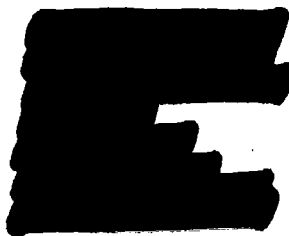




European Ombudsman

0875/2011/JF
S2011-146575

P. Nikiforos Diamandouros
European Ombudsman



Strasbourg, 30 -11- 2011

Complaint 875/2011/JF

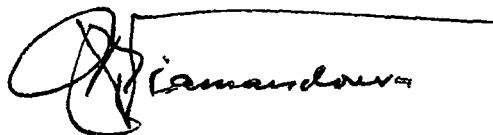
Dear 

Please find enclosed the opinion that I received from the Commission concerning your above complaint.

If you wish to make any observations on the opinion, please send them to me before 31 January 2012.

Please note that, if I do not receive any observations from you, I may close the case with a decision, based on the information you have already provided and the Commission's opinion.

Yours sincerely,



P. Nikiforos Diamandouros

Enclosure:

- Copy of the opinion submitted by the Commission

Comments of the Commission on a request for information from the European Ombudsman

- Complaint by [REDACTED] ref. 875/2011/JF

I. BACKGROUND/SUMMARY OF THE FACTS/HISTORY

Current legislative background:

- Type-approval for powered two and three wheelers is covered by Directive 97/24/EC¹
- Roadworthiness tests for motor vehicles and their trailers are covered by Directive 2009/40/EC²
- Technical roadside inspections of the roadworthiness of commercial vehicles circulating in the Community are covered by Directive 2000/30/EC³

Summary of history:

In preparation of the revision and update of L-category vehicle market surveillance and approval legislation the Commission services have carried out an impact assessment (IA)⁴ between December 2008 and December 2009. L-category vehicles are light vehicles mainly composed of two- or three-wheel mopeds, two-wheel motorcycles with and without a sidecar, tricycles and quadricycles. One of the many inputs to this impact assessment has been a public consultation⁵ that was conducted between December 2008 and March 2009, in which stakeholders, including individuals, were invited to provide their opinions regarding the issues of current type-approval legislation. The opinions were summarised in a report that was also published on the Commission website⁶. Subsequently the proposal was presented by the Commission on 4 October 2010 and is currently under scrutiny by the Council and the European Parliament.

In preparation of the revision of the roadworthiness legislation (Agenda Planning 2010/MOVE/014) DG MOVE carried out an impact assessment (IA) as of the beginning of 2010. One part of the IA was a public consultation via internet which was launched on 29 July and lasted 8 weeks ending on 24 September 2010.

On 21 September 2010 the complainant sent an e-mail to the Commission services (DG MOVE), which he forwarded on the 22 September 2010 to Vice-President [REDACTED]. The complainant criticised the administration and the structure of the survey. He stated that the internet consultation was only available in English and that the questionnaire was very misleading and would therefore produce biased results. No access to documents was requested.

¹ OJ L 226, 18.8.1997, p. 1

² OJ L 141, 6.6.2009, p.12

³ OJ L 203, 10.8.2000, p. 1

⁴ http://ec.europa.eu/enterprise/sectors/automotive/documents/proposals/index_en.htm

⁵ http://ec.europa.eu/enterprise/sectors/automotive/documents/consultations/2008-type-approval/index_en.htm

⁶ http://ec.europa.eu/enterprise/sectors/automotive/documents/consultations/type-approval-contributions/index_en.htm

On 20 October 2010 the complainant's letter was answered by Vice-President [REDACTED] (signed by the Deputy Head of Cabinet). The concern related to the language of publication was appreciated. However, the reply stated that an EU citizen can reply in any official language of the European Union and will be treated in the same way as those written in English. Furthermore, the reply stated that when analysing the answers their origin will be taken under consideration to avoid an unequal treatment. Regarding the quality of the questionnaire Vice-President [REDACTED] replied that the quality will be carefully reassessed as it can always be improved.

On 23 November 2010 the complainant sent another e-mail to the cabinet of Vice-President [REDACTED] in which he stated that a flawed Impact Analysis (IA) is being carried out. He made further comments on the type-approval proposal for Powered Two Wheelers (PTW), in particular on the provisions for emission regulations, in-use conformity testing, anti lock/advanced braking systems and other issues such as mandatory light-on requirements. Furthermore, the complainant argued that misbehaviour of other road users or insufficient infrastructure quality is the main cause of accidents with PTWs. This e-mail was accompanied by detailed remarks criticising the IA accompanying the Commission's proposal for type-approval legislation on PTWs. No access to documents was requested.

