

UK election law: how are businesses restricted during the EU referendum campaign?

The UK is holding a referendum on whether it should remain in or leave the European Union on 23 June 2016. UK election law applies from 15 April to regulate what individuals and companies can do and say about the referendum.

Many businesses will wish to discuss the potential impact of Brexit with their clients, counterparties and staff; however there have been various media reports suggesting that election law means businesses will be silenced. In our view that is incorrect.

This briefing summarises the law, and asks what it means in practice for business in the run up to the referendum.

What is the law?

From 15 April, the Political Parties Elections and Referendums Act 2000 (PPERA) restricts "referendum expenditure" of more than £10,000 by any individual or entity who is not registered with the Electoral Commission.

The term "referendum expenditure" includes most types of expenditure which are incurred:

"in connection with the conduct or management of any campaign conducted with a view to promoting or procuring a particular outcome in relation to any question asked in the referendum"

It also covers expenditure which is "otherwise in connection with" promoting or procuring any such outcome; this covers overheads and other expenditure indirectly related to campaigning activity.

(There are also company law issues associated with election expenditure, which we discuss further below.)

What does it mean?

Whilst PPERA is relatively new legislation, the "with a view to promoting or procuring" test is a longstanding feature of UK election law. There is fifty years of caselaw making clear that it is a test of subjective intent, and not objective outcome.

This means that PPERA only regulates activities that are **intended** to promote or procure a particular outcome of the referendum. The Electoral Commission, which supervises UK election law, has made clear that they accept that the test is one of intent.

Most activities of most businesses have no such intention, and are therefore outside the scope of PPERA. Press reports that businesses cannot even mention the referendum (and its

potential consequences) are therefore incorrect.

The purpose of the rule is to ensure that the expenditure limits and disclosure rules applied to the "Leave" and "Remain" campaigns cannot be circumvented by third parties. The purpose is not to inhibit normal political debate, or to prevent businesses from carrying out normal contingency planning.

Indeed the rules are essentially the same as those that have been in place for every General Election since 2001. Nobody suggested that business representatives were forbidden from speaking out during (say) the 2015 general election; there is no reason why they should treat this referendum differently.

When do the rules apply?

The expenditure rules in PPERA apply from the start of 15 April 2016. However they also apply to material produced prior to 15 April 2016 if it is circulated, or remains available, on or after the 15th.

Hence if, for example, you put material on your website in March 2016 which was created with the intention of influencing the

referendum result, then that should be removed before 15 April.

Press/broadcast interviews

There is a media exemption in PPERA that should in practice cover expenses associated with opinion pieces in newspapers and newspaper and broadcast radio/television interviews.

Business leaders and representatives should therefore generally feel unconstrained by election law when speaking to the media.

There are, however, two caveats to this.

PPERA was drafted at a time when the internet was a relatively recent phenomenon.

The exemption for written material is therefore stated to apply to "newspapers and periodicals", with no explicit reference to the internet. We would say that a newspaper's website or an internet-only publication (such as Politico) is likely a "newspaper" or "periodical" within this definition. A blog or aggregator, however, is probably not.

Similarly, the broadcast exemption only covers the BBC and licensed broadcasters; an interview on a YouTube channel is unlikely to be exempt.

The second caveat is that, even where the PPERA media exemption applies, authorisation and reporting may still be required under the Companies Act – see below.

Written materials and events

If your business will be publishing material, or organising events, relating to Brexit during the

referendum period, you will need to show that your intention was not to promote or procure a particular referendum result.

If the material and/or events are targeted at professional clients or counterparties of your business, as opposed to the general public, then it is unlikely you could be reasonably regarded as intending to influence the referendum result.

This should be the case even if you say to clients, for example in a research publication, that you believe Brexit would have a negative effect on your business or a particular market. Provided you are communicating with them as clients, for business reasons, and not as voters, to influence their vote, you should generally be outside PPERA. Of course if your activity steps over into actual advocacy and/or support for a campaign, then your activities would likely be regulated by PPERA.

You will need to take more care if material and/or events will be sent to or attended by non-professional clients or customers, the general public or the media, particularly if the content of the material/events could be seen as helpful to one side of the referendum debate. You should then consider obtaining specific advice.

You should also take care if material produced to professional clients is promoted to the media, e.g. in an interview, in such a way as to suggest that there is an intent to influence the referendum result. The interview itself will likely be exempt; however it could "taint" that written material.

Debates

You may wish to organise Brexit debates, with speakers contesting the merits of the rival campaigns.

If so, the debate should be "non-selective" – the panel must be reasonably balanced and representative, and the Chair should give all panel members broadly equivalent time to speak and opportunity to answer points and questions.

If, conversely, you only invited speakers from one side of the debate then the cost would likely be regarded as election expenditure.

Communications with staff

There is no exemption in PPERA for communications with staff. The general rule about intent therefore applies.

Hence for example:

- an email sent by a business in May 2016 to all its staff recommending they vote to leave the EU would fall within PPERA;
- an email discussing contingency plans in the event of Brexit should not.

What are the consequences of breaching PPERA?

Breach of PPERA is a criminal offence. Where a company breaches PPERA, criminal liability applies to the entity itself and any director, manager, secretary or other similar officer who authorised the act in question (or who, by neglect, permitted the act to occur).

A person found guilty of an offence is liable to fines and/or imprisonment of up to one year.

