

**COMPLAINT BY EPEE TO THE EUROPEAN COMMISSION CONCERNING  
INFRINGEMENT OF EC LAW BY AUSTRIA: ORDER NO. 447 OF 10 DECEMBER 2002 ON  
HFC's, PFC's and SF6  
(Complaint number 2003/4716 SG(2003) A/5830/2  
EXECUTIVE SUMMARY  
23 July 2003**

## **I Background**

EPEE has submitted a complaint to the European Commission concerning an **Austrian Order that imposes a general ban on the import, sale and use of three synthetic greenhouse gases ('GHG's')**. The Order was adopted purportedly to help Austria comply with commitments flowing from the Kyoto Protocol to the United Nations Framework Convention on Climate Change. However, **EPEE considers that the Order is not necessary** to achieve the Kyoto objective of emissions reduction. The Order is a **disproportionate and discriminatory measure that creates barriers to trade, and breaches Austria's obligations under the EC Treaty**.

EPEE members include businesses involved in the development and manufacture of equipment which relies on HFC's as a refrigerant, and producers, exporters and distributors of HFC's. The European refrigeration and air-conditioning industry acknowledges that minimising HFC emissions from its products, and enhancing their energy efficiency, are necessary measures to reduce the impact of those products on climate change.

The Order establishes a general ban, subject to a number of derogations and exemptions, on new and recovered hydrofluorocarbons (HFC's) and new products containing HFC's. The following aspects of the Order (which are generally effective 1<sup>st</sup> January 2008) are of particular concern:

- **ban on use and placing on the market of HFC's** (other than for servicing existing installations);
- **ban on use of HFC's in air-conditioning systems, refrigerators and freezers;**
- **ban on use of HFC's in mobile refrigeration equipment and mobile air-conditioning systems;**
- **ban on the production and placing on the market of insulation foam using HFC's.**

Products covered by the ban include: commercial refrigeration systems; commercial and household refrigerators and freezers; industrial refrigeration systems; air-conditioning systems; chillers; and heat pumps.

## **II Free movement of goods**

The Austrian Order prevents the import and use of substances and products lawfully produced and marketed in other Member States of the European Union, and therefore breaches the basic principle of free movement of goods set down in Article 28 of the EC Treaty. Imports into Austria of HFC's and equipment containing HFC's are worth millions of euro each year.

The Austrian Order does not comply with the criteria established by the case law of the European Court of Justice applicable to national measures aimed at environmental protection. The **ban is unnecessary and disproportionate**.

### **(a) Necessity**

The ban is not justified by imperative requirements in the general interest, as it will not materially contribute to the protection of the environment:

- By 2010 HFC's will comprise just 1.6% of the total GHG emissions in the whole of the EU.

- The effects of the Austrian Order are limited to the Austrian territory, where total GHG emissions represent only 0.4% of the industrialised world's emissions.
- The relatively high global warming potential (GWP) of HFC's gives a misleading picture of the level of harm caused. Only actual emissions (not use) contribute to global warming. The 100-year cut-off for the GWP calculation means that the figures for HFC's cover all potential damage whereas the damage caused by CO<sub>2</sub> (the main comparator) continues well beyond that period.
- As a replacement for CFC's and HCFC's, which are ozone depleting substances, HFC's already form part of the solution to global atmospheric problems.

(b) Proportionality

The Austrian Order goes beyond what is necessary to reduce emissions levels and is therefore disproportionate:

- Austria has failed to give sufficient weight to the independent, international scientific evidence that improvements in technology and training lead to significant reductions in emissions and that a ban is therefore an unnecessarily restrictive measure. In The Netherlands, a highly successful mandatory system (STEK) involving close cooperation between industry, trade associations, and regulatory bodies, and factors such as quality assurance schemes for contractors, use of leakage detection systems, and comprehensive monitoring of refrigerants, has resulted in emission rates being reduced on average from 30% down to just 3%.
- The obligation to recover HFC's from equipment that has reached the end of its life prevents venting and thus contributes to reductions in emissions.
- Despite Austrian claims that it has taken comprehensive action to try to reduce emissions through containment, its attempts have been unsatisfactory. A report for the European Commission shows that applying a STEK-type approach in Austria would result in emissions levels dropping to just 5.5%.

