

POLITICAL PARTIES, ELECTIONS AND REFERENDUMS ACT 2000

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Part IX : Political donations and expenditure by companies

Section 139 and Schedule 19 : Control of political donations by companies

246. The general purpose of *section 139 and Schedule 19* is to require directors of companies to seek the approval of the company in general meeting to the making of political donations to political parties or organisations or to the incurring of expenditure for political purposes. At present the making of political donations and expenditure by a company on other political purposes is left to the general discretion of the directors and the management of the company. As a result of the Act the detailed arrangements will continue to lie with the directors, but it will not be lawful for such action to be taken unless approved in advance by the company in general meeting.
247. Part IX of the Act goes further than the regulation of political funding in the United Kingdom and covers the approval of company donations to political parties and organisations in other member states of the European Union. This reflects the potential for the views of political parties based in other member states to have a direct impact on the commercial climate in the UK through bodies such as the European Parliament.
248. The regime for the control of political donations and expenditure is set out in Schedule 19 of the Act, which inserts new Part XA (comprising new sections 347A to 347K) into the Companies Act 1985.
249. Part IX of the Act does not extend to Northern Ireland, which has separate company law.

New Sections 347A and 347B : Introductory provisions and exemptions

250. *Section 347A* establishes the general purpose of the sections on control of political donations and expenditure by companies, as set out above in relation to section 139 of this Act. In addition, it provides the following definitions in respect of the new Part XA (subject to the exemptions in section 347B):
- (a) “director” includes shadow director;
 - (b) “donation” means anything that would constitute a donation for the purposes of sections 50 to 52 of this Act;
 - (c) “EU political expenditure” means any expenditure incurred by a company-
 - in respect of the preparation, publication or dissemination of any advertising or other promotional material which could reasonably be regarded as intended to affect public support for any EU political organisation, or

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- in respect of any activities by the company itself which are capable of being reasonably regarded as intended to affect public support for a political party registered under this Act, any other EU political party or any independent candidates at elections, or to influence voters in relation to any national or regional referendum in any EU member state.

(d) “EU political organisation” means:

- (i) a political party registered under the Act, or
- (ii) a political party which carries on, or proposes to carry on, activities for the purpose of, or in connection with, the participation of the party in any election or elections to public office held in an EU member state other than the United Kingdom, or
- (iii) an organisation which carries on, or proposes to carry on, activities which are capable of being reasonably regarded as intended to affect public support for-
 - any registered party,
 - any other political party within (ii) above, or
 - independent candidates at any election or elections to public office held in an EU member state, other than the UK, or
- (iv) an organisation which carries on, or proposes to carry on, activities which are capable of being reasonably regarded as intended to influence voters in relation to any national or regional referendum held under the law of any EU member state.

251. *Section 347B(1) to (3)* provide for the following exemptions:

- a subscription paid to an EU trade association for membership of the association is not to be regarded as a political donation for the purposes of the new Part XA;
- an all-party parliamentary group composed of members of one or both of the Houses of Parliament (or of such members and other persons) is not an EU political organisation for the purposes of that Part.

252. Under *section 347B(4) to (7)*, a company (including, where appropriate, a subsidiary company) does not need to seek prior shareholder consent for donations to EU political organisations except to the extent (if any) that the amount or aggregate amount of any such donation or donations made in a particular qualifying period exceeds £5,000.

253. A “qualifying period” is defined in *subsection 347B(6)* as a period of twelve months. The first such period will commence either on the date of the company’s first annual general meeting after this section has come into force or on the date immediately following the end of the 12-month period beginning with the date of the coming into force of this section, whichever is sooner.

254. Under *section 347B(8)*, the Secretary of State may make an order by statutory instrument conferring an exemption on companies or expenditure of any description or category specified in the order. The Government has said that it intends to exempt business activities such as the publication of newspapers which, by their very nature, involve the publication or dissemination of material which seeks to influence the views of members of the public.

New Section 347C : Prohibition on donations and political expenditure by companies

255. *Section 347C* prohibits a company from making a donation or incurring political expenditure unless the transaction or the expenditure is authorised under, or by virtue of, a resolution of the company in general meeting. An approval resolution must be one passed by the company in general meeting which authorises the making of donations and incurring of expenditure for a period of not more than four years commencing with the date of the passing of the resolution up to a value specified in the resolution. The resolution must not identify specific transactions but must simply seek approval for the global amount to be spent on donations and political expenditure within the relevant period.
256. *Subsection (5)* provides that where donations are made or expenditure incurred without an approval resolution it cannot be subsequently ratified or approved in any way by the shareholders. The consequences will be governed only by section 347H.
257. *Subsection (6)* provides that nothing in section 347C is to be taken as authorising a company to make political donations etc where its constitution does not permit it. Similarly any such approval will not override any mandatory provisions of the political funding regime set up under this Act.

