

European Union Referendum Bill 2015 House of Lords Committee Stage (Day 2) Briefing

30 October 2015

Introduction

This briefing sets out the Electoral Commission's view on amendments tabled ahead of the second day of Committee Stage of the European Union Referendum Bill in the House of Lords on 2 November.

This briefing covers all amendments that have yet to be debated. We will update the briefing ahead of the third day of Committee Stage as needed. We have not commented on all amendments tabled in relation to this Bill, and the absence of comment does not imply that we support them.

This briefing covers amendments relating to:

- Provision of information on the consequences of the UK's withdrawal from the European Union
- Restrictions on the publication of promotional material by UK governments and the European Commission
- Campaigning and financial controls and the control of loans to permitted participants

Our comments at this stage relate solely to the provisions currently set out on the face of the Bill. However, if the Bill is significantly amended during its progress through Parliament, the detail of such changes will need to be carefully considered. We will continue to brief on the Bill and any relevant amendments that are tabled as the Bill progresses through Parliament. All briefings will be available on our website [here](#).

The Electoral Commission's role in referendums

The Electoral Commission has specific responsibilities and functions in relation to the delivery and regulation of referendums held under PPERA, which applies to any referendum Bill brought before the UK Parliament unless specifically stated otherwise.

Our responsibilities under PPERA include:

- Commenting on the intelligibility of the referendum question.
- Registering organisations or individuals who want to campaign in the referendum.
- Considering and approving applications for designation as the lead campaign group for each referendum outcome.
- Making grant payments to the approved designated organisations.
- Monitoring spending on referendum campaigning, in line with the referendum spending limits imposed by PPERA.
- Providing advice and guidance on the rules to campaigners.
- Monitoring and securing compliance with campaign donation, loan and spending controls.
- Reporting on the administration of the referendum and referendum campaign spending.

The Chair of the Commission, or a person the Chair appoints, is the Chief Counting Officer for the referendum and responsible for certifying the outcome of the referendum.

Clause 5: Provision of information on the consequences of the UK remaining a member of, or leaving the European Union

A number of amendments have been tabled which would require the Secretary of State to publish (and lay before each House of Parliament) reports on the consequences of the United Kingdom remaining a member of the European Union or leaving the European Union. The amendments would require any reports to be published not later than 12 weeks before the date of the referendum.

Our research to inform [the Commission's statutory assessment of the referendum question included in the Bill](#) considered what information people needed to know to enable them to make an informed decision on how to vote in the referendum. We found that participants were not clear about what the consequences would be for the United Kingdom if there was a majority 'remain' or a majority 'leave' vote, and that there is an appetite for more detailed information about the implications of any decision to either remain a member of, or leave the European Union.

Participants wanted to know whether a majority vote to remain a member of the European Union would mean the continuation of current terms of membership, continued membership with different terms of membership, or continued membership and adoption of the Euro. Similarly, participants wanted to know whether a majority vote to leave the European Union would mean entire separation from the European Union, renegotiated terms of membership, some kind of partial membership, or a relationship with European Union with trade agreements similar to other European countries that are not part of the European Union.

As many of those requesting this information also acknowledged, it is likely that much of the information that voters would like will not be simply factual in nature, but will sit at the heart of the campaign arguments put forward by those on both sides of

the referendum debate. We do not think it would be appropriate in these circumstances for the Commission to attempt to provide this type of information ourselves.

We recommended instead, in our report that all campaigners' websites include a section with their answers to these questions, highlighting any wider sources that they have relied upon in formulating their response.

The Electoral Commission believes it is important for voters to have access to information about the consequences of voting to remain a member of the European Union or leave the European Union, to help ensure they are able to make an informed decision on how to vote. **However, any provision in legislation for this should ensure that voters can have confidence in the accuracy and impartiality of the information. There should also be sufficient balance given to the consequences of both a majority vote to remain a member of the European Union and a majority vote to leave the European Union.**

Restrictions on the publication of promotional material by UK governments and the European Commission

We are pleased that the Bill was amended at Report stage in the House of Commons to ensure that Section 125 of PPERA will apply at the referendum on the United Kingdom's membership of the EU. Section 125 places restrictions during the 28 days immediately before polling day on the publication of promotional material about referendums by Ministers, government departments, local authorities and certain other bodies in receipt of public funds. We also recommend that governments should not undertake paid-for advertising (including government referendum material delivered to households) during the whole of the referendum period.

It is important that the restrictions on the ability of governments to use public funds to put forward campaign arguments should apply during the 28 days preceding polling day. We have not identified problems with the workability of Section 125 of PPERA applying to governments at previous referendums, and so we think that it should be workable in relation to this referendum.

Following amendments made in the House of Commons, the Bill now also includes regulation-making powers for Ministers to modify Section 125 for the purpose of the EU Referendum. The modifications could exclude specified published material or oral communication from the 28 day pre-poll prohibition, for example, Government communication with the media about the referendum.

Our view remains that the scope of any regulations to exempt activity from being prohibited under Section 125 should be limited only to managing any potential restrictions on the conduct of 'day-to-day' EU business that the Government is concerned could be affected by Section 125.

Amendment 56, tabled in the name of Lord Forsyth of Drumlean and others would modify Section 125 of PPERA, to apply the restrictions to the Scottish Government,

the Welsh Government, the Northern Ireland Executive, and the European Commission.

Amendment 57, tabled in the name of Lord Hamilton of Epsom and others would similarly modify Section 125 of PPERA.

