JUDGMENT OF THE GENERAL COURT (Ninth Chamber, Extended Composition)

13 December 2018 (*)

(Environment — Regulation (EU) 2016/646 — Pollutant emissions from light passenger and commercial vehicles (Euro 6) — Setting of the not-to-exceed (NTE) values for emissions of oxides of nitrogen during the real driving emission (RDE) tests — Action for annulment — Powers of a municipal authority in the field of environmental protection to limit the circulation of certain vehicles — Direct concern — Admissibility — Lack of competence on the part of the Commission — Compliance with higher-ranking legal rules — Temporal adjustment of the effects of an annulment — Non-contractual liability — Compensation for the alleged harm to image and reputation)

In Joined Cases T-339/16, T-352/16 and T-391/16,

Ville de Paris (France), represented by J. Assous, lawyer,

applicant in Case T-339/16,

Ville de Bruxelles (Belgium), represented by M. Uyttendaele and S. Kaisergruber, lawyers,

applicant in Case T-352/16,

Ayuntamiento de Madrid (Spain), represented by F. Zunzunegui Pastor, lawyer,

applicant in Case T-391/16,

v

European Commission, represented by A.C. Becker, E. Sanfrutos Cano and J.-F. Brakeland, acting as Agents,

defendant,

APPLICATION based, first, on Article 263 TFEU and seeking annulment of Commission Regulation (EU) 2016/646 of 20 April 2016 amending Regulation (EC) No 692/2008 as regards emissions from light passenger and commercial vehicles (Euro 6) (OJ 2016 L 109, p. 1) and, second, on Article 268 TFEU and seeking compensation for the harm caused to the City of Paris as a result of the adoption of the same regulation,

THE GENERAL COURT (Ninth Chamber, Extended Composition),

composed of S. Gervasoni, President, L. Madise (Rapporteur), R. da Silva Passos, K. Kowalik-Bańczyk and C. Mac Eochaidh, Judges,

Registrar: M. Marescaux, Administrator,

having regard to the written part of the procedure and further to the hearing on 17 May 2018,

gives the following

Judgment

1 Commission Regulation (EU) 2016/646 of 20 April 2016 amending Regulation (EC) No 692/2008 as regards emissions from light passenger and commercial vehicles (Euro 6) (OJ 2016 L 109, p. 1, 'the contested regulation') supplements the requirements for the real driving emission (RDE) tests intended to measure the pollutant emissions from light passenger and commercial vehicles as part of the procedures prior to the authorisation to place new vehicles on the market. Those tests seek to better reflect the level of pollutant emissions under real driving conditions than the laboratory tests. More specifically, in the contested regulation, the Commission set, in relation to emissions of oxides of nitrogen, not-to-exceed (NTE) values for the RDE tests; those values resulted from the application of CF pollutant conformity factors to the pollutant emission limits laid down for the Euro 6 standard in 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 2007 L 171, p. 1). The applicants, namely the ville de Paris (City of Paris), the ville de Bruxelles (City of Brussels) and the Ayuntamiento de Madrid (Municipality of Madrid), seek the annulment of the contested regulation because, in their view, the European Commission was unable to adopt the NTE values for emissions of oxides of nitrogen applied, which are higher than the limits on those emissions laid down for the Euro 6 standard. The Commission contests both the admissibility and the substance of the applicants' actions for annulment. Furthermore, the City of Paris seeks symbolic compensation of one euro for the harm caused to it as a result of the contested regulation, a request which the Commission considers equally inadmissible and unfounded.

Background to the disputes

2 Directive 2007/46/EC of the European Parliament and of the Council of 5 September 2007 establishing a framework for the approval of motor vehicles and their trailers, and of systems, components and separate technical units intended for such vehicles (Framework Directive) (OJ 2007 L 263, p. 1), which is the result of the consolidation of various instruments, provides that the technical requirements applicable to systems, components, separate technical units and vehicles must be harmonised and specified in 'regulatory acts' which primarily seek to ensure a high level of road safety, health protection, environmental protection, energy efficiency and protection against unauthorised use. Its provisions organise a Community type-approval system for all categories of vehicles. In that regard, and as is apparent from Article 3 of that directive, where a Member State grants 'EC type-approval' to a type of vehicle, it certifies that that type of vehicle satisfies the relevant administrative provisions and technical requirements of that directive and of the 'regulatory acts' listed in annex thereto. Such 'regulatory acts', within the meaning of the same directive, may be inter alia other directives or separate regulations, and each of those 'regulatory acts' relates to a specific aspect.

3 As is clear from Annex IV to the directive in question, EC type-approval of a type of vehicle assumes that that vehicle type is compatible with the provisions of dozens of 'regulatory acts' relating, for example, to the prevention of fire risks, steering equipment, braking or, as far as the present cases are concerned, pollutant emissions. The 'regulatory act' concerned in relation to the last aspect, in the case of light passenger and commercial vehicles, is Regulation No 715/2007.

4 According to the second subparagraph of Article 4(3) of Directive 2007/46, a Member State is not to 'prohibit, restrict or impede the registration, sale, entry into service or circulation on the road of vehicles … on grounds related to aspects of their construction and functioning covered by this

Directive, if they satisfy the requirements of the latter'.

5 The recitals of Regulation No 715/2007 provide insight into its context. Recital 2 of that regulation, which refers to Council Directive 70/156/EEC of 6 February 1970 on the approximation of the laws of the Member States relating to the type approval of motor vehicles and their trailers (OJ, English Special Edition 1970(I), p. 96), replaced by Directive 2007/46, states that that regulation is one of the 'regulatory acts' applicable under the type approval procedure provided for in the latter directive. In addition, according to recital 4 of the same regulation, that regulation contributes to the implementation of the Clean Air For Europe programme, launched by the Commission in 2001, the 'thematic strategy' of which provides that further reductions in emissions from the transport sector (air, maritime and land transport), from households and from the energy, agricultural and industrial sectors are needed to achieve EU air quality objectives, and that, in that regard, the Euro 5 and 6 standards for vehicles number amongst the measures designed to reduce emissions of particulate matter and ozone precursors such as nitrogen oxide and hydrocarbons. Lastly, recitals 5 and 6 of the regulation in question state that emissions of oxides of nitrogen from diesel vehicles must continue to be reduced significantly by reaching ambitious limit values at the Euro 6 stage without being obliged to forego the advantages of diesel engines in terms of fuel consumption and hydrocarbon and carbon monoxide emissions, but that an interim stage for reducing nitrogen oxide (Euro 5 stage) must be defined to provide long-term planning security for vehicle manufacturers.

6 Article 10 of Regulation No 715/2007, entitled 'Type approval', provides, inter alia, in relation to passenger vehicles and vehicles for the carriage of persons, that the limits of the Euro 5 standard will apply from 1 September 2009 for type approval, that from 1 January 2011 new vehicles which do not comply with that standard may no longer be registered, sold or entered into service, that the limits of Euro 6 standard will apply from 1 September 2014 for type approval and that from 1 September 2015 new vehicles which do not comply with that standard may no longer be registered, sold or entered into service. For example, Tables 1 and 2 of Annex I to Regulation No 715/2007 set the limit on emissions of oxides of nitrogen for a diesel passenger vehicle or vehicle for the carriage of persons at 180 mg/km for the Euro 5 standard and at 80 mg/km for the Euro 6 standard.

7 In Article 4 of Regulation No 715/2007, entitled 'Manufacturers' obligations', paragraph 1 requires vehicle manufacturers to ensure that all their new vehicles intended for registration, sale or entry into service within the European Union are type approved in accordance with that regulation and its implementing measures, in particular by meeting the emission limits set out in Annex I to that regulation. The second subparagraph of paragraph 2 of the same article states that vehicle manufacturers must ensure that the tailpipe and evaporative emissions are effectively limited throughout the life of the vehicle under normal conditions of use. It is clarified in this regard that in-service conformity measures are to be checked for a period of up to five years or 100 000 km. The third subparagraph of the same paragraph states that 'in-service conformity shall be checked, in particular, for tailpipe emissions as … against emission limits set out in [that annex]' and that, 'in order to improve control of evaporative emissions and low ambient temperature emissions, the test procedures shall be reviewed by the Commission'. Paragraph 4 of the same article provides in particular that the specific procedures and requirements for the implementation of the provisions cited above are to be established in accordance with the procedure referred to in Article 15(2) of the same regulation, which now corresponds to the comitology 'examination' procedure described in Article 5 of Regulation (EU) No 182/2011 of the European Parliament and of the Council of 16 February 2011 laying down the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers (OJ 2011 L 55, p. 13), pursuant to Article 13 of the latter regulation.

8 In Article 5 of Regulation No 715/2007, entitled ‘Requirements and tests’, paragraph 1 provides first of all that ‘the manufacturer shall equip vehicles [so as to enable them], in normal use, to comply with this Regulation and its implementing measures’. Paragraph 2 of that article goes on to provide that, save in specific situations, the use of defeat devices that reduce the effectiveness of emission control systems is to be prohibited. Finally, paragraph 3 states:

‘The specific procedures, tests and requirements for type approval set out in this paragraph, as well as requirements for the implementation of paragraph 2, which are designed to amend non-essential elements of this Regulation, by supplementing it, shall be adopted in accordance with the … procedure … referred to in Article 15(3). 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;

…

(c) OBD systems and in-use performance of pollution control devices;

(d) durability of pollution control devices, replacement pollution control devices, in-service conformity, conformity of production and roadworthiness;

…’

9 The procedure mentioned, by reference to Article 15(3) of Regulation No 715/2007, corresponds to the comitology ‘regulatory procedure with scrutiny’ provided for in Article 5a of Council Decision 1999/468/EC of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission (OJ 1999 L 184, p. 23), the effects of which were maintained for the purposes of the acts making reference thereto, pursuant to Article 12 of Regulation No 182/2011.

10 Article 14(3) of Regulation No 715/2007 provides:

‘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 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 referred to in Article 15(3).’

11 Commission Regulation (EC) No 692/2008 of 18 July 2008 implementing Regulation No 715/2007 (OJ 2008 L 199, p. 1) was adopted, in particular, for the purposes of applying Articles 4 and 5 of the latter regulation. Recital 2 of Regulation No 692/2008 states that new light-duty vehicles must comply with new emission limits, that those technical requirements take effect in two stages, Euro 5 starting from 1 September 2009 and Euro 6 from 1 September 2014, and that, therefore, the Regulation aims at setting the requirements necessary for the type approval of Euro 5 and Euro 6 specification vehicles. Recital 9 of the same regulation explains that the measures provided for are in accordance with the opinion of the Technical Committee — Motor Vehicles mentioned in Article 40 of Directive 2007/46.

12 Article 3(1) of Regulation No 692/2008 provides that EC type-approval is granted with regard, inter alia, to pollutant emissions if the manufacturer demonstrates that the vehicles concerned comply

with the test procedures specified in Annexes III to VIII, X to XII, XIV, XVI and XX. Article 3(2) of the same regulation clarifies, in essence, that, depending on their characteristics, vehicles are to be subject to different types of tests listed in Figure 1.2.4 of Annex I, which are themselves described in various annexes. For example, the type 1 test comes under Annex III, entitled 'Verifying average exhaust emissions at ambient conditions', and the type 4 test under Annex VI, entitled 'Determination of evaporative emissions'. Article 3(5) of that regulation states that 'the manufacturer shall take technical measures so as to ensure that the tailpipe and evaporative emissions are effectively limited, in accordance with this Regulation, throughout the normal life of the vehicle and under normal conditions of use'.

13 In the wake of various studies, as well as high-profile events in the media, showing that the type 1 tests performed did not reflect the actual level of real driving pollutant emissions on the road, the Commission amended Regulation No 692/2008 by supplementing it, on the basis of Article 5(3) of Regulation No 715/2007, that is to say in accordance with the comitology 'regulatory procedure with scrutiny' provided for in Article 5a of Decision 1999/468, to which reference is made in paragraph 9 above. It adopted the contested regulation to that end. Recitals 3 to 10 of the contested regulation state inter alia:

'(3) The Commission has performed a detailed analysis of the procedures, tests and requirements for type-approval that are set out in [Regulation No 692/2008] on the basis of own research and external information and found that emissions generated by real driving of Euro 5/6 vehicles on the road substantially exceed the emissions measured on the regulatory new European driving cycle (NEDC) [applied for type 1 tests], in particular with respect to … emissions [of oxides of nitrogen from] diesel vehicles.

…

(5) "Defeat devices" as defined in Article 3(10) of [Regulation No 715/2007] reducing the level of emission control are prohibited. Recent events have highlighted the need to strengthen the enforcement in this respect. …

…

(7) The Commission has established in January 2011 a working group involving all interested stakeholders for developing a real driving emission (RDE) test procedure better reflecting emissions measured on the road. For this purpose, and after thorough technical discussions, the option suggested in [Regulation No 715/2007], i.e. the use of portable emission measurement systems (PEMS) and … (NTE) limits, has been followed.

…

(9) The RDE test procedures were introduced by [Commission Regulation (EU) 2016/427 of 10 March 2016 amending Regulation … No 692/2008 as regards emissions from light passenger and commercial vehicles (Euro 6) (OJ 2016 L 82, p. 1)]. It is now necessary to establish the quantitative RDE requirements in order to limit tailpipe emissions under all normal conditions of use pursuant to the emission limits set out in [Regulation No 715/2007]. For that purpose, statistical and technical uncertainties of the measurement procedures should be taken into account.

(10) In order to allow manufacturers to gradually adapt to the RDE rules, the final quantitative RDE requirements should be introduced in two subsequent steps. In the first step, which should start applying four years after the dates of mandatory application of the Euro 6

standards, a conformity factor of 2.1 should apply. The second step should follow one year and four months after the first step and should require full compliance with the emission limit value for [oxides of nitrogen] of 80 mg/km set out in [Regulation No 715/2007] plus a margin taking into account the additional measurement uncertainties related to the application of portable emission measurement systems (PEMS).'

14 As is apparent from recitals 3 to 10 of the contested regulation, a test procedure was previously introduced by Regulation 2016/427 to verify vehicle emissions under real driving conditions. To that end, Regulation No 692/2008 was supplemented by an Annex IIIA, entitled 'Verifying real driving emissions', which describes the process of an additional test, called a type 1A or RDE test, intended to measure the real driving exhaust emissions using a portable emissions measurement system (PEMS). In point 2.1 of that annex, Regulation 2016/427 gives expression to the principle that the result of an RDE test is to regarded as consistent with the provisions of Regulation No 715/2007 if the emissions recorded during that test do not exceed NTE values throughout the normal life of the vehicle which are calculated as follows: 'NTE pollutant = CF pollutant x Euro 6, where Euro 6 is the [relevant] emission limit [given the nature of the vehicle, as set out in Regulation No 715/2007 (in Table 2 of Annex I to that regulation, as set out in paragraph 6 above) and where] CF pollutant is a conformity factor [applied] for the respective pollutant'. Under the provisions of Regulation 2016/427, so long as the values of the conformity factors were not determined, the RDE tests would be performed for new type approvals but only for monitoring purposes (Article 3(10) of Regulation No 692/2008, as a result of Regulation 2016/427).

