II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION

of 3 May 2006

concerning draft national provisions notified by the Kingdom of the Netherlands under Article 95(5) of the EC Treaty laying down limits on the emissions of particulate matter by diesel powered vehicles

(notified under document number C(2006) 1791)

(Only the Dutch text is authentic)

(2006/372/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community, and in particular Article 95(5) and (6) thereof,

Whereas:

I. FACTS

1. Relevant Community legislation

(1) Directive 98/69/EC of the European Parliament and of the Council of 13 October 1998 relating to measures to be taken against air pollution by emissions from motor vehicles and amending Council Directive 70/220/EEC of 20 March 1970 on the approximation of the laws of the Member States relating to measures to be taken against air pollution by gases from positive-ignition engines of motor vehicles [1] sets a limit value for particulate emissions at 25 milligrams per kilometre (see Section 5.3.1.4 of Annex I to the Directive) for diesel vehicles in category M as defined in Annex II, Section A, 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 [2] — except vehicles the maximum mass of which exceeds 2 500 kg — and N_1, class I. This limit value applies from 1 January 2005 to new types of vehicles and from 1 January 2006 to new vehicles. The Directive also sets a limit value for particulate emissions of 40 milligrams per kilometre for diesel vehicles in category N_1, Class II and a limit value for particulate emissions of 60 milligrams per kilometre for diesel vehicles in category N_1, Class III and M whose maximum mass exceeds 2 500 kg. These two latter limit values apply from 1 January 2006 to new types of vehicles and from 1 January 2007, to new vehicles.

(2) According to Article 2(1) of Directive 98/69/EC '… no Member State may, on grounds relating to air pollution by emissions from motor vehicles:

— refuse to grant EC type-approval pursuant to Article 4(1) of Directive 70/156/EEC, or

— refuse to grant national type-approval, or

— prohibit the registration, sale or entry into service of vehicles, pursuant to Article 7 of Directive 70/156/EEC,

if the vehicles comply with the requirements of Directive 70/220/EEC, as amended by this Directive'.

(3) On 21.12.2005, the Commission adopted a proposal for a Regulation of the European Parliament and of the Council on type-approval of motor vehicles with respect to emissions and on access to vehicle repair information, amending Directive 72/306/EEC and Directive …/…/EC (Euro 5 proposal) [3]. The proposal reduces the particulate matter emission limit for diesel vehicles to 5 milligrams per kilometre. This new limit value will apply to new types of vehicles of category M and N_1, class I, from 18 months + 1 day after entry into force of the Regulation and to new vehicles of category M and N_1, class I, from 36 months from the date of entry into force of the Regulation.

[1] OJ L 350, 28.12.1998, p. 1.
[2] OJ L 42, 23.2.1970, p. 1.
[3] COM(2005) 683 final.

(4) Directive 99/30/EC of the Council of 22 April 1999 relating to limit values for sulphur dioxide, nitrogen dioxide and oxides of nitrogen, particulate matter and lead in ambient air [4], which should be read in conjunction with Council Directive 96/62/EC of 27 September 1996 on ambient air quality assessment and management [5], lays down limit values for concentrations in ambient air of PM_{10}, defined as 'particulate matter which passes through a size-selective inlet with a 50 % efficiency cut-off at 10 µm aerodynamic diameter'. In accordance with Article 5 of Directive 99/30/EC, such limit values have been legally binding since 1 January 2005. In accordance with Annex III of the same Directive, the annual limit value for the protection of human health is 40 µg/m^3, while the 24 hour limit value for the protection of human health is 50 µg/m^3, not to be exceeded more than 35 times in a calendar year.

(5) Article 7(3) of Directive 96/62/EC stipulates that 'Member States shall draw up action plans indicating the measures to be taken in the short term where there is a risk of the limit values and/or alert thresholds being exceeded, in order to reduce that risk and to limit the duration of such an occurrence. Such plans may, depending on the individual case, provide for measures to control and, where necessary, suspend activities, including motor-vehicle traffic, which contribute to the limit values being exceeded'.

2. **National provision notified**

(6) The Kingdom of the Netherlands has notified the Commission of a draft decree intended to impose a mandatory limit value for the emissions of particulate matter of 5 mg per kilometre on commercial vehicles with a maximum permissible weight of 1 305 kg (N_1 vehicles, class I) and passenger cars (M_1 vehicles) as defined in Article 1.1(h) and 1.1(at) of the Voertuigreglement. The decree would apply to all such vehicles first used after 31 December 2006, which have a diesel engine. This would imply that these vehicles are fitted with particulate filters.

(7) The measure notified by the Dutch authorities constitutes an amendment to the legislation concerning the permanent requirements that must be complied with by vehicles and their component parts throughout their useful life (Voertuigreglement). Checks on compliance with these permanent requirements are performed under the procedure for the regular inspection of vehicles and may be conducted by the police.

