

Transparency in digital campaigning: Response to the Cabinet Office Technical Consultation on Digital Imprints

4th November 2020

Proposal 1: Extension of regime

Questions 1 and 2: Do you agree or disagree with this proposal for the extension of the imprints regime to digital election material? Please provide any further detail to explain your response here.

The Electoral Reform Society (ERS) strongly agrees with this statement. The ERS has long advocated the extension of the imprints regime to digital election material, in line with requirements for print campaign material, and we welcome the government's proposals in this regard.

The Electoral Commission has been calling for imprints to apply to digital material since 2003 and has been joined by a plethora of parliamentary committees, academics, civil society organisations and experts in advocating this. The salience of such calls has only increased in recent years with the increasing use of digital advertising in political campaigns by candidates, parties and campaigners. In the 2017 general election, parties spent around £3.16 million on Facebook adverts, more than double the £1.3 million they spent on Facebook in the 2015 general election. Though full spending returns for the 2019 general election are yet to be submitted, estimates seem to indicate that political party spending on platforms is likely to have increased by over 50 percent in 2019 compared to 2017, with around £6 million spent on Facebook and just under £3 million on Google by the three main UK-wide parties.

Alongside this, there has been growing public concern around the lack of information about who is behind online content. The Electoral Commission's 2019 post-election research found that less than a third of people (29%) said they could find out who has produced the political information they see online, though 72% of respondents said that it was important for them to know who produced the political information they see online. Nearly half (46%) agreed that they were concerned about why and how political ads were targeted at them.

Though online campaigning is not new, it has changed significantly in terms of scale, reach and sophistication in recent years and it is high time that our election rules were updated to account for such changes.

Digital imprints, stating who has paid for and promoted content, will enhance transparency about who is behind election material for voters, regulators, researchers, and journalists. Voters will know who is trying to influence their vote, which will enable them to make a more informed decision at the ballot box and to hold those seeking to persuade them to account after the election. The Electoral Commission will be able to rely on digital imprints as part of its regulatory monitoring and enforcement work.

While digital imprints are a necessary and important first step in tackling the unregulated realm of online campaigning, more needs to be done to ensure greater transparency and enhance public trust.

Questions 3 and 4: Do you agree or disagree that this regime will improve the transparency of digital election material? Please provide any further detail to explain your response here.

The ERS agrees with this statement. But, as mentioned in response to question 2, while necessary, digital imprints are not sufficient to enhance transparency of election material and their impact on transparency and public confidence in our elections should not be overestimated. Digital imprints can provide information on an individual advert run by a single campaigner and targeting a specific set of voters. These would allow voters to know who they are receiving information from and provide the Electoral Commission with information on who is running adverts. But imprints do not offer voters a comprehensive overview of all political adverts running on tech platforms through a dedicated ads library, meaning that – even with imprint disclosures – voters would be unable to know if campaigners are targeting different voters with different and potentially contradictory messages. Nor would imprints provide details on how those adverts were targeted, such as targeting criteria. Opacity in online campaigning would therefore persist and campaigners would still be able to push different messages to different people, undermining the collective public debate at election time, with little opportunity for accountability.

- For these reasons, the ERS has been calling for further action to be taken to address these digital shortcomings, including: requiring campaigners to provide more detailed and meaningful invoices to the Electoral Commission on their digital spend, and to do so in near real-time, to assist the Commission in its monitoring and enforcement work, and to allow for public scrutiny during the course of a campaign; setting up a single, online database for all political adverts, which would be publicly available and easily searchable, and would provide voters with information on who has produced a piece of content, on groups targeted and the criteria used, on reach/impressions (including by demographics, geography and other characteristics); establishing a statutory code of practice for political parties and campaigners with regards to how they use personal sensitive data for political purposes and targeted advertising.
- More broadly, in line with the Law Commissions' recommendations, the ERS is calling for a comprehensive review and overhaul of our electoral law, which needs to be simplified, updated and future-proofed for the digital age. The fundamental principle must be to ensure that the public have faith in the democratic process.

Question 5: What do you consider to be the main benefits of the digital imprints proposal?

As outlined in response to previous questions, the primary benefits of the digital imprints proposals are, firstly, the fact they can enhance transparency for voters, the Electoral Commission, and others about who is behind political adverts online. This would help voters make a more informed decision at the ballot box by giving them clarity as to who is hoping to influence their vote, and would ensure campaigners are held to account for the messages they put out in the course of election and referendum campaigns. Second, they help ensure the Electoral Commission can effectively monitor political adverts running online in line with its role as regulator of political finance.

An additional benefit is the fact that the imprints regime, based on the current proposal, will apply all year round, rather than just before an election,

in recognition of the shift to permanent campaigning mode made possible by online techniques and platforms. Further, the proposal sets out that election material will be subject to the regime regardless of the country it is being promoted from, which is particularly important given that social media has made it possible for political ads to be purchased and promoted from anywhere in the world.

Question 6: Do you have any other comments on this proposal?