15 In that context and as regards those aspects of the contested regulation linked to the complaints put forward by the applicants, the adoption of the contested regulation essentially consisted, first, in setting an end date for the period during which the RDE tests were to be used solely for monitoring purposes by specifying the dates of application of the NTE values in the context of those tests for the purposes of granting or refusing type approval and then the registration, sale or entry into service of new vehicles (for example, from 1 September 2017, type approval for passenger vehicles and vehicles for the carriage of persons may be granted only if the RDE test is successful, and from 1 September 2019 new vehicles in those categories may no longer be registered, sold or put into service if their type has not successfully undergone such a test) and, second, in determining the CF pollutant conformity factor for oxides of nitrogen (and not for other pollutants at this stage). In that regard, the value of that factor is set at 2.1 as an option open to manufacturers for a transitional period of two years and four months from the date on which compliance with those tests is required for type approval and for a transitional period of one year and four months from the date on which compliance with those same tests is required for new vehicles to be registered, sold or put into service. The normal value of the CF pollutant conformity factor for oxides of nitrogen, dubbed the 'final' value, is set at 1.5.

16 Thus, for example, in the case of a diesel passenger vehicle or vehicle for the carriage of persons, the NTE value for emissions of oxides of nitrogen during the RDE tests in order to be granted type approval is 168 mg/km from 1 September 2017 to 31 December 2019, and then 120 mg/km from 1 January 2020, for a emission limit set at 80 mg/km under the Euro 6 standard, as is apparent from a combined reading of the third subparagraph of Article 3(10) and of points 2.1, 2.1.1 and 2.1.2 of Annex IIIA to Regulation No 692/2008, as amended by the contested regulation. It is those provisions of the contested regulation which set, in relation to emissions of oxides of nitrogen, the values of the CF pollutant conformity factors and the resultant NTE values which are called into question by the applicants.

17 Account should also be taken, within the sectoral legal framework but in more general terms, of Directive 2008/50/EC of the European Parliament and of the Council of 21 May 2008 on ambient

air quality and cleaner air for Europe (OJ 2008 L 152, p. 1). As set out in Article 1(5) of that directive, the purpose of the directive is to maintain ambient air quality where it is good and to improve it in other cases. Limit values, target values, critical levels, alert thresholds, information thresholds or assessment thresholds as well as other data are defined in the directive in relation to the various pollutants likely to affect the ambient air, and in particular for nitrogen dioxide. Provision is made therein for the division of the territories of the Member States into zones for the purposes of air quality assessment and management; the directive further states that an agglomeration may be a zone.

18 Amongst other provisions relating to air quality management, Article 13 of Directive 2008/50 provides that Member States are to ensure that, throughout their zones and agglomerations, the limit values of various pollutants are not exceeded, inter alia in relation to nitrogen dioxide. Article 23 states that, 'where, in given zones or agglomerations, the levels of pollutants in ambient air exceed any limit value or target value … Member States shall ensure that air quality plans are established for those zones and agglomerations in order to achieve the related limit value or target value'. The same article states that those plans may themselves contain short-term action plans. In this regard, Article 24(2) of the same directive provides:

'The short-term action plans … may, depending on the individual case, provide for effective measures to control and, where necessary, suspend activities which contribute to the risk of the respective limit values or target values or alert thresholds being exceeded. Those action plans may include measures in relation to motor-vehicle traffic …'

Procedure and forms of order sought

19 The City of Paris, the City of Brussels and the Municipality of Madrid lodged their applications, respectively, on 26 June (Case T-339/16), 29 June (Case T-352/16) and 19 July 2016 (Case T-391/16).

20 By separate documents lodged on 28 September, 23 September and 5 October 2016, the Commission, on the basis of Article 130(1) of the Rules of Procedure of the General Court, raised pleas of inadmissibility against the actions, asking that the Court make a decision without going to the substance of the case.

21 The City of Paris, the City of Brussels and the Municipality of Madrid lodged their observations on the pleas of inadmissibility raised by the Commission on 15 November, 16 November and 15 November 2016 respectively.

22 By orders of 20 March 2017, the Court joined the pleas of inadmissibility raised by the Commission to the substance of the actions.

23 The Commission lodged the defences on 2 May 2017.

24 On 16 May 2017, the Court invited the parties to express their views, in the replies and rejoinders, on the potential impact of the provisions of the second subparagraph of Article 4(3) of Directive 2007/46 on the admissibility of the actions for annulment.

25 The City of Paris, the City of Brussels and the Municipality of Madrid lodged the replies, including the expression of views sought by the Court, on 28 June 2017.

26 The Commission lodged the rejoinders, including the expression of views sought by the Court, on

15 September 2017.

27 By decision of 6 March 2018, the plenary meeting of the Court referred the cases back to the Ninth Chamber (Extended Composition).

28 By decision of the President of the Ninth Chamber (Extended Composition) of the General Court of 10 April 2018, Cases T-339/16, T-352/16 and T-391/16 were joined for the purposes of the oral procedure and the decision closing the proceedings.

29 The City of Paris, the City of Brussels and the Commission presented oral argument and answered the written and oral questions put by the Court at the hearing on 17 May 2018. The Municipality of Madrid did not attend that hearing.

30 The City of Paris claims that the Court should:

– dismiss the Commission's plea of inadmissibility, declare its action for annulment and its claim for damages admissible and order the Commission to present argument on the substance of the case;

– annul the contested regulation;

– order the Commission to pay symbolic damages of one euro as compensation for the harm caused to it as a result of the adoption of that regulation;

– order the Commission to pay all the costs.

31 The City of Brussels claims that the Court should:

– declare its application admissible and well founded;

– annul the contested regulation;

– order the Commission to pay the costs.

32 The Municipality of Madrid claims that the Court should:

– dismiss the plea of inadmissibility raised by the Commission;

– declare its action admissible, examine the substance of the action and assess and uphold the pleas of annulment raised in its application;

– declare the contested regulation null and void as regards emissions from light passenger and commercial vehicles (Euro 6);

– order the Commission to pay the costs.

33 The Commission contends that the Court should:

– dismiss the actions in their entirety as inadmissible, without consideration of the substance of the case;

– alternatively, in relation to the actions brought by the City of Paris and the City of Brussels, dismiss the actions for annulment and the action for damages brought by the City of Paris as

unfounded;

– in the alternative, in relation to the action brought by the Municipality of Madrid, dismiss that action as unfounded;

– order the applicants to pay the costs of the proceedings.

Law

The actions for annulment

Admissibility of the actions for annulment

34 Under the fourth paragraph of Article 263 TFEU, 'any natural or legal person may … institute proceedings against an act addressed to that person or which is of direct and individual concern to them, and against a regulatory act which is of direct concern to them and does not entail implementing measures'.

35 In the present case, the parties are in agreement that the admissibility of the actions for annulment must be assessed in the light of the third scenario provided for in the fourth paragraph of Article 263 TFEU, namely that concerning actions against regulatory acts which are of direct concern to the applicant and do not entail implementing measures. The parties also agree that the contested regulation must be regarded as a regulatory act and that it does not entail implementing measures within the meaning of that provision in relation to each of those two aspects. The dispute between them relates solely to whether the contested regulation is of direct concern to the applicants, which the Commission contests, whereas the applicants submit that that is the case since that regulation limits their powers to regulate the circulation of vehicles within the context of air pollution abatement measures.

36 However, since the admissibility of the actions is a matter of public policy which is not within the discretion of the parties, it is nevertheless necessary, in the present case, for an express ruling to be made first of all on whether the contested regulation is indeed a regulatory act which does not entail implementing measures within the meaning of the fourth paragraph of Article 263 TFEU (see, to that effect, judgment of 23 April 1986, *Les Verts* v *Parliament*, 294/83, EU:C:1986:166, paragraph 19).

37 It has been held that acts of general application other than legislative acts, that is to say other than those adopted following the ordinary legislative procedure described in Article 294 TFEU or a special legislative procedure, such as that defined in Article 289(2) TFEU, which involve the European Parliament with the participation of the Council of the European Union or vice versa, satisfy the definition of such a regulatory act (see, to that effect, judgment of 3 October 2013, *Inuit Tapiriit Kanatami and Others* v *Parliament and Council*, C-583/11 P, EU:C:2013:625, paragraphs 51 to 61).

38 The contested regulation was adopted by the Commission on the basis of Article 5(3) of Regulation No 715/2007, that is to say in accordance with the comitology 'regulatory procedure with scrutiny' provided for in Article 5a of Decision 1999/468, as stated in paragraph 9 above. It is not therefore a legislative act. Furthermore, as a regulation, it has general application in accordance with Article 288 TFEU. It covers situations which are determined objectively and produces legal effects for categories of persons envisaged in a general and abstract manner (see, to that effect, judgment of 2 February 1988, *Kwekerij van der Kooy and Others* v *Commission*, 67/85, 68/85 and 70/85,

EU:C:1988:38, paragraph 15). It is indeed therefore a regulatory act within the meaning of the fourth paragraph of Article 263 TFEU.

39 With regard to the existence, or non-existence, of implementing measures of the contested regulation, it should be recalled that, in order to determine whether or not a regulatory act being challenged entails such measures for the purposes of assessing the admissibility of an action for annulment brought against that act on the basis of the third scenario provided for in the fourth paragraph of Article 263 TFEU, reference should be made to the position of the person bringing the action and the subject matter of that action (see, to that effect, judgment of 19 December 2013, *Telefónica* v *Commission*, C-274/12 P, EU:C:2013:852, paragraphs 30 and 31).

40 However, it is apparent that the contested regulation does not require any implementing measures in relation to the applicants for it to be incorporated into the legal order applicable to them, even though it does entail in relation to other persons a number of implementing decisions, resulting for example in type approvals or registrations of vehicles, or decisions refusing such approvals and registrations, on the basis of the regulation's provisions. Such basic implementing decisions must not be confused with the implementing measures referred to in the third scenario provided for in the fourth paragraph of Article 263 TFEU. If all implementing decisions, in particular those which 'impose penalties' or are 'negative' and are intended to sanction the failure to comply with a regulatory act, were also to be regarded as being implementing measures, the introduction in the FEU Treaty of the third scenario provided for in the fourth paragraph of Article 263 TFEU would often be deprived of effect even though it was introduced specifically in response to the concern to prevent persons being required to trigger measures which 'impose penalties' on them or are 'negative' in relation to them in order to be able to obtain a review of the legality of that regulatory act by means of a preliminary ruling, as is made clear inter alia in the judgment of 19 December 2013, *Telefónica* v *Commission* (C-274/12 P, EU:C:2013:852, paragraph 27).

41 Finally, with regard to whether the contested regulation is of direct concern to the applicants, it follows from settled case-law that, if the contested act directly affects the applicant's legal situation and leaves no discretion to its addressees who are entrusted with the task of implementing it, such implementation being purely automatic and resulting solely from EU law without the application of other intermediate rules, that act is of direct concern to the applicant within the meaning of the fourth paragraph of Article 263 TFEU (judgments of 5 May 1998, *Dreyfus* v *Commission*, C-386/96 P, EU:C:1998:193, paragraph 43, and of 17 September 2009, *Commission* v *Koninklijke FrieslandCampina*, C-519/07 P, EU:C:2009:556, paragraph 48; see also, to that effect, judgment of 13 May 1971, *International Fruit Company and Others* v *Commission*, 41/70 to 44/70, EU:C:1971:53, paragraphs 23 to 29). That assessment was unchanged by the entry into force, on 1 December 2009, of the Treaty of Lisbon, which introduced the third scenario in which the natural or legal persons referred to in the fourth paragraph of Article 263 TFEU have standing to bring proceedings (see, to that effect, judgments of 25 October 2011, *Microban International and Microban (Europe)* v *Commission*, T-262/10, EU:T:2011:623, paragraph 32, and of 7 July 2015, *Federcoopesca and Others* v *Commission*, T-312/14, EU:T:2015:472, paragraph 32).

42 In the present case, the Commission contends inter alia that the applicants' powers to regulate the circulation of vehicles with a view to reducing air pollution are in no way affected by the contested regulation, which therefore has no effect on their legal situation, contrary to the applicants' claims. In that regard, the Commission argues that the emission limits for oxides of nitrogen resulting from the Euro standards to which the applicants refer, where applicable on account of the national legislation laying down the detailed rules to restrict the circulation of vehicles according to their pollutant emissions, are in no way amended by that regulation, in particular those resulting from the Euro 6 standard currently applied to new vehicles. The existence of such national legislation and the

lack of any amendment to the limits resulting from that standard establish, on two counts, that that regulation is not of direct concern to the applicants. The Commission observes in this regard that the City of Brussels concedes that the same regulation does not prevent it from deciding on 'car-free days'. The provisions of that regulation lay down obligations concerning pollutant tailpipe emissions during RDE tests only on vehicle manufacturers. Since, moreover, the applicants are not involved in the procedures for those tests, nor more generally in the procedures for vehicle type approval, their legal situation is entirely unaffected by the regulation in question.

43 With regard to any impact in that regard as a result of the second subparagraph of Article 4(3) of Directive 2007/46, which provides that '[Member States] shall not prohibit, restrict or impede the registration, sale, entry into service or circulation on the road of vehicles, components or separate technical units, on grounds related to aspects of their construction and functioning covered by this Directive, if they satisfy the requirements of the latter', on which the Court asked the parties to express their views, the Commission argues as follows.

44 Putting forward, first of all, a teleological analysis, the Commission points out that Directive 2007/46, like all past and present European legislation on type approval for motor vehicles, has as its legal basis Article 114 TFEU or the equivalent articles of the Treaties which preceded the FEU Treaty. That article concerns 'measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market'. Such a legal basis does not allow interference in transport or environmental policy, and Directive 2007/46, like those which preceded it, is essentially intended to facilitate the placement on the market, in each Member State, of vehicles from the other Member States, thereby preventing a fragmentation of the internal market on account of the disparities in the requirements and controls governing the sale of vehicles which would have persisted in the absence of such harmonising legislation. However, the scope of that legislation goes no further. In particular, it is by no means intended to limit the policing powers of the Member States' authorities in relation to the circulation of vehicles once those vehicles are being used by their drivers.

