

19.11.2012

0875-2011-JF-

E2012-164997

[REDACTED]

From: [REDACTED]
Sent: 18 November 2012 19:41
To: Euro-Ombudsman
Cc: [REDACTED]
Subject: Ref: Open complaint 0875/2011/JF

Dear Ombudsman Diamandouros,

I am writing to you as a courtesy to advise you of actions I have recently undertaken with regard to the Type Approval aspects of my complaint.

Following my conversation with [REDACTED] in which I was informed you would be reaching your decision later than anticipated I have petitioned (1332/2012 – see below) the European Parliament to postpone the IMCO and plenary vote until after you have reached your decision. It seemed premature to be voting on a proposed regulation that still had an open challenge to the lawfulness of the drafting process and consequently the lawfulness of the proposal itself. In my view it would bring the European Parliament into disrepute if it were to vote on and pass a measure that had subsequently been found to be unlawfully drafted.

In no way do I wish to prejudice your findings. For my part I have to have belief in the processes you operate and your wisdom. I understand that you may require additional time to resolve more complex issues. I respect that you may not find in favour of my complaint. Equally I believe that it would be prejudicing your findings for the Parliament to vote on a issue that is under an open challenge as to its lawfulness.

I have also written directly to [REDACTED] of the European Parliament to appeal that he intervenes to expedite a hearing of my petition. I will also forward that on to you as a courtesy. As I am merely a citizen I do not feel bound by diplomatic conventions and have been pointed in the expression of my views. Perhaps it will wake the appropriate people up.

I am not asking you to take any action on my petition as it relate to the legislative process of the Parliament. I have not exhausted due process with the Parliament on this issue. We have a saying in English, "When you find yourself in a hole, stop digging!" I am hoping those with responsibility for the Parliamentary process can find the wisdom to lift their sights from the timetable to the fundamental issues at stake.

Kind regards,

[REDACTED]

----- Forwarded Message

From: [REDACTED] >
Date: Tue, 9 Oct 2012 08:17:24 +0200 (CEST)
To: [REDACTED]
Subject: Pétition envoyée par [REDACTED]

19/11/2012

We are pleased to acknowledge receipt of your message. We will respond to you as soon as possible.

Name and address

Gender: Mr

Surname: [REDACTED]

First name: [REDACTED]

Nationality: [REDACTED]

Postal address: [REDACTED]

Post code: [REDACTED]

Town: [REDACTED]

Country: [REDACTED]

Information concerning the petition

If the Committee on Petitions declares your petition admissible, do you agree to its being considered in public? YES

Do you consent to your name being recorded on a public register, accessible through Internet? YES

Title of your petition: Petition requesting postponement of IMCO and EU Parliament Plenary votes on Regulation for Powered Two Wheeler Type Approval and Market Surveillance until EU Ombudsman has published decision on complaint covering the proposed regulation - For urgent consideration.

Dear [REDACTED] and members of the Petitions Committee of the European Parliament, Ref: Petition to the European Parliament, for urgent consideration, covering voting on COM (2010) 542 final – Proposal for Regulation of approval and market surveillance of two- or three- wheel vehicles and quadricycles.

I had the pleasure of attending the event “Europe in crisis: the challenge of winning citizens’ trust” arranged by the European Union Ombudsman on 24th April this year. I had the privilege of hearing Ombudsman Diamandouros, [REDACTED] then President of the European Council, [REDACTED], and [REDACTED] speak. I was provoked to attend by events leading up to my submitting a complaint to the EU Ombudsman that in part covered the proposed regulation above – open Complaint ref 2011/0875/JF. I wanted to see and hear these people in person rather than through the lens of the British media.

I wish to exercise my right of petition to the European Parliament as a citizen of the European Union to make an urgent petition that IMCO and the European Parliament postpone their respective votes on the compromise proposal until after Ombudsman Diamandouros has made his decision. It is with regret that I need to make this petition. I had hoped that Ombudsman Diamandouros would have been able to come to his decision by now. However, I respect that the questions I have raised with him have deep issues in respect of interpretation of European Union Treaty law.

In respect of my petition please first let me state that I have no wish to prejudice or prejudge the outcome of Ombudsman Diamandouros’ investigation and decision on my complaint. I am comfortable with letting him, whom I understand to have been appointed by the European Parliament, continue to the conclusion of his work. I respectfully request that the European Parliament seeks to avoid prejudicing the outcome of Ombudsman Diamandouros’ investigation and decision. I understand that under the procedures of the European Parliament the European Ombudsman is someone considered to be able to perform the highest judicial roles in the European Union. Proceeding with the vote in advance of his decision seems premature and to undermine his position. In the event that he makes a decision in my favour it would be embarrassing for the EU Parliament to have voted on and potentially passed measures that I have challenged as being unlawfully drafted by the European Commission under Treaty of the European Union (TEU) Article 5(4) and Protocol 2 Article 5.

