

19.11.2012

0875-2011-JF-

E2012-164998

[REDACTED]

From: [REDACTED]
Sent: 18 November 2012 20:03
To: Euro-Ombudsman
Cc: [REDACTED]
Subject: Ref: Open complaint 0875/2011/JF
Attachments: 20121116 [REDACTED] 3.pdf

Dear Ombudsman Diamandouros,

Please find attached a copy of my appeal to [REDACTED] forwarded to you as a courtesy. I re-iterate that I have no wish to prejudice your decision making. My complaint seems to be one where politics, prejudice and law stand in stark relief. I would much rather been in a position to quote Portia's speech from the Merchant of Venice ("The quality of mercy is not strain'd...") than the US Declaration of Independence and Hans Litten but needs must. I consider myself fortunate not to live in a time in which I am likely to share Hans Litten's fate and that we have due processes to follow. I am also conscious that the freedom and liberty to live in a civilised society is a blessing easily eroded.

Kind regards

[REDACTED]

----- Forwarded Message

From: [REDACTED]
Date: Fri, 16 Nov 2012 01:24:34 +0000
To: <[REDACTED]>
Cc: [REDACTED]

Conversation: Winning the Citizens' trust or turning the clock back seventy years?
Subject: Winning the Citizens' trust or turning the clock back seventy years?

Dear [REDACTED]

I respectfully request your assistance with something that in terms of the underlying principles at stake I believe speaks to the heart of what the European Ombudsman arranged his "Europe in crisis" conference in April this year to discuss. I attended in person and listened to your view that Europe is at risk of turning the clock back 70 years. Please see my attached letter for full details of my request for your assistance and backing arguments.

Yours sincerely

[REDACTED]

----- End of Forwarded Message

19/11/2012



16th November 2012

[Redacted]
President of the European Parliament
Rue Wiertz 60
1047 Bruxelles
Belgique

Dear [Redacted]

Ref: "Turning back the clock seventy years" or "Winning the citizens' trust"

My purpose in writing to you is to request your assistance as President of the European Parliament in resolving an issue that in my view threatens to bring the European Parliament into disrepute and speaks to the heart of the standards of governance we as citizens can expect from the European Union

I respectfully request you use your best auspices to request the Petitions Committee hear my petition to postpone the plenary vote on the proposal for a regulation for the type approval and market surveillance of powered two wheelers, three wheelers and quadricycles. I set out some contextual background and supporting arguments following. My request is that the vote is postponed until after the European Ombudsman has reached his decision on my complaint. My understanding is that Ombudsman Diamandouros has been appointed by the European Parliament on the basis of his ability to exercise the highest judicial authority in the European Union.

My starting point is an understanding that all our nations in Europe have a chequered past of dark and light as we have moved forward slowly and painfully in our respective understandings of what constitutes good governance. From my own nations past I can cite such examples as the apparent invention of the Concentration Camp during the Boer War, internment without trial and the massacre at Amritsar as the dark side of my nation's past. On the light side I can cite the abolition of slavery, admittedly in the face of our own industrialisation of the status of slavery and honouring the Treaty of London 1839.

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] and you speak. I wished to understand how you all perceive the situation in Europe at present. I wanted to see and hear you all in person rather than through the lens of the British media. My interest was sparked following my raising a complaint with the EU Ombudsman covering amongst several aspects of the actions of the European Commission ("the EC") in the arena of implementing Road Safety policy, amongst others in drafting the Proposal for a Regulation on approval and market surveillance of two or three wheel vehicles and quadricycles COM 542/2010 Final and that surveys run by the EC were conducted only in English thus effectively excluding many European citizens from the democratic process – Open case ref 2011/0875/JF lodged April last year.

I noted your comments at the event that Europe was risking turning the clock back seventy years. At the time I felt strong disagreement with your statement. I considered my experience of working in Germany, France, Sweden, Portugal, Denmark, Belgium, the Netherlands and Italy as first a Software Consultant and later as a consultant in the field of strategy and performance management. I reflected on the character of the people I had met and thought there was not one whom I could perceive as allowing that situation to return. Indeed I have one friend who carries the scars from intervening to help break up a neo-Nazi attack on a Turkish man. She probably has greater courage than I.

However, on due reflection I have come to the conclusion that perhaps you are right in your view though maybe not for the reasons you gave. One of my great disappointments from attending the Ombudsman's event was that the importance of "The Rule of Law" was not discussed. You come from a nation with a written constitution and a robust and respected constitutional court that bind your power as politicians as to how law is framed.

