

22.01.13

0875-2011-JF-

E2012-165453

From: [REDACTED]

Sent: 21 January 2013 21:25

To: [REDACTED]

Cc: Euro-Ombudsman

Subject: FW: Proposal for a regulation of the European Parliament and European Council on the periodic roadworthiness tests for motor vehicles... COM(2012) 380 final and EU Ombudsman case ref (0875/2011/JF)

Dear Vice President [REDACTED]

I am writing to:

1. Express my disappointment that I have not received a response from you or your staff in response to my email of 21/10/2012 below.
2. Formally acknowledge that in one respect I have made an error and misinterpreted a key element of the proposed regulation.
3. Draw your attention to what seems to be a critical misstating of evidence and a related omission of evidence in the Impact Assessment supporting the proposed regulation that renders it impossible to appraise the proportionality of draft legislative act in accordance with the requirements of Treaty of the European Union Article 5(4) and Protocol 2 Article 5 in a fair manner.

My understanding is that there is a general requirement on the European Commission to respond to citizens within a period of two months. That period is well past even allowing for a slacking of the pace of work in the run up to Christmas. You undertook on behalf of the European Commission not to treat me in a disproportionate manner. I have not yet received even an acknowledgement of the email on your behalf from your staff. Given the gravity and complexity of the issue I raised I would have found an acknowledgement with a target response date as a professional and acceptable response in line with your commitment. I regard ignoring my email, as appears to be the case, to be treating me in line with your staff's previous line of not communicating with me further on this and other issues and thus a disproportionate response.

Under my second point above, I have re-read and studied the draft legislative act and its supporting documentation several times since my communication below. Most recently this has been at the prompting of our Department for Transport here in the UK who read the proposal in a different light.

I acknowledge and regret that my attention to detail has fallen short of the standards I expect of myself. In the preamble to the proposed regulation I note that, whilst the language may not be entirely clear, paragraph 10 on page 10 can be read in a manner that acknowledges that member states can choose the system they adopt for the implementation of the required Roadworthiness Testing regime. Additionally section 5.7 of the impact assessment indicates that garage based systems are not being proscribed by the proposed regulation. I formally acknowledge that I have misinterpreted the draft legislative act in this sense. I believe if someone makes an error that person should acknowledge it as soon as it comes to light in the forum in which the initial statements were made. I would greatly appreciate it if you would confirm that it is not the intent of the proposed regulation to require member states to adopt a roadworthiness testing regime based on specialist suppliers such as DEKRA and that garage based approaches will be acceptable under the proposed regulation.

24/01/2013

Notwithstanding my acknowledgement of the above possibility of continued use of garage based systems contained within the proposed regulation, I still maintain that Impact Assessment Study contained in Annex 14 to the Impact Assessment is extremely biased in that it seemingly attempts to balance quantitative analysis of the benefits of specialist inspection regimes against assertions as to garage based regimes. In allowing its inclusion as it stands it demonstrates a relationship between the Commission's staff and the advising consultants in which the Commissions staff have surrendered some of their objectivity and reveals the direction the Commission wishes to take Periodic Roadworthiness Testing in the future. As such my questions from my email still stand and require a response.

