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# Legality of the Conformity Factors in the RDE tests

Opinion on the legality of the conformity factors in the implementing measures to introduce Real Driving Emission tests for light duty vehicles

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## Executive summary

Air pollution has a major impact on human health. It is associated with a range of deadly diseases and is the number one environmental cause of death in Europe. In order to limit the amount of air pollution emitted by vehicles, increasingly strict vehicle emission standards (the so-called 'Euro' standards) have been introduced in Europe.

However, successive Euro standards have failed to deliver expected emission reductions, as vehicle emissions are assessed through an obsolete laboratory test cycle, which does not reflect real driving conditions. This has contributed to widespread breaches of air quality limits in urban areas throughout the EU.

In order to address these problems, the European Commission is using its implementing powers to introduce Real Driving Emissions (RDE) testing to the latest Euro 6 standard. The new test cycle is intended to better reflect actual emissions during on-road driving. Alongside the new test procedure, the Commission is also introducing 'not-to-exceed' (NTE) emissions limits that will apply in the new tests. The NTE limit is the legal emission limit plus a margin called the 'conformity factor'.

However, the proposed conformity factors would allow vehicles to temporarily emit more than double the emission limit for oxides of nitrogen (NO<sub>x</sub>) set by the Euro 6 Regulation. From 2021, all cars will be indefinitely permitted to emit 50% more NO<sub>x</sub> than the emission limit. This will further delay compliance with air quality objectives throughout the EU, with severe implications for human health and the wider environment.

The European Parliament has the power to oppose the implementing measures adopted by the Commission, if they exceed the implementing powers granted by the EU legislature or are not compatible with the aim or the content of the Euro 6 Regulation.

In setting the temporary and final conformity factors applicable to RDE tests, the Commission has taken a political decision to favour the commercial interests of car manufacturers over the protection of the health of European citizens. This decision therefore exceeds the implementing powers granted by the EU legislature and is incompatible with the Euro 6 Regulation's aim to progressively reduce vehicle emissions and achieve air quality objectives.

The decision is therefore illegal and should be vetoed by the European Parliament.

## 1 Introduction

1. On 28 October 2015, the Technical Committee on Motor Vehicles (TCMV) voted on the second package of the implementing measures to introduce Real Driving Emission (RDE) tests for emissions from light duty vehicles, under the framework of Regulation (EC) No 715/2007.<sup>1</sup> Those measures are contained in a Commission Regulation to be adopted through the regulatory procedure with scrutiny, on the basis of Articles 5(3) and 14(3) of the Euro 6 Regulation.<sup>2</sup>
2. The Second Draft Regulation establishes so-called “conformity factors”, which are designed to determine the maximum emissions that can be generated by a vehicle during an individual test trip (the not-to-exceed (NTE) emission limits).
3. Reacting to the TCMV vote, many have called on the European Parliament to veto the Second Draft Regulation pursuant to Article 5a(3)(b) of Council Decision 1999/468/EC.<sup>3</sup>
4. The purpose of this opinion is to assess the legality of the Second Draft Regulation in relation to the following issues:
  - whether the Commission was empowered to establish conformity factors;
  - if so, whether the Commission, in establishing the value of the conformity factors, exceeded the implementing powers granted by the Euro 6 Regulation.

## 2 Background

### 2.1 Air pollution in Europe and the failure of the Euro 6 standard

5. Air pollution has a major impact on human health. It is associated with a range of deadly diseases including cancer, heart disease, strokes and asthma, and is the number one environmental cause of death in Europe. The European Environment Agency estimates that air pollution was responsible for more than 430,000 early deaths in Europe in 2012 alone.<sup>4</sup>
6. Even though emissions of the main air pollutants in Europe have declined since 1990, emissions of nitrogen oxides (NO<sub>x</sub>)<sup>5</sup> from road transport have not sufficiently decreased to meet air quality standards in many urban areas. As of 2013, the concentrations of NO<sub>2</sub> in

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<sup>1</sup> Regulation (EC) No 715/2007 of the European Parliament and of the Council of 20 June 2007 on type approval of motor vehicles with respect to emissions from light passenger and commercial vehicles (Euro 5 and Euro 6) and on access to vehicle repair and maintenance information (OJ L 171, 29.6.2007, p. 1) (the “Euro 6 Regulation”).

