

Deighton Pierce Glynn  
8 Union Street  
London  
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Your reference: PG/3553/001/PG

19 October 2018

Dear Sirs

## **In the proposed claim between Good Law Project Ltd & Ben Bradshaw MP and the Electoral Commission**

1. I refer to your letter before claim of 5 October 2018, which was received by us on the same day. Our response to your letter is below.

### **The Claimants**

2. Good Law Project Ltd and Ben Bradshaw MP (no address supplied).

### **From**

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

### **The details of the matter being challenged**

4. The Electoral Commission's supposed failure to take action in respect of apparent unlawfulness in relation to spending reported by the Democratic Unionist party ("**DUP**") in the 2016 EU Referendum, which you claim is set out in the Commission's letter of 2 August 2018 and which you further claim is confirmed by letter of 10 September 2018. Specifically:
  - (1) The Electoral Commission's supposed failure to take action in respect of referendum expenses incurred and reported by the DUP which you claim

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are referendum expenses incurred by the Constitutional Research Council (“**CRC**”) an unincorporated association which you claim did not register as a permitted participant nor report its spending and donations as required by Part VII of PPERA 2000 (**Ground 1**). You claim that the evidence points to there being reasonable grounds to suspect offences were committed warranting an investigation by the Commission. You further state that given the Commission was found by the High Court (Good Law Project Ltd v Electoral Commission [2018] EWHC 2414 (Admin) ) to have erred in its analysis of the law the Commission cannot rely on such wrongful analysis to support a decision not to investigate.

- (2) The DUP’s apparent failure to enquire properly into whether the person or persons making the donation to it were permissible donors, as required by Part IV of Political Parties, Elections and Referendums Act 2000 (“**PPERA**”) as a precondition to accepting a donation. Specifically statements made by the DUP’s Treasurer provide reasonable grounds to suspect a contravention and/or an offence have been committed warranting an investigation (**Ground 2**).
5. You challenge the Commission’s supposed failing on the grounds that it was vitiated by an error of law and/or is unreasonable. You state that there are grounds for further investigation as to whether the CRC contravened Part VII of PPERA; and the DUP contravened Part IV of PPERA; and having done so the DUP should now be ordered to forfeit the donation. Accordingly you seek an order quashing the Commission’s “decision”.

## **Response to the proposed claim**

6. This proposed claim is without merit and is not conceded in any respect. Our response to the proposed claim is set out below.

## Preliminary issue

7. The Commission is bound by the restrictions on disclosure of information set out in section 71E PPERA and your attention is drawn specifically to the criminal provision in section 71E(5). For the purposes of defending the proceedings foreshadowed in your pre-action letter, the Commission will disclose to you certain information that the Commission considers is within the grasp of s 71E(1) of PPERA with the expectation that onward disclosure by you is for the purposes of these judicial review proceedings only. That information is contained in the Annex of this Response.

## Legislation

8. The Commission is an independent body set up under PPERA.
9. Under the provisions of PPERA, the Commission is the statutory regulator for political campaign finance. It conducts enforcement action under its duties and powers set out in PPERA and other legislation when applicable. It has a duty to monitor, and take all reasonable steps to secure, compliance with the restrictions and other requirements imposed by or by virtue of various provisions of PPERA, including those in Part 7 of that Act concerning referendums. It has investigatory powers set out in Schedule 19B to PPERA and civil sanction powers set out in Schedule 19C to PPERA. It also has a published Enforcement Policy, explaining how it carries out these duties and exercises these powers: [https://www.electoralcommission.org.uk/\\_data/assets/pdf\\_file/0011/199703/Apr-il-2016-Enforcement-Policy.pdf](https://www.electoralcommission.org.uk/_data/assets/pdf_file/0011/199703/Apr-il-2016-Enforcement-Policy.pdf).
10. Provisions regarding the financing of campaigns including reporting obligations for the EU Referendum were made under the European Union Referendum Act 2015 (“**EURA**”) and PPERA as modified by EURA. The provisions regarding Northern Ireland donations and campaign expenditure were not modified by EURA and the PPERA provisions were relevant for the EU Referendum.
11. Of relevance is section 71E PPERA. Reference to this has already been made above. This provision restricts the Commission’s ability to publish information regarding donations and related transactions made to a party registered to field candidates in Northern Ireland. This includes information which if published by the Commission would disclose information falling within the section 71(E) prohibition.
12. In light of section 71 E, allegations that the Commission has been unreasonable in not disclosing information regarding donations to Northern Ireland are devoid of merit. The Claimant is aware that the Commission is under a duty to publish all donation reports received from every party registered on the GB Register of Political Parties, and since 1 July 2017 on the Northern Ireland Register. The Commission is committed to transparency and this extends to publication of its conclusions on investigations including those relating to any breach of donation

rules by a party registered on the Northern Ireland register, to the extent that the restrictions in law on disclosure do not apply.

