

Deighton Pierce Glyn
8 Union Street
London
SE1 1SZ

Our reference: CAS-63568-L5F7W9
Your reference: PG/3553/001/PG

12 October 2017

In the proposed claim between the Good Law Project and the Electoral Commission

1. We refer to your letter before claim dated 29 September 2017, which was received by us on the same day. Our response to your letter is below.

The claimant

2. The Good Law Project Ltd, 3 East Point High Street, Seal, Sevenoaks, Kent, TH15 0EG.

From

3. The Electoral Commission, 3 Bunhill Row, London, EC1Y 8YZ

Reference details

4. Our reference: CAS-63568-L5F7W9
5. The following have been handling this matter at the Electoral Commission: Bob Posner (Director of Party and Election Finance and Legal Counsel), Rupert Grist (Senior Electoral Administration Lawyer), Louise Footner (Head of Legal), Sheilja Shah (Senior Regulatory Lawyer), Louise Edwards (Head of Regulation), Mathias Rosengren (Enforcement Manager) and Matt Franks (Senior Investigator).

The Electoral Commission
3 Bunhill Row
London EC1Y 8YZ

Tel: 020 7271 0500
Fax: 020 7271 0505
info@electoralcommission.org.uk
www.electoralcommission.org.uk

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The details of the matter being challenged

6. The letter of claim states the following.
7. The proposed challenge concerns campaigning at the European Union Referendum, and the alleged failure of the Electoral Commission to take any action relating to expenditure of more than £625,000 on services provided by a company called Aggregate IQ, further to the same sum being passed from the designated lead campaigning organisation “Vote Leave” to Mr Darren Grimes, a registered campaigner for the referendum.
8. The letter claims that the Commission erred in law in concluding that money paid by Vote Leave to Aggregate IQ was not a referendum expense of Vote Leave.
9. The letter further claims that the Commission erred in law in concluding that money spent by Mr Grimes did not constitute “common plan expenses”, which would have required its inclusion in Vote Leave’s referendum expenses return.
10. The letter further claims that the Commission’s decision that there were no reasonable grounds even to suspect any breach was wholly unreasonable.
11. The letter gives reasons why the claim is not out of time.
12. The letter also gives reasons why the claimant has sufficient standing to bring any proceedings in this regard.
13. The details of the action that the defendant is expected to take:
 - a. Consider initiating a prosecution of Vote Leave.
 - b. Consider initiating a prosecution of Darren Grimes/BeLeave.
 - c. If not proceeding with either prosecution, give its reasoning and explain whether it intends to take any further steps in relation to the matter, and what those steps will be.

Response to the proposed claim

14. This proposed claim is without merit and is not conceded in any respect.

15. Our response to the proposed claim is set out below. It sets out the legal framework, the background to the inquiries at issue, and a response to each of the arguments set out in your letter.

Legal framework

16. The Commission is an independent body set up under the Political Parties, Elections and Referendums Act 2000 (PPERA).

17. Under the provisions of PERA, the Commission is the statutory regulator for political campaign finance. It conducts enforcement action under its duties and powers set out in PERA and other legislation when applicable, and under its published Enforcement Policy (https://www.electoralcommission.org.uk/data/assets/pdf_file/0011/199703/April-2016-Enforcement-Policy.pdf).

18. Provisions regarding the financing of campaigns for the EU Referendum were made under the European Union Referendum Act 2015 (EURA) and PERA as modified by EURA. These provisions included that:

- a. Anybody intending to spend over £10,000 on referendum campaigning was required to register with the Commission.
- b. Following the referendum, the “responsible person” for a registered campaigner was required to deliver a return of all referendum spending incurred by that campaigner or on its behalf. Any registered campaigner that spent £250,000 or over on referendum campaigning had until 23 December 2016 to deliver this return.
- c. Paragraph 22(5) of Schedule 1 of the EURA provides that any referendum expenses incurred by a campaigner in pursuance of a “common plan” with the designated campaigner were to be regarded as incurred by the designated campaigner only.
- d. It is an offence, under section 122(4)(b) PERA, for the responsible person for a campaigner to deliver, without reasonable excuse, a return which fails to include a complete statement of all payments made in respect of referendum expenses incurred during the referendum period.

