

# COMMISSION

## COMMISSION DECISION

of 21 December 2007

### concerning national provisions notified by the Republic of Austria on certain fluorinated greenhouse gases

(notified under document number C(2007) 6646)

(Only the German text is authentic)

(Text with EEA relevance)

(2008/80/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

1. COMMUNITY LEGISLATION

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

(3) Article 95(4) of the EC Treaty provides that 'If, after the adoption by the Council or by the Commission of a harmonisation measure, a Member State deems it necessary to maintain national provisions on grounds of major needs referred to in Article 30, or relating to the protection of the environment or the working environment, it shall notify the Commission of these provisions as well as the grounds for maintaining them.'

Having regard to Regulation (EC) No 842/2006 of the European Parliament and of the Council of 17 May 2006 on certain fluorinated greenhouse gases <sup>(1)</sup>, and in particular Article 9(3) thereof,

(4) Article 95(5) of the EC Treaty provides that '[...], without prejudice to paragraph 4, 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'.

Whereas:

(5) According to Article 95(6), the Commission shall, within six months of the notification, approve or reject the national provisions involved after having verified whether or not they are a means of arbitrary discrimination or a disguised restriction on trade between Member States and whether or not they shall constitute an obstacle to the functioning of the internal market.

#### I. FACTS AND PROCEDURE

(1) On 29 June 2007, the Republic of Austria informed the Commission, pursuant to Article 9(3)(b) of Regulation (EC) No 842/2006 on certain fluorinated greenhouse gases, about national measures adopted in 2002 (BGBl. II No 447/2002 — Ordinance of the Federal Minister for Agriculture, Forestry, Environment and Water Management on bans and restrictions for partly fluorinated and fully fluorinated hydrocarbons and sulphur hexafluoride (HFC-PFC-SF<sub>6</sub> Ordinance), published in the Federal Law Gazette on 10 December 2002) as subsequently amended by Ordinance BGBl. II No 139/2007, 21.6.2007.

(2) In this letter the Austrian Government points out that the Republic of Austria intends to maintain its national provisions which are more stringent than the Regulation, in accordance with Article 9(3)(a) of Regulation (EC) No 842/2006 until 31 December 2012.

1.2. REGULATION (EC) No 842/2006

(6) Regulation (EC) No 842/2006 on certain fluorinated greenhouse gases (F-gases) aims at preventing and containing the emissions of certain F-gases (HFCs, PFCs and SF<sub>6</sub>) covered by the Kyoto Protocol.

<sup>(1)</sup> OJ L 161, 14.6.2006, p. 1.

- (7) It also contains a limited number of use bans and placing on the market prohibitions when alternatives were considered available and cost effective at Community level and where improvement of containment and recovery were regarded as not feasible.
- (8) The Regulation has a double legal basis, Article 175(1) of the EC Treaty with respect to all provisions and Article 95 of the EC Treaty for Articles 7, 8 and 9, due to their implications in terms of free circulation of goods within the EC single market.
- (9) Article 9 of the Regulation governs the placing on the market and, more precisely, prohibits the marketing of a number of products and equipment containing, or whose functioning relies upon, F-gases covered by the Regulation. In its paragraph 3(a) it stipulates that Member States that have, by 31 December 2005, adopted national measures which are stricter than those laid down in the Article and which fall under the scope of the Regulation may maintain those national measures until 31 December 2012. In accordance with its paragraph 3(b), these measures and their justification shall be notified to the Commission and they shall be compatible with the Treaty.
- (10) The Regulation shall apply with effect from 4 July 2007, with the exception of Article 9 and Annex II, which shall apply from 4 July 2006.
- permissibility are laid down in Articles 4 to 17 of the Ordinance.
- (14) The amendment in 2007 takes into account the decision of the Austrian Constitutional Court to annul (in decisions of 9 June 2005 and 1 December 2005, published in the Federal Law Gazette on 9 August 2005 and 24 February 2006 respectively) the limit value of Global Warming Potential 3 000 for HFC laid down in Article 12(2) line 3 of Ordinance No 447/2002, as well as the exception clause laid down in Article 12(2) line 3(a) thereof, with the reason of their being unlawful.
- (15) Furthermore, the amendment in 2007 introduced relaxations of the restrictions relating to the refrigeration and air-conditioning sector bringing them into line with provisions under Regulation (EC) No 842/2006. Mobile refrigeration and air-conditioning are no longer covered by the amended Ordinance. As regards stationary applications, the bans only apply to small plug in units with a refrigerant charge of 150 g or less and to stand alone equipment with a refrigerant charge of 20 kg or over. For other applications technical parameters are defined ensuring that no more refrigerants are used than necessary in accordance with the state of art. Changes have also been made with respect to the treatment of aerosols containing HFCs and the use of SF<sub>6</sub> to bring them in line with EU legislation.
- (16) By letter of 1 August 2007 the Commission informed the Austrian Government that it had received the notification and that the six-month period for its examination under Article 95(6) started on 30 June 2007, the day following the day on which the notification was received.