The provisions of Section 125 of PPERA apply to any Minister of the Crown or government department. **We are content that the publication of promotional material by the Scottish Government, Welsh Government and Northern Ireland Executive would already be restricted under the current legislation.**

The Commission's view is that the institutions of the EU, including the European Commission, should adhere to the same rules that apply to governments across the UK under the PPERA referendum regime and that they should not, for example, undertake any paid-for advertising activity during the referendum period. However, we also recognise that we have no regulatory powers that could be utilised directly against these institutions if they do undertake such activity, given both their non-UK status and protection from such regulatory activity as international governmental bodies.

We have therefore written to the UK Government to suggest that it would be helpful for Ministers to secure a voluntary agreement from the institutions of the EU that they will adhere to the same principles that will apply to governments across the UK during the referendum period, including the restrictions which will apply during the final 28 days before polling day under Section 125 of PPERA. We suggested that it would be helpful for any such agreement to be published so that voters and campaigners can be informed about its existence in the build up to the referendum.

Amendment 60, tabled in the name of Lord Blencathra and others, would require the Electoral Commission to establish a new authority to rule on the impartiality of programming shown by the UK's broadcasters during the referendum period.

The Electoral Commission does not support this amendment.

Ofcom and the BBC Trust are already responsible for regulating the respective broadcasters that fall within their remit and these bodies operate during election and referendum periods as they do at all other times. Each of the broadcasters also has duties requiring their impartiality and appropriate balance in the political programming they provide and complaints about any breaches of these duties can be referred to the existing regulators.

Amendment 61A, tabled in the name of Lord Forsyth of Drumlean, would provide for the Electoral Commission to apply a surcharge on a person that caused public funds to be spent in breach of Section 125 in order to recover those funds.

The Electoral Commission does not support this amendment, which would apply sanctions for breaches of Section 125 to individuals, rather than public bodies themselves and it is not clear how this would work in practice. It is also worth noting in respect of any system of regulation in this area that any fines

levied by the Electoral Commission are currently returned to the Treasury's Consolidated Fund.

However, we do welcome the apparent intention behind the amendment. The Commission has noted previously that there are no sanctions associated with the restrictions on central and local government spending in PPERA. Following the 2011 referendums, we suggested to the Government that there would be benefit in clarifying the scope of the restrictions that applied to the publication of promotional material in Section 125 PPERA, including what sanctions, if any, should apply to breaches. It would be helpful if the Government in responding to this amendment could set out its view on how any regulation of Section 125 could work in practice and commit to returning to the House on this point at Report stage.

Schedules 1 and 2: Campaigning and financial controls and the control of loans to permitted participants

Amendment 37, tabled in the names of Lord Forsyth of Drumlean and Lord Blencathra, would remove the established spending limits that exist in PPERA for political parties that register to campaign but are not designated lead campaigners.

The Electoral Commission does not support this amendment.

One of the Commission's referendum principles is that there should be no barriers to campaigners putting forward arguments for any of the possible outcomes. This amendment would reduce the spending limits for political parties that register to campaign to £0. Although other types of campaigner would be able to register as a permitted participant with a spending limit of £700,000, this would not apply to political parties. This would mean that political parties would be limited to spending a maximum of £10,000 as an unregistered campaigner at the referendum. We do not believe that this would be sufficient for established political parties to get their campaign messages to voters to enable them to make an informed decision when they cast their vote.

Amendment 40, tabled in the name of Lord Hamilton of Epsom, would limit the amount that permitted participants could spend between Royal Assent of the Bill and the date on which a referendum is appointed to £20m.

The Electoral Commission does not support this amendment.

In practice, it is not possible for spending limits to create a completely level playing field between campaigners at elections or referendums, because:

- There can be no certainty that there will be equal resources on each side, whatever the limits that apply, and
- The number of participants on each side should not be artificially limited by the rules – all those that have arguments to make and who are eligible to register should be able to make them.

The practical implications of the amendment would be to require all permitted participants to know how much they had each spent and intended to spend during the period, and for them to adjust their own individual spending accordingly. We do not believe that this would be workable in practice.

In addition, the amendment would only apply to spending incurred by campaigners once they had registered as a permitted participant – spending by unregistered campaigners would not be covered. The registration requirement only relates to spending during the referendum period and therefore this amendment would be a disincentive to early registration.

Amendment 42, tabled in the name of Baroness Anelay of St Johns, would limit the amount of funding that registered political parties can accept from certain sources to their referendum spending limit.

Amendment 48, also tabled in the name of Baroness Anelay of St Johns, would amend the loan controls to provide that political parties will not be able to increase the value of a referendum loan from certain sources once it has been entered into.

The Electoral Commission supports these amendments.

The Bill extends the categories of organisations that are permitted to donate and lend to referendum campaigners, including political parties and other campaigners, compared to previous PPERA referendums¹. This enables all those entitled to campaign at the referendum to accept funding from the same sources.

One of the implications of these changes is that a wider group of donors will be able to donate and lend money to political parties that register to campaign at the referendum than are able to fund parties campaigning at elections. Under the PPERA election rules these donors are impermissible sources of election funding.

Allowing political parties to accept donations and loans from these extended sources for campaigning at the referendum means it is possible that funding from these sources could be used for future elections. **Amendments 42 and 48** would limit that risk as a political party would not be able to accept, in total, donations from these sources over and above that which they could spend campaigning at the referendum, or increase the value of a referendum loan.

For further information, please contact **Mazida Khatun**, Senior Communications Officer on 020 7271 0583 or mkhatun@electoralcommission.org.uk.

¹ Permissible categories of 'donor' to a referendum campaigner under Schedule 1, paragraphs 22 and 24 and 'lender' under Schedule 2, paragraph 4(2) EU Referendum Bill - a Gibraltar elector, bodies and organisations in Gibraltar, bodies incorporated by Royal Charter, charitable incorporated organisations, Scottish charitable incorporated organisations, partnerships constituted under the law of Scotland which carry on business in the UK.