code; and
 - c. the meaning of “clearly linked and timely programmes” under Rules 5.11 and 5.12 of the Code.
27. Taking into account its views on each of the above, the Committee proceeded to consider whether the material submitted by Vote Leave and ITV demonstrated that ITV correctly interpreted and applied each of Rules 5.1, 5.11, 5.12 and 6.3 of the Code in relation to the Programming.

Rules 5.1 and 5.11: Due impartiality in referendum coverage

28. The Committee noted that, whilst Ofcom has not published guidance specifically in relation to due impartiality in referendum coverage, the Code itself provides a general definition for the concept of due impartiality and Ofcom has published separate guidance on Section Five of the Code which considers the meaning of this term.
29. The Committee emphasised that, taking this into account, due impartiality is a flexible concept. In particular, it noted that it is an editorial matter for a broadcaster as to how it maintains due impartiality. Whether or not due impartiality has been preserved will be dependent on a range of factors such as, for example: the nature of the programme; the programme's presentation of its argument; the transparency of its agenda; the audience it is aimed at; and what the audience's expectations are.
30. The Committee proceeded to consider Vote Leave's suggestion that (i) due impartiality requires broadcasters to give approximately equal airtime to opposing sides in a national referendum, and (ii) reliance on Ofcom's guidance applicable to elections in this context is misplaced.
31. The Committee considered that the principle that due impartiality does not mean that balance is required “in any simple mathematical sense” (as expressed in its guidance on Rule 6.1 in relation to election coverage) should also apply to referendum coverage. It noted that to require broadcasters to dedicate equal time or approximately equal airtime, in a mathematical sense in their coverage to both sides of a referendum campaign would be unduly onerous for broadcasters and unnecessary in light of the objectives of the Code. This is the case notwithstanding that referendums will usually differ in some respects to elections, as noted by Vote Leave in the Complaint.
32. The Committee considered that the provision of equal time or approximately equal airtime, in a mathematical sense, is unlikely to be in and of itself determinative of whether due impartiality has been preserved as it does not take account of the full range of relevant qualitative and contextual factors. However, the Committee noted that the amount of time provided by a broadcaster to opposing views in a referendum may be one relevant indicator for the purposes of assessing due impartiality. In particular,

where the amount of time dedicated to the different sides of a referendum is broadly similar, in the Committee's view this may indicate observance by the broadcaster with the due impartiality rules. Conversely, a significant imbalance in the coverage provided to the two different sides may be a *prima facie* indication that that coverage was not duly impartial.

33. Nevertheless, the Committee reiterated that it is an editorial matter for a broadcaster as to how it maintains due impartiality and that this can be considered in the round, taking into account a range of factors. In reaching this view, the Committee emphasised that the obligation in Section Five of the Code is to preserve "due impartiality", and that this should not be read as imposing any specific quantitative obligations on broadcasters in relation to their coverage.
34. The Committee considered Vote Leave's argument (also made in relation to "due weight" under Rules 5.12 and 6.3) that, where a broadcaster consistently broadcasts coverage in which a particular designated organisation leads the news bulletin, it will fail to comply with its obligation to preserve "due impartiality" under Rules 5.1 and 5.11 (and its obligation to give due weight). The Committee considered that the particular 'running order' applied in a given news bulletin is a matter of editorial discretion, subject to the broadcaster complying with the relevant rules relating to due impartiality and due weight, as applicable.

Rules 5.12 and 6.3: Due weight in referendum coverage

35. The Committee noted that Rule 5.12 requires broadcasters to include and give "due weight" when dealing with matters of major political and industrial controversy, to an appropriately wide range of significant views. With specific application to referendums, Rule 6.3 states that "due weight" must be given to designated organisations in coverage during the referendum period. Broadcasters must also consider giving "appropriate coverage" to other permitted participants with significant views and perspectives.
36. The Committee proceeded to consider Vote Leave's complaint that: (i) the concept of "due weight" in Rules 5.12 and 6.3 requires broadcasters – in referendum coverage - to give approximately equal airtime and equal weight to (as applicable) designated organisations and an appropriately wide range of significant views; and (ii) Rule 6.3 requires "manifestly greater weight" to be given to designated organisations than to other permitted participants with significant views and perspectives.
37. The Committee noted that there is no definition of the concept of "due weight" in the Code. Further, whilst Ofcom has published some guidance on this concept in the specific context of elections (paragraph 1.20 to its published Guidance on Rule 6.2), its published guidance on Rule 6.3 of the Code is more limited and does not provide detail on the concept of "due weight" in referendum coverage.
38. As with the concept of "due impartiality" discussed above, the Committee considered that "due weight" under the Code is a flexible concept that should be applied on a case-by-case basis, having regard to the subject and nature of the programming in question.
39. In the context of a referendum, where there are views and organisations campaigning on either side, the Committee considered that the "due weight" requirement does not oblige broadcasters to afford designated organisations and/or representatives of each side of the debate equal airtime, or approximately equal airtime, in a mathematical sense. Rather, as with the assessment of due impartiality, there are a range of factors

that may be relevant in any given case and the underlying requirement to give “due weight” should not be read as imposing any specific quantitative obligations on broadcasters in relation to their coverage.