New Section 347D: Special rules for subsidiaries

258. *Section 347D* specifies special rules which apply to a company incorporated in Great Britain which is a subsidiary of a holding company. (The terms “subsidiary”, “holding company” and “wholly-owned subsidiary” each have the meaning given by section 736 of the Companies Act 1985.) *Subsection (2)* provides that, when the subsidiary company is not a wholly-owned subsidiary, it may not lawfully make any donation or incur any expenditure which has not been approved in general meeting by both the holding company and the subsidiary company itself.
259. *Subsection (3)* provides that, when the subsidiary is a wholly owned subsidiary of its holding company, then the subsidiary need not pass its own resolution but the resolution of the holding company will still be required.
260. *Subsections (4), (6) and (9)* provide that the resolution of the holding company must be in the same terms as those required for the subsidiary itself.
261. *Subsection (7)* provides that, where donations or expenditure by a number of subsidiaries are required to be approved by the holding company, there must be separate resolutions dealing with each subsidiary. *Subsection (8)* applies the prohibition on subsequent ratification and approval described in relation to section 347C above to holding company approval resolutions.

New Section 347E : Special rule for parent company of non-GB subsidiary undertaking

262. *Section 347E* places an obligation on the directors of the holding company to take all such steps as are reasonably open to them to secure that any “subsidiary undertaking” (as defined in section 258 of the Companies Act 1985) that is incorporated or otherwise established outside Great Britain only makes a political donation or incurs political expenditure authorised by a prior resolution of the holding company in general meeting. The holding company resolutions are to be in the same form as required for GB subsidiaries and no subsequent ratification or approval of unauthorised donations or expenditure is permitted.

Section 347F : Remedies for breach of prohibitions on company donations etc.

263. *Section 347F* sets out civil remedies in relation to the making of donations or the incurring of political expenditure without the required approval of shareholders

(“unauthorised transactions”). The remedies are to be available to a company and are to be pursued in the normal manner by the company; i.e. they will be pursued by the directors in the exercise of the management powers conferred by the articles of association, who will be subject to the various fiduciary and other duties applicable to directors in the conduct of the company’s business.

264. *Subsections (2) and (4)* provide that, where a company has engaged in an unauthorised transaction, the company is to have a statutory right to recover the amount of the donation or expenditure jointly and severally from the directors of the company (including for this purpose shadow directors) in office at the time the transaction was entered into. The company is also to have a statutory right to recover damages for any harm caused to the company by the unauthorised transaction e.g. if it is established that the unfavourable publicity surrounding an unauthorised transaction caused a loss of business to the company. Under *subsection (3)*, the company is also entitled to interest on the amount of the unauthorised expenditure from the time of the unauthorised transaction until the amount is repaid at a rate to be prescribed by the Secretary of State by regulations subject to the negative procedure.
265. *Subsection (6)* provides that, where the company entering into an unauthorised transaction is a subsidiary of a holding company incorporated in Great Britain, that holding company is to have equivalent rights of action to those of the subsidiary itself against the directors of the holding company at the time the subsidiary entered into the unauthorised transaction. Again the liability is to be joint and several and is to include shadow directors and to be on the same terms as the actions vesting in the subsidiary company itself.
266. *Subsection (8)* disapplies the general power of the court under section 727 of the Companies Act (to grant relief to directors in breach of their duty) to liability arising under this section.

New Section 347G : Remedy for unauthorised donation or expenditure by non-GB subsidiary

267. *Section 347G* provides that, where the unauthorised transaction is entered into by a subsidiary incorporated outside Great Britain, the holding company is to have the rights of action set out in section 347F against the directors of the holding company at the time the transaction was entered into, jointly and severally, where the directors are shown to have failed to take all such steps as were reasonably open to them to prevent unauthorised transactions. Section 727 is also disapplied in this subsection.

