

Brexit Essentials: Rules on corporate campaigning and political expenditure

On 23 June 2016, UK voters will go to the polls to decide whether the UK should remain a member of the EU. As the date of the referendum draws closer and campaigning intensifies, it is likely that both UK firms and multinationals will face increasing pressure to voice their opinion on the debate and to lend their support to one side or the other.

This is the fourth in a series of briefings covering the essential aspects of the UK's referendum on EU membership. This edition discusses the legal issues around corporate campaigning and political donations and what businesses should watch out for when considering how to get their voices heard.

Why is this important?

Interest in the EU referendum is high and it is unsurprising - given the decision could have important consequences for the British economy and businesses operating in the UK - that the 'business case' for remaining or leaving seems likely to be a key part of the public debate, both in the UK and internationally.

On 23 February 2016, *The Times* newspaper published an open letter, organised by *Britain Stronger in Europe* and Downing Street, which had been signed by 198 business leaders, including the heads of 36 companies in the UK's FTSE 100, backing the campaign to stay in the EU. A number of business chiefs and companies have already separately expressed public support for the "Remain" campaign, including Michael O'Leary's Ryanair, which intends to campaign actively through press advertisements and more targeted advertisements to its passenger base. On the other side of the debate, the Vote Leave campaign has announced that it is backed by business leaders including Joe Foster, the founder of Reebok; Christopher Foyle, the Chairman of Foyles bookstores; Luke Johnson, the Chairman of Risk Capital Partners; and Lord Kalms, the President of Dixons Retail plc.

"Business needs unrestricted access to the European market of 500 million people in order to continue to grow, invest and create jobs."

Open letter to *The Times* signed by 198 business leaders, 23 February 2016

"Ryanair is absolutely clear that the UK economy and its future growth prospects are stronger as a member of the European Union than they are outside of the EU. Leaving Europe won't save the UK money or red tape because like Norway the UK will still have to contribute to Europe, and obey its rules if it wants to continue to trade freely with Europe"

Michael O'Leary, CEO of Ryanair, 24 February 2016

“As an entrepreneur, I know that the UK would thrive outside the EU. The EU costs us too much, it hinders our trade with fast-growing global economies and it over-regulates.”

Luke Johnson, Chairman of Risk Capital Partners, 13 January 2016

Communicating about the referendum can raise legal issues - particularly around campaign financing - and it is important that firms that are considering supporting either side of the campaign bear these in mind to ensure they stay the right side of the line while getting their voice across.

What should businesses watch out for?

1. Company law restrictions on political donations and expenditure

A UK-incorporated company must not make a political donation to a political organisation or incur any political expenditure without shareholder approval or, if the company is a subsidiary, the approval of its UK holding company. Directors could incur personal liability if authorisation is not obtained.

UK companies - including UK subsidiaries of overseas companies - are likely to bump up against these restrictions in three main ways:

- i. **Making a political donation to a political organisation.** A political donation includes any gift of money, but the definition is very broad and could include, for example, allowing a political organisation to use a business’s facilities on favourable commercial terms. An organisation - including any *“body corporate or unincorporated association and any combination of persons”* - that carries on activities capable of being reasonably regarded as intended to influence voters in relation to any national referendum held under the law of the UK (which includes the EU referendum) will be a “political organisation”. While the Electoral Commission has yet to designate a lead campaign group for either side of the debate - *Britain Stronger in Europe* and *Vote Leave* currently seem most likely to lead the “Remain” and “Leave” sides respectively - it seems highly likely that, given the breadth of the definition, all campaign groups will be considered to be “political organisations”. If a campaign group constituted an “all-party parliamentary group” it would be exempted, but none of the main campaign groups are currently registered and we are unaware of any suggestion that they would be considered as such. Importantly, there is a *de minimis* threshold of £5,000 before a political donation is caught by the rules - but there is no such equivalent for political expenditure.
- ii. **Incurring any political expenditure on the preparation, publication or dissemination of promotional material that is capable of being reasonably regarded as intended to affect public support for a political organisation.** This could extend to, for example, a company distributing leaflets to its employees in support of a campaign group or its activities.
- iii. **Incurring any political expenditure on activities that are capable of being reasonably regarded as intended to influence voters in relation to any national referendum.** Note that it is unnecessary under this limb for a company’s expenditure to relate to a campaign group. This could include, for example, the expense of holding a press conference in order to promote one side of the EU referendum debate.

A company that must produce a directors' report under the UK Companies Act 2006 must record any political donations made and political expenditure incurred over £2,000 during the financial year in its report.

2. Referendum-specific rules

Businesses considering donating money to a campaign group or incurring expense in advocating for a particular outcome in the EU referendum should also bear in mind certain referendum-specific rules:

- i. **Donating to a campaign group.** Campaign groups who wish to wish to campaign for or against leaving the EU can register with the UK's Electoral Commission. UK law limits who can donate to a registered campaign group (but UK-registered companies which are incorporated in the EU and which carry on business in the UK will generally be permitted to donate¹), and registered campaign groups will need to keep a record of donations received over £500 and file publicly available reports with information on persons who donate over £7,500.
- ii. **Advocating for a particular outcome.** Any person incurring expenses on referendum activities for referendum purposes in excess of £10,000 during the referendum period is legally required to register as a campaigner with, and file reports with, the Electoral Commission. The definitions of "referendum activities" and "referendum purposes" are broad and would catch, for example, a wide range of internal and external corporate communications that advocate, or favour, the "Remain" or "Leave" side of the debate.

What should companies do first?

Before taking any steps in relation to the EU referendum debate, businesses should consider the relevant rules and restrictions around political donations and expenditure and the referendum-specific rules to ensure their proposed activities are compliant with the legal framework.

In particular:

- Unlisted UK-incorporated companies should consider whether they need to pass enabling resolutions prior to undertaking any activity.
- Listed companies may have standing authorities from their 2015 AGM to make political donations and incur political expenditure. However, consistent with institutional investor guidance, these authorities are typically sought in order to prevent inadvertent breaches of the rules. A company considering relying upon its standing authority should consider the investor relations implications of doing so. In addition, listed companies may well have in place corporate policies which prohibit political donations or expenditure irrespective of the standing authority.
- Listed companies with AGMs coming up prior to the "in/out" referendum should consider whether they require an enabling resolution and, if so, what to say in the explanatory notes in relation to their intention to use the authority.

¹ As will Gibraltar-registered companies which are incorporated in the EU and which carry on business in Gibraltar.

- All companies should consider requiring any referendum-related communications, whether to the public generally or to employees, to be pre-cleared through the legal or compliance team in order to seek to avoid such communications counting towards the threshold for registration as a campaigner with the Electoral Commission.
- Companies should consider the tax consequences of making a political donation or incurring any political expenditure. For most UK tax resident companies, obtaining a deduction for any such costs is likely to be challenging.

To read all the briefings in this series, please see:

1. [Brexit essentials: UK proposals for EU reform](#)
2. [Brexit essentials: Alternatives to EU membership](#)
3. [Brexit essentials: Renegotiation of the UK's relationship with the EU](#)