## 2. NATIONAL PROVISIONS NOTIFIED

- (11) The national provisions notified by the Republic of Austria were introduced by Ordinance No 447/2002 of 10 December 2002 and amended by Ordinance No 139/2007 of 21 June 2007.
- (12) Ordinance No 447/2002 as amended by Ordinance No 139/2007 (hereafter the Ordinance) concerns greenhouse gases classified under the Kyoto Protocol, most of which have high global warming potentials: hydrofluorocarbons (HFCs), perfluorocarbons (PFCs) and sulphur hexafluoride (SF<sub>6</sub>), with a view of meeting Austria's emission reduction targets.
- (13) The Ordinance bans the placing on the market and use of the abovementioned greenhouse gases and their use in certain equipment, units and products, unless they are used for research, development and analytical purposes. The detailed provisions on bans and the conditions of
- (17) By letter of 12 October 2007, the Commission informed the other Member States of the notification providing them a period of 30 days to submit any comments. The Commission also published a notice regarding the notification in the *Official Journal of the European Union* <sup>(1)</sup> in order to inform other interested parties of Austria's national provisions, as well as the grounds invoked to that effect.

## II. ASSESSMENT

### 1. CONSIDERATION OF ADMISSIBILITY

- (18) The present notification has been examined in the light of Article 95(4) and (5) of the EC Treaty and in accordance with Regulation (EC) No 842/2006.

<sup>(1)</sup> OJ C 245, 19.10.2007, p. 4.

- (19) Article 95(4) concerns cases where, after the adoption of a harmonisation measure, a Member State deems it necessary to maintain national provisions on grounds of major needs referred to in Article 30, or relating to the protection of the environment or the working environment.
- (20) However, since the measures adopted in 2002 have been amended in 2007 it is appropriate to examine if Article 95(5) applies with regard to such provisions of the Ordinance which were modified after adoption of Regulation (EC) No 842/2006. If such provisions had changed the substance of those already enacted before the harmonisation act, they should have been notified to the Commission before adoption and justified on the basis of on new scientific evidence on grounds of a problem specific to that Member State arising after the adoption of the harmonisation measure.
- (21) The analysis of the amending act concluded that the amendments introduced in 2007 aimed either at deleting provisions (points 10, 12 of the amending Ordinance), reducing their scope to more specific products or applications without adding new requirements (points 1, 3 and 10 of the amending Ordinance), or at introducing additional possibilities to derogate from restriction imposed by the 2002 Ordinance (points 6, 7 of the amending Ordinance). Furthermore, references to Regulation (EC) No 842/2006 and explicit requirements taking account of the harmonisation measures were introduced (points 1, 8, 9 of the amending Ordinance).
- (22) No measures were identified which changed the substance of the measures enacted before the adoption of the harmonisation measure in a way that additional restrictions were introduced. Thus this amendment did not contain new measures which have to be considered as more stringent than Regulation (EC) No 842/2006, but reduced their impact on the internal market. Therefore, it is appropriate to apply Article 95(4) for the evaluation of all provisions of the Ordinance, also to those amended in 2007.
- (23) The Ordinance continues to consist, however, of more stringent provisions than Regulation (EC) No 842/2006 since it contains bans on the import, sale and use of new products containing F-gases after 1 January 2006 as well as a ban on the import, sale and use of F-gases, new and recovered, after 1 January 2006, while the Regulation contains a less restrictive ban on the placing on the market since it only applies to products as listed in its Annex II. Furthermore, the Regulation imposes restrictions on the use only on SF<sub>6</sub>, while the Austrian measure controls also the use of HFCs and PFCs. By going further in terms of placing on the market and control of use, the Ordinance is more stringent than the legislation now in force at Community level.
- (24) The Republic of Austria argues that such legislation is necessary in order for it to meet its obligations under the Kyoto Protocol, namely the reduction of 13 % of its total level of greenhouse gas emissions compared to the 1990 level by 2012, which arguably requires a concerted effort in tackling every source of greenhouse gas emissions.
- (25) The compatibility is examined on the basis of Article 95(4) and 95(6) of the Treaty, taking Regulation 842/2006 into account. Article 95(4) requires that the notification be accompanied by a description of the grounds relating to one or more of the major needs referred to in Article 30 or to the protection of the environment or the working environment.
- (26) In the light of the foregoing, the Commission considers that the application submitted by the Republic of Austria with a view to obtaining authorisation to maintain its national provisions on certain industrial greenhouse gases is admissible under Article 95(4) of the EC Treaty.