In contesting the lawfulness of the above proposed draft legislative act I have appealed to the European Ombudsman and am comfortable with him coming to a decision. I understand that I have raised a fundamental issue as to the standards of governance we as citizens can expect in the framing of European law under the applicable treaties of the European Union. As a consequence, noting the decision of the European Court of Justice in case 24/62 Federal Republic of Germany v the EC. I can accept it takes some time to analyse the facts, the issues in law raised and whether there has been maladministration in the framing of the draft legislative act.

I have also, given the additional time beyond the target one year from opening a case that I was advised in mid October that Ombudsman Diamandouros will require to reach a decision, petitioned the European Parliament requesting a postponement of the final IMCO and European Parliament plenary votes on the proposed regulation until such time as the European Ombudsman has made his decision. I believe I have followed the designated process throughout. Unfortunately, Parliamentary process in the European Parliament does not seem to allow for urgent petitions to be expedited. The letter dated 08/11/2012 I received indicating my petition has been lodged (ref 1332/2012) indicated that it petition may not be heard before the relevant votes. Feedback from my MEP, [REDACTED] indicates that this will likely be the case. As there does not appear to be any process for urgent petitions such as mine I am appealing directly to you for your assistance in ensuring my petition is heard in advance of the relevant votes.

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 on the basis of his adjudged ability to execute the functions of the highest judicial office in the European Union, continue to the conclusion of his work. I assume and trust that the European Parliament, having appointed him, would be comfortable to do the same.

Respectful of your high office I wish to submit the following facts and observations. I am mindful that many in the European Parliament will regard me as an inconvenient nuisance. Some will no doubt consider me direct to the point of being downright rude. However, I submit that to fail to scrutinise effectively proposed legislation for its lawfulness is more than rude to us as citizens and that my response is reasoned, measured and also human.

Facts:

- 1) The Concise Oxford English Dictionary (1964) Edn defines Arbitrary: adjective, "Derived from mere opinion; capricious; unrestrained; despotic; (law) discretionary"
 - a. This edition of the dictionary is the foundation of my understanding of English
- 2) Article 18 of the draft legislative act concerns Anti-Tampering measures and apparently extends current regulations designed to prevent modifications to power two wheelers to all classes of motorcycle. Currently, under the legislation that exists only machines in Powered Two Wheeler categories under 125cm³ are subject to the requirement to have physical anti-tampering measures designed into new machines. Under the current legislation in effect the capacities and power output for the vehicles to which anti-tampering measures apply are explicitly stated. Article 18 has no such explicit statement of limitation as to the classes of PTW affected and thus applies to all PTW categories. My understanding is that when called upon to interpret Treaty law the European Court of Justice can examine source documents to determine the purpose of the legislation. The tone of the Impact Assessment, one of the source documents that would be referenced, with respect to Anti-tampering measures is that they should be applied to all categories of machine.
- 3) Para 3 in Annex XVIII of the Impact Assessment containing what is supposed to be the required detailed statement enabling proportionality of the draft legislative act to be appraised contains
 - a. An explicit recommendation that baseline data as to the scale of tampering within the fleet and its impact on accidents and emissions is collected, i.e. an admission that the European Commission has no evidence as to the scale of the perceived problem nor that perceived problem's impact on either accidents or emissions.
 - b. An explicit statement that the Commission have known the mechanisms through which they can assess those impacts and have used such mechanisms in the past for similar purposes
- 4) Other articles infringe my current rights to choose how best maintain my motorcycles and in extremis how to protect my own life when riding without presenting any evidence as to their necessity, e.g. Automatic Headlamp On, mandating ABS fitment without mandating it be switchable. The detail is in my complaint to the European Ombudsman.
- 5) The TuV Nord (2003) report, funded by the EC, demonstrates the ineffectiveness of the anti-tampering measures under a regime where there is no roadworthiness inspection regime citing studies in the Netherlands that indicate that 70% of

mopeds have illegal modifications of their powertrains. The same study, citing TuV' Nord's own evidence from Germany, indicates that with a roadworthiness testing regime to enforce compliance, the level of powertrain faults detected is as low as 5% of PTWs.

This indicates that high levels of compliance, in excess of 80%, with requirements can be achieved with Roadworthiness Inspection. Please note that fault is not the same as illegal modification / tampering.