19. The details of the following provisions are of particular relevance here.

20. Section 111 of PERA (as modified) defines “referendum expenses” for these purposes. It states as follows:

(1) The following provisions have effect for the purposes of this Part.

(2) “Referendum expenses”, in relation to a referendum to which this Part applies, means expenses incurred by or on behalf of any individual or body which are expenses falling within Part I of Schedule 13 and incurred for referendum purposes.

(3) “For referendum purposes” means—

(a) 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, or

(b) otherwise in connection with promoting or procuring any such outcome.

(4) “Referendum campaign” means a campaign such as is mentioned in subsection (3)(a); and “campaign organiser”, in relation to referendum expenses, means the individual or body by whom or on whose behalf the expenses are incurred.

21. Paragraph 22 of Schedule 1 to EURA sets out provisions regarding “common plan expenses”. It states as follows:

(1) This paragraph applies where—

(a) referendum expenses are incurred by or on behalf of an individual or body during the referendum period for the referendum, and

(b) those expenses are incurred in pursuance of a plan or other arrangement by which referendum expenses are to be incurred by or on behalf of—

(i) that individual or body, and

(ii) one or more other individuals or bodies,

with a view to, or otherwise in connection with, promoting or procuring a particular outcome in relation to the question asked in the referendum.

(2) In this paragraph references to “common plan expenses” of an individual or body are to referendum expenses which are incurred by or on behalf of that individual or body—

(a) as mentioned in sub-paragraph (1)(a), and

(b) in pursuance of a plan or other arrangement mentioned in subparagraph (1)(b).

(3) The common plan expenses of the individual or body which is mentioned in subparagraph (1)(a) are to be treated for the purposes of—

(a) section 117 of the 2000 Act, and

(b) section 118 of and Schedule 14 to that Act,

as having also been incurred during the referendum period by or on behalf of the other individual or body (or, as the case may be, each of the other individuals or bodies) mentioned in subparagraph (1)(b)(ii); but this is subject to subparagraph (5).

(4) This paragraph applies whether or not any of the individuals or bodies in question is a permitted participant.

(5) But if any of the individuals or bodies in question (“the persons involved”) is or becomes a designated organisation, the following referendum expenses are to be treated for the purposes of sections 117 and 118 of and Schedule 14 to the 2000 Act as having been incurred during the referendum period by or on behalf of the designated organisation only—

(a) any referendum expenses incurred during the referendum period by or on behalf of the designated organisation;

(b) where any of the other persons involved is a permitted participant, any common plan expenses of that permitted participant;

(c) where any of the other persons involved is an individual or body which is not a permitted participant but is below the expenses threshold, any common plan expenses of that individual or body.

(6) For the purposes of this paragraph an individual or body is “below the expenses threshold” if the total of the referendum expenses incurred during the referendum period by or on behalf of the individual or body does not exceed £10,000.

(7) For the purposes of this paragraph—

(a) section 112 of the 2000 Act (notional referendum expenses) applies as it applies for the purposes of Part 7 of that Act,

(b) section 113(3) of the 2000 Act (expenses incurred in contravention of section 113(1)) applies as it applies for the purposes of sections 117 to 123 of that Act, and

(c) subsections (5) and (6) of section 117 of the 2000 Act (certain expenditure incurred before the referendum period) apply as they apply for the purposes of that section.

(8) In this paragraph any reference to referendum expenses incurred by or on behalf of a designated organisation, or a permitted participant, during the referendum period includes referendum expenses incurred during that period before the person by or on whose behalf the expenses were incurred became a designated organisation or, as the case may be, permitted participant.

Summary of the Commission's inquiries regarding "Vote Leave" and Mr Grimes

22. Vote Leave and Mr Grimes both registered as separate campaigners with the Commission. ("BeLeave" was a name used by Mr Grimes for his campaign, although it was not itself registered as a campaigner.) As an individual registered as a campaigner, Mr Grimes was also the "responsible person" for the purposes of PPERA and EURA. As required by law as part of the registration process, and along with around 50 other campaigners, they both declared that they were campaigning for a 'leave' outcome in the EU referendum. As the register of campaigners was published, any member of the public could see at a glance which outcome any campaigner was supporting.
23. The Commission first contacted Vote Leave and Mr Grimes about donations Vote Leave made to Mr Grimes in August and September 2016. We received some documentation in respect of these donations. As this was in advance of the spending return deadline for campaigners that spent over £250,000, we decided to await and analyse those returns.
24. Both Vote Leave and Mr Grimes submitted referendum spending returns by the statutory deadline of 23 December 2016.
25. We made further enquires of Vote Leave and Mr Grimes in February and March 2017, under the framework of an "assessment", in accordance with our Enforcement Policy (see paragraph 6). The purpose of an assessment is to determine whether or not an "investigation" by the Commission should be conducted. We established that