45 The Commission refers in this regard to various recitals of Directives 70/156 and 2007/46, and of its proposal for a directive to replace Directive 2007/46. It also points out that that harmonising legislation concerns only type approval for new types of vehicles and the entry into service of new vehicles, and not the circulation of vehicles already in service. In the Commission's view, if the view were to be taken that Directive 2007/46 and its secondary 'regulatory acts' restrict the powers to govern circulation enjoyed by the Member States' authorities, the latter would no longer have any powers in that field, since the harmonisation at issue would be total, which demonstrates, *ad absurdum*, that such an interpretation is flawed. Furthermore, even if the European Union were to adopt measures of general application relating to circulation on the road, on the basis of Article 91 or 192 TFEU, with a view to improving transport safety or to ensure the quality of the environment and the protection of human health, for example a uniform speed limit in urban areas for lorries, such measures could be incompatible with the principle of subsidiarity.

46 Next, advancing an analysis which it terms 'contextual', the Commission contends that the expression 'circulation on the road' contained in the second subparagraph of Article 4(3) of Directive 2007/46 has no independent scope, and that it must be understood as falling within the 'category of "the registration, sale, entry into service"' referred to in that provision.

47 The Commission observes that, in Regulation (EU) No 167/2013 of the European Parliament and of the Council of 5 February 2013 on the approval and market surveillance of agricultural and forestry vehicles (OJ 2013 L 60, p. 1), which is likewise based on Article 114 TFEU, the corresponding provision states that 'Member States shall not prohibit, restrict or impede the placing on the market,

registration or entry into service of vehicles … on grounds related to aspects of their construction and functioning covered by this Regulation, if they satisfy its requirements', without mentioning any prohibitions, restrictions or obstacles in relation to circulation on the road. It points out in that connection that recital 7 of the same regulation states that 'this Regulation should be without prejudice to measures at national or Union level regarding the use of agricultural and forestry vehicles on the road, such as specific driver's licence requirements, limitations of maximum speed or measures regulating the access to certain roads'. It makes similar observations concerning Regulation (EU) No 168/2013 of the European Parliament and of the Council of 15 January 2013 on the approval and market surveillance of two- or three-wheel vehicles and quadricycles (OJ 2013 L 60, p. 52) and Regulation (EU) 2016/1628 of the European Parliament and of the Council of 14 September 2016 on requirements relating to gaseous and particulate pollutant emission limits and type-approval for internal combustion engines for non-road mobile machinery, amending Regulations (EU) No 1024/2012 and No 167/2013, and amending and repealing Directive 97/68/EC (OJ 2016 L 252, p. 53).

48 According to the Commission, the origin of Directive 2007/46 confirms that the expression 'circulation on the road', contained in the second subparagraph of Article 4(3), has no independent scope. The version of that provision in the Commission's initial proposal read: 'the Member States shall register or permit the sale or entry into service only of such vehicles … as satisfy the requirements of this Directive'. In the course of the legislative debate of the text, that provision evolved for the following reasons set out in an amended Commission proposal: 'in order to ensure that the provisions on the approval of motor vehicles laid down in this Directive and in the separate regulatory acts are not undermined by the imposition of national construction and functioning requirements on vehicles after they have been sold, registered and/or put into service, a free circulation clause has been introduced in the third paragraph of Article 4'. Accordingly, the purpose of adding the expression 'circulation on the road' was not to expand the scope of the legislation being drawn up but rather to prevent the circumvention of the prohibition, on the Member States, to oppose the placing on the market, the registration or the entry into service of new vehicles which comply with the provisions of that legislation. The same type of 'anti-circumvention' provision previously appeared in Directive 70/156, which referred to 'use' rather than to 'circulation on the road'. The Commission states that, like the comparable German and Netherlands provisions, Article 9 of Décret du Premier ministre français n° 2009-497, du 30 avril 2009, relatif aux réceptions et homologations des véhicules et modifiant le code de la route (Decree of the French Prime Minister No 2009-497 of 30 April 2009 on type-approvals and approvals of vehicles and amending the Highway Code (JORF of 3 May 2009, p. 7 472)), which transposes Directive 2007/46, does not refer to the 'circulation on the road' of vehicles, but to them being 'put into circulation', an expression which relates to access to the market.

49 In addition, Directive 2008/50, which concerns ambient air quality, the main elements of which have been set out in paragraph 17 above, affords the Member States complete freedom to adopt air pollution abatement measures. In particular, the short-term action plans for which that directive provides may contain measures relating to the circulation of motor vehicles, which shows that Directive 2007/46 and its secondary 'regulatory acts' in no way restrict the actions of the authorities of the Member States in such matters.

50 It should be recalled, first of all, that it follows from settled case-law that the fact that an act of the European Union prevents a public legal person from exercising its own powers as it sees fit has a direct effect on its legal position, and that, therefore, that act is of direct concern to it. This has been found to be the case, for example, in cases concerning the grant of public aid by infra-State bodies (see, to that effect, judgments of 8 March 1988, *Exécutif régional wallon and Glaverbel* v *Commission*, 62/87 and 72/87, EU:C:1988:132, paragraphs 6 and 8; of 30 April 1998, *Vlaamse*

Gewest v *Commission*, T-214/95, EU:T:1998:77, paragraph 29; and of 26 November 2015, *Comunidad Autónoma del País Vasco and Itelazpi* v *Commission*, T-462/13, EU:T:2015:902, paragraph 34). The same conclusion was also reached in a case concerning obligations in the field of agriculture and charges applicable to agricultural products imposed on a future Member State prior to its accession (see, to that effect, judgment of 10 June 2009, *Poland* v *Commission*, T-257/04, EU:T:2009:182, paragraphs 56 to 58). An act of the European Union is of even greater direct concern to an infra-State body since it affects its own legislative powers (in the present cases in relation to regulating the circulation of vehicles) and not just its power to adopt individual decisions within a pre-defined framework.

51 Next, it is apparent in the present case that certain types of legislation governing the circulation of vehicles which can be adopted by public authorities of the Member States, in particular those which fall within the category of infra-State bodies, cannot in fact be affected by the contested regulation, without prejudice to the question of their compatibility with other provisions of EU law.

52 In this regard, the second subparagraph of Article 4(3) of Directive 2007/46, within the context of which the contested regulation falls, provides '[Member States] shall not prohibit, restrict or impede the registration, sale, entry into service or circulation on the road of vehicles, components or separate technical units, on grounds related to aspects of their construction and functioning covered by this Directive, if they satisfy the requirements of the latter'. Only legislation which takes into account, with a view to defining its scope, aspects related to the construction or functioning of the vehicles covered by provisions of that directive, of its 'regulatory acts' and of the secondary acts of such acts can therefore fall foul of that provision. This is not the case with legislation governing circulation which covers all vehicles, or indeed a category of vehicles defined in relation to other criteria (for example, vehicles over 3.5 tonnes generally), because the scope of such legislation is not defined in relation to aspects concerned with the construction or functioning of the vehicles in question covered by the directive, its 'regulatory acts' and the secondary acts of such acts. To that extent, most legislation pertaining to the 'Highway Code' or adopted under that code and measures restricting circulation which cover all vehicles, such as those which establish pedestrian zones, 'car-free days' or alternating traffic arrangements in the event of a peak in pollution, in particular cannot be affected by such acts of the European Union. Accordingly, the Commission rightly observed that the City of Brussels was at liberty, in the light of the contested regulation, to introduce 'car-free days'.

53 Similarly, a public authority of a Member State could currently, without infringing the second subparagraph of Article 4(3) of Directive 2007/46, impose restrictions on circulation based on the level of pollutant emissions in respect of vehicles falling into the category covered by Regulation No 715/2007 and which, at best, comply only with the Euro 5 standard, since that standard and the previous Euro standards are no longer in force for the purposes of the application of that directive. As stated in paragraph 6 above, under Article 10 of that regulation, the Euro 6 standard has applied since 1 September 2014 for the type approval of new passenger vehicles and vehicles for the carriage of persons and since 1 September 2015 for the registration or the authorisation to sell or put into service those vehicles; those dates are deferred by one year for most light commercial vehicles, whereas heavy duty commercial vehicles are covered by another regulation. It may be recalled in this regard that, in the judgment of 21 December 2011, *Commission* v *Austria* (C-28/09, EU:C:2011:854), the Court of Justice stated that, rather than imposing a sectoral traffic prohibition applicable to lorries regardless of which Euro class into which they fell, contrary to the rules of the EC Treaty on the free movement of goods, a Member State which, in order to combat pollution of the ambient air, had already prohibited the circulation of lorries falling into, at best, an earlier Euro class could simply have extended the initial prohibition to those lorries falling into the Euro class which followed the class initially covered in order to ensure compliance with those rules.

54 By contrast, in the case of traffic legislation adopted by the public authorities of the Member States which impose restrictions on circulation based on the level of pollutant emissions on vehicles which fall into the category covered by Regulation No 715/2007 and which comply with the Euro 6 standard or, during the RDE tests, with the NTE values, the situation is different since the pollutant emission limits defined for that standard or under those values are in force for the purposes of the application of Directive 2007/46.

55 It is true that the introduction of traffic legislation likewise falls within the powers derived from national law, as the Commission essentially points out, even though the Member States and the public authorities of the Member States may also be encouraged to enact such legislation in order to comply with their obligations under Directive 2008/50 to guarantee ambient air quality and even though, as the case may be, that legislation uses the Euro standards in order to determine the scope of the restrictions which it lays down.

56 The question is therefore whether traffic legislation adopted by the public authorities of the Member States, in so far as it covers the vehicles referred to in paragraph 54 above, falls foul — in relation to such vehicles — of the requirements under Directive 2007/46, in particular the second subparagraph of Article 4(3) thereof.

57 In that regard, it should be borne in mind that, in interpreting a provision of EU law, it is necessary to consider not only its wording but also the context in which it occurs and the objectives pursued by the rules of which it is part (judgments of 17 November 1983, *Merck*, 292/82, EU:C:1983:335, paragraph 12, and of 19 July 2012, *ebookers.com Deutschland*, C-112/11, EU:C:2012:487, paragraph 12). Reference is made in this connection, respectively, to the literal, contextual (or systematic) and teleological interpretations.

58 The sphere of autonomy enjoyed by national law, referred to in paragraph 55 above, is indeed, in the light of the wording of the second subparagraph of Article 4(3) of Directive 2007/46 circumscribed, preventing the public authorities of the Member States from restricting, on grounds based on the level of pollutant emissions, the circulation of vehicles which satisfy the relevant European requirements in force, since that provision states that Member States are not to 'prohibit, restrict or impede the … circulation on the road of vehicles … on grounds related to aspects of their construction and functioning covered by this Directive, if they satisfy the requirements of the latter'.

59 More specifically, on a literal interpretation of the second subparagraph of Article 4(3) of Directive 2007/46, a public authority of a Member State, in particular an infra-State body, could not impose restrictions on circulation based on the level of pollutant vehicle emissions in respect of vehicles which fall into the category covered by Regulation No 715/2007 and comply with the Euro 6 standard, since that standard is in force and, therefore, such vehicles satisfy the requirements under that directive. Similarly, since the contested regulation defines the values of pollutant emissions of oxides of nitrogen which may not be exceeded during the RDE tests, such an authority could not impose restrictions on circulation based on the level of pollutant vehicle emissions in respect of those vehicles which fall into the category covered by Regulation No 715/2007 and comply with those NTE values during such tests. It should be recalled that those tests and limits have been applied with binding effect since 1 September 2017, as set out in paragraph 15 above.

60 It is, however, necessary to examine whether the arguments advanced by the Commission on the basis of teleological and contextual interpretations of the second subparagraph of Article 4(3) of Directive 2007/46 call that interpretation into question.

61 In essence, with regard to the teleological interpretation of the second subparagraph of Article 4(3)

of Directive 2007/46, the Commission states that the sole purpose of that directive and of its 'regulatory acts' and the secondary acts of those acts is to ensure that new vehicles satisfying the harmonised requirements of that legislation may be placed on the market without obstacles in the Member States, within the context of the principles applicable in the internal market.

62 That statement is in itself well founded, but it is incapable of calling into question the literal interpretation of the second subparagraph of Article 4(3) of Directive 2007/46 set out in paragraph 59 above.

63 The legal basis of Directive 2007/46 is Article 95 EC (the substantive provisions of which were reproduced in Article 114 TFEU). Article 95 EC does indeed relate to the achievement of the objectives set out in Article 14 EC (the provisions of which were essentially reproduced in Article 26 TFEU), namely the establishment of the internal market (Article 14(1) EC), which 'comprises an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of the [EC Treaty]' (Article 14(2) EC). In addition, as the Commission argues, that legal basis does not allow the European Union to harmonise all aspects relating to goods and services on the ground of the establishment of the internal market. Article 95 EC allowed the adoption of 'the measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market' and, in the judgment of 5 October 2000, *Germany* v *Parliament and Council* (C-376/98, EU:C:2000:544, paragraph 83), upon which the Commission relies, it was held that that provision did not vest in the European Union legislature a general power to regulate the internal market. As is set out in essence in paragraphs 84 and 85 of that judgment, the power derived from Article 95 EC is restricted to situations in which it is in fact necessary to remedy obstacles to the free movement of the goods, services and capital concerned between Member States.

64 In the present case, recital 2 of Directive 2007/46 states that, 'for the purposes of the establishment and operation of the internal market of the Community, it is appropriate to replace the Member States' approval systems with a Community approval procedure based on the principle of total harmonisation'. Article 1 of that directive, entitled 'Subject matter', provides that the directive 'establishes a harmonised framework containing the administrative provisions and general technical requirements for approval of all new vehicles within its scope … with a view to facilitating their registration, sale and entry into service within the [European Union]'. It is therefore true that the main object of that directive is the placement on the market of new motor vehicles, that is to say the free movement of certain goods between the Member States, that it does not seek in general terms to provide a framework for legislation governing circulation on the road covering such vehicles and laid down by the public authorities of the Member States, and that it does not fall within the scope of the transport or environmental policy of the European Union, even though it must incorporate in that regard the requirement of a high level of protection referred to in Article 95 EC.