On 19 January 2011 the Commission services (DG MOVE Road Safety Unit) replied by clarifying the difference between type-approval of vehicles and their periodic technical inspection. In relation to the cause of accidents involving motorcycles, the Commission agreed with the complainant's observation that accidents are often due to human behaviour and that this issue is already being addressed in the Policy Orientations on Road Safety 2011-2020. Moreover, the reply underlined that the legislative proposals from the Commission will have to be examined by the European Parliament and the Council before adopting new EU rules.

On 21 January 2011 the complainant answered by mainly repeating his arguments on accident causes for PTWs, stressing that the quality of legislation is relying on the quality of the input (in his words: "garbage in – garbage out"). In addition, he asked for evidence of internal quality checks related to the periodic technical inspection (PTI) survey and raised several questions on the Commissions services' quality of work. No access to documents was requested.

On 31 January 2011 the Commission services (DG MOVE Road Safety Unit) replied that the complainant did not bring forward any additional arguments. Nothing would therefore be added to the previous answer, with no comments on his remarks on the administration of the Commission.

On 13 February 2011 the complainant sent another e-mail to Vice-President [REDACTED] in which he stated that he is not satisfied with the responses given by the Commission services so far and he repeated his criticism on the PTI survey, type-approval and extended his complaints in relation to the allocation of EC road safety budget and on the outcome of the Saferider programme. The complainant requested access to the following documents:

- PTI SURVEY⁷;

⁷ A detailed description of the documents requested is provided under point II.

- STRATEGIC ALLOCATION OF FINANCIAL RESOURCES⁸;

On 23 February 2011 the Commission (DG MOVE Road Safety Unit) acknowledged receipt of the complainant's e-mail and stressed that its services did their best to answer in an appropriate way his former questions. Furthermore the complainant has been informed that based on the provisions of Section 4 of the Code of Good Administrative Behaviour it would stop all exchange of correspondence in the future.

On 10 April 2011 the complainant submitted a complaint to the European Ombudsman, requesting an investigation into maladministration by the European Commission with respect to PTW Safety Policy.

II. THE COMPLAINT

The complainant made these statements:

1. Failure to provide requested documents:

1.A.) PTI survey:

1. Documentary evidence recording the grounds for and analysis supporting rejection of his critique of the PTI survey;
2. The documented assessment criteria used by the Transport Commission to validate the PTI survey questions as good practice prior to launch of the survey including:
 - a. Any final documents detailing the standards and process for managing the design of EC surveys, i.e. documented workflows and quality checkpoints;
 - b. The document standards and criteria for survey questionnaire design issued by the EC along with their published date and effective date.
 - c. The academic references used to validate the questionnaire design standards applied by the EC;
 - d. Documents demonstrating the PTI survey's compliance with the standard requested in 2.b above;
3. The language complexity assessment criteria used to validate the level of English required to comprehend the PTI survey;
4. The level of language complexity for the PTI Survey as assessed under the criteria in 3 above and the level of linguistic analysis expertise of the assessor(s);
5. Data indicating the percentage of the population by EU Member State having the English language comprehension level to be able to effectively comprehend the PTI survey and respond to it;
6. Data evidencing the likely reduction in fatalities by EU Member State of a PTI regime involving random roadside inspections against a regime involving stops of inspection only where a police officer or official has reasonable grounds for suspicion an offence is being committed.

⁸ A detailed description of the documents requested is provided under point II.

1.B.) Strategic allocation of financial resources:

1. The detailed strategic root cause analysis to framework budget allocations based on MAIDS (Motorcycle Accidents in Depth) root cause proportions, Total EU wide accidents, appropriate VoSL (Value of Statistical Life) values and weighted costs of severe and minor injuries broken down by EU member state. The information to include date of authorship and date of publication;
2. Details of the programmes, e.g. WATCH-OVER⁹ and SAFERIDER¹⁰, targeted at addressing the principal root causes of accidents involving PTWs and the budgets associated with those programmes;
3. Where programmes are at a stage where legislation is being formulated resulting in potential costs for PTW riders within the EU, details of the expected reduction of lives saved with the economic benefits and the costs of compliance by citizens of the EU and the member states, by programme and by EU Member state;
4. With specific reference to the proposed PTI regime, the documents illustrating the reduction of fatalities and injuries expected as a result of the proposals broken down by EU member state and the reductions in fatalities and injuries that could be expected from random roadside inspections against those expected based on a regime of annual inspection backed by police stop and inspection where reasonable suspicion of an offence forms the grounds for stopping the vehicle. It is reasonable to expect that the numbers will be consistent with the upper limits for fatalities and injuries indicated by the Root Cause case described in MAIDS when mapped to EU wide PTW fatality statistics and not overstate the benefits to be obtained.