## Ground 1: Constitutional Research Council

13. Your claim suggests there has been unreasonable delay by the Commission in opening an investigation since the High Court delivered its judgment on 14 September, some four weeks ago. There has been no delay by the Commission. Rather, as your clients are aware, the Commission is in the early stages of appealing that judgment and the time for filing an application to the Court of Appeal has not expired. The Commission does not consider it sensible or a good use of its limited resources to pre-empt the outcome of any application it makes to the Court of Appeal by embarking on an investigation before the outcome of application that is filed is known. It is open to you to make representations to the Court of Appeal asking that it expedite its consideration of the permission application once it is filed.
14. Further, your claim presupposes that, even if the judgment were to be upheld, the Commission will necessarily be required to open an investigation. As a responsible regulator the Commission will consider when and if appropriate to do so the implications of the judgment for donations given during the EU Referendum campaign. Whether this would lead to an opening of an investigation will depend on the facts as assessed in line with our Enforcement Policy including whether a strong defence existed to any offence that could be investigated or where the balance of the public interest lies. Should the Commission open an investigation disclosure of such investigation and any findings will be published, in accordance with our Enforcement Policy. In short, your complaint is (if nothing else) premature.
15. Ground 1 of the claim is without merit.

## Ground 2 DUP Permissibility checks

16. You state that the Commission failed to investigate allegations set out in Ground 2, suggesting that the Commission failed to take the evidence contained in that programme seriously enough to warrant investigation into the permissibility of the donations received by the DUP. This ground, too, is fundamentally flawed.

17. Section 71D PPERA provides:

“(1) The Commission must take such steps as are prescribed for the purpose of verifying the information given in Northern Ireland reports.

(2) “Northern Ireland report” means a report to the Commission which—

(a) is prepared by a Northern Ireland recipient, and

(b) contains, or purports to contain, information required to be given by Schedule 6 or 7.”

18. The order prescribing the steps that the Commission must take is the Political Parties, Elections and Referendums Act 2000 (Northern Ireland Political Parties) Order 2007, SI 2007/2501, as amended by the Transparency of Donations and Loans etc (Northern Ireland Political Parties) Order 2018, SI 2018/328. Article 8 of SI 2007/2501 requires the Commission to select for verification 50% of all donations made by individual donors reported by a Northern Ireland recipient who has provided a Northern Ireland report, and select for verification every donation that has not been made by an individual donor. Article 9 then sets out the steps that the Commission must take in relation to each selected Northern Ireland donation and the documentation provided with it. Article 9 makes it clear that the requirement on the Commission is to take reasonable steps to ascertain the two matters identified as (a) and (b) in Art 9(2), and these may include (but are not limited to) contacting a relevant body.

19. The DUP as a registered political party as well as a permitted participant in the EU Referendum was required to meet its obligations to report donations of over £7,500 to the Commission on a quarterly basis. This continued during the Referendum period. Shortly after receiving such reports from the DUP during that period the Commission verified the information given in them. For any substantial donations, we obtained information from the DUP about their actions in checking their permissibility.

20. The information we received showed that the donations were from permissible sources. There was therefore no basis to consider investigating the DUP for failing to return an impermissible donation.

21. The comments attributed to Mr Campbell in the BBC NI Spotlight programme *Brexit, Dark Money and the DUP* caused the Commission concern about his understanding of the donation rules generally, and not in relation to any specific donations. The Commission wrote to Mr Campbell on 27 June 2018 for this

reason, as part of our pro active compliance work, to remind him of his obligations.

22. The decision of August 2 2018 reflected in the letter to the BBC Northern Ireland of the same date explained that the Commission had taken a decision on allegations they broadcast about the DUP and Vote Leave in their programme *Brexit, Dark Money and the DUP*. Those allegations were that the DUP and Vote Leave had failed to declare *joint spending* in the EU Referendum. As that letter explained, the evidence in that programme did not disclose reasonable grounds to suspect an offence had been committed. Accordingly, the Commission did not consider that that should cause it to open an investigation. That decision did not relate to the permissibility or otherwise of *any donation* to the DUP.
23. This part of claim is misguided as it is based on mistaken fact and/or context. As presently described in your pre-action protocol letter, it is devoid of merit.
24. The Commission recognises the restrictions on transparency of donations to Northern Ireland parties means that certain information about these which would otherwise be made public is limited. That, however, is a matter for Parliament. It is not open to the Commission to ignore those restrictions.