<sup>2</sup> Draft Commission Regulation amending Regulation (EC) No 692/2008 as regards emissions from light passenger and commercial vehicles (Euro 6), doc. D042120/02 of 28 October 2015 (the “Second Draft Regulation”) – available at <http://ec.europa.eu/transparency/regcomitology/index.cfm?do=search.documentdetail&hxb86lcmqg3oYE/bjESk4sY+mUxt5zTyDIGuuTctW+y0yjcmlFTUQTskkOVTUeCz> (accessed on 20 November 2015).

<sup>3</sup> Council Decision 1999/468/EC of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission (the “Comitology Decision”).

<sup>4</sup> European Environment Agency, ‘Air Quality in Europe - 2015’ (Report) (30 November 2015), at page 9: <http://www.eea.europa.eu/publications/air-quality-in-europe-2015>

<sup>5</sup> Comprising a mixture of Nitric Oxide (NO) and Nitrogen Dioxide (NO<sub>2</sub>).

- ambient air exceeded the limit set under EU legislation<sup>6</sup> in 19 out of the 28 EU member states.
7. NO<sub>2</sub> is a harmful gas that, according to the European Environment Agency, was responsible for around 75,000 premature deaths in Europe in 2012.<sup>7</sup>
  8. Failure to achieve the ambient air quality limits set by EU legislation exposes member states to legal action from the Commission.<sup>8</sup> NGOs and citizens are increasingly taking to the courts to successfully defend their right to clean air. For instance, in 2011 ClientEarth started a case against the UK Government in relation to the widespread breaches of the NO<sub>2</sub> limit value in the UK. After a landmark decision from the European Court of Justice (ECJ),<sup>9</sup> the UK Supreme Court ordered the UK Government to prepare a plan containing measures to achieve the NO<sub>2</sub> limit value in the "shortest time possible".<sup>10</sup> The UK Government has repeatedly blamed the failure of the Euro standards for its failure to achieve the NO<sub>2</sub> limits.
  9. Regulation of emissions from diesel vehicles is key in order to achieve compliance with the NO<sub>2</sub> air quality limit, given that:
    - around 40% of Europe's NO<sub>x</sub> emissions originate from the road transport sector; and
    - diesel vehicles are responsible for around 80% of the NO<sub>x</sub> emissions from vehicles.<sup>11</sup>
  10. Increasingly strict vehicle emission standards (the 'Euro' standards) have been introduced in Europe in order to limit the amount of air pollution emitted by vehicles. The most recent (and strictest) Euro standard for diesel vehicles is the Euro 6 Regulation, which sets an emission limit for NO<sub>x</sub> of 80 mg/km.
  11. In order to be placed on the EU market, vehicle models are first tested under laboratory conditions using a pre-defined 'test-cycle'. EU legislation prescribes the use of laboratory test cycles (the New European Drive Cycle (NEDC)) to measure emissions from light duty vehicles.<sup>12</sup>
  12. However, the NEDC test has never been adequate to assess real driving emissions. Diesel cars emit significantly more pollution under normal driving conditions than when tested on the NEDC. On-road emission levels of NO<sub>x</sub> are on average seven times higher than the certified emission limit for Euro 6 vehicles.<sup>13</sup> According to Transport & Environment, just one in ten cars meet the NO<sub>x</sub> emission limits on the road.<sup>14</sup>

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<sup>6</sup> Directive 2008/50/EC on ambient air quality and cleaner air for Europe OJ 2008 L152/1.

<sup>7</sup> European Environment Agency, 'Air Quality in Europe - 2015', note 4 above, at 9.

<sup>8</sup> The Commission has already started infringement proceedings, issuing letters of formal notice, against six member states for breaches of NO<sub>2</sub> limit values: France, Germany, Italy, Portugal, Spain and the UK.

<sup>9</sup> Case C-404/13 R (on the application of ClientEarth) v Secretary of State for Environment, Food and Rural Affairs.

<sup>10</sup> UK Supreme Court decision on 29 April 2015 in case R (on the application of ClientEarth) v Secretary of State for the Environment Food and Rural Affairs [2015] UKSC 28.