Under my third point above I note the following

1. That the additional staff cost assumptions contained in the Impact Assessment base the cost benefit analysis, Annex 13, p91 section 5, on a cited 25 minutes per test. The citation is the MOT Scheme Evidence Base produced by the UK's Department for Transport. This 25 minutes is used as the basis for calculating the number of inspections an inspector can carry out in a year.
2. That the UK MOT Evidence Base document:
 1. States, p22 para 64 (first bullet on page), "MOT tests take on average 60 minutes, and re-tests on average 7.2 minutes". This leads to the productivity of inspectors being overstated by a factor of 2.4 with a consequent understatement of the staff costs by the same factor.
 2. Demonstrates, pp20,21 paras 61-63, it is necessary and possible (Note Protocol 2 Article 5 requirements – wherever possible quantitative indicators) to factor in the citizens time to take their vehicle to a test centre. This does not appear to have been factored into the EC's cost model in the impact assessment. The DfT estimates do demonstrate it is possible to factor in time and some estimate of national average income for each member state based on the model of testing used and the distribution of test centres (Note Protocol 2 Article 5 requirements). Average incomes in each member state, travel time and thus costs to citizens are possible to assess and have been assessed for the UK. Protocol 2 Article 5 requires the financial and administrative burden to citizens to be minimised. In the absence of including this quantitative data which is demonstrably possible to estimate based on one of the source document for the impact assessment how is it possible to appraise compliance with the principle of proportionality.
 3. This completely reframes the options and costs and makes the Cost Benefits case invalid.
3. That the UK MOT test, taking 60 minutes, does not include visual inspection of brake linings and brake discs / drums for contamination. The proposed regulation, Annex 2 p15 requires visual inspection of said items under 1.1.13 b and 1.1.14 b.
 1. To carry out inspection of the pad or lining surfaces or the internal surfaces of a drum brake requires removal of the wheels on a car and in the case of a drum brake disassembly and subsequent reassembly of the unit.
 2. To carry out the same process on a motorcycle equipped with drum brakes as found on many small capacity motorcycles requires,
 1. Removal of the front wheel, including disconnection of the torque arm where fitted, disassembly of the brake unit, inspection of the surfaces, reassembly which can require realigning the front forks etc.
 2. Removal of the rear wheel, including disconnection of the torque arm, disconnection of the final drive chain in most cases – few bikes having shaft or belt drive, disassembly of the brake unit without introducing oil contamination from the chain, inspection of the surfaces, reassembly of the components and most critically for motorcycle safety correct tensioning of the chain according to manufactures specification for that model and realignment of the rear wheel to ensure accurate tracking of the front and rear wheels and correct torque settings on the axle nuts.
 1. Failure to tension the chain correctly can either, if too slack result in a chain jumping

- its sprockets causing in extremis a fatal crash or, if too tight significant damage to gearbox components.
2. Failure to realign the rear wheel correctly will lead to the bike handling in a dangerous manner and in extremis to a fatal crash.
3. Ensuring lack of cross contamination of chain oil, correct model specific chain tension and correct wheel alignment takes care and time. Contamination of brake surfaces during inspection can lead to brake failure.
3. The extra time to ensure these additional disassembly and reassembly operations cannot have been factored into the time take to undertake the tests and thus staff costs if those staff cost estimates have been based on the UK MOT Test times as state, whether accurately or inaccurately. As it took a qualified Yamaha mechanic 15 minutes to replace the two sets of disc pads on my ABS equipped late FZ6 Fazer, a benchmark model in the case for mandating of ABS on the Type Approval regulations, one can reasonably expect that the disassembly and reassembly of a set of a pair of drum brake units could take double that. I know it takes me over 45 minutes on my classic motorcycle to get everything disassembled checked reassembled and aligned correctly.
4. Using the evidence available to me from yourselves, DEKRA and the UK's DfT it is clear the time estimated for completing a test bears no relationship to that which could be reasonably expected in reality and that a correct reasonable time estimate based on the proposed test would have been a simple enough information for a reasonably competent specialist inspection body, such as DEKRA, providing input to the legislative process to have provided. I know how long it takes me as someone without professional training and experience as a mechanic.
 1. I venture to suggest that advising consultants such as DEKRA acting in the interests of the EU rather than their own interests would be more than capable of estimating the time to conduct a test by class of vehicle, HGV, Car, Motorcycle etc., according to the required new standards rather than relying on a misstatement of the time taken to undertake what they imply is an inferior vehicle test. Why have such estimates not been required of them.
5. As such the financial model first underestimates the staff costs based on an incorrect statement of the time taken to conduct the UK test by a factor of four and even if the correct UK test time had been stated would have still significantly underestimated the time taken because of the incorrect test standard, i.e. not the proposed test standard, being used as the basis for estimation.

On the basis of the above facts I contend that the impact assessment forming the detailed statement supporting the appraisal of proportionality proposed regulation as a draft legislative act is so inaccurate as to prevent the required appraisal of the proportionality of the draft legislative act. As such I contend, based on the evidence as to quality of the financial statement that the proposed regulation breaches Protocol 2 Article 5 and thus Treaty of the European Union Article 5(4). Furthermore this breach can seemingly be attributed to a lack of objectivity and application of critical reasoning applied to submissions from and questions to the advising consultants. In failing to require the Impact Assessment study to require an estimate of costs to citizens to have been provided it appears to support my contention that the relationship between the EC and the Advising Consultants is too close in this instance.