It is understandable that the prospect of criminal sanctions makes people cautious. However it is important to note that PPERA has applied to every general election since 2001 and is based on very long-standing election

law concepts. There is nothing in the history of the legislation or the Electoral Commission's approach to it which suggests that ordinary business communications are at risk of prosecution.

Why not aim to keep expenditure below £10,000?

In principle a business could undertake some campaigning activity, but aim to keep the expenditure below £10,000. One might think that the low marginal cost of websites and emails means that this would be straightforward.

In practice that may not be the case.

The rules in PPERA are designed for small campaigning groups, where their expenditure consists of direct expenditure (e.g. printing leaflets and buying advertising space), and overheads (e.g. premises and facilities costs) that they simply pro rate over the referendum period and declare as PPERA expenditure. Staff wages are specifically exempted.

Matters are more awkward for a complex business. The premises and facilities costs would likely be significant, and complicated by cross-charging between entities – and that same cross-charging means that wages may not technically be exempt. The overhead would then need to be pro-rated across the activities that are considered to potentially constitute "referendum expenditure" (and everything that supported those activities).

The calculation of "referendum expenditure" would therefore be subject to multiple uncertainties, and a real risk of accidentally hitting the £10,000 threshold. For most businesses we would therefore suggest that the prudent approach is

to set out to do nothing with the intent of influencing the referendum result, and therefore have no PPERA expenditure at all.

Why not simply register with the Electoral Commission?

Registering with the Electoral Commission as a "permitted participant" permits the £10,000 expenditure threshold to subsequently be breached.

However it also triggers a complex compliance regime that is intended for political campaigning groups and is ill-suited for complex businesses.

Compliance would be an arduous task, with criminal sanctions for even accidental non-compliance.

For these reasons, no business has ever registered under the referendum rules, and only one (small) business has registered under their general election equivalents.

Election law on polling day

Broadcasters (and maybe others) will be conducting exit polling from the moment polling opens at 7am on 23 June. The exit poll results are then generally published by the media as soon as polls shut at 10pm.

Given the potential political and market impact of the result, there may well be rumours throughout the day (online and offline) as to the initial exit polls findings. It will likely be unclear whether the rumours are founded on actual leaks or merely speculation. Regardless, this is something people need to be extremely careful about.

It's an offence under the Representation of the People Act to publish exit polls (or other estimates

or forecasts derived from interviews after people have voted) before the close of poll. The term "publish" has a wide meaning and potentially covers any communication in any form.

Breaching this rule is punishable by subject to fines and/or imprisonment of up to six months.

We would therefore suggest that any business whose staff are likely to have a particular interest in Brexit should warn those staff not to discuss any exit poll rumours before 10pm.

Does PPERA apply to people outside the UK?

PPERA is in principle extra-territorial, and applies to any activity throughout the world intended to influence the referendum result.

It follows that a company's personnel and entities outside the UK are potentially subject to PPERA if they are working on material or planning events which will reach the UK – either directly, because the material will be hosted on the internet, or because it will reach English language media (and hence may be picked up by media in the UK).

It is therefore prudent to ensure that no such activities/events can be reasonably regarded as intended to influence the referendum result.

Regulation of donations

PPERA restricts donations to the various registered referendum campaigns, in much the same way as it restricts donations to political parties.

Very broadly, donations over £500 may only be made by UK resident individuals, companies incorporated in the UK, and companies incorporated elsewhere in the EU but carrying on business in the UK. It is

an offence for any other person to make a donation.

It should be noted that, as well as simple cash donations, the term "donation" includes any loan or provision of goods or services for less than market value.

A full explanation of the donation rules is outside the scope of this briefing, but generally the kinds of Brexit-related activity discussed in this paper are unlikely to constitute donations for PPERA purposes.

Company law implications

As well as PPERA, companies incorporated in the UK are subject to the "political donation" and "political expenditure" rules in the Companies Act 2006.

In short:

- The Companies Act concepts are similar in concept to those in PPERA. Hence where a company is not making donations or incurring expenditure for PPERA purposes, then it will in most cases also fall outside the Companies Act donation and expenditure rules.
- There are, however, subtle differences. The "expenditure" concept in the Companies Act is narrower, and likely does not cover indirect costs such as overheads. The media exemption is also narrower, covering only activities in the ordinary course of a business. Hence any media work that is outside the ordinary course and incurs direct costs may amount to expenditure under the Companies Act but not PPERA.
- The Companies Act rules operate across a UK corporate group, whereas PPERA generally

applies to individual people or entities.

- The Companies Act thresholds are different from PPERA: £5,000 for political donations (aggregated across the corporate group) and no threshold at all for expenditure (i.e. any expenditure at all will trigger the Companies Act rules).
- Donations (over the £5,000 threshold) and any expenditure are required to be authorised by a shareholders' resolution and, subsequently, reported. Many companies (particularly public companies) have general authorisations in place.
- Provided appropriate authorisation and reporting is in place, the Companies Act does not prohibit political donations or expenditure or place any limits upon them.

Any breach of the Companies Act rules can result in personal liability for directors. Hence any company anticipating making a donation, or which has a material risk of incurring election expenditure, should ensure it has an appropriate authorisation in place and seek specific advice..

Further information

If you would like further details on any aspect of election law, or how it applies to your institution, please speak to your usual Clifford Chance contact or any of those listed opposite

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