

COMMISSION DECISION

of 8 December 2006

concerning national provisions notified by Denmark on certain industrial greenhouse gases

(notified under document number C(2006) 5934)

(Only the Danish text is authentic)

(2007/62/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

1.2. Regulation (EC) No 842/2006

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

(5) 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 SF6) covered by the Kyoto Protocol.

Whereas:

I. FACTS AND PROCEDURE

(1) By letter of 2 June 2006 the Permanent Representation of the Kingdom of Denmark to the European Union, the Danish Government, referring to Article 9(3)(b) of Regulation (EC) No 842/2006 of the European Parliament and of the Council⁽¹⁾, notified to the Commission its national provisions concerning the regulation of certain industrial greenhouse gases that it deems necessary to maintain after the adoption of that Regulation, together with the justification for maintenance.

(6) 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.

(2) In this letter the Danish Government points out that the Kingdom of Denmark 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.

(7) The Regulation has a double legal base, Article 175(1) of the EC Treaty with respect to all provisions but Articles 7, 8 and 9, which are based on Article 95 of the EC Treaty due to their implications in terms of free circulation of goods within the EC single market.

1. Community legislation

(8) 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.

1.1. Article 95(4) and (6) of the EC Treaty

(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.'

(9) 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.

2. National provisions notified

(4) 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.

(10) The national provisions notified by Denmark were introduced by Order No 552 of 2 July 2002.

(11) The Order concerns three greenhouse gases classified under the Kyoto Protocol, most of which have high global warming potentials: hydrofluorocarbons (HFCs), perfluorocarbons (PFCs) and sulphur hexafluoride (SF6).

⁽¹⁾ OJ L 161, 16.4.2006, p. 1.

- (12) The Order consists of a general ban on the import, sale and use of new products containing the above mentioned greenhouse gases after 1 January 2006 as well as a ban on the import, sale and use of these greenhouse gases, new and recovered, after 1 January 2006.
- (13) The general ban on new products containing the covered F-gases is accompanied by derogations specified in Annex I of the Order.
- (14) The Order allows for exemptions to be possibly granted by the Danish Environmental Protection Agency in 'very special cases'. The notification contains a description of when such an exemption process can be contemplated in practice, pointing for instance at the unforeseen disproportionate effects of a ban, at situations where it turns out that alternatives are not available or not suitable, or at situations where the overall level of greenhouse gas emissions converted to carbon dioxide equivalent are demonstrated to be lower for a system containing F-gases. The notification also contains a guidance document issued by the Danish Environmental Protection Agency for operators willing to apply for an exemption. This document lists the criteria used by the Danish Environmental Protection Agency to grant or refuse the exemption, and a brief overview of all applications submitted so far, as well as the corresponding decisions taken by the Danish Environmental Protection Agency.
- (15) By letter of 26 October 2006 the Commission informed the Danish Government that it had received the notification and that the six-month period for its examination pursuant to Article 95(6) started on 9 June 2006, the day following the day on which the notification was received.
- (16) By letter of 19 September 2006, 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* ⁽²⁾ in order to inform other interested parties of Denmark's national provisions, as well as the grounds invoked to that effect.
- (19) Placing on the market of products and equipments containing certain F-gases is harmonised at the EC level by Regulation (EC) No 842/2006, and in particular by Article 9 and Annex II thereof.
- (20) The Danish Order consists of more stringent provisions than Regulation (EC) No 842/2006 since it contains a general ban 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 limited ban on the placing on the market since it only applies to products as listed in its Annex II
- (21) As a result of the above, including Article 9(3)(b) of Regulation (EC) No 842/2006, Member States shall notify their measures to the Commission, together with their underlying justification. Such measures shall be compatible with the Treaty.
- (22) The compatibility is examined through the procedure of Article 95(4) and 95(6), 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.
- (23) In the light of the foregoing, the Commission considers that the application submitted by Denmark 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

II. ASSESSMENT

1. Consideration of admissibility

- (17) 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.
- (18) The Danish notification relates to national provisions derogating from those of Article 9(1) of Regulation (EC) No 842/2006. These national provisions were adopted and entered into force in 2002, therefore before the adoption of that Regulation.

- (24) 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

- (25) 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⁾ OJ C 228, 22.9.2006, p. 4.