- 6) The MAIDS 2004 report into the root causes of motorcycle accidents found that less than one percent of accidents were attributable to the technical condition of the PTW as the primary cause and that these mostly related to tyre condition.
- 7) The European Commission has acknowledged in repealing the 74kw optional limit for unrestricted motorcycles that they could find no causal link between power and accidents.
- 8) The Impact Assessment accompanying the proposed regulation makes no attempt to assess the impact of the proposed Anti-tampering measure on the Aftermarket Supply industry.
- 9) IMCO's version of the Article 18 text does not contain any reference to applying the article to specific classes of PTW. It seems that Council were the ones that ensured it was amended.
- 10) The full text of the Legislation is not yet available in all Official Languages of the EU and is only in a "Council edited" version in English <http://www.europarl.europa.eu/committees/en/imco/subject-files.html#menuzone> . This does not look like a final version. The vote is on Tuesday 20th November 2011. How can citizens review the content of the proposed regulations and contact their MEPs with any concerns if it is not in available in their language?
 - a. I am on record as having objected to English only surveys. Ombudsman Diamandouros found that English only surveys effectively disenfranchised the citizen because they cannot be understood. It was with struggling German overlayed with Italian (after 5 years study) that I talked motorcycles with non English speaking Germans in Pforzheim(2010) and Koln earlier this year. Ich habe nicht Deutsch seit zehn Jahr geschrieben. Ich habe zu viel vergessen. Does the same disenfranchisement not occur if the legislative texts are not available in the official languages of the European Union sufficiently far in advance of critical votes for people to be able to understand the proposed legislation and contact their political representatives? How can a citizen who doesn't speak English be expected to understand the text? Have not we all as citizens the right to demand Habeas Lex in a situation such as this? Is the European Parliament based on representative democracy with all MEPs accountable to the citizens they represent on all issues or merely a rubberstamping organisation for its constituent committees?

Protocol 2 Article 5 tests in relation to draft legislative acts, (Draft Legislative Acts defined in Protocol 2 Article 3):

- 1) Should contain a detailed statement making it possible to appraise compliance with the principles of subsidiarity and proportionality
- 2) Should contain some assessment of the proposal's financial impact
- 3) Be substantiated by qualitative, and wherever, possible quantitative indicators.
- 4) Shall take account of the need for any burden, whether financial or administrative, falling upon the Union, national governments, regional or local authorities, economic operators and citizens, to be minimised and commensurate with the objective to be achieved

Additional Observations

- 1) Any designed anti-tampering measures represent a cost to the manufacturer that must be passed on to us as citizens.
- 2) I understand that you believe, as I, that Official EU documents should be available to all citizens, not just those who speak English, as a vital part of ensuring democracy in the European Union and its Institutions.
- 3) From my perspective it appears that my complaint was well founded and that the Rapporteur has supported the Commission's measure and, on behalf of the European Parliament as a whole, has opened negotiations with the Commission and the Council on the basis of an unlawfully drafted measure. I note the Masters in Law on his CV and I also note the IMCO committee appears to have at least four members with legal practice experience.

I have contested the legitimacy of this measure within the draft legislative act on the basis that it breaches Treaty of the European Union (TEU) Article 5(4) and Protocol 2 Article 5. One cannot appraise the proportionality of measures in the absence of evidence. On the facts above the Commission has admitted it has no evidence either to the scale of any perceived problem,