In previous answers, we have highlighted how it is important to be open and realistic about what the imprints regime alone will be able to achieve in terms of enhancing transparency and public confidence. We have set out possible further reforms which, we believe, would help enhance transparency around elections and improve public trust, alongside digital imprints, such as online political ads databases.

A further comment in relation to transparency relates to whether or not a digital imprint will be sufficient to find out who is behind election content. A range of new organisations and campaign groups are active in election campaigns. While campaign material from political parties and candidates is often easy to recognise, it can be difficult for voters to recognise these groups, work out who is behind their campaign material and what their intentions are. Such opacity makes it hard to know what agenda they are pushing and whether to trust the information they provide.

If one of the aims of the regime is to ensure the public knows who is paying for and promoting election material, then the ultimate source of the advert, or the party or candidate on behalf of whom the material is ultimately being promoted, must be clear. Our recent report, *Democracy in the Dark*, researched and written by leading political finance experts Dr Katharine Dommett and Dr Sam Power, presented some examples of how opacity around who is running online political advertising and for what purpose may persist even with imprints. This poses challenges, as some of these groups can be affiliated to parties, but not make those links overt. This makes it difficult for citizens, as the Electoral Commission suggests, to ‘understand the origins of campaigning material’ and ‘make a political choice with greater confidence’.

Proposal 2: Material subject to the regime

Questions 7 and 8: Do you agree or disagree that the regime should be extended to registered political parties, registered third party campaigners, candidates, holders of elected office and registered referendum campaigners - both paid and unpaid (or ‘organic’) material? Please provide any further detail to explain your response here.

We strongly agree that the imprints regime should be extended to the campaigners outlined in questions 7, given that these are the primary actors involved in political campaigning during election and referendums, who are already required (in the case of political parties and third-party campaigners) to register with the Electoral Commission. There should be transparency around the election material they publish and promote, as for printed material.

Such actors are already required to submit spending returns to returning officers (for candidate spending) or the Electoral Commission (for parties and registered campaigners). Requiring them to include an imprint on their online election material will make monitoring and enforcement of spend easier for those tasked with electoral finance regulation.

Questions 9 and 10: Do you agree or disagree that the regime should be extended to prospective office holders (both paid and unpaid, or 'organic', material)? Please provide any further detail to explain your response here.

The ERS does not take a position on this question. When deciding whether the regime should be extended to prospective office-holders, we believe that consideration should be given to, firstly, defining when someone can be regarded as a 'prospective officeholder'; secondly, to ensuring consistency between this regime and that applying to candidates, registered parties and third-party campaigners, to avoid potential loopholes in who is required to display an imprint; and thirdly to making sure the regime applying to prospective office-holders is proportionate and not overly burdensome, given the complexities in defining when someone is regarded as being a prospective candidate for the purposes of imprints.

Questions 11 and 12: Do you agree or disagree that the regime should be extended to unregistered third party campaigners promoting paid material only? Please provide any further detail to explain your response here.

The ERS believes that the imprints regime should strike the right balance between ensuring transparency and being proportionate for those to which it applies, particularly insofar as it would affect free speech and a healthy and vibrant political debate, which are fundamental to election and referendum campaigns.

Under the government's proposal, the imprint regime would apply to paid content only for unregistered third-party campaigners, which would seem to ensure that private individuals who are merely participating in open democratic debate, rather than promoting election material, would not be required to display an imprint on their online posts.

Nonetheless, this should be kept under review once the imprints regime is in place, given the potential for unscrupulous actors to circumvent the imprint requirements by posing as private individuals/unregistered campaigners.

Questions 13 and 14: Do you agree or disagree with the distinction made in this proposal between paid and unpaid material? Please provide any further detail to explain your response here.

The ERS agrees with this statement. As set out in response to question 12, the current distinction between paid and unpaid material would, prima facie, appear to strike the right balance between ensuring transparency in online political campaigning and protecting free speech/an open democratic debate among private individuals. Nevertheless, this should be kept under review should such a distinction allow for loopholes to be exploited by those seeking to circumvent the rules and not display an imprint.

Questions 15 and 16: Do you agree or disagree that the regime should be expanded beyond what is considered election material (as set out in this proposal), to wider online political advertising? Please provide any further detail to explain your response here.

We agree that the digital imprints regime should apply to election material, as set out in the government's proposal and in line with the requirements for print material contained in the RPA 1983 and PPERA 2000.

With regards to wider online political advertising, there is no agreed upon definition of what this constitutes, which means that extending the imprints regime to such material will need to be subject to careful consideration, taking into account, inter alia, the year-round, permanent nature of political campaigning nowadays (which might mean that not all material that should require an imprint is covered under the current definition of ‘election material’) and potential chilling effects on speech/debate if a too broad definition of online political advertising is used.

Questions 17 and 18: Do you agree or disagree that the digital imprints rules should apply to all forms of elections and referendums (beyond those already listed in the proposal and excluding devolved elections and referendums)? Please provide any further detail to explain your response here.

The digital imprints regime should apply to the forms of election and referendums as listed on the government’s technical proposals paper, including local government elections in England and Northern Ireland, for the reasons set out in response to previous questions.