New Section 347H : Exemption of directors from liability in respect of unauthorised donations or expenditure

268. *Section 347H* provides that, when proceedings are brought against a director or former director in respect of unauthorised donations or expenditure, it is a defence for the director to show that:
- (a) the amount involved in any unauthorised transaction has been repaid to the relevant company, together with any interest on that amount up to the date of repayment;
 - (b) the repayment has been approved by the company in general meeting;
 - (c) the notice of the resolution to be submitted to that meeting disclosed in full the circumstances in which the unauthorised transaction occurred and the circumstances and source of the repayment made to the company.
269. *Subsection (2)* provides that, in the case of directors of a holding company, it will be a defence to show in relation to unauthorised transactions by a subsidiary company that:

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- (a) the unauthorised amount has been repaid, together with any interest on that amount up to the date of repayment;
 - (b) the repayment has been approved by both the subsidiary and the holding company in general meeting;
 - (c) the notice of the resolution to be submitted to each of those meetings disclosed in full the circumstances in which the unauthorised transaction occurred and the circumstances and source of the repayment made to the company.
270. *Subsection (3)* provides that, in the case of a wholly-owned subsidiary of the holding company, it is not necessary for the repayment to be approved by the subsidiary company in general meeting.
271. *Subsection (4)* provides that, in the case of directors of a holding company, it is a defence to show that proceedings have been commenced by the subsidiary against its directors and are being pursued with due diligence by that company unless the subsidiary is wholly owned. Under *subsection (5)*, this defence may only be raised with the leave of the court which may make, on such application for leave, such order as the court thinks fit, including an order adjourning or permitting the continuance of the action on such terms and conditions as the court thinks fit.
272. *Subsection (6)* provides that it is a defence for directors of a holding company of a subsidiary incorporated outside Great Britain to show that:
- (a) the unauthorised amount has been repaid to the subsidiary undertaking, together with any interest on that amount up to the date of repayment;
 - (b) the repayment has been approved by the holding company in general meeting;
 - (c) the notice of the resolution to be submitted to that meeting disclosed in full the circumstances in which the unauthorised transaction occurred and the circumstances and source of the repayment made to the company.

New Section 347I : Enforcement of directors' liabilities by shareholder action

273. *Section 347I* provides for an action to be available under which shareholders may enforce on behalf of the company any of the remedies outlined in section 347F above.
274. Under *subsection (2)*, the shareholder action is only to be available when brought by one of the groups of shareholders described in section 54(2) of the Companies Act 1985; i.e. those groups entitled to challenge the re-registration of a public company as a private company. No shareholders other than those comprised in any one of such groups ("an authorised group") will be able to bring the shareholder action.
275. Under *subsection (3)*, an authorised group can only commence an action after:
- (a) serving a notice on the company which sets out the cause of action, a summary of the facts on which it is based, the names and addresses of the shareholders making up the group and the grounds on which they qualify as an authorised group; and
 - (b) a period of 28 days has elapsed between the service of the notice and the commencement of the action.
276. Under *subsections (4), (5) and (6)*, any director may apply to the court during the period of 28 days to bar the shareholder action on any of the following grounds:
- (a) repayment of the amounts claimed has been made in accordance with the procedures described in section 347H above;
 - (b) the company has itself commenced proceedings and is pursuing those proceedings with due diligence. If the company makes an application on this basis, the court

has a full discretion under *subsection (6)* not only to bar the shareholder action but to permit it to continue on such terms and conditions as the court thinks fit or to require the company's action to be discontinued in favour of the shareholder action or for the company's action to be continued on such terms and conditions as the court may think fit;

(c) the members proposing to bring the shareholder action do not constitute an authorised group.

277. *Subsection (7)* provides that, if proceedings are brought by an authorised group of members, the group is to conduct the action on behalf of the company as if they were the directors of the company bringing an action on its behalf in the normal manner. The members are, in so far as they are acting on behalf of the company, to be subject to the same duties in relation to their acting on behalf of the company as would be owed by the directors themselves when conducting the action. But no action by the company to enforce such a duty is to be brought without the leave of the court.

278. Under *subsection (8)*, the authorised group is to require the leave of the court to discontinue or compromise a shareholder action, and the court may give such leave on such terms as it thinks fit.

New Section 347J : Costs of shareholder action

279. *Section 347J* provides that the authorised group of members of a company are not to be entitled as of right to have the cost of the shareholder action met from the funds of the company except as provided in the section. Under *subsection (2)*, they have the right to apply to the court for an indemnity out of the company's assets in respect of costs incurred or to be incurred in a shareholder action. The court has full discretion to grant such an indemnity on such terms as it thinks fit. Under *subsection (4)*, if the company is awarded costs or they are agreed to be paid to the company and no *subsection (2)* order has been made, the costs are paid to the group. *Subsection (5)* provides, in the same circumstances but where costs go the other way, for them to be paid by the group.

New Section 347K : Information for purposes of shareholder action

280. *Section 347K* provides that the authorised group of members of a company is entitled, once the action is commenced, to be provided by the company with all information possessed by it, under its control or obtainable by it and relating to the subject matter of the action. Under *subsection (2)*, this right may be enforced by the authorised group by application to the court for an order directing the company, and any officers or employees specified in the application, to disclose to the group all or any such information in such form and by such means as the court may direct.