(8) According to its explanatory memorandum, the notified measure does not concern the type-approval procedure. It would seem that vehicles EC type-approved in another Member State will not be refused registration by the Dutch authorities and vehicles complying with the requirements of Directive 70/220/EEC, as amended by Directive 98/69/EC, should continue to be granted type-approval by the Dutch authorities. However, the first time these vehicles go through technical inspection or whenever they are checked by the police, they will be found not to be compliant with the notified measure.

(9) In conclusion, the notified measure imposes a ban on the use of new vehicles of category N_1, class I and M_1 emitting more than 5 mg/km of particulate matter, as from 1 January 2007.

II. **PROCEDURE**

(10) By letter of 2 November 2005, the Kingdom of the Netherlands notified the Commission, in accordance with Article 95(5) of the EC Treaty of its intention to adopt a draft decree laying down regulations to limit the emissions of particulate matter by diesel powered vehicles in derogation of the provisions of Directive 98/69/EC.

(11) By letter of 23 November 2005, the Commission informed the Dutch government that it had received the notification under Article 95(5) of the EC Treaty and that the six-month period for its examination under Article 95(6) started on 5 November 2005, the day following the day on which the notification was received.

(12) By letter of 17 January 2006, the Commission informed the other Member States of the notification received from the Kingdom of the Netherlands. The Commission also published a notice regarding the notification in the *Official Journal of the European Union* [6] in order to inform other interested parties of the national provisions that the Kingdom of the Netherlands intended to introduce as well as the grounds invoked to that effect.

(13) By letter of 10 March 2006, the Netherlands authorities informed the Commission of a recent report by the Netherlands Environmental Assessment Agency entitled 'New understanding of the scale of the particulate matter problem' which shows that levels of PM_{10} are 10-15 % lower than previously assumed.

[4] OJ L 163, 29.6.1999, p. 41.
[5] OJ L 296, 21.11.1996, p. 55.
[6] OJ C 12, 18.1.2006, p. 5.

(14) In order to assess the arguments put forward by the Dutch authorities, the Commission asked for the scientific and technical advice of a consortium of consultants coordinated by TNO (Nederlandse Organisatie voor **t**oegepast-**n**atuurwetenschappelijk **o**nderzoek). The consortium submitted its report to the Commission on 27 March 2006 ([7]).

III. LEGAL ASSESSMENT

1. Consideration of admissibility

(15) Article 95(5) of the EC Treaty reads as follows: 'If, after the adoption by the Council or by the Commission of a harmonisation measure, a Member State deems it necessary to introduce national provisions based on new scientific evidence relating to the protection of the environment or the working environment on grounds of a problem specific to that Member State arising after the adoption of the harmonisation measure, it shall notify the Commission of the envisaged provisions as well as the grounds for introducing them.'

(16) The notification submitted by the Dutch authorities is intended to obtain approval for the introduction of new national provisions which are deemed to be incompatible with Directive 70/220/EEC, as amended by Directive 98/69/EC. This Directive constitutes a measure of total harmonisation of the technical requirements for the type approval of motor vehicles with regard to their emissions. It lays down a limit value for particulate emissions from diesel cars and light vans at 25 mg/km.

(17) When comparing the provisions of Directive 70/220/EEC, as amended by Directive 98/69/EC, with the national measures notified by the Dutch authorities it emerges that the Dutch proposal sets more stringent requirements for the technical control of motor vehicles on grounds relating to air pollution by their emissions than those laid down in the Directive. In particular the notified measure imposes a mandatory limit value for the emissions of particulate matter of 5 mg/km on commercial vehicles with a maximum permissible weight of 1 305 kg (N_1 vehicles, class I) and passenger cars (M_1 vehicles), thus preventing the use of vehicles in these categories complying with the requirements of Directive 70/220/EEC, as amended by Directive 98/69/EC. It should be noted that the Directive will be deprived of its effect if Member States could impose different requirements on vehicles on grounds relating to air pollution by their emissions for the purposes of technical controls. Indeed, an EC type-approval should remain valid for a number of years and certainly well beyond the first vehicle inspection. Any other interpretation would enable the Member States to bypass the EC type-approval system.

([7]) TNO report, 06.OR.VM.013.1/IJR 'Evaluation of the Dutch request for derogation to Directive 98/69/EC', March 27, 2006 (hereinafter referred to as the TNO report).

(18) As required by Article 95(5) of the EC Treaty, the Netherlands notified the Commission of the actual wording of the provisions that they intend to introduce going beyond those set out in Directive 70/220/EEC, as amended by Directive 98/69/EC. The request was accompanied by an explanation of the reasons which, in their opinion, justify the introduction of the provisions.

(19) The notification submitted by the Netherlands in order to obtain approval for the introduction of national provisions derogating from the provisions of Directive 70/220/EEC, as amended by Directive 98/69/EC, is therefore to be considered admissible under Article 95(5) of the EC Treaty.