65 However, this does not mean that any provision on the circulation on the road of new motor vehicles would have no place in Directive 2007/46. It is common for a directive, or another directive adopted under that first directive, to contain provisions which do not come under the main objective stated but which are intended to ensure that the provisions adopted have practical effect with a view to achieving that objective. Thus, the objective of the directives on the award of public contracts is to facilitate the free movement of goods and the freedom to provide services within the context of public procurement. However, in order to guarantee that objective, that is to say to ensure that those directives have practical effect, provisions have been adopted in specific directives to guarantee that the decisions of the contracting authorities and bodies are open to effective remedies, which in particular are as swift as possible, even though the object of the directives on the award of public

contracts was by no means the harmonisation of judicial remedies in the various Member States (see, to that effect, judgment of 11 June 2009, *Commission* v *France*, C-327/08, not published, EU:C:2009:371, paragraphs 2 to 9). Similarly, directives intended to ensure the free movement of information services (press, radio, television, internet) contain, with a view to ensuring such free movement, decisions harmonising prohibitions on advertising in respect of tobacco products which meet an objective of public health protection (see, to that effect, judgment of 12 December 2006, *Germany* v *Parliament and Council*, C-380/03, EU:C:2006:772, paragraphs 3 to 11).

66 In addition, it has been consistently held that, where a provision of EU law is open to several interpretations, preference must be given to that interpretation which ensures that the provision retains its effectiveness (judgments of 6 October 1970, *Grad*, 9/70, EU:C:1970:78, paragraphs 12 and 13; of 22 September 1988, *Land de Sarre and Others*, 187/87, EU:C:1988:439, paragraph 19; and of 24 February 2000, *Commission* v *France*, C-434/97, EU:C:2000:98, paragraph 21). The reference to circulation on the road would have no practical effect if, as the Commission submits, it had the same scope or meaning as 'the registration, sale and entry into service' of the vehicles.

67 It is for this reason that the provision contained in the second subparagraph of Article 4(3) of Directive 2007/46 cannot, specifically in the context of a teleological approach, be interpreted as being limited, in essence, to meaning that the new owner of a new motor vehicle which complies with the requirements of that directive is indeed entitled to purchase, register and put it into service and to get behind the wheel, without prejudice to what follows. The practical effect of that directive would be undermined as a result because the placement on the market of the vehicles potentially concerned would be impeded by the fear that it may not be possible to use them normally. For example, if a driver using a vehicle to travel to Paris (France), Brussels (Belgium) or Madrid (Spain) were to anticipate that the applicants were going to prohibit, entirely or partly, the circulation of vehicles in their territory which do not comply with the limits of the Euro 6 standard during RDE tests, even if those vehicles do comply with the NTE values, such a driver might opt not to purchase such a new petrol or diesel motor vehicle in such a situation. The problem would be even greater if, in the name of combating air pollution, a number of infra-State bodies were to adopt a similar approach within the European Union, as was pointed out at the hearing. Furthermore, in its contextual line of argument, the Commission states that the insertion of the reference to circulation on the road in that subparagraph amounts to the insertion of an 'anti-circumvention' provision intended to ensure the unimpeded placement on the market of the vehicles concerned.

68 The Commission also stated at the hearing that it would be inconsistent to take the view that the public authorities of the Member States cannot restrict the circulation of vehicles which comply with the most recent requirements on air pollution abatement on grounds related to their level of pollutant emissions, but that they could restrict the circulation of the vehicles on the basis of considerations not taken into account within the context of Directive 2007/46 or restrict the circulation of less recent vehicles which fully complied with the requirements on the limitation of pollutant emissions when they were placed on the market. The response to that argument should be that it is on the contrary consistent, from a teleological perspective, first, that that directive does not cover the question of restrictions on circulation laid down on the basis of criteria independent from the technical aspects forming the subject matter of its provisions (see paragraph 52 above) and, second, that nor does that directive cover the question of the circulation of vehicles which do not comply with the requirements now in force under its provisions, even where, as the case may be, when they were placed on the market they did comply with requirements of the same kind then in force (see paragraph 53 above). By definition, those vehicles are either new vehicles which may no longer generally be placed on the market in the European Union or used vehicles, for example new or used vehicles which would comply with the Euro 5 standard but not with the Euro 6 standard. Both categories of vehicles fall outside the protective scope established by the directive, which covers

new motor vehicles to be sold in the European Union. The teleological interpretation of the second subparagraph of Article 4(3) of Directive 2007/46 is likewise in agreement in this regard with the literal interpretation of that provision.

69 With regard to the contextual interpretation of the second subparagraph of Article 4(3) of Directive 2007/46, the Commission argues that the reference, in that provision, to the prohibition on limiting circulation on the road is not found in the similar provisions of the legislation concerning types of vehicle or machinery other than those covered by that directive and was added to that directive only in the course of the legislative debate of the text, which demonstrates that that reference is not different in scope from the references to the registration, sale and entry into service of the vehicles. However, that argument appears to be almost identical to the argument advanced by the Commission with regard to the teleological interpretation of that provision. The fact that, in one piece of legislation, it is explicitly stated that, in the circumstances set out above, the circulation on the road of vehicles compatible with the requirements under that legislation must not be limited, and that, in another piece of legislation, mention was made of use rather than circulation on the road and in other legislation again there are no such references in no way changes the fact that it is inherent in a situation resulting from complete harmonisation, such as that resulting from that directive, that Member States and the public authorities of the Member States cannot, save in particular circumstances, oppose the ordinarily intended use of a product which satisfies the requirements laid down in the harmonising arrangements, since they would otherwise undermine the practical effect of those arrangements.

70 It is true that that principle is without prejudice to the possibility, on the part of the Member States, to rely on the provisions contained in Article 114(4) et seq. TFEU, which under certain circumstances allow derogation from a harmonising measure, inter alia on grounds of health and environmental protection. However, use may be made of that exceptional possibility only subject to the immediate and close monitoring of the Commission, with the result that the view cannot be taken that, in view of that possibility, the powers of the Member States and the authorities of the Member States are unaffected by the harmonising measure.

71 Mention was also made at the hearing of Article 8(3) and Article 29 of Directive 2007/46 itself, which provide respectively:

‘If a Member State finds that a type of vehicle …, albeit in conformity with the required provisions, presents a serious risk to road safety or seriously harms the environment or seriously harms public health, it may refuse to grant EC type-approval . In this case, it shall immediately send the other Member States and the Commission a detailed file explaining the reasons for its decision and setting out the evidence for its findings.’

‘1. If a Member State finds that new vehicles, systems, components or separate technical units, albeit in compliance with the applicable requirements or properly marked, present a serious risk to road safety, or seriously harm the environment or public health, that Member State may, for a maximum period of six months, refuse to register such vehicles or to permit the sale or entry into service in its territory of such vehicles, components or separate technical units.

In such cases, the Member State concerned shall immediately notify the manufacturer, the other Member States and the Commission accordingly …

[Followed by a procedure which may result either in the amendment of the legislation or in measures intended to ensure better compliance with such legislation].’

72 However, in addition to observations in the same vein as those made in relation to Article 114(4) et seq. TFEU, it may be stated that the only possible outcomes of the application of Article 8(3) and Article 29 of Directive 2007/46 are, in essence, a refusal of EC type-approval, thus preventing any sale of the type of vehicle concerned, or a review of the legislation; such measures are very different from the targeted restrictions on circulation envisaged by the applicants within their territories.

73 Nor are the other arguments advanced by the Commission capable of rebutting the findings based on the literal and teleological interpretations of the second subparagraph of Article 4(3) of Directive 2007/46.

74 The fact that Directive 2008/50 provides that Member States are required to take measures to combat air pollution, in particular within the context of the short-term action plans introduced in that directive, does not release the Member States from their obligations under other rules of EU law (see, to that effect, judgment of 21 December 2011, *Commission* v *Austria*, C-28/09, EU:C:2011:854, paragraph 111). Thus, only if the literal and teleological interpretations of the second subparagraph of Article 4(3) of Directive 2007/46 were to render impossible or excessively difficult the adoption, under Directive 2008/50, of any effective measure to restrict the circulation of vehicles with a view to combating air pollution could those interpretations be called into question on the basis of a contextual interpretation of that provision. In addition, as has been set out in paragraphs 52 and 53 above, the Member States and the public authorities of the Member States retain the power to adopt measures to restrict circulation covering all vehicles or categories of vehicles determined on the basis of very general criteria or even targeted at vehicles which no longer fall within the scope of the provisions in force in Directive 2007/46, its 'regulatory acts' and the secondary acts of those acts. In particular, if the literal and teleological interpretations of that provision actually limit the powers of the competent authorities of the Member States to adopt targeted measures to restrict circulation which would encompass vehicles compatible with the requirements in force in that directive, its 'regulatory acts' and the secondary acts of such acts (for example, a restriction covering vehicles which, during the RDE tests, exceed the limits of the Euro 6 standard but remain below the NTE values), that provision does nonetheless afford them significant leeway to adopt measures which contribute to achieving the objectives laid down in Directive 2008/50, even though, from the perspective of those authorities, those measures would perhaps not be the most appropriate (for example, a general restriction or a restriction covering all vehicles which at best comply only with the Euro 5 standard).

75 Finally, the fact that the measures transposing Directive 2007/46 in certain Member States refer to the 'entry into circulation' and not the 'circulation on the road' cannot in the present case constitute a factor to be taken into account with a view to interpreting the second subparagraph of Article 4(3) of that directive. As has been held on a number of occasions, the terms of a provision of EU law which makes no express reference to the law of the Member States for the purpose of determining its meaning and scope must normally be given an autonomous and uniform interpretation throughout the European Union, which must take into account the context of that provision and the purpose of the legislation in question (see, to that effect, judgment of 21 December 2016, *Associazione Italia Nostra Onlus*, C-444/15, EU:C:2016:978, paragraph 66 and the case-law cited). Although it has sometimes also been held that, even in the absence of an express reference to the law of the Member States, the application of EU law may necessitate a reference to the law of the Member States where the court cannot identify in EU law or in its general principles criteria enabling it to define the meaning and scope of the provision of EU law at issue by way of independent interpretation (judgment of 18 December 1992, *Díaz García* v *Parliament*, T-43/90, EU:T:1992:120, paragraph 36), that is not the case here, as is clear from the preceding analysis.

76 The literal, teleological and contextual interpretations of Directive 2007/46, and more specifically

of the second subparagraph of Article 4(3) thereof, are therefore along the same lines, that is to say that that directive actually prevents the public authorities of the Member States, without affording them any discretion, from prohibiting, restricting or impeding the circulation on the road of vehicles on grounds related to aspects of their construction and functioning covered by the directive if they satisfy the requirements of the latter, which means that, on account of the adoption of the contested regulation, the applicants may not, as they claim, actually limit, within the context of a targeted measure taking into account the pollutant emission levels of vehicles, the circulation of those vehicles which during the RDE tests do not comply with the emission limits for oxides of nitrogen laid down in the Euro 6 standard, but which do nevertheless comply during those tests with the NTE values for emissions of oxides of nitrogen defined in that regulation, which are higher than the emission limits.

77 In this regard, the City of Paris and the City of Brussels stated at the hearing that a national administrative court seized of proceedings, brought for example by a unhappy driver, against one of their acts restricting, in the circumstances referred to in paragraph 76 above, the circulation of vehicles would not fail to annul such an act on the ground that it is contrary to Directive 2007/46 and the contested regulation.

78 Without prejudice to any decisions of the courts or tribunals of the Member States, it should be recalled that the concern to ensure that directives have practical effect, which is essential for the construction of Europe, gave rise to the theory of the direct effect of their provisions which seek to confer rights on individuals, upon which those individuals may rely as against public authorities (judgment of 4 December 1974, *van Duyn*, 41/74, EU:C:1974:133, paragraph 12). The provision contained in the second subparagraph of Article 4(3) of Directive 2007/46, under which a Member State is not to 'prohibit, restrict or impede the registration, sale, entry into force or circulation on the road of vehicles … on grounds related to aspects of their construction and functioning covered by this Directive, if they satisfy the requirements of the latter', is capable of conferring rights on individuals since it is unconditional, clear and precise, even though the Commission was able to discuss its scope (see, to that effect, judgments of 6 October 1970, *Grad*, 9/70, EU:C:1970:78, paragraph 9, and of 4 December 1974, *van Duyn*, 41/74, EU:C:1974:133, paragraph 14). It should also be recalled that, under the second paragraph of Article 288 TFEU, regulations are to have general application, be binding in their entirety and directly applicable in all Member States, and may therefore be invoked by individuals.

79 Furthermore, nor are the Kingdom of Belgium, the Kingdom of Spain and the French Republic protected from an action for failure to fulfil obligations brought on the basis of Article 258 or 259 TFEU if one or other of the applicants were to adopt the acts referred to in paragraph 77 above. On that basis, Member States must answer for the infringements of EU law by all their public authorities (judgment of 5 May 1970, *Commission* v *Belgium*, 77/69, EU:C:1970:34, paragraph 15). As a general rule, pursuant to the principle of sincere cooperation laid down in Article 4(3) TEU, Member States are to take any appropriate measure to ensure fulfilment of the obligations arising out of the Treaties or resulting from acts of the institutions of the Union and to refrain from any measure which could jeopardise the attainment of the Union's objectives. That principle applies to all the authorities of a Member State, whether it be the central authorities of the State or the authorities of a federated State or other territorial authorities (see, to that effect, judgments of 12 June 1990, *Germany* v *Commission*, C-8/88, EU:C:1990:241, paragraph 13, and of 13 April 2010, *Wall*, C-91/08, EU:C:2010:182, paragraph 69). Pursuant to that principle, the applicants should therefore themselves refrain from adopting the measures to restrict circulation described in paragraph 76 above.

80 In addition, the limitation of the powers also mentioned in paragraph 76 is real for the applicants.

81 In this regard, the applicants have not only proven that under national law they enjoyed powers to protect the environment and health, in particular to combat air pollution, including the power to restrict the circulation of vehicles to that end. The Commission does not contest this.

82 The applicants also gave examples of measures which they had already adopted. Thus, the City of Paris has, inter alia, introduced, by two successive decrees of the Mayor and the Police Commissioner, a restricted traffic area corresponding to the entirety of its '*intra-muros*' territory, successively prohibiting, on 1 September 2015 and then on 1 July 2017, from 8.00 to 20.00 on weekdays, save in specific circumstances, the circulation of vehicles which do not comply with at least a given Euro standard, for example at present the Euro 3 standard for a diesel passenger vehicle. In 2020, the minimum standard to be met in order to be able to drive a vehicle will be the Euro 5 standard, and the 'Climate-Air-Energy Plan' of that city provides for the prohibition of the circulation of diesel vehicles in 2024 and of petrol vehicles in 2030, as is clear from documents in the file. The City of Brussels has created an extensive pedestrian zone in its centre and, as already mentioned, has introduced 'car-free days'. In 2015 and 2016, by decrees of the Delegate of the Sector of Government responsible for the Environment and Mobility, the Municipality of Madrid imposed traffic restrictions during periods of high pollution, as provided for in the 2011-2015 Air Quality Plan and the measurement protocol adopted by the city which is to be initiated during periods of high nitrogen dioxide pollution.