<sup>11</sup> See European Environment Agency, 'Air Quality in Europe - 2015', note 4 above, at 32.

<sup>12</sup> Commission Regulation (EC) No 692/2008 of 18 July 2008 implementing and amending Regulation (EC) No 715/2007 of the European Parliament and of the Council on type-approval of motor vehicles with respect to emissions from light passenger and commercial vehicles (Euro 5 and Euro 6) and on access to vehicle repair and maintenance information (OJ L 199, 28.7.2008, p. 1).

<sup>13</sup> ICCT, *Real-world exhaust emissions from modern diesel cars* (2014) available at <http://www.theicct.org/real-world-exhaust-emissions-modern-diesel-cars>

<sup>14</sup> Transport and Environment, *Don't Breathe Here* (2015) available at <http://www.transportenvironment.org/press/just-one-10-new-diesel-cars-clean-legal-limit-report-finds>

## 2.2 The introduction of the RDE tests

13. The Euro 6 Regulation requires the Commission to keep the testing procedures under review and to update them if necessary. Article 14(3) of the Euro 6 Regulation empowers the Commission to revise the tests.
14. Since January 2011, the Commission has established a working group of stakeholders to develop new RDE testing procedures. The proposed RDE test should complement the current test regime, using portable emission measurement systems (PEMS).
15. In particular, the Commission is adopting two different, but linked, implementing regulations:
  - a first package, setting out the details of the RDE testing procedures (the "First Draft Regulation");<sup>15</sup> and
  - the Second Draft Regulation, establishing the conformity factors and the NTE emission limits.
16. The First and Second Draft Regulations have been endorsed by the TCMV, on 19 May and 28 October 2015 respectively.
17. The Second Draft Regulation, which introduces conformity factors above the Euro 6 NO<sub>x</sub> emission limit, is highly controversial. In order to allow manufacturers to gradually adapt to the new testing rules, the NTE limits will be introduced in two stages:
  - in the first stage, a higher 'temporary conformity factor';
  - in the second stage, a lower 'final conformity factor'.
18. During the meeting of the TCMV on 28 October 2015, the level of ambition of the Commission proposal for the Second Draft Regulation was significantly lowered. As set out in the following table, the TCMV voted to:
  - raise the value of the temporary and final conformity factors; and
  - push back the timetable for implementation.

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<sup>15</sup> The draft implementing regulation and its annexes are available at <http://ec.europa.eu/transparency/regcomitology/index.cfm?do=search.documentdetail&fdS4FBz3W1xafkiwzCzzAp0ZwEvDcq2Uq4FMBypwnfsn/Qhs71dMAJ5dvcXCvNlj> - accessed on 20 November 2015.

	Commission proposal		TCMV opinion	
	Timetable	Conformity Factor	Timetable	Conformity Factor
<b>First stage</b>	1 Sept. 2017 (new models) 1 Sept. 2018 (new vehicles)	1.6 (128 mg/km)	1 Sept. 2017 (new models) 1 Sept. 2019 (new vehicles)	2.1 (168 mg/km)
<b>Second stage</b>	1 Jan. 2019 (new models) 1 Jan. 2020 (new vehicles)	1.2 (96 mg/km)	1 Jan. 2020 (new models) 1 Jan. 2021 (new vehicles)	1.5 (120 mg/km)

19. The Second Draft Regulation was endorsed by almost all the representatives of the 28 EU Member States in the TCMV. Only the Netherlands voted for stronger limits.<sup>16</sup>

## 2.3 The Commission's implementing powers

20. In general, EU legislation can delegate to the Commission the power to adopt implementing measures. According to settled ECJ case-law, "*the adoption of rules essential to the subject-matter envisaged is reserved to the legislature of the European Union*".<sup>17</sup> Acknowledging this case-law, the Treaty of Lisbon now provides that, "*A legislative act may delegate to the Commission the power to adopt non-legislative acts of general application to **supplement or amend** certain **non-essential elements** of the legislative act*" (Article 290 TFEU) (emphasis added).