We do not take a position on whether these should apply to other elections, but would like to highlight that consideration should be given to ensuring transparency and proportionality in the application of the regime to campaigners in these elections.

Proposal 3: Details on the imprint

Questions 20 and 21: Do you agree or disagree with the proposal on the details to be contained within the imprint i.e. the name and address of the promoter of the material and the name and address of any person on behalf of whom the material is being published? Please provide any further detail to explain your response here.

The ERS agrees with the details that should be contained within the imprint, as set out in the government’s proposals and in line with print requirements. As noted in response to question 6, we wish to highlight the importance of ensuring that, insofar as possible, the imprint should clearly state on behalf of whom the material is ultimately being published and/or on whose behalf it is being promoted. If an individual or organisation are promoting material on behalf of a party or candidate, then this should be made clear on the imprint, so as to prevent campaigners from circumventing the requirements and relying on new, little known or opaque individuals/organisations to run adverts on their behalf.

Question 22: Do you have any other comments on this proposal?

When finalising the digital imprints regime, attention must be paid to how one can ensure transparency about those who are ultimately behind election material. A range of new organisations and groups are active in election campaigns. While campaign material from political parties and candidates is often easy to recognise, it can be difficult for voters to recognise these groups, work out who is behind their campaign material and what their intentions are. Such opacity makes it hard for voters, regulators and researchers to know what agenda they are pushing and whether to trust the information they provide.

Proposal 4: Location of the imprint

Questions 23 and 24: Do you agree or disagree with the proposal for the location of the imprint - that the imprint must be located as part of the material where it is practical to do so and where it is not practical, must be accessible from the material? Please provide any further detail to explain your response here.

The ERS agrees that the imprint should be located as part of the material, as this will allow for its source to be clearly and immediately identified. While we recognise that in some limited circumstances (e.g. due to the nature or size of the advert) this may not be possible, the “where it is practical to do so” exemption must be clearly defined. It should be easy and immediate for anyone to know who is behind an advert without the process being confusing or time-consuming, which may be the case if someone has to click through different links and pages in order to see who is paying and promoting a piece of election content. A clear definition of what is practical will also ensure that there are no loopholes around clearly disclosing who is behind election material, thus preventing unscrupulous actors from abusing the rules.

Proposal 7: Territoriality

Questions 34 and 35: Do you agree or disagree with the proposal that the regime will apply to all election material regardless of where it has been promoted from? Please provide any further detail to explain your response here.

We strongly agree with the government’s proposals that the imprint regime should apply to all election material regardless of where it is being promoted from. The shift to online campaigning has made country of origin irrelevant with regards to being able to pay for and promote election material.

The purpose of the digital imprints regime should be to ensure that information on those who are spending money on and seeking to influence our elections is readily available, regardless of where they are based.

Question 36: Do you have any other comments on this proposal?

Linked to the issue of territoriality in relation to online election material, the ERS has long called for loopholes relating to foreign donations and spending in UK elections to be closed. This includes ensuring that donations should be funded only from UK-generated activities, with checks to ensure companies can prove this. Under current rules, it is possible for unscrupulous actors to set up a UK company, begin trading a nominal amount of cashflow through it, and then use this as a vehicle to fund elections.

Further, given that sums below £500 are not classed as ‘donations’ in law, there is a loophole for foreign donors to fund political campaigns and activities in the UK, for example by breaking up large donations into smaller sums, which is made increasingly easy by online platforms such as PayPal. The ERS is calling for ‘permissibility check’ requirements to be reduced from £500 to 1p for all non-cash donations, and £500 to £20 for cash donations.

Section 8: Enforcement

Questions 37 and 38: Do you agree or disagree that the relevant authorities are in a position to effectively enforce digital imprints? Please provide any further detail to explain your response here.

The ERS disagrees with this statement. The ERS believes that the Electoral Commission should be tasked with enforcing digital imprints for both candidates and parties/third-party campaigners, so that there is a single, simple, consistent and proportionate regime.

The current proposals duplicate the disjointed and outdated approach to candidate and party/registered campaigner finance law, where the police is tasked with enforcing breaches that fall under the Representation of the People Act 1983, and the Electoral Commission those that fall under the Political Parties, Elections and Referendums Act 2000.

Under the government's current proposal, the only recourse for breaches relating to candidates would be for the police or prosecuting bodies to take the matter to the courts, which would then be able to impose unlimited fines. Such an escalation might not always be proportionate to the offence and, when the options for enforcement lie largely at the extremes (prosecution v. no action), there is the potential for offences to fall through the gaps and not be effectively and proportionately dealt with.

By contrast, the current proposal would see the Electoral Commission tasked with enforcing breaches by parties/third-party campaigners, but only able to enforce a maximum penalty of £20,000, which seems woefully insufficient when compared with the deterrent fines available for candidate breaches.

For this reason, we believe that the Electoral Commission should be in charge of enforcing the imprints regime – and, where necessary, impose penalties – for all breaches, whether these are committed by candidates or parties/third-party campaigners. It is imperative that the Commission should have sufficient deterrent capacity, however, which is why we believe the Commission should have unlimited fines at its disposal, as is the case for candidate breaches in the current proposals.