83 The applicants have also produced various documents and studies on the quality of the air in their territories, showing worrying levels of pollution (despite a fall in emissions of oxides of nitrogen over a decade in Paris and Madrid) and pointed to infringement proceedings brought by the Commission against the Kingdom of Belgium, the Kingdom of Spain and the French Republic for failing to comply with Directive 2008/50, including in relation to the level of oxides of nitrogen to which the Commission referred, in a press release annexed by the City of Brussels to its pleadings, stating that 'most emissions result[ed] from traffic and diesel cars in particular'. At the hearing of oral argument in the present cases, on 17 May 2018, the representative of the City of Paris added, without being contradicted, that the Commission announced by a press release of the same day that infringement proceedings would be brought before the Court of Justice against several Member States for exceeding limit values laid down in that directive in relation to the concentration of nitrogen dioxide in the air, including proceedings involving the French Republic, since very high concentrations had been recorded, particularly in Paris (press release IP/18/3450).

84 It thus follows from the legal aspects and the facts analysed above, in particular as regards the applicants' powers to restrict the circulation of vehicles in order to protect air quality and the use which they make of those powers, that it is established that the applicants' legal situation is affected by the contested regulation and that that regulation is therefore of direct concern to them, within the meaning of the fourth paragraph of Article 263 TFEU. Furthermore, since the contested regulation is a regulatory act which does not entail implementing measures, within the meaning of that same provision, as set out in paragraphs 38 and 40 above, it follows that the actions for annulment brought by the City of Paris, the City of Brussels and the Municipality of Madrid are admissible and that the pleas of inadmissibility raised by the Commission must be dismissed.

The substance of the actions for annulment

85 The applicants put forward pleas in law alleging that the Commission lacked the competence to adopt the provisions of the contested regulation which they criticise as well as pleas in law alleging infringement, in substantive terms, of various provisions of EU law which can be grouped into three categories: provisions of Regulation No 715/2007 and, more generally, of acts of secondary law which contribute to guaranteeing air quality; provisions of the EU and FEU Treaties and of the

Charter of Fundamental Rights of the European Union; and, lastly, various legal principles. In addition, they submit that, by adopting the contested regulation, the Commission misused its powers.

– *The pleas alleging that the Commission lacked competence*

86 As set out in paragraphs 7 and 8 above, Regulation No 715/2007 provides that the Commission is authorised to adopt various implementing measures to ensure the application of its provisions within the context of procedures now laid down in Regulation No 182/2011. In the present case, the contested regulation refers explicitly, in its recitals, to Article 5(3) of Regulation No 715/2007, which states that the specific procedures, tests and requirements for type approval relating to a certain number of elements, inter alia tailpipe emissions, are to be defined by the Commission in accordance with the regulatory procedure with scrutiny, which is itself described in Article 5a of Decision 1999/468, the effects of which have been maintained for the purposes of the acts making reference thereto pursuant to Article 12 of Regulation No 182/2011.

87 The applicants claim that, in the present case, the conditions subject to which the Commission may supplement the provisions of Regulation No 715/2007 within the context of the regulatory procedure with scrutiny are not met. They advance, inter alia, the following arguments.

88 The applicants state that recital 7a of Decision 1999/468 states that 'it is necessary to follow the regulatory procedure with scrutiny as regards measures of general scope which seek to amend non-essential elements of a basic instrument adopted [jointly by the Parliament and the Council], inter alia by deleting some of those elements or by supplementing the instrument by the addition of new non-essential elements[, but] the essential elements of a legislative act may only be amended by the legislator on the basis of the Treaty'. The City of Brussels adds that recital 25 of Regulation No 715/2007 expresses a similar view by stating that, 'in particular, power should be conferred on the Commission to introduce particle number based limit values in Annex I, as well as to recalibrate the particulate mass based limit values set out in that Annex', and that, 'since those measures are of general scope and are designed to amend non-essential elements of this Regulation, they should be adopted in accordance with the regulatory procedure with scrutiny provided for in Article 5a of [this decision]'. Along the same lines, the Municipality of Madrid makes mention of recital 26 of the same regulation, which states that 'power should also be conferred on the Commission to establish specific procedures, tests and requirements for type approval, as well as a revised measurement procedure for particulates and a particle number based limit value, and to adopt measures concerning the use of defeat devices, access to vehicle repair and maintenance information and test cycles used to measure emissions', and that, 'since those measures are of general scope and are designed to supplement this Regulation by the addition of new non-essential elements, they should be adopted in accordance with the regulatory procedure with scrutiny provided for in Article 5a of [this decision]'.

89 Pointing to the differences between the regulatory procedure with scrutiny and the legislative procedure resulting in an act of the Parliament and of the Council, the applicants further submit that, by introducing, for the RDE tests, NTE values of emissions of oxides of nitrogen higher than the limits on those emissions defined for the Euro 6 standard in Annex I to Regulation No 715/2007, even though up until that point those limits had been continually reduced, the Commission amended essential elements of that regulation without having the power to do so. The City of Brussels clarifies that it does not dispute that the Commission is authorised, on the basis of Article 5(3) of Regulation No 715/2007, to define new tests. It does not therefore call into question Regulations No 692/2008 and 2016/427 prior to the incorporation of the provisions of the contested regulation. However, it does contest the introduction of new quantitative limits on emissions of oxides of

nitrogen by the contested regulation which are more relaxed than those laid down in Annex I to Regulation No 715/2007, adopted by the Parliament and the Council. Those new limits, which are the result of the determination of the CF pollutant conformity factor in the contested regulation, deprive the limits laid down in the Euro 6 standard contained in that annex of their practical effect. Since the Commission states that the CF pollutant conformity factors applied are justified by the discrepancies likely to be observed between the data from the RDE tests and the data from the laboratory tests, relaxing the limits applied for the first type of tests actually amounts to abandoning the Euro 6 limits laid down in Annex I to Regulation No 715/2007.

90 The City of Paris and the Municipality of Madrid add that, in so doing, the Commission infringed essential procedural requirements. In their view, the normal intervention of the 'co-legislators', in particular that of the Parliament, would have provided procedural safeguards and necessarily influenced the content of the act to be adopted which, at the very least, would have been subject to a number of amendments.

91 As a preliminary point, the Commission recalls the legislative and regulatory context into which the contested regulation falls and seeks to show that, contrary to the applicants' claims, that regulation contributes to the improved protection of the health of European citizens and of the environment.

92 The Commission explains that the type approval process for a new vehicle is as follows. The manufacturer submits a prototype to the competent authorities, which must ensure that that prototype satisfies the conditions laid down in Annex IV to Directive 2007/46, in particular those which follow from Regulation No 715/2007 in relation to pollutant emissions. Once the 'type' is approved, the manufacturer begins its industrial production and every vehicle sold must comply with the type.

93 The Commission points out that Annex I to Regulation No 715/2007, which contains the limits on pollutant emissions defined for the Euro 5 and Euro 6 standards, in particular those relating to oxides of nitrogen, has never been amended and that it 'still forms part, as such, of EU law'.

94 The Commission also states that Regulation No 715/2007 does not itself define the procedure for monitoring compliance with the limits on pollutant emissions laid down in Annex I thereto, even though Article 5(2) of that regulation does however contain the rule prohibiting, save in the exceptional cases listed, defeat devices which may distort the measurement of pollutant emissions.

95 According to the Commission, the power to define the specific procedures, tests and requirements for type approval, by supplementing Regulation No 715/2007 and amending its non-essential elements, itself falls within the scope of the regulatory procedure with scrutiny, as is stated in Article 5(3) of that regulation. It likewise takes the view that Article 14(3) of the regulation also assigns it responsibility for the subsequent review of those procedures, tests and requirements as well as the test cycles used to measure emissions, and confers on it, under the same conditions, the duty of adapting them when they are no longer adequate or no longer accurately reflect the real pollutant emissions generated by driving on the road.

96 The Commission states that, within that context, it adopted Regulation No 692/2008 with a view — inter alia — to establishing the procedures to monitor pollutant emissions from light passenger and commercial vehicles using a type of laboratory test called the 'New European Driving Cycle' (NEDC), corresponding to the technology available at the time (type 1 test mentioned in paragraph 12 above). It takes the view that, as is stated in recital 15 of Regulation No 715/2007, the EU legislature was aware of the possible inadequacy of that type of test to reflect real pollutant emissions and explicitly tasked the Commission with examining whether that test needed to be

updated or replaced.

97 The Commission argues that it therefore pursued two lines of action, as set out in paragraph 10 of its Communication on the application and future development of Community legislation concerning vehicle emissions from light-duty vehicles and access to repair and maintenance information (Euro 5 and 6) (OJ 2008 C 182, p. 17).

98 First, the Commission was involved, as part of the work undertaken by the United Nations Economic and Social Council, in the design of a new type of laboratory test called the 'Worldwide Harmonised Light Vehicles Test Procedure' (WLTP), which better reflects real pollutant emissions than the NEDC test. In this connection, the NEDC test was replaced by the WLTP test by the adoption of Commission Regulation (EU) 2017/1151 of 1 June 2017 supplementing Regulation No 715/2007, amending Directive 2007/46, Regulation No 692/2008 and Commission Regulation (EU) No 1230/2012 and repealing Regulation No 692/2008 (OJ 2017 L 175, p. 1).

99 Second, the Commission developed a procedure for measuring pollutant emissions under real driving conditions, involving all relevant stakeholders in its work, including some environmental protection organisations. The procedure was introduced into EU legislation in March 2016 for light passenger and commercial vehicles with the adoption, by the Commission, of Regulation 2016/427, amending Regulation No 692/2008. It is Regulation 2016/427 and not the contested regulation, which introduced the concept of NTE values. A similar approach had been adopted as early as 2011 for heavy duty commercial vehicles.

100 The Commission explains that the laboratory tests and the RDE tests complement one another. The former provide more information, whereas the latter, on account inter alia of their duration and the variety of the conditions in which they are performed, have the advantage of enabling the detection of any repeated inconsistencies with the results of the laboratory tests which may point to the use, by vehicle manufacturers, of defeat devices during those laboratory tests, devices which distort the results of those tests as compared with the results when the vehicle is used normally. It is for this reason that provision was made in Regulation 2016/427 that, even during the transitional period preceding the determination of the NTE values, beginning on 20 April 2016, the RDE tests were to be performed 'for monitoring purposes'.

101 The Commission goes on to explain, in essence, that the varied conditions of the on-road trips to be performed in order to validate an RDE test, like the use of PEMS, give rise to statistical and technical uncertainties which justify establishing CF pollutant conformity factors to be applied to the limits on Euro 6 emissions of oxides of nitrogen, in order to avoid results which are invalid vis-à-vis compliance with those limits when conducting those tests, and also entail subsequent unlawful refusals of type approval. At the hearing, the Commission thus explained that an RDE test conducted in Estonia on a summer afternoon and an RDE test conducted in Luxembourg in the early morning in winter using the same vehicle could give markedly different results given the significantly different conditions. Similarly, since the RDE tests last for between one and a half and two hours, their variable duration may influence the results. The PEMS themselves measure three sets of data which have to be combined to determine the mass of the oxides of nitrogen emitted per kilometre, and each of those three measurements carries with it a degree of uncertainty. In addition, the operation of the PEMS may be affected during the tests. The CF pollutant conformity factors were provided for in Regulation 2016/427 in order to take account of such uncertainties, even though the values of those factors were not yet specified therein. Provision had already been made for such factors in earlier legislation in relation to heavy duty commercial vehicles.

102 The adoption of the contested regulation, which entered into force on 15 May 2016, led to the

amendment of the legal scope of the RDE tests, since such a test which is unsuccessful having regard to the NTE values now fixed as a result of the determination of the CF pollutant conformity factors entails, with effect from the dates of application of those limits, the refusal pure and simple of type approval for the vehicle type in question. The Commission observes that, in accordance with the findings of the consultations conducted for several years with stakeholders and with the statement made in recital 5 of Regulation 2016/427, two consecutive phases were established for the NTE values and the CF pollutant conformity factors relating to oxides of nitrogen. Thus, as regards type approval of passenger vehicles, over the period from 1 September 2017 to 31 December 2019, a temporary CF pollutant conformity factor, applicable at the manufacturer's request, was set at 2.1. The normal, or 'final', CF pollutant conformity factor mandatory for all such vehicles with effect from 1 January 2020 was in turn set at 1.5.

103 The Commission explains that the normal, or 'final', CF pollutant conformity factor is 1, increased by a margin of technical uncertainty of 0.5 justified in view of the performance level of current PEMS. According to the Commission, that margin of uncertainty will be subject to an annual review and revised in line with improvements in the quality of the measurements taken. It states that the temporary CF pollutant conformity factor of 2.1, which may be used on request, is justified not only by that margin of technical uncertainty but also by the statistical uncertainty associated with the various possible trips which may be undertaken when conducting the RDE tests. It was calculated as lying within a range of between 1.6 and 2.2, a range identified by the Joint Research Centre (JRC) using modelling, since the feedback available when the contested regulation was being drafted was not yet sufficient. According to the Commission, that statistical uncertainty should 'decrease since new vehicle types will factor in the mandatory performance of the RDE [tests]', in the same way that technical uncertainty will be reduced on account of improvements made to the PEMS. In this regard, a draft amending regulation currently under examination provides for a margin of technical uncertainty which is reduced to 0.43 and thus a normal, or 'final', CF pollutant conformity factor of 1.43.

104 The Commission infers from the legal and historical context in which the contested regulation was adopted that that regulation in no way constitutes a 'licence to pollute' or a decline in the level of environmental protection, but on the contrary that it bolsters the legal arsenal to combat air pollution by preventing the type approval of vehicles equipped with prohibited defeat devices.

105 In order to address more specifically the pleas advanced by the applicants alleging that it lacked the competence to adopt the contested regulation, the Commission explains first of all that the recitals of acts are not provisions on the basis of which the legality of that regulation may be reviewed.

106 The Commission goes on to observe that the contested regulation was adopted on the basis of Article 5(3) of Regulation No 715/2007. It charts the course of its adoption, within the framework of the comitology regulatory procedure with scrutiny, and points out that neither the Parliament nor the Council opposed the draft.

107 The Commission denies that, by the contested regulation, it amended an essential element of Regulation No 715/2007, here the limits on pollutant emissions laid down in the Euro 6 standard contained in Annex I to that regulation, as the applicants claim. In that regard, it agrees that Article 5(3) of Regulation No 715/2007 does not allow it to amend or replace the limits contained in Annex I to that regulation.