### 2.3.1 The implementing powers granted by the Euro 6 Regulation

21. Article 5(3) of the Euro 6 Regulation empowers the Commission to adopt implementing measures setting the specific procedures to assess compliance of light duty vehicles with the emission limits. In particular, it provides that:

*"The specific procedures, tests and requirements for type approval set out in this paragraph, [...] which are designed to amend non-essential elements of this Regulation, by supplementing it, shall be adopted in accordance with the regulatory procedure with scrutiny [...]. This shall include establishing the requirements relating to:*

*(a) tailpipe emissions, including test cycles, low ambient temperature emissions, emissions at idling speed, smoke opacity and correct functioning and regeneration of after-treatment systems [...]."*

22. Article 14(3) of the Euro 6 Regulation further grants implementing powers to revise the testing procedure.<sup>18</sup> In particular, Recital 15 clarifies that a revision may be necessary to

<sup>16</sup> See the voting sheet of the TCMV meeting on 28 October 2015, available at:

<http://ec.europa.eu/transparency/reqcomitology/index.cfm?do=search.documentdetail&vWF0PD7HBsGwMbCr4x4BAC+KlpTNsjiMmQ8qetl8eclXV3U4/r7rqJvJWdYwELHq>

<sup>17</sup> Case C-355/10 *European Parliament v Council*, para. 64.

<sup>18</sup> Article 14(3) of the Euro 6 Regulation "*The Commission shall keep under review the procedures, tests and requirements referred to in Article 5(3) as well as the test cycles used to measure emissions. If the review finds that these are no longer adequate or no longer reflect real world emissions, they*

ensure that real world emissions correspond to those measured during the test. When revising the procedure, the Commission should consider "[t]he use of portable emission measurement systems and the introduction of the 'not-to-exceed' regulatory concept".<sup>19</sup>

23. The Commission therefore has implementing powers to:

- set the specific procedures, tests and requirements in relation to the type approval of vehicles, regarding, *inter alia*, tailpipe emissions; and
- revise the procedures, tests and requirements, so as to adequately reflect the emissions generated under real driving conditions.

### 2.3.2 The Regulatory Procedure with Scrutiny

24. The exercise of implementing powers by the Commission is subject to the control of the member states and the European Parliament.

25. The adoption of implementing measures under the Euro 6 Regulation is subject to the Regulatory Procedure with Scrutiny (RPS) provided by Article 5a(3)(b) of the Comitology Decision.

26. Under the RPS, the Commission must submit its draft measure to a committee composed of representatives of the member states (in the present case, the TCMV). Where, as with the Second Draft Regulation, the committee endorses the proposal, the Commission must without delay submit the draft measures for scrutiny by the European Parliament and the Council.

27. The Council and the European Parliament can oppose the draft measures within three months only on limited grounds – namely, if they believe that the draft measures proposed by the Commission:

- exceed the implementing powers provided for in the basic instrument;
- are not compatible with the aim or the content of the basic instrument; or
- do not respect the principles of subsidiarity or proportionality.

## 2.4 The potential conflict between the Commission and the European Parliament

28. The Second Draft Regulation may trigger a dispute between the EU institutions. On 27 October 2015 – the day before the TCMV's vote – the European Parliament called on the

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*shall be adapted so as to adequately reflect the emissions generated by real driving on the road. The necessary measures, which are designed to amend non-essential elements of this Regulation, by supplementing it, shall be adopted in accordance with the regulatory procedure with scrutiny*'.

<sup>19</sup> Recital 15 of the Euro 6 Regulation.

Commission to adopt an ambitious RDE test cycle, "*with a conformity factor reflecting only the possible tolerances of the measuring procedure in place by 2017*".<sup>20</sup>

29. Critics of the Second Draft Regulation have argued that the NTE emission limits are aimed at protecting the interests of car manufacturers and are an attempt to introduce a derogation to the Euro 6 standards through the "back door" rather than through the proper legislative process.<sup>21</sup>
30. MEPs are currently considering a potential opposition under the scrutiny procedure. On 14 December 2015, an extraordinary meeting of the ENVI Committee will be held to vote on a draft veto resolution. If the ENVI Committee adopt the draft resolution, it will then go to a plenary vote during the week of 18 January 2016, where it will need to be supported by a majority of MEPs.
31. If the European Parliament opposes the Second Draft Regulation, it will not be adopted by the Commission. The Commission would then have two alternatives:
  - submit to the TCMV an amended draft implementing regulation, respecting the limits of the implementing powers; or
  - present a legislative proposal to the Council and the European Parliament on the basis of the Treaty. The legislative proposal could also amend rules essential to the subject-matter (namely, the Euro 6 emission limits).
32. If, on the contrary, the European Parliament does not oppose the Second Draft Regulation, it would still be open to any member state to bring an action for annulment of the Second Draft Regulation before the ECJ pursuant to Article 263 of the TFEU.