2. Assessment of merits

(20) In accordance with Article 95 of the EC Treaty, the Commission has to ensure that all the conditions are fulfilled enabling a Member State to make use of the possibilities of derogation provided for in this Article.

(21) The Commission must therefore assess whether the conditions provided for by Article 95(5) of the EC Treaty are met. This Article requires that when a Member State deems it necessary to introduce national provisions derogating from a harmonisation measure, the Member State should base it on:

(a) new scientific evidence relating to the protection of the environment or the working environment;

(b) grounds of a problem specific to that Member State arising after the adoption of the harmonisation measure.

(22) In addition, pursuant to Article 95(6) of the EC Treaty, where it considers that the introduction of such national provisions is justified, the Commission must check whether or not those national provisions are a means of arbitrary discrimination or a disguised restriction on trade between Member States and whether or not they constitute an obstacle to the functioning of the internal market.

(23) In accordance with the Court's case law, any exception to the principle of the uniform application of Community law and of the unity of the internal market must be strictly interpreted. Article 95(5) of the EC Treaty provides an exception to the principles of uniform application of Community law and the unity of the market. Therefore, it must be interpreted in such a way that its scope is not extended beyond the cases for which it formally provides.

(24) In the light of the timeframe established by Article 95(6) of the EC Treaty, the Commission, when examining whether the national measures notified under Article 95(5) are justified, has to take as a basis 'the grounds' put forward by the notifying Member State. This means that, according to the provisions of the EC Treaty, the responsibility of proving that the national measures are justified lies with the Member State making the request. Given the procedural framework established by Article 95 of the EC Treaty, including in particular a strict deadline for a decision to be adopted, the Commission normally has to limit itself to examining the relevance of the elements which are submitted by the requesting Member State, without having itself to seek possible reasons or justifications.

1. *Existence of new scientific evidence*

(25) According to the Dutch authorities, their request is justified because new scientific evidence on the environmental and health effects of particulate matter has become available since the adoption of Directive 98/69/EC. This new information shows that excessive particulate matter emissions have harmful effects on human health, such as premature deaths and impaired lung functions.

(26) The documents submitted by the Netherlands in relation to the new scientific evidence on the environmental and health effects of particulate matter include national and international studies, publications and reviews on the subject. The documents provide a comprehensive overview of the existing scientific knowledge concerning the range of health effects linked to exposure to particulate matter that has emerged since the adoption of Directive 98/69/EC.

(27) The Dutch authorities point out that the link between exposure to airborne particles and a range of health effects has been proven and emphasised in many recent scientific publications. The health effects of particulate matter can be divided into those arising from relatively short periods of exposure ('acute') and those from long-term exposure ('chronic'). The studies submitted by the Netherlands show that although the health effects of short-term exposure are not negligible, long-term exposure to airborne particulate matter has more significant impacts. Effects related to short-term exposure include: inflammatory reactions in the lung, respiratory symptoms, adverse effects on the cardiovascular system and increases in medication use, hospital admissions and mortality. The effects related to long-term exposure include: increases in lower respiratory symptoms and chronic obstructive pulmonary disease, reductions in lung function in children and adults, and reduction in life expectancy, due mainly to cardiopulmonary mortality and probably to lung cancer.

(28) The Dutch authorities submitted documents showing that although the health effects of the various sub-fractions and various sources of particulate matter is not entirely clear, recent epidemiological and toxicological studies showed that particles generated by combustion processes, such as soot from diesel engines, are particularly important in terms of health effects. Primary combustion derived particles have especially harmful effects on health because of their composition (presence of transitional metals and reactive organic compounds) and because of their very small size. Due to their small size, combustion derived particles have the potential to sidestep the human body's protective mechanisms and penetrate into the blood stream and various tissues. The Dutch authorities point to the fact that epidemiological studies on large scale populations have been unable to identify a threshold concentration below which ambient particulate matter has no effect on mortality and morbidity.

(29) The Dutch authorities consider that although it is currently not possible to sufficiently quantify the health impacts of particulate matter, on grounds of protection of the health of the Dutch population and on the basis of the precautionary principle, it is essential to act as swiftly as possible to reduce by the greatest possible extent exposure to traffic-generated soot particles.

(30) In the Dutch authorities' view, recent scientific studies show that susceptible population groups are subject to higher health risks associated with particulate matter. These groups comprise those who are innately more susceptible to the effects of exposure to particulate matter (e.g. those with genetic predisposition, very young children, aged people, people with respiratory disorders and lung diseases), those who become more susceptible as a result of environmental or social factors or personal behaviour and those who are exposed to unusually large amounts of air pollutants as a result of living near a main road or spending long hours outdoors. Due to the fact that in the Netherlands a large proportion of the population is living in an urban environment and near busy roads, the Dutch authorities claim that the health risk related to particle matter for the population is considerable.

