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### NOTE ON ACCESS TO INFORMATION ON EMISSIONS

#### 1) The new rules on access to information on emissions

At the 73rd meeting of the ‘Technical Committee - Motor Vehicles’ (TCMV) held in Brussels on 3 May 2018, a Draft Commission Regulation amending Commission Regulation (EU) 2017/1151 (RDE4/WLTP2) received a positive vote from the members of the Committee.

Following the introduction of the requirement for the manufacturers to declare the use of auxiliary emission strategies by Commission Regulation (EU) 2016/646<sup>1</sup> and the increased supervision of emission strategies by the type approval authorities in Commission Regulation (EU) 2016/1154<sup>2</sup>, the Commission Regulation voted on 3 May lays down a common format for the extended documentation package and a common methodology for the assessment of auxiliary emission strategies.

One of the modifications in this context was the deletion from Regulation (EU) 2017/1151 of the confidentiality clause linked to manufacturer's extended documentation package. Article 1(4) of that draft Regulation will replace the second subparagraph of Article 5 (11) of the WLTP Regulation in its current version as amended by the RDE III Regulation with the following text: *“The extended documentation package shall be identified and dated by the approval authority and kept by that authority for at least 10 years after the approval is granted.”*

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<sup>1</sup> 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 L 109, 26.04.2016, p.1).

<sup>2</sup> Commission Regulation (EU) 2017/1154 of 7 June 2017 amending Regulation (EU) 2017/1151 supplementing Regulation (EC) No 715/2007 of the European Parliament and of the Council on type-approval of motor vehicles with respect to emissions from light passenger and commercial vehicles (Euro 5 and Euro 6) and on access to vehicle repair and maintenance information, amending Directive 2007/46/EC of the European Parliament and of the Council, Commission Regulation (EC) No 692/2008 and Commission Regulation (EU) No 1230/2012 and repealing Regulation (EC) No 692/2008 and Directive 2007/46/EC of the European Parliament and of the Council as regards real-driving as regards emissions from light passenger and commercial vehicles (Euro 6) (OJ L 175, 07.07.2017, p.708)

## 2) The discussion at TCMV

Some Member States showed concern about the public access to the AES extended documentation package, as this may include confidential and proprietary information. The issue of potential not-harmonized application of the legislation regarding the disclosure of information was also raised. Some Member States fear that, since the discretion to decide on the disclosure of information on a case-by-case basis would be given to the Member States, this could potentially lead to unequal treatment between manufacturers.

It is therefore necessary to clarify the rules on access to information on emissions in the context of vehicle type-approval and to lay down advice on how to ensure the respect for national rules on access to documents on the one hand and the respect of EU and international rules on the other. It is also vital to safeguard the harmonised application of the rules throughout the Union, in order not to endanger the internal market, as well as the possibility for all parties to access all relevant information for conducting RDE testing.

The Commission was therefore requested to provide guidance regarding the disclosure of information, so as to ensure openness and transparency, yet prevent misuse of information and protect the Intellectual Property rights of manufacturers.

## 3) The rules on access to environmental information

The EU is a Party to the United Nations Economic Commission for Europe (UNECE) Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus Convention)<sup>3</sup> since May 2005. The Aarhus Convention establishes a number of rights of the public (individuals and their associations) with regard to the environment. The Parties to the Convention are required to make the necessary provisions so that public authorities (at national, regional or local level) will contribute to these rights to become effective.

The Convention provides for the following rights:

- the right of everyone to receive environmental information that is held by public authorities ("access to environmental information"). This can include information on the state of the environment, but also on policies or measures taken, or on the state of human health and safety where this can be affected by the state of the environment. Applicants are entitled to obtain this information within one month of the request and without having to say why they require it. In addition, public authorities are obliged, under the Convention, to actively disseminate environmental information in their possession;
- the right to participate in environmental decision-making. Arrangements are to be made by public authorities to enable the public affected and environmental non-governmental organisations to comment on, for example, proposals for projects affecting the environment, or plans and programmes relating to the environment,

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<sup>3</sup> <http://www.unece.org/fileadmin/DAM/env/pp/documents/cep43e.pdf>

these comments to be taken into due account in decision-making, and information to be provided on the final decisions and the reasons for it ("public participation in environmental decision-making");

- the right to review procedures to challenge public decisions that have been made without respecting the two aforementioned rights or environmental law in general ("access to justice").

The Union legislator has implemented the Aarhus Convention by, inter alia, establishing a right of access to environmental information in the Environmental Information Access Directive<sup>4</sup> and the Aarhus Regulation<sup>5</sup>. Both the Environmental Information Access Directive and the Aarhus Regulation notably include – in accordance with the Aarhus Convention - the possibility to exceptionally refuse, after taking into account the public interest served by the specific disclosure requested and weighing it against the interest served by the refusal, a request for environmental information (Art. 4 Aarhus Convention, Arts 3, 4 Aarhus Directive, Art 6 Aarhus Regulation).

The deleted provision from the RDE III Regulation could be seen as prescribing the automatic refusal of any request for disclosure of an extended documentation package held by a national authority (or Union institution) without any consideration or weighing of the relevant interests in the specific case, with regard to this information and thereby breach the right on access to environmental information guaranteed by the Aarhus Convention and implemented into Union law.