## 3 Assessment of the legality of the Second Draft Regulation

### 3.1 The introduction of conformity factors and NTE emission limits

33. The first issue is whether the Commission has the power to introduce conformity factors and NTE emission limits in the first place or if, on the contrary, that power is reserved for the EU legislature.
34. In this regard, Recital 15 of the Euro 6 Regulation, in setting the framework for the Commission's power to revise the tests, expressly states that, "*the introduction of the 'not-to-exceed' regulatory concept should [...] be considered*".
35. Even if the Euro 6 Regulation does not define the 'not-to-exceed' regulatory concept, the Commission can introduce the NTE emission limits, provided it respects the limits of its

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<sup>20</sup> Resolution of the European Parliament of 27 October 2015 on emission measurement in the automotive sector (2015/2865(RSP)), para. 14 - available at <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+TA+P8-TA-2015-0375+0+DOC+PDF+V0//EN>

<sup>21</sup> See Transport & Environment's press release on 28 October 2015: <http://www.transportenvironment.org/press/governments-double-and-delay-air-pollution-limits-diesel-cars>

implementing powers. The key question, therefore, is not *if* the Commission had the power to introduce the conformity factors, but *how* and *why* it has used this power.

### 3.2 Limits to the Commission's discretion in establishing the conformity factors

36. In order to assess whether the Commission exceeded the limits of the implementing powers, it is necessary to:

- analyse the mandate to the Commission provided for in the Euro 6 Regulation;
- analyse the aims of the Euro 6 Regulation; and
- analyse the specific implementing measures and compare them with the mandate and the aims of the Euro 6 Regulation.

#### 3.2.1 The mandate in the Euro 6 Regulation

37. The Euro 6 Regulation empowers the Commission to set and revise the specific procedures, tests and requirements for approval of vehicles, regarding emissions of pollutants.<sup>22</sup> During the revision, the introduction of portable emissions measurement systems and the NTE regulatory concept should be considered.<sup>23</sup>

38. As the Euro 6 Regulation does not define the 'NTE regulatory concept', it is necessary to look elsewhere for guidance. The wording of the mandate is particularly useful in this regard. In particular, the Second Draft Regulation can only "*amend non-essential elements of the [Euro 6 Regulation] by supplementing it*". Therefore, the Commission is only empowered to **supplement** the Euro 6 Regulation, without being able to actually **amend** its provisions.

39. According to the EU Treaties and ECJ case-law, the supplemental measures adopted by the Commission must be **non-essential**. In order to ascertain which elements of a matter are essential, "*it is necessary to take account of the characteristics and particularities of the domain concerned*".<sup>24</sup> In other words, it is necessary to consider the aims of the basic regulation.

40. In this regard, the ECJ has clarified that "*provisions which, in order to be adopted, require **political choices** falling within the responsibilities of the European Union legislature **cannot be delegated***".<sup>25</sup>

#### 3.2.2 The aims of the Euro 6 Regulation

41. The Euro 6 Regulation aims at ensuring "*a high level of environmental protection*".<sup>26</sup> To this effect, limits for vehicle emissions need to become progressively stricter. The evolution from

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<sup>22</sup> Articles 5(3) and 14(3) of the Euro 6 Regulation.

<sup>23</sup> Recital 15 of the Euro 6 Regulation.

<sup>24</sup> Case C-355/10 *European Parliament v Council*, para. 68.

<sup>25</sup> *Ibid.*, para. 65, emphasis added.

<sup>26</sup> Recital 1 of the Euro 6 Regulation.