(31) The Commission notes that the environmental and health effects related to particulate matter concentrations were already known to a certain extent before the adoption of Directive 98/69/EC. There was already an impression that smaller particles had more significant impacts on health than coarse particles. However, few studies on this issue were available. Since then, a large number of new epidemiological studies on many aspects of exposure and health effects of particulate matter have been completed showing in particular evidence to conclude that fine particles are more hazardous than larger ones ([8]). The availability of such new studies led the World Health Organisation to produce updates of its 'Air Quality Guidelines for Europe' for particulate matter in 2000, 2003 and 2004 ([9]).

(32) In the light of the foregoing, it would appear that the Netherlands has provided new scientific evidence relating to the protection of the environment as required by Article 95(5) of the EC Treaty. This scientific evidence was not available at the time of adoption of Directive 98/69/EC.

2. *Problem specific to the Netherlands arising after the adoption of Directive 98/68/EC*

(33) The Dutch authorities take the view that the Netherlands is facing a specific problem that has arisen after the adoption of Directive 98/69/EC. First, they argue that the Netherlands has been experiencing difficulties for around one and a half years in complying with Directive 99/30/EC. Secondly, they note that the number of diesel cars has risen in the Netherlands due to higher petrol prices, the wider availability of diesel car models, and the greatly improved performance and fuel efficiency of diesel engines. Such an increase in the share of diesel cars was not expected when Directive 98/69/EC was adopted. The share of diesel cars has risen from up from below 15 % in 1995 to around 25 % now. All of these factors have meant that the full extent of the air quality problem was not realised until after 1998.

(34) According to the Dutch authorities, particulate matter is a cause of major concern in the Netherlands because of the high population density and a more highly concentrated infrastructure than in other European countries. They take the view that the Netherlands occupies a special position in Europe by virtue of its intensive use of space, with high density of people, cattle, traffic and industry. In their view, this situation leads to high emissions per square kilometre. Furthermore, the Dutch authorities claim that the Netherlands has to cope with a major amount of pollution from abroad. In particular, 45 % of the particulate matter concentration in the Netherlands is caused by human activity, of which two thirds is generated abroad. However, in urban areas, the anthropogenic contribution from sources in the Netherlands is 30-45 %, with traffic being a significant source.

(35) The Dutch authorities claim that air quality in many areas of the Netherlands does not comply with the European limit values for particulate matter as set out in Directive 99/30/EC. Though particulate matter emissions in the Netherlands have declined sharply between 1990 and 2003, according to the Dutch authorities, due to the high volume of traffic and the high concentration of people and buildings in the Netherlands, this decrease is not enough to combat the negative health effects of excessive particulate matter emissions and to implement the European air quality limit values.

(36) According to the Dutch authorities, of the overall domestic particulate matter emissions, around a third comes from traffic, another third from industry and approximately a quarter from agriculture. Particles from exhaust gases are among the most harmful of all particulate matter. Traffic subjects people to major exposure, due to its emissions occurring in close proximity to residential areas and other sensitive land uses.

(37) In the documents titled 'Environmental balance 2005' (Milieubalans 2005) and 'Particulate matter: a closer look' (Fijn stof nader bekeken) annexed to their notification, the Dutch authorities stress that concentrations of particulate matter in the air exceed European air quality standards to a considerable extent across wide areas of the Netherlands. The Dutch authorities note that the daily air quality limits for particulate matter will still be exceeded on a large scale in 2010. On the contrary, breaches of the annually averaged standard for particulate matter occur hardly at all. The Dutch authorities note that violations of the limit values laid down in Directive 99/30/EC have been observed in nearly all European cities. However, the violations in the Netherlands, Belgium, the Ruhr district of Germany and the industrialised area of northern Italy take place over a larger geographical area than in other Member States.

(38) The Dutch authorities note that it is impossible to draw far-reaching conclusions from this information without considering the exact situation and size of the zones in the various countries. The Dutch authorities also note that determination of air quality in the Netherlands takes place with a high level of detail by employing detailed planning modelling alongside the prescribed measurements. However, only a limited number of EU

([8]) 'Health aspects of Air Pollution with Particulate Matter, Ozone and Nitrogen Dioxide', Report on a WHO Working Group, 2003.

([9]) Meta-analysis of time-series studies and panel studies of Particulate matter (PM) and Ozone (O_3), WHO Regional office for Europe, 2004.

countries also use models; most countries on the contrary, only use measurements of air quality. It is also possible that some of the differences can be explained by differences in the correction factors used. The Netherlands, for example, increases the measured result by a factor of 1.33. According to the Dutch authorities, a number of countries follow the indications provided by the European Commission and use a correction factor of 1.3. Most countries use lower correction factors or no correction factor at all. Moreover, not all countries model their air quality down to street levels. According to the Dutch authorities, the number of hotspots in the countries that do not model their air quality at the street level is possibly underestimated.

(39) Finally, the Dutch authorities point to their specific legal situation. The Air Quality Decree, which entered into force in 2001, has put in place a legal regime whereby construction and expansion plans can be blocked or modifications to the plans can be required if these are likely to have detrimental effects on air quality. Following the implementation of this regime, more than 40 objections to spatial developments plans have been lodged with various judicial authorities, including the Council of State, due to possible conflicts with the Air Quality Decree. In one third of these cases, the Council of State nullified the plan.