the records of both campaigners show donations from Vote Leave to Mr Grimes in June 2016. They further show that Vote Leave paid for services from Aggregate IQ during the referendum campaign, and that the donations to Mr Grimes were by way of payments to Aggregate IQ for services provided to Mr Grimes. The evidence, including documentary evidence, obtained during our assessment was consistent with these being donations and not joint spending.

26. Where a donation has occurred, the donor does not, and is not required to, report the donation. The recipient campaigner will report the donation in its referendum return, along with its referendum spending. Consequently, there is nothing inconsistent with the law in Vote Leave donating to Mr Grimes, and in those donations not being reported by Vote Leave as referendum spending.
27. Further, campaigners on the same side of the argument can liaise and discuss campaigning approaches without meeting the threshold of joint spending within the meaning of the legislation. Campaigners can use the same suppliers. Campaigners can gift donations to another campaigner by paying for something on their behalf.
28. Again, there is nothing inconsistent with the law in Vote Leave making a donation to Mr Grimes by way of payment to a supplier. While a degree of communication would clearly be necessary to implement such an arrangement, this does not in and of itself mean the joint spending controls are engaged.
29. Whilst some of these activities may be suggestive of joint spending, whether such activities count as joint spending in terms of the rules will depend on the specific circumstances. The facts must be looked at on a case by case basis.
30. The Commission's assessment addressed whether there was evidence to suggest that Vote Leave and/or Mr Grimes had delivered an incorrect spending return in respect of these donations. This included consideration of whether the joint spending controls had applied, and if so if they had been applied correctly. Any implications for the referendum spending limit would follow from these initial issues.
31. In this case, the assessment considered information from a complainant and other sources, as well as documentary material and explanations obtained from Vote Leave, Mr Grimes and Aggregate IQ. All the evidence was subject to analysis by the Commission. We concluded that this information was consistent with the money paid by Vote Leave to Aggregate IQ for services provided to Mr Grimes being donations, and with the services provided by Aggregate IQ to Mr Grimes not being in pursuance of a common plan with Vote Leave. We therefore did not have reasonable grounds to suspect an offence under PPERA or the EURA.

32. Accordingly, we took a decision on 21 March 2017 that no further action was necessary. In accordance with our Enforcement Policy (see paragraph 6.8), we did not consider there were sufficient grounds to open an “investigation”.
33. There has been no delay in this matter. As explained above, campaigners spending over £250,000 have six months to deliver a referendum spending return. We have a statutory duty to publish these returns as soon as practicable. We published them in February 2017. We conducted an assessment in early 2017 and took a decision on this matter by the end of March.
34. In accordance with our Enforcement Policy (see Appendix B), we did not publish the fact that we were conducting an assessment or the result of it.

Analysis of the Claimant’s arguments

A: Who incurred the expenses?

35. In determining who is responsible for accounting for any referendum expenses, in order to establish whether a limit has been exceeded or whether such expenses need to be reported, it is clearly necessary to determine whether a particular person or body has incurred referendum expenses by reference to the definition in section 111 above.
36. Section 111 includes only “expenses incurred by or on behalf of any individual or body” (our emphasis).
37. You refer to “payments” made by Vote Leave (first paragraph of your point 7 b), and appear to assume that since Vote Leave made the payments, it therefore incurred the expenditure. However, the legislation specifically uses the word “incurred” here. There is an important difference between “paid” and “incurred”. It is clearly possible for person A to incur expenditure that is paid for by person B. If the legislation had intended to regulate payments it would have done so.
38. The legislation uses the word “incurred” rather than “paid” because the purpose of these provisions is to regulate those who are campaigning, rather than those who are paying for campaigning.
39. You appear to accept, in fact, that it was Mr Grimes who “incurred” the expenses, by commissioning the services of Aggregate IQ for his own campaign (the second and third paragraphs of your point 7.b).