40. However, the Committee also noted that the amount of time provided by a broadcaster to opposing views in a referendum may be indicative for the purposes of assessing whether due weight has been given to a wide range of significant views (Rule 5.12) and/or designated organisations (Rule 6.3). In particular, where the amount of time dedicated to the different sides of a referendum is broadly similar, this may indicate observance by the broadcaster with the requirement to give due weight to a wide range of significant views. Conversely, a significant imbalance in the coverage provided to the two different sides may be a *prima facie* indication that that coverage did not give due weight to those views as required.
41. Moreover, the Committee considered that Rule 6.3 did not impose any obligation on broadcasters to afford “manifestly greater weight” to designated organisations when compared with other permitted participants. The obligation is to give due weight to designated organisations and consider giving appropriate coverage to permitted participants with significant views and perspectives. It is a matter for the editorial discretion of the broadcaster to discharge its obligations in an appropriate manner, having regard to its obligations in the Code to maintain due impartiality and give due weight to designated organisations. In this regard, the Committee agreed with ITV that the principles set out in paragraphs 1.19 and 1.20 of Ofcom’s published guidance on Rule 6.2 (in particular, that it is an editorial decision for the broadcaster as to what constitutes “appropriate coverage” and that due weight does not mean that broadcasters automatically have to accord more coverage to the larger parties) are instructive when considering compliance with Rule 6.3.

Rules 5.11 and 5.12: Clearly linked and timely programmes

42. The Committee noted that parts of Vote Leave’s Complaint related specifically to the Monitored Programmes whereas parts appeared to relate more generally to ITV’s entire EU referendum coverage. ITV submitted that its news and current affairs coverage should be considered in its totality. The Committee considered that it would be appropriate in this case to consider ITV’s compliance in the context of the totality of its Programming, rather than limiting its consideration to the Monitored Programmes only.
43. In the Committee’s view, irrespective of whether it considered the Monitored Programming only or the Programming as a whole, there is a separate question when assessing ITV’s compliance with Rules 5.11 and 5.12 of the Code as to whether any of that programming is “clearly linked and timely”. If it is, the Committee noted that ITV may satisfy those Code Rules across that range of programming rather than, for example, on the basis of individual or specific programmes.
44. The Committee noted that there is no definition in the Code for the term “clearly linked and timely programmes”. However, in its view, the reference to “clearly linked” programmes should be read as capturing programmes that are editorially and explicitly linked. It also emphasised the reference to “timely” in the Code Rules which, in its view, indicates that the programmes should be broadcast at sufficiently close intervals and at broadly similar times.
45. In light of the above, the Committee explained that it did not agree with ITV’s suggestion that its coverage of the EU Referendum across all of its outlets (for example, regional news bulletins, *Good Morning Britain* and the *ITV Lunchtime News*)

could properly be considered to be clearly linked and timely for the purposes of Rules 5.11 and 5.12 of the Code. In particular, it noted that – other than being broadcast on the same channel – it was not clear that, for example, *Good Morning Britain* could be regarded as clearly linked to the *ITV Lunchtime News*. Further, whilst there may be a degree of overlap in the viewers that watch both of these programmes, in its opinion, viewers were unlikely to regard these programmes as “clearly linked and timely” and the programmes were not necessarily aimed at a like audience.

46. The Committee would expect ITV’s flagship news and current affairs programmes (for example, the *ITV Evening News* or *Peston on Sunday*), on their own, to be duly impartial and to give due weight to the designated organisations (subject to the ability for ITV to comply with the due impartiality and due weight rules across a number of bulletins or programmes where they are clearly linked and timely).

The Committee’s consideration of the parties’ data and conclusions

47. Having considered the relevant principles applicable in this case, the Committee considered whether the material provided by the Complainant and ITV indicated that ITV had breached the Code.
48. In this regard the Committee noted that the parties had provided differing figures and that each disputed the other’s methodology for collating the data. The Complainant’s analysis comprised of actual speaking time on screen in seconds for named individuals with a declared “In” or “Out” position (for *ITV Evening News*, *News at Ten*, and *Peston on Sunday*). ITV provided a selection of data for its news programming (broken down by regional news, national news programming³, and *Good Morning Britain*). ITV also provided a description of its referendum coverage on other current affairs programming. The Committee noted that there was no single ‘right’ way to measure coverage and that the appropriate means of doing so should be a matter for the broadcaster’s discretion, provided that the methodology adopted is reasonable and not unduly narrow or broad.
49. The Committee noted that the parties were measuring coverage using different methods and that there appeared to be some differences between Vote Leave and ITV in relation to the exact proportion of time dedicated by ITV to the “Leave” outcome and Vote Leave. With this in mind, and taking into account the Committee’s views above on the nature of “due impartiality” and “due weight”, the Committee did not consider that it should place any significant weight on the data provided. The Committee noted that the Complaint did not identify any specific instance in which due impartiality had not been preserved or the due weight requirements in Rules 5.12 and 6.3 had not been observed.
50. The Committee therefore decided that there was nothing before it that demonstrated ITV had failed to comply with Rules 5.1, 5.11, 5.12 and 6.3 of the Code in respect of the Programming.

Decision

51. For the reasons set out above, the Committee decided to not uphold the Complaint.

10 June 2016

³ This included: *ITV Lunchtime News*, *ITV Evening News*, and *News at Ten*).