(40) The Commission notes that the percentage contribution of transboundary transport of particulate matter in the Netherlands is high though not higher than in other Benelux countries ([10]). The Commission also notes that the Netherlands is characterised, in comparison to other Member States, by considerably higher particulate matter emissions derived from inland waterway shipping and maritime transport ([11]). It should also be noted that the large port at Rotterdam is not a predominant source of particulate matter, but has a significant influence on activities and transport in and around the Netherlands ([10]).

(41) The annual reports under Council Directive 96/62/EC indicate that the Netherlands had no especially high exceedance problems in 2003 compared to other Member States (such as Belgium, Austria, Greece, the Czech Republic, Lithuania, Slovenia and Slovakia). Since the Netherlands has not submitted official data yet for 2004, it is not possible to compare the air quality situation in the Netherlands with that in other Member States in 2004. Moreover, the Commission notes that very recently (March 2006) the Netherlands Environmental Assessment Agency NMP has published a re-evaluation of the PM_{10} levels, indicating that the levels of PM_{10} are 10-15 % lower than previously assumed. This decrease depends on the location in the Netherlands, and tends to be larger in rural areas than in cities. According to the NMP report, the number of areas where the air quality limit values will be exceeded will be halved in 2010 in comparison with 2005 and in 2015 in comparison to 2010.

(42) Based on the annual reports for 2003 and taking into account the new information transmitted by the Dutch government and contained in the NMP report, it would seem that there is considerable doubt as to the existence of a specific problem in the Netherlands compared to other Member States in the compliance with the limit values laid down in the Air Quality Directive. In particular, the level of total emissions of particles (PM_{10} and $PM_{2.5}$) per square kilometre in the Netherlands is only half of that in Belgium ([11]).

(43) More specifically, it is doubtful whether there is a specific problem with regard to Directive 98/69/EC. As stated in section 40 above, the Netherlands is characterised by considerably higher than average particulate matter emission derived from inland waterway shipping and maritime transport. Moreover, the share of diesel vehicles in the Netherlands is considerably lower (25 % of new sales) than the EU average (around 50 % of new sales). It is therefore questionable whether there is a specific problem with regard to particulate matter emission derived from motor vehicles covered by Directive 98/69/EC.

(44) The Commission therefore considers that the Netherlands has failed to show the existence of a specific problem with regard to Directive 98/69/EC.

3. *Assessment of the conditions under Article 95(6) of the EC Treaty*

(45) Article 95(6) of the EC Treaty obliges the Commission to verify that the notified national provisions are not a means of arbitrary discrimination or a disguised restriction on trade between Member States and that they do not constitute an obstacle to the functioning of the internal market.

(46) The last condition cannot be interpreted in such a way that it prohibits the approval of any national measure likely to affect the functioning of the internal market. In fact, any national measure derogating from a harmonisation measure aiming at the establishment and operation of the internal market constitutes in substance a measure that is likely to affect the internal market. Consequently, to preserve the usefulness of the procedure for derogation provided for by Article 95 of the EC Treaty, the Commission considers that, in the context of Article 95(6), the concept of obstacle to the functioning of the internal market has to be understood as a disproportionate effect in relation to the pursued objective.

([10]) See TNO report, p. 5.
([11]) See TNO report, p. 31.

(47) The Dutch authorities consider that the measure is necessary to improve the quality of the environment and thus protect human health. They also consider that the draft measure is neither a means of arbitrary discrimination nor a disguised restriction on trade between Member States. Furthermore, they believe that, in view of the risks which the emissions of soot particles entail both for the environment and human health, and considering the specific exposure situation in densely populated regions such as the Netherlands, the measure is proportionate to the aim pursued. Furthermore, according to the Dutch authorities, all models of vehicles with any significant share in diesel car sales are already available with particulate traps or will shortly be available. Thus the notified measure would not force car manufacturers to make (radical) modifications to their production process.

(48) The French and Italian governments have submitted comments on the Dutch notification within the deadline. They have both stressed the negative impacts the notified measure would have on the internal market for vehicles, by distorting the market. They have pointed to the possibility for the Dutch authorities to encourage early uptake of cars meeting the particulate matter emission level of 5 mg/km by fiscal incentives, which would allow for an early implementation of the future European emission standards while, at the same time, not hindering the internal market for vehicles.

(49) As mentioned above (see Section 46), in the context of Article 95(6) the concept of obstacle to the functioning of the internal market has to be understood as a disproportionate effect in relation to the pursued objective. The Commission will therefore focus its assessment of the conditions under Article 95(6) of the EC Treaty on the proportionality of the national provisions which have been notified. Making this assessment will imply a judgement on whether the notified measure exceeds the limits of what is appropriate and necessary to achieve the stated aim of environmental and health protection. The assessment will be made on the understanding that, where there are a number of appropriate measures that could be taken, the choice should fall to the least restricting of them.