On that basis, and noting the requirements of Article 9(3) for removal of registration rather than prohibition of use on the road, once again I conclude that I am looking at the EC as law makers, with quasi judicial authority, who are prepared to construct laws that bind their fellow citizens under threat of punitive sanction whilst not abiding by the treaty provisions in law that grant them the right to make laws. I acknowledge the concept of the "margin of appreciation" and that is quite broad. However, in the instance of the principle of proportionality the margin of appreciation is tightly bound in terms of how to demonstrate compliance with it. This is in the letter of the treaty, the tests to be applied and the judgement of the ECJ 24/62.

As previously committed in my email of the 21/10/2012 I will follow up with some more detailed observations on the proposed regulation. I believe those are outside the scope of my complaint lodged with the European Ombudsman, unless your staff choose to ignore me again, and thus would be inappropriate to include under this subject.

I put my lack of attention to detail down to the effects of a head injury received 17/10/2012 resulting in a heavy concussion. I was hit from behind at stop lights whilst on my motorcycle. The impact speed was estimated to have been in excess of 40mph/60kph based on the damage to my motorcycle. A problem with brain injuries is that it hard for one to judge their effects on oneself as the injured party. You may consider that this just demonstrates your need to further restrict motorcyclists due to the danger. In response I would point out that since lodging my complaint with the European Ombudsman I have experienced four rear end shunts 3 at stop lights of which 2 were whilst on my motorcycle. All four incidents resulted in me having to attend A&E. None were my fault. In all but the latest case fault has been admitted. In the latest case the police are taking further action against the other party. I agree with their approach that compulsory driver training is a better solution to the problem than prosecution. I'd rather share the road with someone who has had the opportunity to amend their ways. My experience, along with the data, does demonstrate that more emphasis should be placed on driver training rather than penalising motorcyclists with additional costs. To add insult to the physical injuries received, whilst acknowledging that none of the accidents were my fault, my insurers declined to quote for my new less powerful motorcycle and the fully comprehensive quotation from another insure I received was £1556 (GBP). As a matter of interest and in the hope that I would be able to claim any material loss due to the negligent actions of others I asked what the quotation would have been without the accidents. That quote was £276 (GBP). It would be nice to see legislation that was aimed at improving driver training and ensuring fair processes in assessing the risk of loss by insurers providing compulsory insurance. In this latter case I accept that I am a higher risk due to the area of London in which I live however I do not accept that based on my recent accident history illustrates that I my driving leads to me being a higher individual risk of loss to an insurer. In three of the four incidents the other parties have admitted full liability and in the last that will eventually be the case.

It is because I can see other previous good work undertaken by the EC in areas such as competition strategy under [REDACTED] that I am taking this complaint through the channels I am. I can see wisdom in much of what the Treaties aspire to. I could campaign for British withdrawal from the EU. I am not. I have to believe that others who also operate judicial processes of the EU believe that the ideals and principles set out in the preamble to the Treaty of the European Union "*CONFIRMING their attachment to the principles of liberty, democracy and respect for human rights and fundamental freedoms and of the rule of law,*" are worth giving substance to in terms that I can understand and that our existing rights and freedoms will not be usurped without due and reasonable presentation of evidence. In my view Democratic Liberty is a delicate flower to be cherished. It can be as easily lost through the "Lingchi" of mis-framed legislation as through the usurpation of power by a charismatic individual. A flower without its petals is no flower.

I trust you will recognise that where I have discovered I believe I have made an error I am quick to acknowledge it. I am not perfect but with every error I have the opportunity to learn something and change to be better.