108 However, first, the limits contained in Annex I to Regulation No 715/2007 continue to apply in full to the laboratory tests, which are the 'cornerstone' of the type approval system of the vehicles in question and which cannot be replaced by the RDE tests, which are 'less stable, less comprehensive

and are based on a different technology'.

109 Second, the limits contained in Annex I to Regulation No 715/2007 are likewise applicable to the RDE tests and the CF pollutant conformity factors do not amend them; those factors merely allow comparisons to be made, for reasons associated with the statistical and technical uncertainties set out in paragraphs 101 and 102 above, with the laboratory results with a view to detecting defeat devices. The RDE tests procedure, which is conducted in addition to the laboratory tests and organised as set out above, does not therefore have the effect of amending essential elements of that regulation; on the contrary, it ensures greater compliance with them. In the light of the foregoing, the Commission disputes in particular the argument advanced by the City of Brussels in its reply, namely that the NTE values resulting from the application of the CF pollutant conformity factors deprive the Euro 6 limits on pollutant emissions contained in that annex of their practical effect.

110 With regard more specifically to the arguments advanced by the City of Paris and the Municipality of Madrid which seek to demonstrate that the Commission infringed essential procedural requirements, the Commission takes the view that, since it had the power to adopt the contested regulation if it complied with the procedure laid down for that purpose, namely the comitology regulatory procedure with scrutiny, it necessarily complied with the essential procedural requirements. In that regard, it recalls the course of the procedure which led to the adoption of the contested regulation and observes that the draft was not opposed by a majority in the Parliament, which was sufficient, in the light of the applicable rules, for the procedure to be continued, regardless of the fact that the majority in favour was slim.

111 Finally, with regard to claims that the procedure followed lacked transparency, the Commission states that the power, on the part of the legislature, to authorise the Commission to amend or supplement the provisions of a basic act by means of implementing provisions which do not concern essential elements has been acknowledged by the European Union judicature (judgment of 17 December 1970, *Köster, Berodt & Co*., 25/70, EU:C:1970:115) and is now enshrined in Articles 290 and 291 TFEU. In the present case, account was taken, in any event, of public consultations and the opinion of experts in connection with the establishment of the RDE tests.

112 It should be observed that, as is confirmed by its recitals, the contested regulation was adopted by the Commission on the basis of Article 5(3) of Regulation No 715/2007. That provision allows the Commission, as stated in paragraph 8 above, to define specific procedures, tests and requirements for the purposes of the type approval of vehicles, in particular in relation to tailpipe emissions and defeat devices, by amending non-essential elements of Regulation No 715/2007 and supplementing it if necessary.

113 Even though it is not cited in the recitals of the contested regulation, Article 14(3) of Regulation No 715/2007, cited in paragraph 10 above, which is essentially concerned with the development of the elements forming the subject matter of Article 5(3) of the same regulation, must also be taken into consideration. The contested regulation in fact makes the successful performance of the RDE tests a new requirement for the type approval of a vehicle, that is to say that it seeks to satisfy the objective of adapting the tests prior to that approval 'so as to adequately reflect the emissions generated by real driving on the road', as provided for in Article 14(3) of that regulation.

114 According to those two provisions, both Article 5(3) and Article 14(3) of Regulation No 715/2007, the Commission must thus act within the framework of the regulatory procedure with scrutiny defined in Article 5a of Decision 1999/468, as set out in paragraph 9 above. Recital 7a of that decision, relied on by the applicants, which clarifies the scope of Article 5a of the decision, itself states, as explained in paragraph 88 above, that the regulatory procedure with scrutiny must be

followed ‘as regards measures of general scope which seek to amend non-essential elements of a basic instrument adopted in accordance with the procedure referred to in Article 251 [EC], inter alia by deleting some of those elements or by supplementing the instrument by the addition of new non-essential elements[, but that] the essential elements of a legislative act may only be amended by the legislator on the basis of the Treaty’.

115 Since the applicants submit that, by the contested regulation, the Commission amended an essential element of Regulation No 715/2007, namely the limits on emissions of oxides of nitrogen laid down in relation to the Euro 6 standard, contained in Annex I to that regulation, the first question to be resolved is whether or not those limits constitute an essential element of that regulation which the Commission may not amend on the basis of Article 5(3) and Article 14(3) of the same regulation, read in conjunction with Article 5a of Decision 1999/468. If that is the case, consideration will have to be given to the second question, namely whether, by defining in the contested regulations the NTE values for emissions of oxides of nitrogen to be observed during the RDE tests and by determining CF pollutant conformity factors, the Commission amended the limits on those emissions laid down for the Euro 6 standard.

116 With regard to the first question, it may be observed, from a contextual and teleological point of view, that recital 3 of Regulation No 715/2007 states that ‘this Regulation lays down the fundamental provisions on vehicle emissions, whereas the technical specifications will be laid down by implementing measures adopted following comitology procedures’. Recital 4 of that regulation goes on to state that ‘further reductions in emissions from the transport sector … from households and from the energy, agricultural and industrial sectors are needed to achieve EU air quality objectives’, that, ‘in this context, the task of reducing vehicle emissions should be approached as part of an overall strategy’ and that ‘the Euro 5 and 6 standards are one of the measures designed to reduce emissions of particulate matter and ozone precursors such as nitrogen oxides and hydrocarbons’. Recital 5 of that regulation clarifies that ‘achieving EU air quality objectives requires a continuing effort to reduce vehicle emissions’, that, ‘for that reason, industry should be provided with clear information on future emission limit values’ and that ‘this is why this Regulation includes, in addition to Euro 5, the Euro 6 stage of emission limit values’. Recital 6 of the same regulation adds that, ‘in particular, a considerable reduction in nitrogen oxide emissions from diesel vehicles is necessary to improve air quality and comply with limit values for pollution’ and that ‘this requires reaching ambitious limit values at the Euro 6 stage …’.

117 Furthermore, account must be taken of the following provisions of Regulation No 715/2007. Article 1 states that ‘this Regulation establishes common technical requirements for the type approval of motor vehicles … with regard to their emissions’. Article 4(1) provides that ‘manufacturers shall demonstrate that all new vehicles sold, registered or put into service in the Community are type approved in accordance with this Regulation and its implementing measures’ and that ‘these obligations include meeting the emission limits set out in Annex I and the implementing measures referred to in Article 5’. Article 4(2) states that ‘the technical measures taken by the manufacturer must be such as to ensure that the tailpipe and evaporative emissions are effectively limited, pursuant to this Regulation, throughout the normal life of the vehicles under normal conditions of use’ and that ‘in-service conformity shall be checked, in particular, for tailpipe emissions as tested against emission limits set out in Annex I’. Article 10 requires the Member States, in accordance with the timescale laid down therein taking into account the various categories of vehicle, to refuse type approval or the registration, sale or entry into service of new vehicles where they ‘do not comply with this Regulation and its implementing measures, and in particular with the [Euro 5 or Euro 6] limit values set out in … Annex I’.

118 It follows from the recitals and provisions cited in paragraphs 116 and 117 above that the limits on

emissions of oxides of nitrogen laid down for the Euro 6 standard, as stated in Annex I to Regulation No 715/2007, are indeed an essential element of that regulation, and in fact the central element, since the sole purpose of the inclusion of all the provisions of the regulation is to ensure that those limits are observed — with other provisions relating to other pollutant emissions — throughout the normal life of the vehicles under normal conditions of use and that the limits on emissions of oxides of nitrogen are defined in the regulation itself (in Annex I, which is an integral part thereof), that they were defined from the outset by the Parliament and the Council and that no provision of the regulation expressly authorises the Commission to amend them as part of the exercise of implementing powers.

119 In this regard, conversely, in the case of particulate pollutants, defined in Article 3(5) of Regulation No 715/2007 as non-gaseous pollutants present in exhaust gas, Article 14(2) of the same regulation states that, after completion of a particulate measurement programme conducted within the framework of the United Nations Economic Commission for Europe, and at the latest upon entry into force of Euro 6, the Commission will have to 'recalibrate' the particulate mass based limit values set out in Annex I and introduce particle number based limit values in that annex. The lack of a similar provision in relation to the limit values on emissions of oxides of nitrogen confirms that the Parliament and the Council did not intend to entrust to the Commission the power to amend those limit values. The exceptional nature of the provision concerning particulate pollutants is further confirmed by other provisions of Article 14 of that regulation, namely paragraphs 4 and 5 thereof, under which any introduction of emission limits for additional pollutants or the amendment of the carbon monoxide and hydrocarbon tailpipe emission limits after a cold start test must involve the Commission presenting proposals to the Parliament and to the Council. Accordingly, save in relation to particulate pollutants, the setting or the amendment of the limit values on pollutant emissions, including oxides of nitrogen, by the vehicles covered by that regulation falls to the Parliament and the Council.

120 The limits on emissions of oxides of nitrogen laid down for the Euro 6 standard, contained in Annex I to Regulation No 715/2007, are therefore an essential element of that regulation which cannot be amended by the Commission as part of the comitology regulatory procedure with scrutiny, as moreover the Commission itself agrees, as stated in paragraph 107 above.

121 With regard to the second question, the Commission contends that, by having defined in the contested regulation the NTE values for emissions of oxides of nitrogen to be observed during the RDE tests by means of the determination of the CF pollutant conformity factors, it did not amend the limits on emissions of oxides of nitrogen laid down for the Euro 6 standard, contained in Annex I to Regulation No 715/2007. By way of a reminder, the CF pollutant conformity factors applied in the contested regulation for oxides of nitrogen are 2.1, at the request of the vehicle manufacturer concerned for a transitional period ending, depending on the categories of vehicles and the nature of the acts requested, between 31 December 2019 and 31 December 2021, and, normally, 1.5. Used as a factor multiplying the Euro 6 emission limits, they allow the NTE emission values to be determined. In essence, the Commission argues that the limits on emissions of oxides of nitrogen laid down in the Euro 6 standard still apply not only to the laboratory tests but also now to the RDE tests, and that the CF pollutant conformity factors are merely statistical and technical corrective elements.

122 In this regard, it should be observed, first of all, that it is clear from the second subparagraph of Article 4(2) of Regulation No 715/2007, under which 'the technical measures taken by the manufacturer must be such as to ensure that the tailpipe and evaporative emissions are effectively limited, pursuant to this Regulation, throughout the normal life of the vehicles under normal conditions of use', that the limits on emissions of oxides of nitrogen laid down in the Euro 6

standard contained in Annex I to that regulation must be observed under real driving conditions and, therefore, during the official tests under real driving conditions prior to type approval. The Commission does not dispute this, since it contends that this is the case.

123 To that extent, the Commission's argument that the limits on emissions of oxides of nitrogen laid down in the Euro 6 standard, contained in Annex I to Regulation No 715/2007, continue to apply in full in relation to the laboratory tests, although it is true, is irrelevant, since those limits must likewise be observed during the RDE tests. As for the argument that the laboratory tests are the 'cornerstone' of the monitoring of pollutant emissions from vehicles, as mentioned in paragraph 108 above, that argument is at odds with the fact, specifically, that the conditions of such tests are too far removed from real driving conditions for them to be able to ensure on their own compliance with the rules on pollutant emissions from vehicles laid down in the regulation, as was already hinted at by recital 15 of that regulation and as is explicitly stated in recitals 1, 2 and 4 of Regulation 2016/427, which introduced the RDE tests into legislation, just like in recitals 3 and 7 of the contested regulation. Although the laboratory tests do provide very detailed and useful information about the 'behaviour' of vehicles, in particular since the replacement of the NEDC tests with the WLTP tests, they do not therefore confine the RDE tests to a secondary status.

124 In this regard, even though the RDE tests do present specific constraints, in particular as regards the management of certain margins of uncertainty, as the Commission explains, they are designed to provide a better understanding of the normal conditions of use of vehicles than the laboratory tests, as is set out in the recitals of Regulation 2016/427 and of the contested regulation referred to in paragraph 123 above. In particular, recital 4 of Regulation 2016/427 states that the objective of the work which resulted in the RDE tests defined in that regulation was to '[develop] a … [RDE] test procedure better reflecting emissions measured on the road'.

125 The importance of the RDE tests has been further reinforced since the legal scope of those tests was amended by the contested regulation, under which — as the Commission has set out — from the dates of application of the NTE values for emissions of oxides of nitrogen which it defines those tests are no longer to be conducted merely 'for monitoring purposes', rather their results determine whether type approval may be obtained and, consequently, whether the vehicles concerned may be registered, sold, put into service and driven on the road.

126 Accordingly, the parallel existence of the laboratory tests and the RDE tests has no impact on the obligation to comply with the limits on emissions of oxides of nitrogen laid down for the Euro 6 standard, contained in Annex I to Regulation No 715/2007, under real driving conditions and, therefore, during the RDE tests.

127 In those circumstances, the setting by the Commission alone, using CF pollutant conformity factors, of NTE values for emissions of oxides of nitrogen not to be exceeded during the RDE tests which are higher than the limits on those emissions laid down for the Euro 6 standard, contained in Annex I to Regulation No 715/2007, cannot be permitted as the applicable law stands.

128 This results in the de facto amendment of the limits on emissions of oxides of nitrogen laid down for the Euro 6 standard, contained in Annex I to Regulation No 715/2007, for the RDE tests, even though those limits are to apply to those tests, as is clear from paragraph 122 above.

129 It must be noted in this regard that the system which seeks to introduce a coefficient (the CF pollutant conformity factor), a multiplier of the limits on emissions of oxides of nitrogen laid down for the Euro 6 standard, necessarily entails the amendment of that standard itself, unlike a system which takes account of the performance and possible errors of the measuring equipment by making

corrections to the measurements themselves, but not to the limits which must be observed. If the margins of error of the measurements taken remain within sufficiently narrow parameters, the second type of system allows compliance with the limits to be verified with a reasonable degree of reliability.

130 However, since the amendment of the limits on emissions of oxides of nitrogen laid down for the Euro 6 standard, contained in Annex I to Regulation No 715/2007, is — as stated in paragraph 120 above — the amendment of an essential element of that regulation, the Commission did not have the power to make such an amendment in the context of its implementing powers exercised as part of the comitology regulatory procedure with scrutiny, powers which it enjoys as a result of Article 5(3) and Article 14(3) of that regulation.

131 That finding is not called into question by the fact that provision was made for the CF pollutant conformity factors and NTE values for emissions of oxides of nitrogen in Regulation 2016/427, against which an action for annulment has not been brought. First, that regulation, which is also a Commission regulation, cannot 'block' the application of the provisions of Regulation No 715/2007, examined in paragraphs 112 to 120 above, which determine the scope of the Commission's related implementing powers, and, second, it is indeed the contested regulation itself which results in the application, in relation to emissions of oxides of nitrogen and during the RDE tests, of NTE values higher than the limits laid down for the Euro 6 standard and in place of those limits, by making those values a binding requirement to determine the success or failure of those tests.