My challenge to the European Commissions proposal covered several heads. The principal two heads of complaint in relation to this draft legislative act, as defined in Protocol 2 Article 3 (C 83/203), being:

- 1) That the articles in the proposal relating to anti-tampering measures, specifically for L class motorcycles over 125cm³, fail the requirements of proportionality as set out in Treaty of the European

Union (TEU) Article 5 (4) and Protocol 2 Article 5. 2) That the requirements for Automatic Headlamp On breach the requirements of subsidiarity under the same TEU Article 5 (4) and Protocol 2 Article 5.

My arguments can be found in full in the complaint with the reference cited above. However to speed your assessment I will summarise my main points.

With reference to anti-tampering measures that the European Commission has failed to demonstrate in its detailed statement accompanying the draft legislative act, i.e. the Impact Assessment SEC(2010) 1152. Indeed the Commission goes so far as to say, Annex XVIII section 3 of the Impact Assessment p142; " In order to monitor the effect of the selected option it is recommended that the following actions be taken: Identify baseline data, especially relating to the current levels of tampering, and the magnitude of the effect that the tampering has on noise, tailpipe emissions and the involvement of relevant vehicle types in accidents. " This constitutes an open admission that the EC had not obtained the required baseline evidence as to the scale of the perceived problem, nor of its impact. Furthermore in the following paragraph the EC states: "It was recommended to provide more definitive guidance on the effect of future policy options, the impact of tampering on safety and the environment should be reviewed in order that the effects can be quantified. If effects are identified which cause concern, then a survey should be conducted to monitor the current rates and types of tampering present in the current fleet. This could be carried out at periodic inspections, or by roadside checks, as used by previous studies." Thus the EC admitted that in the seven years following the EC funded TÜV Nord 2003 report into anti-tampering measures, in which they were advised to collect the data, it was possible to collect the data, the EC knew how to collect it and moreover had collected the data in similar studies. The same TÜV Nord 2003 report into anti-tampering measures clearly demonstrated that anti-tampering measures are ineffective on two grounds: firstly that in countries such as the Netherlands with no Roadworthiness Inspection regime for powered two wheelers the measures are readily circumvented, and secondly, that in countries with a Roadworthiness Inspection regime low levels of tampering were identified on machines without anti-tampering measures. I contend this demonstrated that engineering in anti-tampering measures is an unnecessary and ineffective measure that by definition adds additional cost to the consumer in member states with roadworthiness inspection regimes. In addition to the above failure the Commission failed to provide any form of meaningful impact assessment on the aftermarkets supply sector. By the EC's own calculation this sector constitutes the largest part of the Motorcycle industry. Other EC funded studies, e.g. MAIDS 2004, indicate that machine condition is the primary causal factor in less than 1% of accidents. The vast majority of us who ride powered two wheelers are killed or injured at the hands of others rather than through our own error so the measures are unlikely to make any inroads into the unacceptable death toll on Europe's roads.

In respect of Automatic Headlamp On I objected on the grounds that the measure was not supported by any evidence whatsoever, that during the period of impact assessment the EC was presenting legal standards designs for on/off headlamp switch tell-tales, and that recent evidence available to the Commission indicates that conspicuity is a subtle issue. I contended that those countries with legislation requiring daytime use of headlamps cannot show that they are safer than the UK that has no such laws and that the measure would prevent me following best practice riding advice, based on UK Police rider training methods, to adjust use of lights according to circumstances. Thus the measure breaches the principle of Subsidiarity. Automatic Headlamp On removes my right to choose how best to protect my own life, e.g. when a low winter sun is behind me. In the UK a significant number of us do ride all year. Additionally, from a UK perspective where legislation currently does not require use of lights during daytime, I argued there is a subtle and dangerous side effect of the proposed legislation in that it will potentially create a "duty of care" in law to be seen and transfer liability from the driver currently deemed as causing an accident through failure to look properly to the rider who is the victim in the majority cases. Costs of long-term injury would thus fall on the victim and thus in the event of permanent disability most likely on the state rather than the driver causing the accident.

In listening to the august speakers at the EU Ombudsman's event this year I was disturbed and disappointed by the lack of reference to the necessity of the "Rule of Law" in winning the citizens' trust. As you are aware, Treaty law binds EU Institutions. If citizens are to be expected to treat the Law with

respect then the EU Institutions as exemplars must model that respect for the Law. I respectfully submit that due process, given the EU Parliament considered Ombudsman Diamandouros as capable of exercising the highest judicial authority, should be to allow the EU Ombudsman to reach his decision as to the lawfulness of the drafting process and thus the lawfulness of the measures. It would be humiliating for the European Parliament were it to find itself in the position of having demonstrably failed to scrutinise effectively the proposed legislation with regard to compliance with the founding treaties and supporting protocols and subsequently on the decision of someone it deems capable of exercising the highest judicial authority be found to have supported the introduction of a potentially unlawfully drafted measure. At the moment that risk merely lies with IMCO who have been kept fully informed of my complaint.

Yours sincerely

[REDACTED]

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