- (26) It is up to the notifying Member State to provide sufficient grounds, facts and scientific evidence so that it can be given authorisation to maintain more stringent national legislation. It is thus in the Member State's interest to attach to the notification any substantive or legal elements which could support the application⁽³⁾. Failure to include in the notification such elements shall lead the Commission to consider the notification not founded.
- 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. *Danish position*
- (27) To justify the maintenance of their national provisions, the Danish authorities have submitted an explanatory statement which provides the following justifications.
- (28) The Order no 552 of 2 July 2002 concerns the regulation of certain industrial greenhouse gases (HFCs, PFCs and SF₆), which are all powerful greenhouse gases. For example, 1 kg of the two most widely used HFC gases in Denmark (HFC-134a and HFC-404A) are equivalent to 1 300 and 3 780 kg CO₂ respectively, while 1 kg SF₆ is equivalent to over 22 000 kg CO₂.
- (29) 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 to 2012 period. During the subsequent discussions within the EC (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, Burden Sharing Agreement⁽⁴⁾), Denmark committed to reduce its overall level of greenhouse gases emissions by 21 % during this period.
- (30) In their notification, the Danish authorities invoke the objective of protecting the environment and, in particular, the need to achieve by all possible means the target of greenhouse gas emissions reduction, as laid down in Decision 2002/358/EC.
- (31) In the case of this Order, the objective is to contribute to the reduction of greenhouse gases emission through the prevention of fluorinated greenhouse gases emissions.
- (32) The Danish authorities point out that the purpose of the Danish Order on industrial greenhouse gases is to restrict
- the use and therefore, the emission of industrial greenhouse gases as far as possible, so as to contribute to the reduction of their emissions and thereby contribute to meeting its obligations which it has committed to in an international context. The Danish authorities consider that the ambitious target of greenhouse gases emissions reductions which Denmark committed itself to reach under Decision 2002/358/EC requires a concerted effort in tackling every source of greenhouse gas emissions.
- (33) HFCs are used in Denmark mainly as cooling fluids in refrigeration units. PFCs are no longer used in Denmark. SF₆ was previously used in soundproof insulating glass units and within the electrical sector in certain switches. Nowadays, it is only used for the latter application, involving very few tonnes per year.
- (34) In their notification, the Danish authorities refer to projections according to which, without further regulation, the level of emissions would double by 2010, accounting for 0,5-0,7 million more tonnes of carbon dioxide equivalent than with the notified legislative measures.
- (35) The Danish authorities indicate that the principles introduced at Community level by Regulation (EC) 842/2006 to reduce emissions through containment were introduced in the Danish legislation more than 50 years ago and since then applied to applications using F-gases and are therefore unlikely to result in further reductions.
- (36) In its notification, Denmark gives a brief description of some of the areas of application where alternative solutions have been developed, and which therefore are covered by the Danish regulation. From Denmark's point of view, there is a presumption that alternatives to the industrial greenhouse gases being used in the applications which were banned from 1 January 2006 or will be banned from 1 January 2007 are available.
- (37) The general ban on the import, sale and use of new products containing the covered F-gases is accompanied by derogations specified in Annex I of the Order. These derogations relate to a number of highly specific applications and, for a number of more common applications, are based on the quantity of greenhouse gases used in the respective systems, thereby exempting for instance refrigeration units, heat pumps or air conditioning units with charges between 0,15 kg and 10 kg as well as refrigeration systems for recovering heat with a charge less or equal to 50 kg. Products for ships and military use as well as the use of SF₆ in high voltage units are exempted.
- (38) In addition to the derogations mentioned above, the Danish Order provides a possibility, 'in very special cases', for an exemption from the general ban. The purpose of this exemption option is to prevent the ban, in specific cases, from having disproportionately serious consequences (in cases not envisaged when the order was issued, in specific situations where the installation of refrigeration equipment based on alternatives to HFCs would incur exceptional and unreasonable additional costs for the installer/owner, or in situations where the overall level of greenhouse gas emissions converted to carbon dioxide equivalent are demonstrated to be lower for a system containing F-gases.).

⁽³⁾ See the Communication from the Commission concerning Article 95 (paragraphs 4, 5 and 6) of the Treaty establishing the European Community (COM(2002) 760 final, 23.12.2002), in particular paragraph 13.

⁽⁴⁾ OJ L 130, 15.5.2002, p. 1.

- (39) The exemption option is intended to be used so that the environmental improvement expected by the ban is achieved in the best and most effective way from an overall environmental perspective, including from an energy standpoint.
- (40) In accordance with Article 8 of the Act on Chemical Substances and Products No 21 of 16 January 1996, the ban does not apply to the import, production and sale of products exclusively intended for export.
- (41) In addition, there is no ban either on importing industrial greenhouse gases to be used in the manufacture of a given product intended for export.
- (42) The Danish Government takes the view that the purpose of the Order 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 Denmark

- (43) After having examined the information submitted by Denmark, the Commission considers that the request to maintain more stringent measures than those contained in Regulation (EC) 842/2006 can be considered compatible with the Treaty for the following reasons.