132 The pleas for annulment advanced by the applicants alleging a lack of competence on the part of the Commission must therefore be upheld in so far as they concern the CF pollutant conformity factors applied in the contested regulation, from which the NTE values for emissions of oxides of nitrogen follow.

133 Furthermore, even assuming that, contrary to the finding made above, the Commission may nevertheless determine CF pollutant conformity factors with a view to taking account of certain uncertainties, it must be stated that it could not, in any event, adopt the levels contained in the contested regulation whilst observing the scope of its implementing powers. Those levels do not enable, with a reasonable degree of reliability, compliance with the limits on emissions of oxides of nitrogen laid down for the Euro 6 standard, contained in Annex I to Regulation No 715/2007, to be verified during the RDE tests, although its limits must apply to those tests, in the light of the findings made in paragraph 122 above.

134 In view of the very high value of the CF pollutant conformity factors, 2.1 and 1.5, the levels of emissions of oxides of nitrogen measured during the RDE tests may be, respectively, up to more than two times greater and up to one and a half times greater than the limits on those emissions laid down for the Euro 6 standard, contained in Annex I to Regulation No 715/2007, without a test being regarded as having been failed. To use an example given by the applicants, this means that a diesel passenger vehicle, the emissions of oxides of nitrogen from which are limited under the Euro 6 standard to 80 mg/km, may pass the RDE test if it remains below a measurement of 168 mg/km during the transitional stage and below a measurement of 120 mg/km after that stage. By way of reminder, the limit laid down for the Euro 5 standard was 180 mg/km for the same type of vehicle.

135 In addition, even if all the explanations provided by the Commission regarding the margins of technical and statistical uncertainty which justified the CF pollutant conformity factors applied in the contested regulation were held to be accurate, the NTE values for emissions of oxides of nitrogen resulting from them do not make it possible to verify, with a reasonable degree of reliability, whether or not the limits of those emissions laid down for the Euro 6 standard, contained

in Annex I to Regulation No 715/2007, are observed by a vehicle during an RDE test.

136 In fact, even applying just the normal, or 'final', CF pollutant conformity factor of 1.5, which is explained by the existence of a margin of technical uncertainty of 0.5, that is to say of 50%, it must be observed that a margin of error of 50% represents half the value which is supposed to be measured and that, if that margin is converted into a real margin of error as compared with the measurement by the equipment, this results in a margin of 33% (it being acknowledged that a measurement of 120 mg/km may correspond in reality to emissions of 80 mg/km, that is one third less than the value measured). This means that it is impossible to determine following an RDE test whether or not the vehicle being tested complies with those limits or is even close to them. Thus, taking into account such a factor, if a PEMS displays, on the return of a diesel passenger vehicle from an RDE test, a level of emissions of oxides of nitrogen of 120 mg/km, this may mean the following three things: either the equipment provides accurate measurements and the vehicle does indeed emit 120 mg/km of oxides of nitrogen, that is to say one and a half times more than the Euro 6 standard allows; or the equipment may in fact make erroneous measurement on a scale corresponding to the margin of technical uncertainty advanced by the Commission and this may mean that in reality the vehicle emits only 80 mg/km of oxides of nitrogen, that is to say that it just complies with the standard; or, on the contrary, if the equipment makes the opposite error, that the vehicle in fact emits 160 mg/km of oxides of nitrogen, that is to say two times greater than that standard allows. In addition, contrary to the statements made in essence by the Commission at the hearing in response to a written question put by the Court, there is nothing to guarantee that the laboratory test will necessarily 'catch' a vehicle emitting excessive levels of pollutants which has successfully passed the RDE test stage thanks to the margin of technical uncertainty. There is nothing to guarantee, for example, that a diesel passenger vehicle 'measured' at 100 mg/km during the RDE test and which did in fact emit oxides of nitrogen at that level or at a higher level during that test will record more than 80 mg/km of emissions of oxides of nitrogen during the laboratory test. If the laboratory tests were that reliable, there would be no need for the RDE tests. A fortiori, the problems identified above exist if the temporary CF pollutant conformity factor of 2.1 is used.

137 Accordingly, the scale of the uncertainty resulting from the value of the CF pollutant conformity factors contained in the contested regulation under no circumstances allows, contrary to the Commission's claims, the limits on emissions of oxides of nitrogen laid down for the Euro 6 standard, contained in Annex I to Regulation No 715/2007, to be applied during the RDE tests, given the potentially very great discrepancies between those limits and the actual volumes of oxides of nitrogen emitted during the tests, even though the NTE values of those emissions are not exceeded according to the measurements taken by the PEMS. The scale of the uncertainty thus results in the de facto amendment of those limits for those tests, even though — according to the provisions of Regulation No 715/2007 — those limits must be observed under real driving conditions and, therefore, during official tests under real driving conditions prior to type approval, as stated in paragraph 122 above. For those reasons, the Commission therefore also exceeded the limits of its power in that regard as set out in paragraph 132 above.

138 Furthermore, it may be observed, with regard to the explanations provided by the Commission to justify specifically the temporary CF pollutant conformity factor of 2.1, citing a margin of statistical uncertainty of 0.6 plus the margin of technical uncertainty of 0.5 applied in relation to the normal, or 'final', CF pollutant conformity factor, that those explanations are unconvincing in the light of the objective which the Commission declares to be following of ensuring compliance with the limits on emissions of oxides of nitrogen laid down for the Euro 6 standard, contained in Annex I to Regulation No 715/2007, during the RDE tests.

139 In this regard, in the Commission's view, the temporary margin of statistical uncertainty of 60% is

linked to the various possible trips which may be undertaken by test drivers. It is true that, in the absence of specific instructions, the results from the different drivers to whom one and the same vehicle is entrusted to be driven on the road for a certain time would vary greatly according to their driving style, the routes actually taken and the traffic conditions. However, generally speaking, any bias or statistical uncertainties (the risk that the results may be unrepresentative as compared with the overall reality) are corrected by work to ensure the representativeness of the sample or of the testing (here: the representativeness of the test) or by the volume of testing (here: the number of tests), and not by stating that the results may be subject to a margin of error of 60%. In the present case, it is by requiring that the trip is sufficiently representative of the actual average use of a vehicle (types of use; highway, city, motorway driving; traffic conditions) and by requiring that an 'average' driving style be adopted that major errors in relation to such use can be avoided. Furthermore, at the hearing, the Commission itself referred to several factors taken from Annex IIIA to Regulation No 692/2008, which defines the RDE test conditions: thus, the three types of trips — highway, city, motorway — must be roughly equal in duration, the tests must take place on a working day at an altitude of less than 700 metres and provision is made for speed parameters. In those circumstances, the random variation of the overall trip length between one and a half and two hours, which is intended to circumvent the operation or the deactivation at a specific moment of any defeat device, should not give rise to markedly different results according to the actual duration of the tests.

140 Furthermore, even though it is possible, as the Commission stated at the hearing, that a trip on a summer afternoon in Estonia gives 'better' results than a trip on a winter morning in Luxembourg, first, the provisions of Annex IIIA should guarantee that there cannot be too many differences between the characteristics of the two trips (a test that is too extreme — excessively cold temperature, too much congestion — would be disregarded), and, secondly, Regulation No 715/2007, which lays down the limit values of emissions of oxides of nitrogen for the Euro 6 standard, does not provide that those limits are higher in Luxembourg than in Estonia. They must be observed throughout the European Union as 'maximum limits'. The very purpose of the RDE tests is to ensure that that is the case in conditions which, without being extreme, must be representative of the reality of the vehicle's use, including in Luxembourg.

141 In addition, as the Commission confirmed at the hearing in response to a written question put by the Court, one and the same type of vehicle must not be subject to a whole series of RDE tests the results of which are amalgamated in the hope that they are statistically representative. A second test may indeed be conducted if a particular issue arose during the first test, and there may be an RDE test for type approval and then, at a later stage, additional tests to verify the continued compliance, throughout the life of the vehicle, with the limits on emissions of oxides of nitrogen (such in-service-conformity testing is not yet conducted). Furthermore, since they are quite complicated and expensive, the RDE tests are conducted on 'test families' which may include several related types of vehicles, placed in the same 'family' by the manufacturer and from which only a selection of the types actually undergoes the tests, as provided for in the second subparagraph of Article 3(10) of Regulation No 692/2008, read in conjunction with appendix 7 of Annex IIIA thereto. In those circumstances, more specifically, at most several vehicles in the same 'family' simultaneously undergo RDE tests; a whole series of RDE tests is not conducted for one and the same vehicle, a type of vehicle or even a 'family' of vehicle types from which some kind of statistical 'average' would be drawn. Each of the vehicles undergoing the test, as the sole representative of a different type within the 'family', must satisfy the RDE test in order for all the 'family' to which it belongs to be regarded as having successfully passed the RDE tests, as is clear from points 4.1.1 and 4.1.2 of the abovementioned appendix 7. Moreover, this confirms the fact that the limits of pollutant emissions defined for the Euro standards are not values which must be achieved as part of a holistic approach, rather they are limits with which each vehicle must comply.

142 On the basis of all the foregoing, the Court has doubts whether the Commission's reliance on possible statistical errors is well founded. The factors highlighted by the Commission appear to call into question the ability of an RDE test to reflect real driving on the road. However, without claiming to be a technical expert, the Court observes that the RDE tests have 'matured' over a long period of time, since the Commission states, in its written submissions, that the work on those tests began in January 2011, that tests of the same kind have been conducted operationally from that same year on heavy duty commercial vehicles, and that those tests were conducted solely 'for monitoring purposes' in relation to the vehicles covered by Regulation No 715/2007 only for a short period of time: between 20 April 2016, the date on which Regulation 2016/427 entered into force, and, in the case of certain vehicles, 1 September 2017, the first day of the actual application of the NTE values for emissions of oxides of nitrogen within the context of type approvals. In those circumstances, it would be surprising if the Commission had not had the time to clarify and standardise the RDE tests sufficiently so that they are representative of real driving conditions on the road in order to prevent in that regard a 60% degree of uncertainty as to their results. Furthermore, the main focus of Regulation 2016/427, which inserted Annex IIIA into Regulation No 692/2008, and in particular of point 4 et seq. of that annex and its 11 appendices, which run to around 120 pages in the consolidated online version in the EUR-Lex database, is to describe in very specific detail the components of an RDE test and how it is to be conducted. Moreover, even if some variations in results persist after the RDE tests on several types of vehicles belonging to the same 'family', or if such variations were to exist between two tests on the same vehicle, this is inherent in the very concept of testing of this kind.

143 Since the 60% margin of uncertainty linked to the temporary CF pollutant conformity factor of 2.1 does not appear to be justified by the statistical issues invoked by the Commission, the Commission has therefore, in any event, failed to demonstrate that that temporary factor allowed compliance with the limits on emissions of oxides of nitrogen laid down for the Euro 6 standard, contained in Annex I to Regulation No 715/2007, to be verified during the RDE tests.

144 Accordingly, for the reasons set out in paragraphs 138 to 143 above, it must therefore be further confirmed that the introduction of the temporary CF pollutant conformity factor of 2.1 results, de facto, in the amendment of those limits in relation to the RDE tests, although in accordance with the provisions of Regulation No 715/2007 those limits must be observed under real driving conditions and, therefore, during official tests under real driving conditions prior to type approval, as stated in paragraph 122 above. For those reasons, the Commission therefore also exceeded the limits of its power in that regard, as set out in paragraph 132 above.

145 However, the pleas alleging the lack of competence on the part of the Commission were not argued in relation to the other aspects of the contested regulation which, furthermore, in general terms, are not criticised by the applicants. They could therefore be upheld in relation to those other aspects only if those aspects cannot be severed from the CF pollutant conformity factors applied in the contested regulation. That question will be examined below as part of the examination of the scope of the annulment to be ordered.

– *The other pleas advanced by the applicants*

146 As stated in paragraph 85 above, the applicants have also advanced pleas alleging infringement, in substantive terms, of various provisions of EU law and claimed that the Commission misused its powers.

147 Like the pleas alleging that a lack of competence on the part of the Commission, all these pleas seek solely to call into question the CF pollutant conformity factors applied in the contested regulation

and the NTE values for emissions of oxides of nitrogen which follow from them. As far as the other aspects of the contested regulation are concerned, their well-founded nature is therefore also dependent on the severable, or non-separable, nature of the various provisions.

148 In so far as the pleas call into question the CF pollutant conformity factors applied in the contested regulation and the NTE values for emissions of oxides of nitrogen which follow from them, it may be observed that the fact that the Commission has been found to lack the competence to apply such factors given the limits on the implementing powers which it derives from Regulation No 715/2007 necessarily means that the Commission has infringed that regulation.

149 In that regard, all three applicants claim infringement of Annex I to Regulation No 715/2007. That annex is mentioned in Article 4(1) of that regulation, which states that the emission limits in that annex must be met. The applicants submit that, by defining CF pollutant conformity factors in the contested regulation, factors which result in NTE values for emissions of oxides of nitrogen during RDE testing which are higher than the limits on those emissions laid down for the Euro 6 standard in that annex, the Commission infringed Article 4(1) of that regulation. The conclusion reached by the analysis conducted above in paragraphs 122 to 144 as part of the examination of the pleas alleging a lack of competence on the part of the Commission is that the Commission did in fact amend the limits on emissions of oxides of nitrogen in relation to the RDE tests although those limits must be applied under real driving conditions, in particular when conducting those tests. To that extent, the Commission necessarily infringed the limits on emissions of oxides of nitrogen laid down for the Euro 6 standard, contained in Annex I to Regulation No 715/2007, and, therefore, the provisions of Article 4(1) of the same regulation under which those limits must be met.

150 It is true that the Commission also advanced, in its defence on the merits, the argument that a legal amendment of the limits on emissions of oxides of nitrogen laid down for the Euro 6 standard, contained in Annex I to Regulation No 715/2007, was not made, since the applicants point to merely ‘specific’ or ‘practical’ amendments. Those limits are not in fact subject to legal amendment in that annex, but it is for that precise reason that the failure to comply with them in the case of the RDE tests, resulting specifically or in practice from the application in their place of the higher NTE values for emissions of oxides of nitrogen following from the CF pollutant conformity factors applied in the contested regulation, is unlawful.