## 2. ASSESSMENT OF MERITS

- (27) In accordance with Article 95(4) and (6), first subparagraph, of the EC Treaty, the Commission must ascertain that all the conditions enabling a Member State to maintain its national provisions derogating from a Community harmonisation measure provided for in that Article are fulfilled. In particular, the national provisions have to be justified by the major needs referred to in Article 30 of the Treaty, or relating to the protection of the environment or the working environment, must not be a means of arbitrary discrimination or a disguised restriction on trade between Member States and must not constitute an obstacle to the functioning of the internal market which would not be proportionate or necessary.

### 2.1. THE BURDEN OF PROOF

- (28) The Commission, when examining whether the national measures notified under Article 95(4) 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 requesting Member State which seeks to maintain them.

2.2. JUSTIFICATION ON GROUNDS OF MAJOR NEEDS REFERRED TO IN ARTICLE 30 OR RELATING TO THE PROTECTION OF THE ENVIRONMENT OR THE WORKING ENVIRONMENT

2.2.1. Austrian position

- (29) To justify the maintenance of their national provisions, the Austrian authorities refer to the commitment of the Republic of Austria under the Kyoto protocol. The adoption of the Ordinance was a contribution to fulfilling the commitment to reduce its emissions by 13 % below its 1990 level by 2012, which corresponds to a maximum emission of 67 million tonnes of CO<sub>2</sub> equivalents.
- (30) Austria submitted a review study 'Examination of the state-of-art in selected areas of application of fluorinated gases with global-warming potential' of May 2006. The study states that F-gases covered by the Ordinance made up for over 2 % of Austria's greenhouse gas emission as of 2003, and that a doubling was expected by around 2010. Therefore the Ordinance was an integral part of the national climate strategy.
- (31) The Austrian Government takes the view that the purpose of the Ordinance is to protect the environment and that it is necessary and proportionate in terms of preventing and reducing emissions of fluorinated gases. Therefore, in its view, it is compatible with the Treaty.

2.2.2. Evaluation of the position of Austria

- (32) After having examined the information submitted by Austria, the Commission considers that the request to maintain more stringent measures than those contained in Regulation (EC) 842/2006, notably after those measures have been brought closer in line with the said Regulation, can be considered compatible with the Treaty for the following reasons.
- (33) Ordinance No 447/2002 was object of an infringement procedure launched by the Commission in 2004, i.e. before Regulation (EC) No 842/2006 came into force. In the letter of formal notice to Austria the Commission pointed out that the ban of HFCs in refrigerating and air-conditioning systems could be considered disproportionate, because these systems are closed systems and as long as proper functioning, maintenance and recycling can be guaranteed, the release of HFCs can be kept to a minimum.

