COUNTDOWN TO THE REFERENDUM:

A series of articles by Matrix that will explore a number of legal topics surrounding the UK referendum on 23 June 2016.

3: The law of the EU referendum

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Synopsis

- *Summarises and discusses the legal framework around the holding and conduct of the EU referendum, and referendums more generally. Examines in detail, the Political Parties, Elections and Referendums Act 2000, Part VII, and its interplay with the European Union Referendum Act 2015.*
- *The main portion of the article sets out: the legislation determining the referendum timetable and question, detailed discussion around permitted participants and choosing lead campaigners (and what that means), and the financial controls on referendum campaigning.*
- *Touches on the controls on publications by government bodies during referendum periods and the administration of the referendum process.*

1. In an election we vote in a predetermined cycle of polling in order to choose people to hold office.
2. In a referendum, however, a political question is brought back to the people for a decision in a vote.
3. Part VII of the Political Parties, Elections and Referendums Act 2000 (PPERA) contains the legal framework for referendums in the UK. But each referendum requires its own bespoke Act of Parliament (the enabling Act) plus bespoke subordinate legislation to fill in the details. For the referendum on EU membership, the enabling legislation is the European Union Referendum Act 2015.

The timetable and question

4. Since referendums are ad hoc polls, on each occasion a timetable must be set and the question identified.
5. The European Union Referendum (Date of Referendum etc) Regulations 2016, SI 2016/278 (made under s 1(1)–(3) of, and para 1 of Sch 1 to, the 2015 Act) specify 23 June as the date of poll.
6. The "referendum period" is the time period during which statutory controls apply to the spending of campaigners. PPERA, s 102 requires this important period to be specified in the referendum's enabling statute, subject to the proviso that it must be less than six months. Sch 1, para 1(2) of the 2015 Act provides that that the EU referendum period must not be less than 10 weeks ending with the date of poll.
7. The 2016 Regulations provide that the referendum period starts on 15 April 2016, ending on date of poll.
8. PPERA, s 104 prescribes how the question is to be determined. It ensures that the Electoral Commission has an opportunity to assess and comment on the proposed question before it becomes law. With the EU referendum, the assessment of the Electoral Commission proposed an amendment, which was accepted by the Government (although there is no legal requirement for this to happen). The question was eventually set as: "Should the United Kingdom remain a member of the European Union or leave the European Union?" (s 1(4) of the 2015 Act), with the alternative answers to the question being "Remain a member of the European Union" or "Leave the European Union" (s 1(5) of the 2015 Act).

Permitted participation and lead campaigners

9. Anyone can spend up to £10,000 on campaigning during the referendum period without registering with the Electoral Commission (PPERA, s 117).

10. In order to spend more, however, an individual, body or political party must become a "permitted participant", or "PerPar". This requires registration pursuant to PPERA, ss 105 and 106, as modified by Sch 1 to the 2015 Act. In the case of a political party the "responsible officers" (the leader and nominating officer) may make a declaration to the Commission that the party wishes to be a permitted participant and as to the outcome for which it wishes to campaign. Labour, Liberal Democrats and the Green Party, for example are PerPars for the Remain outcome. UKIP, predictably, is a PerPar for Leave.

11. Permitted participants in a referendum may apply to the Electoral Commission for designation as lead campaigners, to whom financial and other forms of assistance are made available under PPERA s 110. These include a high permitted spending limit (of £7million in the EU referendum), free distribution of information to voters, the use of certain public rooms for public campaign meetings, referendum campaign broadcasts and a grant of up to £600,000.

12. Designation by the Commission is under PPERA, s 108. Broadly speaking applicants must show that they "adequately" represent those campaigning for a particular outcome (PPERA, s 109). In a binary choice referendum one such permitted participant can be designated for each possible outcome. As a general rule, if it is not possible properly to designate a lead campaigner for each of the referendum outcomes, the Electoral Commission cannot designate any (see PPERA, s 108(2)(b)). But modifications made to PPERA, s 108 by the 2015 Act, enabled the Commission to designate a lead campaigner for one side of the argument only without designating a lead campaigner for the other side.

13. In fact the Commission has made EU referendum lead campaigner designations for both sides. These are The In Campaign Ltd and Vote Leave Limited. There had been hot competition between two of the "out" campaigns for the designation. Dissatisfaction with the Commission's decision ensured, with *The Telegraph* reporting that the referendum might even need to be delayed whilst Arron Banks' losing GO Movement Ltd pursued a judicial review challenge.

Financial controls

14. Chapter II of PPERA, Part VII imposes controls on the incurring of "referendum expenses". There are also requirements as to reporting by, and donations to, campaigners.

15. Referendum expenses are expenses of a type identified in Pt 1 of Sch 13 to the Act that are incurred "for referendum purposes". The types of expense include advertising, mailshots, market research and media relations, transport costs and public meetings.

16. "For referendum purposes" means "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" (PPERA, s 111(3)).

17. As noted above, only permitted participants are allowed to incur such expenses in excess of £10,000 during the referendum period. But in such a hotly contested, fragmented campaign there are doubts about whether the authorities will be able to police this theoretical limit and ensure that smaller groups of, perhaps local, campaigners stay within the limit.

18. Permitted participants (including those designated under s 108) are subject to expenditure limits set out in PPERA, Sch 14 (as amended). The £7m figure for the lead designated campaigners also applies to any political party whose share of the vote achieved at the last General Election exceeded 30 per cent. There are lower limits for other parties pro rata to their lesser share of the vote. Other permitted participants are subject to a flat-rate limit of £700,000.

19. Donations to political parties are covered by the non-referendum provisions of PPERA. Donations to other PerPars are subject to controls under PPERA, s 119 and Sch 15. Permissible donors are identified and donations accepted must be declared.

20. As with election expenses of candidates at elections, returns must be filed by PerPars declaring the referendum expenses said to have been returned during the referendum period (see PPERA, s 120). These must be delivered to the Commission.

Controls on publications

21. Generally speaking, local and central government are banned from publishing materials that provide information on the referendum, encourage voting, or advance arguments about the outcome of the referendum during the relevant period (PPERA, s 125; see also Electoral Commission Guidance). S 8 of the 2015 Act, however, allows the Government to exclude certain proscribed information from the ambit of s 125 following consultation with the Electoral Commission.

22. The contentious Government EU Referendum information booklet was produced and delivered just before the referendum period began.

Conduct of referendum

23. PPERA, s 128 specifies the role of the Chair of the Electoral Commission or his designate as Chief Counting officer. See also s 11 of the 2015 Act.

24. There are bespoke 2016 Regulations for the conduct of the EU referendum. See the EU Referendum (Conduct) Regulations 2016 made under ss 4, 5, 9 and 11 of the 2015 Act. These Regulations broadly reflect the conduct regulations that apply to elections under the Representation of the People Act 1983. The voting

areas for the referendum are the local government areas for the election of councillors. The Returning Officer for such elections is the Counting Officer for the voting area concerned.

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Further information

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