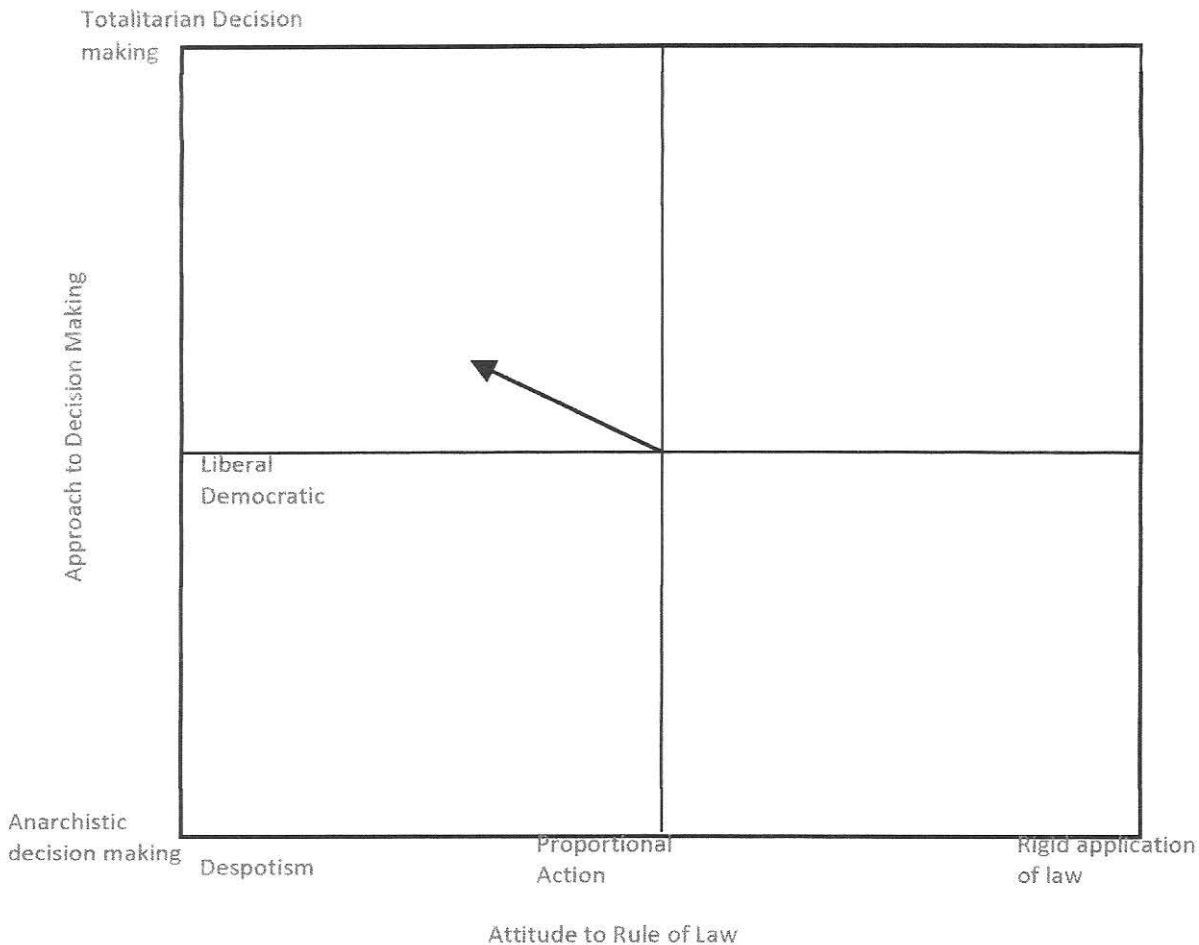
the potential harm caused by the perceived problem nor, not having undertaken any study, any evidence covering the burden of the proposed measure on Economic Operators and Citizens. What is more, on the legal test of substantiation with quantitative indicators The EC admitted it knew the needed indicators, knew how to get them and had collected similar indicators in the past. By definition any legislative act not founded on evidence, or when what evidence there is points to the measure being unnecessary and ineffective, is by definition arbitrary. Arbitrary measures, wilfully drafted in breach of provisions requiring evidence, that raise the costs of pursuing an activity and or reduce the range of options available to the person undertaking the activity to protect themselves are, I would argue, despotic. Surely one purpose of Treaty article and Protocol articles covering proportionality is to ensure good evidence based governance and consequently to both protect citizens from despotic governance and to protect the governing institutions from the charge of despotism. Surely they are in part set up to ensure that people with minority interests are not disproportionately disadvantaged by a powerful state or supra-state body.

Early on in the course of pursuing my complaint against the European Commission, after both reading the bare faced omission of lack of evidence and the Treaty and Article provisions and receiving the blunt rebuff of my request for documents with a refusal to communicate further, and angered by the standards of accountability and governance the facts portrayed, I found myself asking myself: How would Hans Litten counsel me?

Based on the analysis of two critical dimensions of legislative decision making – Approach to Decision Making vs Attitude to Rule of Law, and on the facts of the formulation of this draft legislative act set out in the diagram (Figure 1) on the page following, in which direction do the actions of the Commission take governance? On what evidence in respect of Anti Tampering measures and Automatic Headlamp On measures as set out in the Impact assessment, would the vector I've illustrated in the diagram be rendered inaccurate? Based on the opening negotiating position of IMCO in relation to Article 18 why would the vector drawn be any less accurate in respect of the Committee's behaviour?