Furthermore, the Commission considered that the type-approval framework for motor vehicles is not the appropriate legislation to contain rules about access to information. In fact, by not including any rules on this matter in the basic acts, it must be assumed that the Union legislator intended to submit the matters envisaged in this area of Union law to the general rules on access to (environmental) information, without providing any specific regime. It is therefore appropriate that the implementing legislation follows the same approach.

It is therefore for each national authority or the Commission to decide, on a case-by-case basis, whether access to the requested information may be granted, in light of the confidentiality rules applicable in the EU and in each Member State.

#### **4) The application of the Aarhus Convention**

The Environmental Information Access Directive stipulates that: *'Member States shall ensure that public authorities are required, in accordance with the provisions of this*

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<sup>4</sup> Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information and repealing Council Directive 90/313/EEC (OJ L 41, 14.2.2003, p. 26).

<sup>5</sup> Regulation (EC) N° 1367/2006 of the European Parliament and of the Council on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies (OJ L 264, 25.9.2006, p.13).

*Directive, to make available environmental information held by or for them to any applicant at his request and without his having to state an interest.*<sup>6</sup>

The term ‘environmental information’ is defined in Article 2(1), and includes information in any material form on the ‘*state of the elements of the environment, such as air and atmosphere, factors such as...emissions, discharges and other releases into the environment*’.

Member States are entitled to refuse a request for environmental information in the circumstances laid down in Article 4 of the Information Access Directive. According to Article 4(2):

*“2. Member States may provide for a request for environmental information to be refused if disclosure of the information would adversely affect:*

*(a) the confidentiality of the proceedings of public authorities, where such confidentiality is provided for by law;*

*(b) international relations, public security or national defence;*

*(c) the course of justice, the ability of any person to receive a fair trial or the ability of a public authority to conduct an enquiry of a criminal or disciplinary nature;*

*(d) the confidentiality of commercial or industrial information where such confidentiality is provided for by national or Community law to protect a legitimate economic interest, including the public interest in maintaining statistical confidentiality and tax secrecy;*

*(e) intellectual property rights;*

*(f) the confidentiality of personal data and/or files relating to a natural person where that person has not consented to the disclosure of the information to the public, where such confidentiality is provided for by national or Community law;*

*(g) the interests or protection of any person who supplied the information requested on a voluntary basis without being under, or capable of being put under, a legal obligation to do so, unless that person has consented to the release of the information concerned;*

*(h) the protection of the environment to which such information relates, such as the location of rare species.”*

However, as Article 4(2) of the Directive directs, ‘[t]he grounds for refusal [to disclose information] shall be interpreted in a restrictive way,’ and there is a statutory bar in Article 4(2) against Member State authorities relying upon the exceptions in sections 4(2)(a), (d), (f), (g) and (h), which includes commercial confidentiality, to justify non-disclosure if the information requested relates to information on emissions into the environment.

The first step is therefore to determine whether the information requested falls within the definition of information on emissions into the environment. In other words, in the present case it is necessary to determine whether the extended documentation package or

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<sup>6</sup> Article 3(1)

the information in the Package on Testing Transparency constitutes ‘information ... [which] relates to emissions into the environment’ in the sense of Article 4 (2) Aarhus Directive, Article 6 Aarhus Regulation and Article 4 (4) Aarhus Convention.

The Court has already interpreted this term and held that, in the context of the Aarhus Directive, ‘emissions into the environment’ covers “*emissions which are actually released into the environment at the time of application of the product or substance in question and foreseeable emissions [...] under normal or realistic conditions of use of that product or substance corresponding to those under which the authorisation to place the product in question on the market is granted and which prevail in the area where that product is intended for use*”.

It follows from the Court’s jurisprudence that this concept has to relate to the particular data enabling the public to get an insight on the emissions that are – or can be expected to be – released into the environment. In this regard, as the General Court recently confirmed, in order to be considered as covering information relating to emissions into the environment, it is not enough that the sought information be linked with emissions. Rather, it has to be such as putting the public in a position to know what could be or is actually released into the environment. As a result, information on the way certain installations perform as to the production of emissions cannot be considered as information covering emissions into the environment. The same should be said about the extended documentation package describing all emissions control strategies employed in a vehicle type to be submitted at type-approval

The Commission therefore concludes that the extended documentation package provided does not constitute ‘information...[which] relates to emissions into the environment’ in the sense of Article 4 (2) Aarhus Directive, Article 6 (1) Aarhus Regulation or Article 4 (4) Aarhus Convention.

Therefore, a refusal of disclosure of that information on the grounds of confidentiality for the protection of commercial interests is not prohibited by the counter-exception for ‘information ... [which] relates to emissions into the environment’ referred to above and national authorities or Union institution are permitted, in accordance with the Aarhus Convention and its implementing legislation at Union level, to refuse disclosure it for the protection of confidential commercial or industrial information contained therein.

## **5) Conclusion**

It results from the above that, in accordance with Article 4 (2) lit. d Aarhus Directive and Article 6(1) Aarhus Regulation in conjunction with Article 4(2) Regulation 1049/2001<sup>7</sup>, it is possible to refuse a specific request for disclosure of the information the extended documentation package provided. However, it is vital to carefully take into account the public interest served by disclosure and to weigh it against the interest served by the refusal with regard to the particular case. Also, the interest served by the refusal must always be interpreted restrictively.

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<sup>7</sup> Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents (OJ L 145, 31.5.2001, p. 43).