Euro 5 to Euro 6 standards is part of "a continuing effort to reduce vehicle emissions".<sup>27</sup> Particular importance is placed on the "considerable reduction in nitrogen oxide emissions [...] necessary to improve air quality and comply with limit values for pollution".<sup>28</sup>

42. Recital 3 provides guidance as to the distinction between essential and non-essential provisions:

- on the one hand, the "**fundamental provisions on vehicle emissions**" are laid down in the Euro 6 Regulation;
- on the other hand, "**the technical specifications will be laid down by implementing measures adopted following comitology procedures**".

43. The reason for this distinction is that the setting of the emission standards is based on political choices, as clarified by Recital 7:

*"In setting emissions standards it is important to take into account the implications for markets and manufacturers' competitiveness, the direct and indirect costs imposed on business and the benefits that accrue in terms of stimulating innovation, improving air quality, reducing health costs and increasing life expectancy, as well as the implications for the overall impact on carbon dioxide emissions".*

44. Therefore, the introduction of conformity factors by the Commission is legitimate only to the extent that they are justified on technical grounds. They cannot be introduced for political reasons.

### 3.2.3 The conformity factors in the Second Draft Regulation

45. The original proposal from the Commission drafted the temporary and final conformity factors at 1.6 and 1.2, respectively. This would have resulted in NTE limits of 128 mg/km, followed by 96 mg/km. However, the two sets of limits the TCMV voted through are substantially less stringent than this. The Second Draft Regulation will apply a temporary conformity factor of 2.1 and a final conformity factor of 1.5, resulting in NTE limits of 168 mg/km and 120 mg/km respectively.

46. The legality of the temporary and final conformity factors depends on the reasons for their introduction. The Second Draft Regulation justifies the introduction of the NTE limits in two steps, namely a temporary conformity factor followed by a final conformity factor, in order to "*allow manufacturers to gradually adapt to the RDE rules*".<sup>29</sup>

47. No further reason is given for the introduction of the temporary conformity factor.

48. The final conformity factor is justified on the basis of the "*statistical and technical uncertainties of the measurement procedures*"<sup>30</sup> and, in particular, "*the additional*

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<sup>27</sup> Recital 5 of the Euro 6 Regulation. See also Recitals 4 and 12.

<sup>28</sup> Recital 6 of the Euro 6 Regulation.

<sup>29</sup> Recital 10 of the Second Draft Regulation.

<sup>30</sup> Recital 9 of the Second Draft Regulation.

*measurement uncertainties related to the application of Portable Emission Measurement Systems (PEMS)*".<sup>31</sup> However, the Second Draft Regulation does not provide further details on such uncertainties and how or why they impact on the conformity factors. It is therefore necessary to refer to the following preparatory documents and explanatory papers:

- the Commission's explanatory paper entitled "*NTE emission limits for RDE legislation: state of play*" dated 7 September 2015;<sup>32</sup>
- the Commission's explanatory paper entitled "*NTE emission limits and application dates for RDE legislation*" dated 1 October 2015;<sup>33</sup>
- slides from the presentation entitled "*Preliminary Uncertainty assessment – RDE Task Force on Uncertainty Evaluation*" given by the European Commission's Joint Research Centre (JRC) on 1 October 2015;<sup>34</sup> and
- slides from the presentation entitled "*ACEA measurement uncertainty analysis*" given by the European Automobile Manufacturers Association (ACEA) on 1 October 2015.<sup>35</sup>

49. These documents reveal that the introduction of conformity factors is being made primarily for political rather than technical reasons.

50. There is general agreement between all stakeholders that the RDE test procedures introduce higher measurement uncertainties than the laboratory tests. However, there is some disagreement as to the extent of these risks. Further, these uncertainties apply in both directions – i.e. they could lead to compliant vehicles failing the tests or to non-compliant vehicles passing the tests. The uncertainties therefore give rise to risks for both manufacturers and regulators – who represent the public interest in a clean and healthy environment.

51. For this reason, the Commission explanatory note concluded that, "*if manufacturer's and regulator's risks are kept on a similar level, the NTE emission limits should not be adjusted due to the higher measurement uncertainties.*" This would require a conformity factor of 1, i.e. full compliance with the 80mg/km emission limit.