40. You have not supplied any evidence or argument to cast doubt on the Commission's original view that this expenditure was in fact incurred by Mr Grimes and not by Vote Leave.

B: Were these common plan expenses?

41. Expenses fall within the "common plan expenses" provisions under Schedule 1 paragraph 22 to EURA only when "expenses are incurred in pursuance of a plan or other arrangement" between one individual or body and another.
42. It is not sufficient, therefore, that there is some connection between one campaigner and another regarding specific expenses. There must be a "plan or other arrangement".
43. You suggest that the plan or arrangement here was twofold: firstly, that Mr Grimes would procure the services of Aggregate IQ and Vote Leave would pay for it, and secondly, that Vote Leave would incur other expenses up to the £7m limit with the intention of avoiding having to account for the payment to Aggregate IQ.
44. In respect of the first of these points, this cannot on its own be said to amount to a "plan or other arrangement". This in itself is simply a payment made by one campaigner for the use of services by another campaigner. If such a practice was to be forbidden under the legislation, then Parliament would have prohibited campaigners from making donations to others, by excluding them from the list of "permissible donors" under Schedule 13 to PPERA.
45. There will only be a "plan or other arrangement" if there is some agreement reached as to how expenses incurred will be used.
46. Your second point suggests that there was an agreement reached here to evade the rules. However, the Commission has seen no evidence of that, and you have supplied none.
47. As we set out in the paragraphs above summarising our assessment in February and March 2017, we considered carefully at this time all the evidence available as to whether there might have been a plan or other arrangement in place. In the absence of any credible evidence that there was a plan or other arrangement here, paragraph 22 of Schedule 1 to EURA does not apply to this expenditure, and there

was no reason why Vote Leave needed to account for it. There was insufficient evidence of this at the time, and none has been provided now.

48. Speculation is insufficient. The Commission could only reach the view that a breach had occurred on the basis of evidence.

C: Whether the Commission was at fault for deciding that there were no reasonable grounds to suspect any breach

49. This point does not add anything to the earlier two arguments. The Commission conducted thorough inquiries of this issue, but did not find evidence causing it to suspect a breach of section 122.

Other matters referred to in the letter

Standing

50. We do not at this stage wish to challenge whether the Good Law Project has sufficient standing.

Timing

51. We do not at this stage wish to challenge whether a claim may be brought within time.

Disclosure and further information

52. You suggest that the Commission has made only “limited” disclosure about this matter, and you have requested a list of further information. As our published Enforcement Policy explains, we do not routinely publish details of assessments. We will respond separately to your request under the provisions of the Freedom of Information Act 2000.

53. We do not intend to provide further details or documentation now, other than as already set out in this letter

Costs

54. We do not agree to cost capping at this stage.

Leave.EU

55. You have made some comments regarding our ongoing investigation in respect of Leave.EU. This does not appear to us to be relevant to this potential claim. Nevertheless, for the avoidance of doubt, you appear to have misunderstood the scope of this investigation. As our media release of 21 April 2017 explains: *The investigation is focused on whether one or more donations – including of services – accepted by Leave.EU were impermissible; and whether Leave.EU’s spending return was complete.* Joint spending controls are not an issue in that investigation. We do not routinely provide updates on our investigations. The outcome of the Leave.EU investigation will be published when it is concluded.

Details of any other interested parties

56. You have referred to Vote Leave and Darren Grimes as potential interested parties. We are not aware of any others.

ADR proposals

57. We note that you have not made any Alternative Dispute Resolution proposals. The Commission has none to make, but if you wish to meet with us to discuss the statutory regulatory regime that applied and how that could be improved for the future, we would be happy to do so. We hope that the answers provided above will address the points you have made. You may also be interested to read our report on the regulation of campaigners at the referendum (https://www.electoralcommission.org.uk/_data/assets/pdf_file/0004/223267/Report-on-the-regulation-of-campaigners-at-the-EU-referendum.pdf), particularly paragraphs 3.54 to 3.69, which includes our recommendations to Government on this issue.

Address for further correspondence and service of court documents

58. Rupert Grist, Senior Electoral Administration Lawyer, Electoral Commission, 3
Bunhill Row, London, EC1Y 8YZ.

Yours faithfully



Rupert Grist
Senior Electoral Administration Lawyer
Electoral Commission
rgrist@electoralcommission.org.uk