2. Management of the PTI interactive policy Making Your Voice survey

The complainant claims that:

- 2.1.) His right to good administration under CFREU Article 41 rights to Good Administration has been breached in respect of
 - a. Article 41(2)(a) in rejecting his criticism and failing to give any reason or present any evidence as to why it believed his criticism should be rejected. He has not been heard effectively;
 - b. in terms of the general intent and purpose of the right to Good Administration in operating survey design and execution processes that are so deeply flawed that they put at risk his ability to respond to them effectively. His effective response was to complete the survey as far as possible and additionally respond separately in writing with his views. He could only respond effectively because of his education level. Good Administration as argued above being the purpose of the Article with the explicit sections in conjunction with CFREU Article 42 being the mechanisms through which he and others as citizen can enforce the general right to Good Administration;
- 2.2.) The collective rights of every citizen in the EU in the classes of PTW rider, motorist and commercial vehicle driver have been breached with respect to

⁹ http://ec.europa.eu/transport/road_safety/pdf/projects/watch-over.pdf

¹⁰ http://ec.europa.eu/transport/road_safety/pdf/projects/saferider.pdf

their general right to Good Administration under CFREU article 41 through the poor processes used to develop and manage the execution of the PTI survey being evident in his analysis using public available undergraduate sources to perform the analysis of the PTI survey's final design;

- 2.3.) The collective rights of every citizen in the EU in the classes of PTW rider, motorist and commercial vehicle driver have been breached with respect to their general right to Good Administration under CFREU article 41(1) right to have their affairs handled impartially through utilising a survey containing leading and ambiguous questions which under subsequent qualitative and quantitative analyses would lead to distorted interpretations of their views;
- 2.4.) The CFREU article 41(2)(a) right of every non-English speaking citizen in the EU in the classes of PTW rider, motorist and commercial vehicle driver have been breached with respect to their general right to Good Administration to be heard fairly through using an English-only survey. An English-only survey consequently denies non-English speakers the right to participate effectively in the PTI survey. Cost is not a legitimate reason for failing to seek views of all citizens in the above classes in the official languages of the EU when a survey is used to the chosen mechanism of solicitation of opinions. To be heard fairly a citizen must understand the asked question before being able to respond effectively.

3. Conduct of the officials drafting the proposed PTI legislation

The complainant requests that an investigation is launched into the conduct of the process underway to support the drafting of the future regulations to determine if there has been undue influence exerted on Commission officials by national or commercial interests and a breach of TEU Article 17(3) and TFEU Article 298.

4. Drafting processes for the proposed L-category vehicle market surveillance and approval Regulation (ref 2010/0271 COD) and the associated impact assessment

The complainant highlighted - based on his own analysis – several weaknesses of the Impact Assessment in relation to emissions, market impact and societal impact. He furthermore elaborated his view that the principle of proportionality has not been properly applied especially related to the requirements to install OBD¹¹, anti tampering measures and random roadside inspections for PTWs.

He further fears the proposed measures will not allow maintenance of motorcycles by their owners in the future.

5. Administration of the SAFERIDER programme and potential future legislative impacts

The complainant raises his concerns about proposed products that might be used to warn PTW riders, namely

- vibrating saddles,
- remote mounted warning devices such as vibrating helmet cheek pads and helmet head up displays and

¹¹ OBD: On board diagnosis

– vibrating handlebar grips
which have been subject to closer investigations during the SAFERIDER programme.

Furthermore he considers the programme as waste of money and claims that several deliverables have not been published due to specific confidential provisions.

6. Strategic planning and budgeting with respect to PTW rider safety issues

The complainant readdresses the request for information related to the details of DG MOVE's strategic financial plan and MAIDS root cause analysis (the programme addressing the primary accident causes, the EC budget, the expected impact on PTW fatalities and the cost of compliance).

III. THE COMMISSION'S COMMENTS TO THE COMPLAINT'S ARGUMENTS

General

During the preparation of proposals for a legal act the Commission has to follow the procedures of an impact assessment (IA) as laid down in the IA guidelines [SEC(2009) 92] and based on the White Paper on European Governance [COM(2001) 428 final].

The IA guidelines provide detailed information on the processes to be followed, steps to be taken and provide good practices guidelines. This includes also the consultation process.

Before a proposal for a legal act may be approved by the Commission the IA report will be subject to a quality review and examination by the Impact Assessment Board.

After receiving a positive opinion from the IA Board the Commission services may draft a proposal for a legislative act. This draft proposal will be subject to a so called Inter Service Consultation (ISC) where other Directorates-General are invited to comment on the proposal. During the ISC the compliance of the proposal with the IA report is subject of the process.

The proposal, once adopted by the Commission, will be submitted to the European Parliament and to the Council for examination. Only when both the Parliament and the Council agree with the proposal and adopt it, the new measures will become applicable.

To increase transparency the Commission is using internet facilities for publication of documents. This allows immediate access to these documents.