52. However, the note goes on to explain that, "[...] *if for **political reasons** the manufacturer's risk should be minimised, an additional margin has to be added to regulatory emission limits for defining the respective NTE emission limits.*"<sup>36</sup>

53. A subsequent Commission document dated 1 October 2015 further points to the political reasons for the introduction of the final conformity factor: "*if the resulting manufacturer's and regulator's risk are kept on an equal level, as a balanced approach would require, the value of margin should be set at 0. The proposal of the Commission services strikes a compromise*

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<sup>31</sup> Recital 10 of the Second Draft Regulation. See also point 2.1.1 of Annex II to the Second Draft Regulation.

<sup>32</sup> Available at

[https://circabc.europa.eu/webdav/CircaBC/GROW/automotive/Library/comitology\\_committees/technical\\_committee/49th%20meeting%20on%2010%20September%202015/NTE%20-%20state%20of%20play%20-%20TCMV%2010-09-2015.pdf](https://circabc.europa.eu/webdav/CircaBC/GROW/automotive/Library/comitology_committees/technical_committee/49th%20meeting%20on%2010%20September%202015/NTE%20-%20state%20of%20play%20-%20TCMV%2010-09-2015.pdf)

<sup>33</sup> Paper presented by the Commission at the TCMV meeting of 6 October 2015.

<sup>34</sup> Available at [https://circabc.europa.eu/d/a/workspace/SpacesStore/a4c8455f-de18-4f3a-9571-9410827c4f87/2015\\_10\\_01\\_Error\\_analysis\\_JRC.pdf](https://circabc.europa.eu/d/a/workspace/SpacesStore/a4c8455f-de18-4f3a-9571-9410827c4f87/2015_10_01_Error_analysis_JRC.pdf)

<sup>35</sup> Available at [https://circabc.europa.eu/webdav/CircaBC/GROW/wltp/Library/meetings/151001%20-%20RDE-LDV\\_Uncertainty\\_evaluation%20%28audio\\_web%29/2015-10-01\\_ACEAMeasurement\\_Uncertainty\\_Final%20v1.pdf](https://circabc.europa.eu/webdav/CircaBC/GROW/wltp/Library/meetings/151001%20-%20RDE-LDV_Uncertainty_evaluation%20%28audio_web%29/2015-10-01_ACEAMeasurement_Uncertainty_Final%20v1.pdf)

<sup>36</sup> See Commission, *NTE emission limits for RDE legislation: state of play*, note 32 above, at 2, emphasis added.

*between a balanced and a "worst case" (from a manufacturer's perspective) approach for accounting the additional uncertainties associated with PEMS measurement."*<sup>37</sup>

54. It is clear from these documents that the application of the final conformity factor is based on political, not technical, reasons. The Commission has made a political choice to minimise the risks to manufacturers arising out of the measurement uncertainties, at the expense of the protection of human health and the environment. This is contrary to the aim of the Euro 6 Regulation, which is to progressively reduce vehicle emissions, in order to achieve air quality objectives and to ensure a high level of environmental and health protection.
55. However, only the EU legislature has the power to take the political choices that try to balance the competing commercial interests of car manufacturers (in terms of the costs imposed on business) and the general public (in terms of the right to a healthy environment).<sup>38</sup> The Commission's implementing powers can only lay down the technical specifications.
56. In Case C-303/94 *European Parliament v Council*, the ECJ held that implementing measures cannot modify the scope of the obligations imposed on the member states by the basic regulation.<sup>39</sup>

#### 3.2.4 The value of the conformity factors

57. From a strictly legal perspective, any conformity factor higher than 1 is inherently a political decision and so goes beyond the Commission's implementing powers. It is therefore illegal and may be vetoed by the European Parliament.
58. If the Parliament deems that in the interests of avoiding further delay it is necessary to introduce conformity factors, it should ensure that these are set at levels that are supported by sound evidence. In any event, they cannot go beyond the worst-case margin resulting from the technical assessment of the RDE test uncertainties. Currently, both the temporary and final conformity factors are higher than the worst-case scenarios.