Yours sincerely

[REDACTED]

----- Forwarded Message

From: [REDACTED]

Date: Sun, 21 Oct 2012 22:57:54 +0000

24/01/2013

To: [REDACTED]@ec.europa.eu>

Cc: Euro-Ombudsman <EO@ombudsman.europa.eu>

Conversation: Proposal for a regulation of the European Parliament and European Council on the periodic roadworthiness tests for motor vehicles... COM(2012) 380 final and EU Ombudsman case ref (0875/2011/JF)

Subject: Proposal for a regulation of the European Parliament and European Council on the periodic roadworthiness tests for motor vehicles... COM(2012) 380 final and EU Ombudsman case ref (0875/2011/JF)

Dear Vice President [REDACTED]

I am expecting that your staff have been waiting for my comments on this proposed regulation. I note your assurance to the European Ombudsman under the case reference above that your staff will not deal with me in a disproportionate manner.

You will be well aware that one of the heads of my complaint (0875/2011/JF – still to be decided) against the European Commission (EC) made to the European Ombudsman covered an allegation that there seemed to be an improper relationship between the EC staff and consultancies in the field. Specifically the improper relationship seemed to manifest itself in terms of undue influence in relation to what were then referred to as Periodic Technical Inspections and are now being more clearly referred to as Roadworthiness Inspections.

I note the following:

1. Article 12 (4) of the proposal - “When carrying out a roadworthiness test, the inspector shall be free of any conflict of interests, in particular as regards economic, personal or family links with the holder of the registration certificate of the vehicle subject to testing.”
 1. Given the discussion in paragraph 1.70 of Annex 14 to the impact assessment and other sections of the impact assessment itself with regard to fraud it can be reasonably concluded that this Article is a response to a perceived problem of fraud and conflicts of interest for the inspector arising from various relationship types with the vehicle driver / rider. Specifically these might be familial pressure to pass unfit vehicles or, that an inspector associated with a repair operation to fail otherwise fit vehicles in order to pick up additional repair work that is unnecessary to ensure the safe operation of an inspected vehicle and consequential revenues from the vehicle owner.
 2. The perceived fraud risk problem seemingly has no estimation of scale for those countries such as the UK with a garage based regime as opposed to a specialised inspection regime, nor of the effect of the problem on road safety
 1. That the impact assessment also states that government supervision and inspection of garages can mitigate the risks of fraud.
 3. The Impact Assessment provides no economic and competitive modelling of access to Inspection Services across Europe under either garage based regimes or specialist inspection regimes.
 1. From my previous professional experience working for a software house that provided Geographic Information System (GIS) capabilities embedded in its products as far back as 1997 I know that such an analysis is relatively easy to perform given the will. The EC has a duty under the principles of good governance based on Efficiency, Effectiveness and the concept of “Fairness” or Equity in the provision of Public Services to ensure that those in remote areas of low population density are not unduly disadvantaged. If ensuring “Fairness” in the provision of services is not part of the EC’s thinking then it not unreasonable to expect it might lose what consent it has to be involved in the government of peoples. Such economic modelling based on access to “competitive” services and distance travelled based on population density, for which the data is available, rather than minimising the cost to government of supervising inspections might throw up a different legislative approach as the optimum.

2. That DEKRA cite international expansion as one of their core strategic objectives. DEKRA Annual Report 2011 – Chair of Supervisory Board *“With the introduction of the <<DEKRA 2015>> strategy programme, the Group is aiming to increase that growth and improve profitability in order to secure its position as a leading global provider of safety services in the testing, inspection and certification industry. The management team has set a clear course for expansion, with an increasing focus on the United States and the growth markets of Brazil and Asia.”*
3. That the impact assessment study observes, p8 section 1.43 b), *“testing services are limited in the extent to which they can compete for business from other Member States.”*
4. That the impact assessment study p41 para 1.160 observes. *“An advantage of the garage-based system is the high number of test locations spread over the country, reducing the distances motorists have to travel for the test, and the time it costs them.”*
 1. It is reasonable to assume that a distributed multi-service garage based local testing delivery regime constitutes a significant barrier to entry for specialised testers wishing to enter such a market.
 2. That no study of the effectiveness or otherwise of supervisory actions to mitigate the risk of fraud or conflict of interest has been undertaken
5. That the Impact Assessment, section 2.3 under the heading of Supervision of Inspectors, acknowledges that DEKRA amongst others were found by the German government to require supervision to ensure the required quality of service is delivered. Examples of supervisory techniques included “mystery shoppers”
6. That DEKRA are the organisation that advised upon and chose how to cut the analyses presented as to what constitutes least rigorous, medium level and high level inspection regimes. Annex XIV “Impact Assessment Study” page v section 30.
 1. In effect, one of the key industry suppliers with a stated objective of international expansions is permitted to define how the effectiveness of regimes is to be assessed and provide the analysis to support the restructuring of inspection regimes in other member states.
7. That the road deaths per million inhabitants measure used to justify the proposed measure, and which would rightly get me fired if I were in my strategy and performance management consulting role to propose such a metric for this purpose to either a client or employer, is not an appropriate metric for assessing the relationship between fatalities and the Roadworthiness regime in a country. There are too many other causal factors for road fatalities to correlate the fatalities to the inspection regime in place.
 1. Were the metric to represent the true relationship between fatalities and the inspection regime in place one can see that the German approach is significantly less effective than the UK and Netherlands approaches and the Swedish approach is no better than the UK approach. Indeed, forcing the German (DEKRA) model on the UK using the “Fatalities per Million Inhabitants” metric as a basis for assuming a true statistical correlation one might reasonably expect fatalities to increase by 28% in the UK.