151 The infringement of Regulation No 715/2007 may therefore also be accepted.

152 As for the remainder, in the light of the finding reached by the Court in paragraphs 132, 137, 144 and 151 above, there is no need to examine the other pleas and arguments advanced.

– *The scope of the annulment*

153 The Commission pleads that the applicants have submitted arguments only against point 2 of Annex II to the contested regulation, which determines the value of the final and temporary CF pollutant conformity factors for oxides of nitrogen. That annex itself amends Annex IIIA to Regulation No 692/2008, which sets out the rules governing the RDE tests. In the Commission’s view, the actions for annulment should therefore be declared inadmissible on the basis of Article 76(d) of the Rules of Procedure, which requires that arguments are presented in support of pleas in law, in so far as the actions are directed against other provisions of the contested regulation, which are severable from those called into question. The City of Paris and the Municipality of Madrid submit in response that the annulment of point 2 of Annex II to the contested regulation would deprive that regulation as a whole of any legal cause or reason, thus justifying its annulment in full.

154 It is essential in the present case to rule directly on the question of the severable nature of the various provisions of the contested regulation, meaning that it is necessary to examine whether the fact that the CF pollutant conformity factors in relation to oxides of nitrogen applied in the contested regulation are unlawful must automatically entail the annulment of other provisions of that regulation which cannot be severed from those unlawful elements (see, to that effect, judgment of 11 December 2008, *Commission* v *Département du Loiret*, C-295/07 P, EU:C:2008:707, paragraphs 104 and 105). The Commission argues that the provisions of the contested regulation other than those determining those factors may be severed from the latter provisions.

155 The provision determining the factors at issue, which must be annulled, appears, as the Commission states, in point 2 of Annex II to the contested regulation, which amends Annex IIIA to Regulation No 692/2008 by inserting into that annex, after point 2.1, new points 2.1.1 and 2.1.2 in which the value of the final conformity factor and the value of the temporary conformity factor for the mass of the oxides of nitrogen are stated, respectively, to be '1 + margin with margin = 0.5' and '2.1' and in which the period during which the temporary conformity factor may be used is defined. However, point 2 of Annex II to the contested regulation also inserts into Annex IIIA to Regulation No 692/2008 a new point 2.1.3 concerning a 'transfer function', which is involved in the calculation of the NTE value, is set for now at 1 and therefore currently has no impact on that calculation, and has not been criticised by the applicants. Point 2.1.3 of Annex IIIA to Regulation No 692/2008 may thus be severed from points 2.1.1 and 2.1.2 thereof, and in particular from the value of the CF pollutant conformity factors for oxides of nitrogen mentioned therein, and there is no need to annul point 2 of Annex II to the contested regulation in so far as it inserts that provision.

156 Furthermore, Article 1(2) and (3) of the contested regulation, which amends the third subparagraph of Article 3(10) of Regulation No 692/2008, is indeed linked to the determination of the CF pollutant conformity factors for oxides of nitrogen. The amended version of that provision reads: 'until three years after the dates specified in Article 10(4) and four years after the dates specified in Article 10(5) of [Regulation No 715/2007] [that is, for example, until 31 August 2017 for type approval of passenger vehicles and until 31 August 2019 for their individual entry into circulation] the following provisions shall apply: (a) the requirements of point 2.1 of Annex IIIA shall not apply [the requirements in question are those which set out the formula for calculation of the NTE value and which state that that value must not be exceeded during the RDE tests]'. That provision determines, *a contrario*, the point from which the CF pollutant conformity factors, including those criticised by the applicants, apply in relation to the RDE tests, that is to say from when those tests are no longer conducted simply for monitoring purposes. However, that provision may also relate to pollutants other than the oxides of nitrogen in relation to which CF pollutant conformity factors were determined after those factors for those oxides, as was the case in relation to fine particulate matter. In addition, nor is its annulment necessary for the criticised CF pollutant conformity factors for oxides of nitrogen to cease to apply. The absence of a value in the tables of final and temporary CF pollutant conformity factors contained in points 2.1.1 and 2.1.2 of Annex IIIA to Regulation No 692/2008 alone is sufficient to that end. Article 1(2) and (3) of the contested regulation, which amends the third subparagraph of Article 3(10) of Regulation No 692/2008, may thus be severed from the value of the CF pollutant conformity factors for oxides of nitrogen mentioned in points 2.1.1 and 2.1.2 of Annex IIIA to the latter regulation and there is therefore no need to annul it.

157 The other provisions of the contested regulation, which are primarily intended to supplement or amend Annex IIIA to Regulation No 692/2008 in order to detail the RDE test conditions, retain their purpose, contrary to the views expressed by the City of Paris and the Municipality of Madrid, even if the CF pollutant conformity factors for oxides of nitrogen applied in the contested regulation are annulled. In particular, the entire process laid down in relation to those tests, which has not been criticised, may remain in place regardless of the CF pollutant conformity factors defined for the

various pollutants. In addition, even if the CF pollutant conformity factors for oxides of nitrogen applied in the contested regulation are annulled, as things stand the CF pollutant conformity factors for the number of particles defined since the adoption of Regulation 2017/1154 must be applied within the context of the process laid down for the RDE tests.

158 It follows from the foregoing that the only provision which must be annulled is point 2 of Annex II to the contested regulation, in so far as it sets, in points 2.1.1 and 2.1.2 of Annex IIIA to Regulation No 692/2008, the value of the final CF pollutant conformity factor and the value of the temporary CF pollutant conformity factor for the mass of the oxides of nitrogen. It also follows from the foregoing that, in accordance with the statements made in paragraphs 145 and 147 above, the various pleas advanced in the actions must be dismissed in so far as they concern the other provisions of the contested regulation and that there is therefore no need to rule on the question of admissibility raised by the Commission in that regard (see, to that effect, judgment of 26 February 2002, *Council* v *Boehringer*, C-23/00 P, EU:C:2002:118, paragraph 52).

159 Since the Commission pointed out at the hearing that Regulation No 692/2008, as amended inter alia by the contested regulation, was replaced by Regulation 2017/1151, the Court recalls that, in order to comply with a judgment annulling a measure and to implement it fully, the institution which adopted the provision annulled must eliminate it from the subsequent measures adopted by it in which that provision was reproduced and exclude it from the measures to be introduced by it, having regard not only to the operative part of the judgment but also the grounds which led to the judgment and constitute its essential basis (see, to that effect, judgment of 26 April 1988, *Asteris and Others* v *Commission*, 97/86, 99/86, 193/86 and 215/86, EU:C:1988:199, paragraphs 26 to 31).

– *The temporal effects of the annulment*

160 The second paragraph of Article 264 TFEU provides that, if the European Union judicature considers this necessary, it is to state which of the effects of the act which it has declared void are to be considered as definitive. That provision has been interpreted inter alia as allowing, on grounds of legal certainty but also on grounds seeking to prevent a lack of continuity or a decline in the implementation of policies conducted or supported by the European Union, such as in the fields of environmental protection or public health, the effects of an act declared void to be maintained for a reasonable period (see, to that effect, judgments of 25 February 1999, *Parliament* v *Council*, C-164/97 and C-165/97, EU:C:1999:99, paragraphs 22 to 24, and of 16 April 2015, *Parliament* v *Council*, C-317/13 and C-679/13, EU:C:2015:223, paragraphs 72 to 74).

161 In the present case, when asked by the Court at the hearing about a possible temporal adjustment of the effects of the annulment which could be ordered, the City of Paris and the City of Brussels stated that they were opposed to such adjustment, explaining in essence that, even if, for a certain time, there was no NTE value for emissions of oxides of nitrogen to be observed during the RDE tests, in view of the prospect of more stringent requirements in that regard in the relatively near future vehicle manufacturers would not take advantage of that fact to obtain type approval for vehicles emitting higher levels of oxides of nitrogen than at present, since their industrial processes cannot embrace such hitches. The City of Brussels added that it was particularly opposed to a restriction of the effects into the future. For its part, the Commission replied that a temporal adjustment of the effects of the annulment would be of interest only if the Court were to find in essence that the provisions criticised should have been adopted by the Parliament and the Council.

162 However, the Court is of the view that simply annulling the provisions criticised *ex tunc* could pose two kinds of problem. First of all, with regard to the ‘past’, that is to say from the point at which the RDE tests were no longer conducted solely ‘for monitoring purposes’ (for example, 1 September

2017 for the type approval of passenger vehicles and vehicles for the carriage of persons) up until the point at which the present judgment will take effect in the light of the provisions of the second paragraph of Article 60 of the Statute of the Court of Justice of the European Union, legal uncertainty would exist vis-à-vis the validity of the type approvals of vehicles granted or the refusals of such approvals during that period. The lack of a CF pollutant conformity factor for emissions of oxides of nitrogen could be interpreted either as not requiring any NTE value in that regard during those tests or, on the contrary, as meaning that the limits defined for the Euro 6 standard must be applied as such. With regard to the future, that is to say from the point at which the present judgment will take effect up until the point at which the Commission or the Parliament and the Council gives effect, as the case may be, to the judgment by specifying the rule applicable during those tests, the same legal uncertainty would persist. If the interpretation were to prevail amongst the authorities responsible for the type approval of vehicles that during that period there are no limits on emissions of oxides of nitrogen which cannot be exceeded during those same tests, this could result in vehicles exceeding even the NTE values for emissions of oxides of nitrogen set in the contested regulation obtaining type approval and thus lead to a retrograde development vis-à-vis the related objectives of environmental and health protection pursued.

163 Failing to effect a temporal adjustment of the annulment could therefore undermine both the legitimate economic interests of the automotive industry which has complied with the applicable legislation, and as the case may be those of consumers who acquired vehicles which complied with that legislation, as well as the policies of the European Union on the environment and health. The decision must therefore be taken, first, that the effects of the provision annulled are definitive in respect of the 'past', as defined in paragraph 162 above, and that they are maintained in respect of the future for a reasonable period which allows the related legislation to be amended; that period must not exceed 12 months from the date on which the present judgment takes effect, that is to say, in the light of the provisions of the second paragraph of Article 60 of the Statute of the Court of Justice of the European Union, from the expiry of the period for bringing an appeal if an appeal is not brought against the present judgment or, if an appeal is brought, as from the date of dismissal of the appeal.

The claim for damages made by the City of Paris

164 As stated in paragraph 30 above, the City of Paris claims that the Commission should be ordered to pay to it symbolic compensation of one euro for the harm caused to it as a result of the contested regulation. That claim is based on the second paragraph of Article 340 TFEU, which provides that, 'in the case of non-contractual liability, the Union shall, in accordance with the general principles common to the laws of the Member states, make good any damage caused by its institutions'. The City of Paris relies in that regard on the illegality of that regulation, which follows from a serious breach of higher-ranking rules of law than the regulation, the existence of actual and certain harm occasioned by the cost of the measures which it would be required to implement in order to offset the increase in vehicular pollution, Paris' loss of appeal from the perspective of tourism and the reduced effectiveness of its campaigns to raise awareness amongst the city's inhabitants of the risks caused by pollutant emissions and, finally, the direct causal link between the Commission's conduct and that damage. It does, however, limit its claim for damages to the symbolic amount of one euro, which would enable reparation to be made for the damage to its image and to the legitimacy of its action on environmental matters.

165 The Commission contests the admissibility of the claim for damages made by the City of Paris, inter alia because the latter has failed to produce evidence substantiating the reality of the damage allegedly suffered or the existence of a causal link between the adoption of the contested regulation and that damage.

166 However, the Court may, in the circumstances of the case brought before it, dismiss an action on the merits without ruling on the plea of inadmissibility raised against that action if the proper administration of justice justifies such dismissal (see, to that effect, judgment of 24 June 2015, *Fresh Del Monte Produce* v *Commission* and *Commission* v *Fresh Del Monte Produce*, C-293/13 P and C-294/13 P, EU:C:2015:416, paragraph 193 and the case-law cited).

167 In the present case, no evidence has been produced of the only damage, damage 'to image and legitimacy', for which the City of Paris seeks symbolic compensation of one euro. No evidence supports the applicant's claims of the loss of appeal to tourists or of the difficulties in raising awareness amongst the city's inhabitants of the risks caused by pollutant emissions which could constitute harm to image or legitimacy. Similarly, there is no evidence to support the claim that such circumstances, assuming they were proven to exist, are the result of the Commission's adoption of the contested regulation.

168 In addition, it has been held that the annulment of the act which caused non-material damage to an individual's reputation may, depending on the circumstances, be sufficient reparation for that damage (see, to that effect, judgments of 30 May 2017, *Safa Nicu Sepahan* v *Council*, C-45/15 P, EU:C:2017:402, paragraphs 47 to 49, and of 7 October 2015, *European Dynamics Luxembourg and Others* v *OHIM*, T-299/11, EU:T:2015:757, paragraph 155).

169 Accordingly, in any event, the damage to image and legitimacy claimed by the City of Paris provides a particularly good example of how symbolic and sufficient reparation can consist simply in the annulment of the provision of the contested regulation which it called into question.

170 The claim for damages made by the City of Paris should therefore be dismissed.

Costs

171 Under Article 134(3) of the Rules of Procedure, where each party succeeds on some and fails on other heads, the parties are to bear their own costs. However, if it appears justified in the circumstances of the case, the Court may order that one party, in addition to bearing its own costs, pay a proportion of the costs of the other party.

172 Since the Commission has failed on several heads of claim, it should be ordered, in addition to bearing its own costs, to pay half the applicants' costs.

On those grounds,

THE GENERAL COURT (Ninth Chamber, Extended Composition)

hereby:

1. Annuls point 2 of Annex II to Commission Regulation (EU) 2016/646 of 20 April 2016 amending Regulation (EC) No 692/2008 as regards emissions from light passenger and commercial vehicles (Euro 6), in so far as it sets, in points 2.1.1 and 2.1.2 of Annex IIIA to Commission Regulation (EC) No 692/2008 of 18 July 2008 implementing Regulation (EC) No 715/2007, the value of the final CF pollutant conformity factor and the value of the temporary CF pollutant conformity factor for the mass of the oxides of nitrogen;

2. Dismisses the actions as to the remainder;

3. Orders the effects of the provision annulled pursuant to paragraph 1 of the operative part of this judgment to be maintained pending the adoption, within a reasonable period, of new legislation replacing those provisions; that period may not exceed 12 months from the date on which the present judgment takes effect;

4. Orders the European Commission to bear its own costs and to pay half the costs incurred by the ville de Paris, the ville de Bruxelles and the Ayuntamiento de Madrid.

Gervasoni Madise da Silva Passos

Kowalik-Bańczyk Mac Eochaidh

Delivered in open court in Luxembourg on 13 December 2018.

[Signatures]

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* Languages of the case: French and Spanish.