#### The temporary conformity factor

59. The value of the temporary conformity factor (2.1) is higher than the worst-case scenarios assessed by the Commission and JRC (1.3), or even the ACEA (1.9).
60. The value of the temporary conformity factor is set on the basis of the expected average NO<sub>x</sub> emissions of diesel vehicles in the 2-3 years before the RDE test and NTE limit become binding; i.e. it is set at a level which would not require any effort on the part of vehicle manufacturers.<sup>40</sup>

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<sup>37</sup> See Commission, *NTE emission limits and application dates for RDE legislation*, note 33 above, at 3.

<sup>38</sup> Recitals 3 and 7 of the Euro 6 Regulation.

<sup>39</sup> Case C-303/94 *European Parliament v Council*, paras 30-32.

<sup>40</sup> See Commission, *NTE emission limits for RDE legislation: state of play*, note 32 above, at 1.

61. Moreover, the temporary conformity factor is applicable, for a limited period of time, "*upon request of the manufacturer*".<sup>41</sup>
62. The temporary conformity factor can therefore be characterised as an **optional derogation**, granted to those manufacturers that will not be able to immediately achieve compliance with the final conformity factor.
63. However, according to ECJ case-law, an implementing measure cannot introduce a temporary derogation which would result in a modification of the scope of the obligations defined by EU legislation. In particular, in Case C-303/94 *European Parliament v Council*, the ECJ annulled an implementing measure adopted by the Council which allowed an optional and temporary derogation to an environmental quality standard set under the relevant basic directive.<sup>42</sup>

### The final conformity factor

64. Similarly, the value of the final conformity factor goes beyond the limits of the Commission's implementing powers. The assessments by the Commission and the JRC conclude that, in the "worst case" scenario,<sup>43</sup> the RDE testing procedure may introduce an additional uncertainty of 25 mg/km,<sup>44</sup> which would result in a NO<sub>x</sub> NTE emission limit of 105 mg/km (i.e. a conformity factor of 1.3).
65. Whatever figure is proposed for the final conformity factor must take into account that as it is intended to apply indefinitely, it will have a particularly detrimental impact on the Euro 6 Regulation's aim of reducing vehicle emissions in order to achieve air quality objectives, and consequently on human health and the environment.

## 4 Conclusions

66. The Euro 6 Regulation granted to the Commission the power to introduce conformity factors and NTE emission limits in the RDE tests. However, that power is subject to certain constraints.
67. Implementing powers can only be supplemental and cannot alter the essential elements of the basic legislation. They should be based on technical, not political, reasons.
68. The introduction of conformity factors in the Second Draft Regulation is an inherently political decision that alters the essential element of the Euro 6 Regulation: the emission limit value.
69. While there may be some justification on the basis that the RDE test introduces greater measurement uncertainty, by the Commission's admission, this is a risk that applies both ways. Applying a conformity factor to protect manufacturers from the risk that comes with that measurement uncertainty puts the commercial interests of the manufacturer ahead of the public interest in a healthy environment. This is a political decision that goes beyond the

<sup>41</sup> See point 2.1.2 to Annex II to the Second Draft Regulation.

<sup>42</sup> Council Directive 91/414/EEC of 15 July 1991 concerning the placing of plant protection products on the market (OJ 1991 L 230, p. 1).

<sup>43</sup> Where the maximum overestimation risk of each uncertainty is simply added up, without a proper probabilistic error analysis. See Commission, *NTE emission limits for RDE legislation: state of play*, note 32 above, at 2.

<sup>44</sup> This would result from the following additional inaccuracies compared to the NEDC test: (i) <7% (=6 mg/km) from PEMS inaccuracy; (ii) <3-5% (=2.4-4 mg/km) from misalignments of signals; and (iii) <20% (5-15 mg/km) from drift of analyzer signals.

scope of the implementing powers and is incompatible with the Euro 6 Regulation's aim to progressively reduce vehicle emissions in order to achieve air quality objectives. It exceeds the implementing powers granted by the EU legislature and is therefore illegal.

70. The European Parliament should therefore veto the Second Draft Regulations and call on the Commission to submit to the TCMV an amended draft implementing regulation as soon as possible. If conformity factors are deemed necessary, they should be set at a level that reflects the worst case uncertainties associated with the RDE test procedure. Based on the best current technical evidence this would be no more than a factor of 1.3.

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