I was horrified that IMCO, charged with and paid for holding the Commission to account on behalf of us as citizens should be willing to sanction the articles in question and enter the tri-partite negotiations with Article 18 substantially unaltered and still seemingly applying to PTWs over 125cm³

Figure 1



If this kind of lawmaking is happening in this one area, in how many other areas is this the norm? What is the cumulative effect of decisions taken in such a manner? Is it not to turn back the clock seventy years and undermine the liberties we enjoy and that have been paid for at such a high price in blood? Surely in this instance it is not left (socialist) or right wing politics that matter?

I struggle to comprehend how, lawmakers elected on our behalf and entrusted to scrutinise legislation can frame legislation, which can have severe consequences for us as citizens, as persons, and corporate bodies in the way of fines etc., that in itself fails to meet the tests set out in the laws governing the standards by which laws must be drafted. Surely the European Parliament and its scrutiny Committees should provide exemplars in modelling the application of laws to lawmaking. From my perspective such low standards of scrutiny and opening gambits in negotiating laws hardly works towards winning the citizens' trust. Is it not this kind of behaviour in governing institutions that risks turning the clock back seventy years? Is it not a feature of the totalitarian regimes and dictatorships that one dominated much of our continent that lawmakers acted in ways that demonstrated they believed laws applied to and must be enforced upon the citizen but the Constitutions and Treaties under which granted them the power to act did not apply to them?

Where is the evidence in terms of amendments to Article 18 that IMCO took into account the clear statements in Annex XVIII of the impact assessment as to the availability and collection of quantitative indicators or the impact of the measures on the aftermarket supply chain?

Please understand, whilst the Proposed Regulation annoys me, it is the apparent, complacent and wilful disregard for the Treaty and Protocol that stirs cold anger.

You stated you wished to see closer bonds of Union between our nations in the EU. In considering the approach to the drafting this legislation and its progression through IMCO I am reminded of what I regard as one of the greatest aspirational works in my language that arose as a consequence of another dark period in my nation's past. I am proud to be British and I see great

benefits in the UK belonging to the European Union however I keep in mind what my own nation's past despotism can cause to rise in a people's hearts and mind.

" When, in the course of human events, it becomes necessary for one people to dissolve the Political Bands which have connected them with another, and to assume among the Powers of the Earth, the separate and equal Station to which the Laws of Nature and of Nature's God entitle them, a decent Respect to the Opinions of Mankind requires that they should declare the causes which impel them to the Separation.

We hold these Truths to be self-evident, that all Men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the Pursuit of Happiness -- That to secure these Rights, Governments are instituted among Men, deriving their just Powers from the Consent of the Governed, that whenever any Form of Government becomes destructive to these Ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its Foundation on such Principles and organizing its Powers in such Form, as to them shall seem most likely to effect their Safety and Happiness. Prudence, indeed, will dictate that Governments long established should not be changed for light and transient Causes; and accordingly all Experience hath shown that Mankind are more disposed to suffer, while Evils are sufferable, than to right themselves by abolishing the Forms to which they are accustomed. But when a long Train of Abuses and Usurpations, pursuing invariably the same Object, evinces a Design to reduce them under absolute Despotism, it is their Right, it is their Duty, to throw off such Government, and to provide new Guards for their future Security. Such has been the patient Sufferance of these Colonies; and such is now the Necessity which constrains them to alter their former Systems of Government. The History of the present King of Great- Britain is a History of repeated Injuries and Usurpations, all having in direct Object the Establishment of an absolute Tyranny over these States. To prove this, let Facts be submitted to a candid World. "

In answering my question to myself concerning counsel from Hans Litten, the answer seemed to be: Do the detail to the best of your ability and fight to the last within the law. I cite his position on law in English translation *"Well I am full of belief. It is the arguments and the quarrels I believe in. That is what makes a society. I also believe in a law that sets out the ground-rules for those arguments, with no-one - absolutely no-one - beyond its reach. Law is the process whereby a strong man voluntarily imposes restrictions on himself, bound by a weapon that he puts into the hand of his weaker brother. It is what we call civilization."*

If my challenge to elements of this draft legislation is seen as inconvenient I venture to suggest that any difficulty is not rooted in my challenge but rather in the quality of the work undertaken by the EC in the first instance that gives rise to the opportunity for challenge. They are the ones wasting your time, IMCO's time, the Council's time and as for me I can think of things I would rather have done, but for the fact that rights and liberties purchased at great cost need to be preserved.

Noting Chancellor Merkel's recent stated wish that the UK remain as a valued partner in the EU I therefore appeal to your native Justice and Magnanimity to intervene to ensure that the person the European Parliament appointed to decide up on such matters in an amicable manner is allowed to reach his decision before any vote is taken.

Yours sincerely

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