On the basis of the above evidence points and the absence of key economic analysis that could reasonably have been undertaken using Geographical Information System (GIS) technologies and spatial analysis approaches that have been available for at least 15 years, but might prove disadvantageous to an argument aimed at restructuring entire testing regimes in some member states, I request answers to the following questions:

1. Why are key analyses to demonstrate that the burden on the citizen, economic and administrative, missing, namely:
 1. An analysis of the evidence, rather than mere assertion as in the Impact Assessment and Impact Assessment Study, that garage based regimes, producing a positive outcome in terms of citizen access in sparsely populated areas, under effective government supervision result in a statistically higher fatality rate than a specialist inspection regime?
 2. Accessibility to Inspection centre by region, expected distance in kilometres and miles?

2. Who, other than DEKRA, will benefit from the absence of those analysis?
3. Given the claimed clear correlation between the severity of inspection regimes and the chosen metric, fatalities per million inhabitants, what is the correlation coefficient of the analysis and at what statistical confidence interval?
4. On what basis was it irrational that the French Senate recently found that, in respect of inspections of motorcycles, there was a clear conflict of interest between DEKRA's role as a provider of inspection services and its role in providing advisory services to the European Commission on this subject (<http://www.senat.fr/leg/ppr12-017.html>)?
5. Given the seven year timeframe, as stated in previous communications to me, over which the development of this draft legislative act has taken place was it not possible to fund and obtain an analysis of a true statistical relationship between fatalities and Roadworthiness using a more reasonable metric such as Fatalities attributable to technical defect as primary cause per million vehicle kilometres / miles analysed by category of vehicle?
6. If, whilst acknowledging that roadworthiness tests are within the competence of trained mechanics, it is deemed inappropriate for garages to conduct roadworthiness tests under government supervision because of the risks of fraud and / or conflicts of interest is it more appropriate for a major supplier of testing services to be engaged by the European Commission to assist so closely in the framing of the analysis upon which the draft legislative act is founded?

In answering my questions please request your staff to extend the courtesy of providing page and paragraph references to any documents and verify that they are in the public domain. It was disappointing to have to approach Mr Walsh directly for the Faiz, Walsh et al study covering Air Pollution from Vehicles and cited by the European Commission as a key source. Citing a study that was not generally in the public domain created the impression that the European Commission was being less than transparent and was endeavouring to hide sources.

Noting the significant difference between the DEKRA statistics for motorcycle fatalities attributable to technical condition and other studies such as MAIDS I am requesting that you provide to me, under my right of access to documents (Article 15 Consolidated Version of the Treaty of the Functioning of the European Union, formerly TEC Article 255), and also publish the raw data that indicates details of the PTWs themselves, the technical defect(s) identified as causing each fatal accident and the sampling method for the study. It would seem to me to be inappropriate, given our rights as citizens to "Good governance", for the data set not to be in the public domain and open to review and challenge given it is a primary source upon which sections of the draft legislative act are justified.

I will follow up with further detailed comments on this draft legislative act separately as they would be outside the scope of my complaint to the EU Ombudsman and thus not rightly part of this communication upon which the EU Ombudsman has been copied.

Yours faithfully



----- End of Forwarded Message