(50) As a preliminary remark, the Commission would like to point out that the necessity to further improve the performance of vehicles regarding the emissions of atmospheric pollutants is well recognised by the Commission. This is the reason why, as already mentioned, the Euro 5 proposal has recently been made. According to the proposal the emission limits for particulate matter from new diesel passenger cars and the smallest light-duty vehicles will be reduced by 80 %. In establishing the Euro 5 proposal, the Commission attempted to strike a balance between the need for further improvements in environmental performance and the need to provide car manufacturers with the necessary time to design vehicles and plan production activities. This consideration is reflected in particular in the provisions on the entry into force of the regulation. By bringing forward the application of the particulate matter emission limits set out in the Euro 5 proposal, the measure notified by the Dutch authorities would dramatically reduce the proposed lead time for implementation. This would have a significant impact on vehicle manufacturers, by obliging them to adapt their production to the requirements of the Dutch legislation or requiring them to restrict the models offered in the Dutch market. It should be noted in this regard that, at present, not all types of vehicles in the categories M_1 and N_1, class I, are available with a particulate filter. The Dutch authorities have informed the Commission that several types of diesel passenger cars with diesel particulate filter are already available or will soon be available in the Dutch market. However the Commission notes that, on the basis of the information available to the Commission (as of December 2005), there are at least 240 different types of passenger cars out of ca. 710 that are not available in the Dutch market with a particulate filter and that therefore would be excluded from that market if the notified measure were adopted. As for some models it is the bigger engines that are equipped with particulate filters, the Dutch measure could risk excluding the smaller, more fuel efficient engines of those models from the Dutch market which would run counter to the EU's established policy of limiting CO_2 emissions.

(51) The Dutch authorities have informed the Commission that the envisaged measure is part of a package of measures (Budget Day Set of Measures) aimed at improving air quality in the Netherlands. This package of measures centres on traffic measures since the particles from exhaust gases are among the most harmful of all particulate matter. It includes, among other measures, subsidies for particulate filter on new and older diesel cars, incentives for clean local traffic, freight transport and shipping, incentives for clean fuels. Research has also begun into the cost effectiveness of a subsidy for scrapping older (diesel) cars. In addition, the package of measures includes other generic traffic measures and measures covering industry and agriculture. Local measures affecting the national infrastructure will also be taken, such as reductions in the maximum speed on certain roads. Finally, the package of measures also seeks to take action at local level, such as through the implementation of municipal air quality plans, additional money to encourage less polluting local transport in municipalities and provinces and a measure based on reimbursing a substantial proportion of the additional costs of low-pollution technologies such as particulate traps. Alongside that, there is support for municipalities limiting access to (inner) cities to low-polluting or silent vehicles.

(52) The Dutch authorities have provided an overview of all the measures they intend to put in place with an assessment of the related costs and benefits. It has to be noted that some of the envisaged measures which form part of the Budget Day Set of Measures are qualified as 'hard measures', others as 'soft measures'. The 'hard measures' are concrete actions that have already been specified, their financing has been arranged and they fall under the competence of the Central Government. Soft measures will be decided later or by other institutions (such as the European Union), the instrument and financing is often not defined or the competences do not lie with the Central Government.

(53) In order to assess whether the notified measure is proportionate to the stated objectives, the Commission considers that it should be evaluated whether alternative measures could be taken by the Dutch authorities that would generate the same benefits in terms of particulate matter reduction (in particular ultrafine particles), but at the same time would be less disruptive to the internal market. The first step of this analysis implies an evaluation of the possible benefits that could derive from the implementation of the notified measure.

(54) According to the Dutch authorities, the implementation of an obligation to fit particulate traps as of 1 January 2007 on diesel vehicles in the categories M_1 and N_1, class I, would generate a particulate matter reduction of approximately 0.4 to 0.5 kilotonnes (kt) in 2010 which represents approximately 50 % of the reduction to be achieved by the overall Dutch package of traffic measures. These figures are based on the fact that at the moment of the notification the proportion of diesel vehicles with a particulate trap was 10 % of all cars and on the assumption that the Euro 5 regulation will be mandatory as of 1 July 2008 at the earliest for new types of vehicles and as of 1 January 2010 for new vehicles.