## Donations to the DUP

25. The claims made in the letter appear to be predicated on the assumption that the donations received by the DUP came from impermissible sources.
26. In order to dispose of these proceedings, the Commission is prepared to provide you with the information subject to the disclosure restrictions referred to in paragraph 7 above. From this information you will see that your claims as set out in paragraph 4 (ii) and 5 (**Ground 2**) about supposed failings by the Commission are misguided and without merit in particular because your claim is based on a misunderstanding that the donations were impermissible .

## Conclusion

27. Your letter before claim shows no arguable basis upon which a successful legal challenge may be brought. Accordingly the Commission will strongly defend any

challenge to its decision on the basis of the matters set out in your letter before claim and reserves its right to seek a court order for costs in any such challenge. Should proceedings be issued despite the information provided in this letter the Commission will, as a public body, take all reasonable steps to recover any costs incurred in resisting such proceedings.

Yours faithfully

**Louise Footner**  
**Head of Legal**  
**Electoral Commission**  
**3 Bunhill Row,**  
**London, EC1Y 8YZ.**

ANNEX

## CONFIDENTIAL

The following information is provided to Deighton Pierce Glynn and its clients the Good Law Project Limited and Ben Bradshaw MP for the purpose of civil proceedings only. It is provided in response to the pre-action letter of 5 October 2018 in respect of proposed judicial review proceedings, and under section 71E(3) of the Political Parties, Elections and Referendums Act 2000.

**The information in this annex is not to be used for any other purpose.**

### The Donations

On 27 July 2016 the Democratic Unionist Party (DUP), a permitted participant in the 2016 EU Referendum, reported receiving two donations totalling £434,981 from the Constitutional Research Council (CRC). In August and September 2016, the Commission asked for and got details from the DUP about the CRC and the permissibility checks the DUP had done. The Commission was satisfied that the DUP had taken reasonable steps to check permissibility, and that the CRC was an unincorporated association and permissible donor. The DUP's donations were from permissible sources.

1.1 On 23 May 2016 the Democratic Unionist Party (DUP) registered as a permitted participant in the referendum on the UK's membership of the EU.

1.2 As the DUP was also on the Northern Ireland Register of Political Parties, it was required to deliver quarterly reports of donations over £7,500, including those received during or for the purpose of the referendum campaign. While the Commission promptly publishes all such donation reports from parties on the Great Britain Register, as a result of section 71E of the Political Parties, Elections and Referendums Act 2000 (PPERA) the Commission could not publish donation reports from parties on the Northern Ireland Register (although now we can publish these reports, this transparency only extends back to 1 July 2017).

1.3 On 27 July 2016 the DUP delivered its donation report for the period 1 April – 30 June 2016. The party reported two donations from the Constitutional Research Council (CRC), which together came to £434,981 (“the Donations”). One donation was for £99,988 and was received and accepted by the DUP on 9 June 2016. The second was for £334,993 and was received and accepted by the DUP on 21 June 2016. The DUP reported that the CRC was an unincorporated association and gave an address in Glasgow for it.

1.4 We routinely review all donation reports, and we must verify the information given in Northern Ireland reports (section 71D PPERA). In addition, the size of the Donations stood out as unusual for a Northern Ireland party. On 17 August 2016 we wrote to the DUP to ask about the CRC and the steps the party took to check that the CRC was a permissible donor when each of the Donations was received. We also asked for copies of any records or evidence of the checks. We did this as part of our routine compliance work and not under our Enforcement Policy. At this point we had no reason to suspect that any offences had been committed, but we did have a report that we needed to verify.

1.5 The permissibility rules in PPERA limit the individuals and organisations that political parties can accept donations from – see section 54. Broadly, permitted donors are limited to individuals on the UK electoral registers, or organisations and entities based and operating in the UK. For the EU Referendum, the EU Referendum Act 2015 applied these limits to permitted participants, and added Gibraltar-based individuals or entities. The list includes unincorporated associations, which are defined as:

*Any unincorporated association of two or more persons which does not fall within any of the preceding paragraphs [in section 54 PPERA] but which carries on a business or other activity wholly or mainly in the UK and whose main office is there.*

1.6 Under section 56 PPERA, where a party receives a donation and it is not immediately refused, the party must take reasonable steps to verify the identity of the donation and whether the donor is permissible. If the donor is not permissible, the party must return the donation within 30 days from the date it was received. If the party does not do this, and unless it can show it took all reasonable steps to verify permissibility and believed the donor was permissible, it and the party’s treasurer commit an offence.

1.7 The DUP replied to us by letter dated 31 August 2016. It told us that its Campaign Director for the EU Referendum, Sir Jeffrey Donaldson MP, had established from the CRC that it was permissible under PPERA, and enclosed a supporting email from Richard Cook, Chairman of the CRC.