(34) This procedure was based on Articles 28 to 30 of the EC-Treaty. Following the adoption of Regulation (EC) No 842/2006 and the notification of stricter national measures under its Article 9(3) by Austria, the infringement procedure was closed.

(35) In the letter of formal notice the Commission took the view that the Austrian measures could be contrary to Article 28 of the EC Treaty for the following reasons: firstly, the ban on using HFCs as cooling and refrigerating agents did not seem to be necessary and proportionate with a view to guaranteeing the adequate reduction, by reasonable and effective means, of the releases of greenhouse gases in the interests of environmental protection. Secondly, as far as using HFCs as fire extinguishing agents were concerned, the Commission considered that the GWP threshold as foreseen in the Ordinance might have constituted an arbitrary discrimination against products from other Member States.

(36) These concerns have been addressed by the amending Ordinance No 139/2007. The modification of the Ordinance in 2007 resulted in the lifting and relaxation of some of the bans and thus the notified measures shall not constitute an obstacle to the functioning of the internal market as required by Article 95(6) of the EC Treaty.

(37) As regards the use of HFCs in refrigeration and air-conditioning equipment and uses, the revised prohibition does no longer apply to equipment used for cooling computers, irrespective of charge size, to equipment containing between 150 g and not more than 20 kg, to stand alone units with refrigerant charges up to 20 kg, for compact units with charges of 0,5 kg per kw and for large interconnected stationary units with charges up to 100 kg. Thus the ban does not apply to most refrigeration and air-conditioning systems. These amendments take account of the review study of May 2006, which was submitted to the Commission. The ban on the use of HFCs as fire extinguishing agents was lifted by the revision.

2.2.2.1. The environmental justification

(38) Under the Kyoto Protocol, the EC committed to reducing its collective emissions of greenhouse gases from Member States by at least 8 % below the level in 1990 in the 2008-2012 period. During the subsequent discussions within the EC, the Republic of Austria committed to reduce its overall level of greenhouse gases emissions by 13 % during this period <sup>(1)</sup>.

<sup>(1)</sup> Council Decision 2002/358/EC of 25 April 2002 concerning the approval, on behalf of the European Community, of the Kyoto Protocol to the United Nations Framework Convention on Climate change and the joint fulfilment of commitments thereunder, OJ L 130, 15.5.2002, p. 1.

(39) The Ordinance forms part of a broader strategy put in place by Austria in order to meet its emission reduction target under the Kyoto Protocol and the subsequent burden sharing agreement adopted at Community level.

(40) This strategy covers every source of greenhouse gas emissions covered by the Kyoto Protocol. Measures on F-gases are therefore part of its overall effort to fulfil its obligations. Emissions of these F-gases are estimated to double by 2010 in the absence of further regulation with increasing use of refrigeration and also as a result of the ongoing phase out of HCFCs from refrigeration under Regulation (EC) No 2037/2000 of the European Parliament and of the Council of 29 June 2000 on substances that deplete the ozone layer <sup>(1)</sup>.

(41) Considering the above, the Commission considers that the environmental justification given by the Republic of Austria, namely the reduction and prevention of fluorinated gases emissions, is reasonable and valid.

*2.2.2.2. Relevance and proportionality of the Austrian Ordinance in relation to the objective of achieving further reduction of fluorinated greenhouse gases*

(42) In order to further reduce and prevent F-gases emissions, Austria has decided already in 2002 to opt for selective placing on the market bans of new equipment. This decision was based on investigations into the existence and availability of F-gas-free alternatives. The measures have been subsequently reviewed in 2006 to take account of new scientific and technological evidence and developments, and to address Commission's concerns with regard to their proportionality.

(43) It is also recalled that Article 9.3(a) of Regulation (EC) No 842/2006 allows national measures to be maintained only until 31 December 2012, therefore, and considering that the notification made by the Republic of Austria referred to this Article of the Regulation, it follows that the Ordinance would apply for a limited period.

(44) The Ordinance allows for exemptions to be possibly granted where it turns out that alternatives for the use of HFCs in foams and foam containing products are not available. Furthermore, exemptions for the use of HFCs for novelty aerosols intended for export have been extended.