Some 90% of total GHG emissions by products in this sector are caused by the generation of the energy to run the equipment, and only about 10% derive from direct emissions of the refrigerant. There is, therefore, greater scope for achieving emissions reductions, both in HFC based and in alternative equipment, through energy efficiency improvements (such as through use of better insulation).

### **III Consequences of the ban**

Austria has failed to give sufficient consideration to the effects of the ban:

- The ban will result in longer use of and greater emissions from older technologies.
- There are safety concerns connected with the use of alternatives, in particular in some applications. Ammonia is toxic, even at low concentrations, and can also be flammable. Hydrocarbons, which are highly flammable and explosive, do not smell and leaks are very difficult to detect. Accidents involving these substances have been documented around the world. CO<sub>2</sub> is still at a very early stage of development as an alternative to HFC's. The alternatives have energy efficiency and cost implications.
- The ban will also prevent the further development and use of new generations of low GWP, high energy efficiency HFC's.
- Practical problems will occur, for example when the need arises to replace an existing HFC system in an older building. (Moreover, a provision which would allow a Provincial Governor to grant individual derogations breaches EC law requirements: it attempts to reverse the burden of proof incumbent on Member States to justify a ban, by requiring businesses to prove that HFC's are required in a particular application and that no alternatives are available; and the specific criteria for exercise of the discretion have not been set down).

As UNEP and others have stated, any advantages that might exist for natural refrigerants with lower GWP are lost if HFC systems are made leak-tight.

#### IV Other infringements

The Austrian Order refers to an assessment to be carried out in 2005 by the Austrian authorities of the phase-out deadlines set down in the Order. EPEE would support such a review if carried out properly, as it could result in cancellation or postponement of the 2008 deadline for use of HFC's. However, as the review procedure lacks transparency, and the precise criteria to be applied in the assessment are not known in advance, this provision breaches EC law requirements and will lead to considerable uncertainty for industry. Moreover, the review appears to be a charade, as the Austrian authorities have stated that suitable alternatives already exist in all regulated areas (a claim disputed by EPEE).

Austria has also infringed the Directive 98/34 notification procedure, by deliberately not communicating the amended draft of the Order to the Commission, for comment, prior to its adoption and publication. This amounts to a breach of the duty of loyal cooperation found in Article 10 of the EC Treaty and is a flagrant challenge to the Community legal order.

#### V Kyoto Protocol

The Austrian Order is intended to help Austria meet its commitments under the Kyoto Protocol and under the *Burden Sharing Agreement* between EU Member States. However, even when the Kyoto Protocol comes into force, it will not mandate use of a ban, and it cannot override Austria's obligations under the EC Treaty. The Protocol refers to use of measures such as enhancement of energy efficiency, development of renewable forms of energy, and encouragement of reforms in relevant sectors aimed at reducing emissions of GHG's. The UN Framework Convention on Climate Change provides that national measures should not constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on international trade. The *Burden Sharing Agreement* confirms that Member State commitments do not exempt them from application of EC Treaty obligations.

#### VI Conclusion

Considering that the Austrian Order infringes EC law on free movement of goods, EPEE calls on the European Commission to challenge the Order by opening infringement proceedings against Austria under Article 226 of the EC Treaty. EPEE also calls on the Commission to challenge under Article 10 of the EC Treaty the failure by Austria to notify the amended draft text of the Order.

Rather than unilateral Member State bans such as the Austrian Order, EPEE considers that the **best solution will be an EU-wide Regulation establishing obligatory containment and monitoring provisions**, as concluded by Member States and the Commission in the European Climate Change Programme (ECCP).

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