2.2.2.1. The environmental justification:

- (44) The Order forms part of a broader strategy put in place by Denmark in order to meet its emission reduction target under the Kyoto Protocol and the subsequent burden sharing agreement adopted at Community level. Under such a Community arrangement, Denmark shall reduce its Greenhouse gases (GHG) emissions by 21 % over the period 2008 to 2012 compared to the 1990 base year.
- (45) Considering the above, Denmark is putting in place a climate strategy to meet its commitments which covers every source of greenhouse gas emissions. Measures on F-Gases are therefore part of its overall effort to fulfil its obligations. It should be noted that 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 up-coming 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⁽⁵⁾.
- (46) Regulation (EC) 842/2006 is expected to result in significant F-gases emission reductions throughout the Community, principally in those Member States where appropriate measures for reducing F-gases emissions are not yet in place, mainly by measures aimed at improving the containment and recovery of F-gases used in certain applications. However, the Danish legislation had already introduced comparable provisions (containment policy based notably on compulsory training programmes, regular

checks for leakages) more than 50 years ago, which was then applied to applications containing F-gases, and are therefore unlikely to result in further reductions that could significantly counter the expected growth in F-gases emissions in Denmark.

- (47) Considering the above, the Commission considers that the environmental justification given by Denmark, namely the reduction and prevention of fluorinated gases emissions, is valid.

2.2.2.2. Relevance and proportionality of the Danish Order in relation to the objective of achieving further reduction of fluorinated greenhouse gases:

- (48) In this context, and in order to further reduce and prevent F-gases emissions, Denmark has decided in 2002 already to opt for selective placing on the market bans of new equipment. This selection was based on investigations that were aimed to check, in particular, the existence and availability of F-gas free alternatives.
- (49) Based on this investigation, the Order foresees a general ban on imports, sales and use of new products containing F-gases as from 1 January 2006, with a significant number of derogations and exemptions by which certain products and equipments are automatically exempted or could be exempted under certain conditions, or by which the ban schedule is advanced or put back. Annex I of the Order contains specific derogations for a number of highly specific applications (e.g. medical aerosols, laboratory equipment) and, for some more common applications, exemptions which are based on the quantity of fluorinated gases used in the respective systems, which results in exempting refrigeration units, heat pumps or air conditioning units with charges between 0,15 kg and 10 kg as well as refrigeration systems for recovering heat with a charge less or equal to 50 kg. Products for ship and military use as well as the use of SF6 in high voltage units are equally exempted.
- (50) Additionally, the Order allows for exemptions to be possibly granted by the Danish Environmental Protection Agency in 'very special cases', namely in cases not envisaged when the order was issued, in situations where it turns out that alternatives are not available or not suitable, or in situations where the overall level of greenhouse gas emissions (including 'indirect emissions' due to energy consumption) converted to carbon dioxide equivalent are demonstrated to be lower for a system containing F-gases.
- (51) The procedure applied by the Danish Environmental Protection Agency is clearly described, as well as the criteria upon which the decisions to grant or refuse exemptions are based. These criteria take into account the principle of proportionality.
- (52) In the same vein, it is worth pointing out that the Danish Order allows the use of F-gases for the servicing and maintenance of existing equipment so as not to result in the unnecessary abandonment of equipment.

⁽⁵⁾ OJ L 244, 29.9.2000, p. 1

(53) While noting that the Order has implications on the free circulation of goods within the Community, the Commission nevertheless draws the conclusion from the above analysis that the Order is justified from an environmental point of view and takes into consideration the implications of the envisaged bans on the internal market, reinforced by the possibility to grant individual exemptions.

(54) It should also be 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 Kingdom of Denmark referred to this Article of the Regulation, it follows that the Order would apply for a limited period.

2.3. Absence of any arbitrary discrimination, any disguised restriction of trade between Member States

(55) 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.

(56) It should be recalled that an application pursuant to 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.

(57) The notified national provisions are general and apply to national and imported products alike. There is no evidence that the notified national provisions can be used as a means of arbitrary discrimination between economic operators in the Community.

(58) The objective behind the order is the protection of the environment, there is no indication that the Order, in its intention or implementation, would result in any arbitrary discrimination or disguised barriers to trade.

(59) In view of the risks for the environment resulting from certain F-gases, the Commission considers that there is no evidence indicating that the national provisions notified by the Danish authorities do constitute a disproportionate obstacle to the functioning of the internal market in relation to the pursued objectives.

III. CONCLUSION

(60) In the light of the above considerations, and taking account of comments provided by Member States and other third parties on the notification submitted by the Danish

authorities, the Commission is of the opinion that the request by Denmark, submitted on 2 June 2006, 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, as, is admissible.

Moreover, the Commission finds that the national provisions:

- 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 Denmark, 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 approved,

HAS ADOPTED THIS DECISION:

Article 1

The national provisions on certain fluorinated greenhouse gases, which the Kingdom of Denmark notified to the Commission by letter, dated 2 June 2006, 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 Kingdom of Denmark is authorised to maintain them until 31 December 2012.

Article 2

This Decision is addressed to the Kingdom of Denmark.

Done at Brussels, 8 December 2006.

For the Commission

Stavros DIMAS

Member of the Commission