(45) While noting that the Ordinance has certain implications on the free circulation of goods within the EC, the Commission nevertheless draws the conclusion from the above analysis that the Ordinance is justified from an environmental point of view and takes into consideration the implications of the envisaged bans on the internal market, in particular since it is based on an analysis of the existence and availability of alternatives in the specific circumstances in Austria, reinforced by the possibility to grant individual exemptions.

**2.3. ABSENCE OF ANY ARBITRARY DISCRIMINATION OR ANY DISGUISED RESTRICTION OF TRADE BETWEEN MEMBER STATES**

(46) Pursuant to Article 95(6) of the EC Treaty, the Commission shall approve or reject the national provisions involved after having verified whether or not they are a means of arbitrary discrimination or a disguised restriction on trade between Member States.

(47) It should be recalled that an application under Article 95(4) of the EC Treaty must be assessed in the light of the conditions laid down in both that paragraph and paragraph 6 of that Article. If any one of those conditions is not met, the application must be rejected without there being a need to examine the others.

(48) The notified national provisions are general and apply to national and imported products alike. After bringing the rules concerning the use of HFCs in line with Regulation (EC) No 842/2006, there is no evidence that the notified national provisions can be used as a means of arbitrary discrimination between economic operators in the Community.

(49) With regard to the limitations of purchases from other EEA States, including the Member States of the European Union, it is understood that these provisions are intended to ensure, within the scope of the measures, equal treatment of all substances or products, irrespective of their origin, that means domestically manufactured, imported or purchased on the internal market. Goods imported from outside the EEA are covered by the provisions on the placing on the market. This is also the case for goods purchased from an EEA State which is not Member State of the EU, whereby for these goods the measures are based on two different elements of the provision, as the transaction represents in the same time placing on the market and purchase from an EEA state. However, this should not lead to a discriminatory treatment of those goods.

<sup>(1)</sup> OJ L 244, 29.9.2000, p. 1. Regulation as last amended by Commission Regulation (EC) No 899/2007 (OJ L 196, 28.7.2007, p. 24).

- (50) The objective behind the Ordinance is the protection of the environment; there is no indication that the Ordinance, in its intention or implementation, would result in any arbitrary discrimination or disguised barriers to trade.
- (51) The Commission considers that there is no evidence indicating that the national provisions notified by the Austrian authorities do constitute a disproportionate obstacle to the functioning of the internal market in relation to the pursued objectives.

### III. CONCLUSION

- (52) In the light of the above considerations, the Commission is of the opinion that the request by the Republic of Austria, submitted on 29 June 2007, for maintaining until 31 December 2012 its national legislation more stringent than Regulation (EC) No 842/2006 with respect to the placing on the market of products and equipment containing, or whose functioning relies upon, F-gases, is admissible.
- (53) Moreover, the Commission finds that the national provisions adopted in 2002, as amended in 2007:
- meet needs on grounds of the protection of the environment,
  - take into account the existence and technical and economic availability of alternatives to the banned applications in Austria, and are likely to result in limited economic impact,
  - are not a means of arbitrary discrimination,
  - do not constitute a disguised restriction on trade between Member States, and

— are thus compatible with the Treaty.

The Commission therefore considers that they can be maintained.

However, it should be noted that the exemptions provided for in paragraph 8(2) of the Ordinance cannot be granted after the 4 July 2008 in relation to one component foams as referred to in Article 9(1) and Annex II of Regulation (EC) No 842/2006 unless required to meet national safety standards,

HAS ADOPTED THIS DECISION:

#### *Article 1*

The national provisions on certain fluorinated greenhouse gases, which the Republic of Austria notified to the Commission by letter, dated 29 June 2007, and which are more stringent than Regulation (EC) No 842/2006 with respect to the placing on the market of products and equipment containing, or whose functioning relies upon, F-gases, are hereby approved. The Republic of Austria is authorised to maintain them until 31 December 2012.

#### *Article 2*

This Decision is addressed to the Republic of Austria.

Done at Brussels, 21 December 2007.

*For the Commission*  
Stavros DIMAS  
*Member of the Commission*