All the information related to the processes is public and accessible via the internet <http://ec.europa.eu/governance>

Internet consultations and contributions to them are publicly available via the internet http://ec.europa.eu/yourvoice/consultations/index_en.htm

IA reports are made public via the internet together with the draft proposal when approved by the Commission and submitted to the European Parliament and to the Council. In case of the proposal for type-approval of PTW the whole package is available via the internet <http://www.europarl.europa.eu/oeil/file.jsp?id=5877852>

All other documents requested are currently subject to the procedure for access to documents.

A.) Periodic Technical Inspections – the PTI survey

General principles and minimum standards for consultation of interested parties by the Commission¹² have been issued as a direct contribution to the "Action Plan for Better Regulation". The guiding principle for the Commission is to give interested parties a voice but, as explicitly stated in the European Parliament's resolution on the White Paper on Governance, a consultation of interested parties can only ever supplement and never replace the procedures and decisions of legislative bodies.

Following the Interactive Policy-Making Initiative, an internet based consultation mechanism which is designed to receive and store rapidly and in a structured way reactions to new initiatives, has been set up. This internet consultation mechanism has been used for the purpose of the PTI survey. The content and the questions themselves have been elaborated by Commission staff in close cooperation with an external consultant where both high graduated senior economists and native English speakers were involved.

In addition to the internet consultation the Commission has organised workshops for experts and stakeholders in the area of roadworthiness testing during the consultation phase.

The required principles and minimum standards for consultation have been met during the consultation process.

B.) Related to the proposal for market surveillance and approval of L-category vehicles the Commission would like to underline the following:

As foreseen in the current procedures, a fully-fledged impact assessment has been conducted by the Commission regarding the overhaul of the existing type-approval requirements for L-category vehicles and the report was published on the Commission services website.

The purpose of the impact assessment is to estimate the potential societal, environmental and safety advantages and disadvantages, as well as the associated costs and benefits to European citizens, national authorities in Member States and to industry stakeholders, based upon the best available evidence available at the time of writing. The efficiency and effectiveness of the assessed policy measures and its coherence with the existing related type-approval legislation were assessed.

The options finally chosen represent a balance between the assessed aspects, every step of this process has been regularly shared with the stakeholders. We understand, though, that the preferred policy options might not be custom-tailored for every EU citizen or circumstance.

A strict and rigorous procedure was followed to guarantee the quality of the impact assessment. The final report was separately reviewed and approved by the Impact Assessment Board, consisting of senior, high level Commission staff as foreseen in the current procedure. This procedure included as well the guidance provided by an Impact Assessment Steering Group of Commission Services involved in the subject. This detailed

¹² COM(2002)704 final

analysis finally resulted in preferred policy options that were then used as a basis to draft the proposal.

At the same time while conducting the public consultation, the impact assessment and the drafting of the actual proposal, the Commission Services have been regularly discussing the issues and possible policy measures in the Motorcycle Working Group over a timeframe of more than 7 years. These meetings were very well attended by user associations, Member State authorities and industry representatives. The agenda, discussion material and meeting minutes of these Motorcycle Working Group meetings are publicly accessible¹³.

In parallel, multiple bilateral meetings with stakeholders were held and concerns expressed by individuals were analysed and taken into account. The Commission is therefore confident that it has provided the necessary transparency that is to be expected from the Commission Services while conducting an impact assessment and drafting of a proposal.

The proposal is currently under scrutiny by the European Parliament and Council¹⁴. Only when both the European Parliament and the Council agree with the proposal and adopt it, the new measures will become applicable for new vehicles.

C.) Strategic planning and budgeting of the European Commission

General information related to the budget and the annual budget procedure is made public and available on the internet http://ec.europa.eu/budget/index_en.cfm

Regarding road safety projects the allocated budget is currently about EUR 1 million per year. This budget is used in line with the objectives identified in the Policy Orientations on Road Safety.

D.) SAFERIDER programme

This study is a project under the Seventh Framework Programme and has been managed by DG INFSO. The results of the project have been published on the internet http://ec.europa.eu/transport/road_safety/pdf/projects/saferider.pdf

The results of such kind of studies do not necessarily lead to legal requirements to equip PTWs with any of the products that have been investigated. Any legal requirement will have to follow the procedures as described above.

IV. CONCLUSIONS

The Commission will continue correspondence with the complainant in a non disproportionate way.

The Commission is carefully considering the requests for access to documents from the complainant and will reply according to the relevant procedure prescribed by Regulation 1049/2001¹⁵.

¹³ http://circa.europa.eu/Public/irc/enterprise/automotive/library?l=/mcwg_motorcycle&vm=detailed&sb=Title.

¹⁴ COM(2010) 542 final

¹⁵ OJ L 145, 31.5.2001, p. 43–48

The Commission is prepared to put the complainant's comments/opinions on the regulatory proposals available to the relevant expert groups working on the relevant legislation for consideration as appropriate.