1.8 We were not satisfied that this alone demonstrated that the party had taken all reasonable steps to check that the CRC was a permissible donor. On 14 September 2016 we wrote again to the DUP to get more information. We asked a series of questions about the steps that the DUP had taken. On 27 September 2016 the DUP replied, giving answers to each of our questions. The DUP told us how long it has been aware of the CRC and its work, that it had confirmed the CRC was a multi-member organisation and that the CRC responded to letters sent to the address it gave the party. The party confirmed that it was satisfied that the CRC was a permissible donor.

1.9 What the DUP told us demonstrated that they had taken reasonable steps to check whether the CRC met the criteria of an unincorporated association as defined in PPERA. Furthermore, the Donations were permissible. Having checked these points, we ended this routine compliance work.

## Investigation into the CRC

Unincorporated associations that make political contributions (such as donations) of more than £25,000 in a calendar year have reporting obligations to the Commission. They must notify us of the contributions, and report the gifts of over £7,500 they have received in the preceding year. We then publish this information.

The CRC, an unincorporated association, did not make these notifications. The Commission investigated, found that the CRC had no reasonable excuse for these failings. The Commission fined the CRC £6,000.

The Commission could not publish the notifications because of the restrictions on disclosing information about donations to Northern Ireland parties. But we were able to publish some limited information about the investigation, including that it took place, that offences were found and that a fine of £6,000 was imposed.

1.10 As we explain above, when we verified the information in the DUP's report of the Donations, we found out that the CRC was an unincorporated association that had made two donations in June 2016 totalling £434,981.

1.11 Schedule 19A paragraph 1 PPERA says that if an unincorporated association makes a political contribution of more than £25,000, it has to notify us within 30 days. Under paragraph 2, the unincorporated association then has 60 days to give us a report of every gift it has received of more than £7,500, from the start of the calendar year before the year the political contribution was made in. We publish a register of

unincorporated associations that have notified us of political contributions, and we publish the reports of gifts to them.

1.12 The CRC made its first donation to the DUP on 9 June 2016. It should have notified us by 8 July 2016, and reported the gifts it had received by 8 August 2016. But we didn't have either of these notifications.

1.13 On 21 October 2016, after an assessment done in line with our Enforcement Policy, we opened an investigation into the CRC. During that investigation we established the membership and structure of the CRC. Further, the CRC delivered the notifications that were due. The CRC told us it was not aware of its reporting obligations but that it now recognised that it should have notified the Commission and the error was inadvertent. It also said that while it was not required to restrict its sources of funding to permissible sources, it had checked that its funders were UK residents, as it wished to abide by the spirit of PPERA.

1.14 We also verified that the funders of the CRC were permissible sources under PPERA.

1.15 After investigating, we concluded that the CRC had committed two offences:

- One under Schedule 19A paragraph 6(1)(a) PPERA for failing to notify us of a political contribution of more than £25,000.
- One under Schedule 19A 6(1)(b) PPERA for failing to report gifts made to it of more than £7,500 from the start of 2015.

1.16 We fined the CRC £6,000 for the offences it committed.

1.17 We looked at whether we could publish the notifications given by the CRC during the investigation. These were a notification of its political contribution of more than £25,000, and a report on the gifts it had received of over £7,500. We noted that the basis for the notifications was a donation to a Northern Ireland party - this was the political contribution that had placed the CRC under its reporting obligations under PPERA. Further, since the CRC failed to notify us as required, we only learnt about their donation from the DUP's donation report. The contents of that donation report was protected by section 71E. This put the transparency required by Schedule 19A at odds with the restrictions of section 71E. We concluded that publishing the fact of the CRC having been required to notify us of its political contributions would breach section 71E.

Were we to publish the CRC notifications in these circumstances, we would be publishing information about donations to a Northern Ireland political party.

1.18 We routinely publish the outcome of every investigation we conduct, whether or not we find that offences have been committed. When the investigation into the CRC finished, we looked at how we could publish as much information as we would routinely do about it, within the limits of section 71E PPERA. Again, this was in the context of the investigation only being opened as a result of information we learnt from the DUP's donation report.

1.19 We decided that we could publish the fact that an investigation had taken place, and certain other information. If we said anything more than that, including the name of the CRC and the offences concerned, we would breach section 71E. We considered whether it was not in the public interest to publish such limited information. We decided that the over-riding public interest was in us being as transparent as we could be despite the gaps in the information. On 15 August 2017 we published the following entry in our monthly update on closed investigations:

*The Commission concluded an investigation into failures by a regulated entity to comply with PPERA. The regulated entity came into compliance, and the Commission imposed a penalty of £6,000. The Commission cannot disclose any further information about this case because of the restrictions on disclosure under section 71E of PPERA. The fine was paid on 30 August 2017.*