(55) The Commission acknowledges that the Dutch authorities have implemented since 1 June 2005 a fiscal incentive scheme for fitting new diesel cars with particulate filters. The Commission notes that in the document 'Assessment of the Budget Day Set of Measures tackling air quality 2005' (Beoordeling van het prinsjesdagpakket — Aanpak Luchtkwaliteit 2005), the Dutch authorities assess the impact of this incentive scheme. They assume that, as a result of this measure and assuming that the Euro 5 standard will enter into force at the earliest on 1 July 2008 for new types of vehicles and on 1 January 2010 for new vehicles, in 2008 70-90 % of the new diesel cars sold in the Netherlands will have a particulate filter. The corresponding figures for the previous years are 40-60 % for 2006 and 60-80 % for 2007. The Commission therefore concludes that the additional benefits of the introduction of the notified provisions, in comparison with a baseline scenario where the incentive scheme for new diesel cars is in force, and taking into account the autonomous trend in Europe of equipping diesel vehicles with particulate filters, would be considerably lower than the estimated benefits of 0,4 to 0,5 kt reduction in particulate matter in 2010. The Commission estimates that the impact would possibly be in the range of 0,05 kt ([12]). It should also be noted that the impact of the existing fiscal incentives scheme could be further enhanced by combining this measure with other complementary measures, such as selective circulation bans in accordance with Community law in defined areas for diesel vehicles not complying with a certain particulate matter emission level. The experience of other Member States shows that often the announcement of such selective bans is sufficient to influence purchase decisions in favour of a diesel vehicle with a particulate filter or a non-diesel vehicle.

(56) The Dutch authorities consider that no other national measure with a lower impact on trade would have the same result as the notified measure. However, the Commission notes that in the document 'Assessment of the Budget Day Set of Measures tackling air quality 2005' (Beoordeling van het prinsjesdagpakket — Aanpak Luchtkwaliteit 2005), the Dutch authorities clearly state that there would be alternative more cost-effective options to the measures considered under the Budget Day Set of Measures. In particular, they consider that the most cost-effective way to lower the concentrations on a Dutch scale, both regional and local, would be an additional pricing policy for the transport sector. The total benefits to society associated with this option would outweigh the costs. According to the estimations made by the Dutch authorities, varying the car taxes and the introduction of road pricing would reduce the emissions in 2010 by approximately as much as the measures proposed under the Budget Day Set of Measures. This means that such a policy could deliver reductions in particulate matter emissions 4 to 10 times higher than the notified measure ([12]).

(57) The Dutch authorities note that short term benefits associated to road pricing varying according to time and place do not differ significantly from the benefits associated to the Budget Day measures. However, the Budget Day measures score less well as regards the effects on air quality in 2020. They conclude that while road pricing varying according to time and place costs the government more than the Budget Day measures, it would generate substantial welfare benefits (EUR 1-1.5 billion per year). Moreover, other social problems such as noise nuisance, poor traffic safety and congestion would also be reduced with the implementation of road pricing. Finally, they acknowledge that the measures proposed under the Budget Day measures constitute a 'second best' solution compared to the implementation of an additional pricing policy for the transport sector.

([12]) See TNO report, p. 38.

(58) Based on the information provided by the Dutch authorities, the Commission notes that a road pricing policy for the transport sector appears to be more cost-effective than the notified measure and would deliver higher benefits in terms of reduction of ultrafine particulate matter emissions while, in principle, not creating obstacles to the functioning of the internal market. The effectiveness of this measure would be enhanced by its combination with the existing fiscal incentives scheme and could be further enhanced, as mentioned above, if other complementary measures, such as circulation bans for older more polluting vehicles, were implemented by local authorities. The Commission notes that this latter kind of measures has been effectively and extensively adopted by local authorities in other Member States facing air quality problems similar to those experienced by the Netherlands.

(59) Moreover, in the Commission's view, the Dutch authorities could also consider strengthening some of the 'hard measures' included in the Budget Day measures. For example, retrofitting of diesel vehicles with particulate filter could lead to higher emission reductions than those estimated by the Dutch authorities, if the budget allocated to this measure was increased and if particulate filters were installed in particular in vehicles with a high urban mileage (e.g. taxis). The costs of retrofitting ships with diesel particulate filters are estimated by the Dutch authorities to be lower than other retrofitting measures (in a range of EUR 10 to EUR 60 per kg of particulate matter reduction ([13])) and would be lower than the health costs associated with particulate matter concentrations, as calculated by the Dutch authorities (i.e. EUR 340 per kg in urban environment and EUR 80 per kg in rural environment). It should be noted in this regard that, according to the projections from the RAINS models, while the relative importance of particulate emissions from light-duty vehicles will decrease in the next years, the importance of the emissions from inland shipping and maritime transport is going to increase.

(60) The Dutch authorities could also consider an earlier implementation of some of the 'soft measures' included in the Budget Day measures falling under the competence of the Dutch government. In this context, it is noted that the estimated particulate matter reduction potential of the total package of 'soft measures' of the Budget day proposal is higher than that of the 'hard measures'. In particular, according to the estimation from the Dutch authorities, the introduction of combined 'air washing systems' in intensive stock farming would yield a particulate matter reduction in 2010 of 4.4 kt. This reduction is considerably higher than the expected particulate matter reduction which would be generated by the implementation of the notified measure (0,05 kt, see section 55 above). This measure would probably have a bigger effect on less populated areas than in the cities. However, given the expected order of magnitude of reduction of the background concentration of particulate matter, and its favourable effect in terms of the protection of public health, it would probably be worth considering earlier implementation.

(61) The Commission considers that the information provided by the Dutch authorities clearly indicate that less restrictive measures than the notified measure could be taken by the Dutch authorities to reach the stated objectives of environment and health protection. While the notified measure would constitute a breach of the EC type-approval system for vehicles, the alternative measures would not, in principle, imply a derogation to existing EC harmonisation measures. The reasons why such measures have not been finally proposed, even though contemplated by the Dutch authorities and despite the fact that they could yield at least the same amount of particulate matter reduction than the notified measure, do not clearly emerge from the documents submitted by the Netherlands. The Commission would like to stress in this respect that among the different options capable of reaching the pursued objective of health and environmental protection, Member States are obliged to choose those which are less disruptive to the internal market.

(62) In conclusion, the Commission believes that there is evidence indicating that the envisaged national measure is not the least restrictive measure to achieve the stated aim of environmental and health protection and that, once adopted, it will constitute a disproportionate obstacle to the functioning of the internal market.

4. *International context*

(63) The Commission would like to set out some considerations about the international context of the envisaged measure. By Council 97/836/EC Decision of 27 November 1997 with a view to accession by the European Community to the Agreement of the United Nations Economic Commission for Europe concerning the adoption of uniform technical prescriptions for wheeled vehicles, equipment and parts which can be fitted to and/or be used on wheeled vehicles and the conditions for reciprocal recognition of approvals

([13]) See TNO report, p. 41.

granted on the basis of these prescriptions ('Revised 1958 Agreement') ([14]), the European Community acceded to UN/ECE Regulation 83 ([15]) adopted under the Agreement of the United Nations Economic Commission for Europe concerning the adoption of uniform technical prescriptions for wheeled vehicles, equipment and parts which can be fitted to and/or be used on wheeled vehicles and the conditions for reciprocal recognition of approvals granted on the basis of these prescriptions ('Revised 1958 Agreement'). This Regulation sets the same emission limit values and has the same scope of application as Directive 70/220/EC, as lastly amended by Directive 98/69/EC. According to Article 3 of the 1958 Agreement, 'Wheeled vehicles, equipment or parts for which type approvals have been issued by a Contracting Party in accordance with Article 2 of this Agreement and manufactured either in the territory of a Contracting Party applying the Regulation concerned, or in such other country as is designated by the Contracting Party which has duly approved the types of wheeled vehicles, equipment or parts concerned shall be held to be in conformity with the legislation of all the Contracting Parties applying the said Regulation through type-approval'.

(64) The measure notified by the Dutch authorities does not contain any provision allowing the use of vehicles for which type-approvals have been issued in accordance with UN/ECE Regulation 83. Thus, the measure would prevent vehicles from other Contracting Parties that fulfil the requirements of Regulation 83 from entering the Dutch market. If adopted, the measure would therefore constitute an infringement of the 1958 Agreement. Following the case-law of the Court of Justice, Community law has to be interpreted, as far as possible, in conformity with the Community's international obligations. Thus, the Commission needs to ensure that the Community fulfils its obligations under the 1958 Agreement. This implies that the Netherlands has to comply with UN/ECE Regulation 83. Failure to do so could undermine the recognition of EU type-approvals by the other Contracting Parties and would thus have clearly disproportionate repercussions on the EC's vehicle exports to those countries.

IV. **CONCLUSION**

(65) In light of the elements which it had available to assess the merits of the justifications put forward for the national measures notified, and in light of the considerations set out above, the Commission considers that the request of the Kingdom of the Netherlands for introducing national provisions derogating from Directive 98/69/EC, submitted on 2 November 2005:

— is admissible,

— does not fulfil all the conditions set out in Article 95 of the EC Treaty. The Netherlands has failed to prove the existence of a specific problem with regard to Directive 98/69/EC. Even if it was admitted that the Netherlands has proved the existence of a specific problem with regard to Directive 98/69/EC the Commission considers that the notified measure is not proportionate to the objectives pursued.

(66) The Commission therefore has grounds to consider that the national provisions notified cannot be approved in accordance with Article 95 (6) of the EC Treaty,

HAS ADOPTED THIS DECISION:

Article 1

The national provisions imposing a mandatory limit value for the emissions of particulate matter of 5 mg per kilometre on commercial vehicles with a maximum permissible weight of 1 305 kg (N_1 vehicles, class I) and passenger cars (M_1 vehicles) notified by the Kingdom of the Netherlands pursuant to Article 95(5) of the EC Treaty are rejected.

Article 2

This Decision is addressed to the Kingdom of the Netherlands.

Done at Brussels, 3 May 2006.

For the Commission
Günter VERHEUGEN
Vice-President

([14]) OJ L 346, 17.12.1997, p. 78.
([15]) UN/ECE Regulation 83 on 'Uniform provisions concerning the approval of vehicles with regard to the emission of pollutants according to engine fuel requirements'.