



Miguel ARIAS CAÑETE
Member of the European Commission

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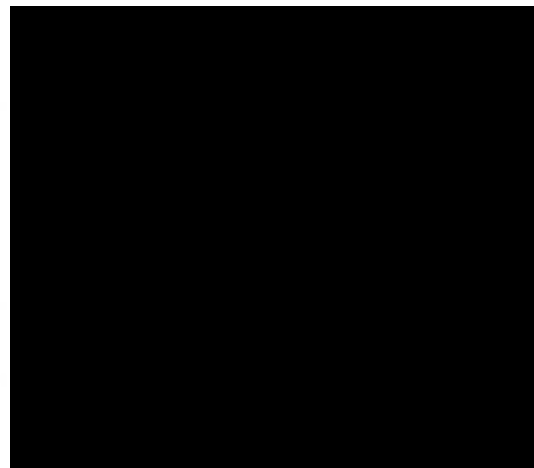
Dear Ms O'Reilly,

Subject: Strategic initiative SI/7/2017/JN concerning the implementation of Article 28 (governing inspections) of Regulation 1005/2009 on substances that deplete the ozone layer

Thank you for the letter of 24 July 2017 addressed to President JUNCKER about the above-mentioned case.

I am pleased to enclose the comments of the Commission regarding this Strategic Initiative. I regret that a certain delay has occurred in the transmission of this reply.

The Commission remains at your disposal for any further information you may require.



Enclosure

Comments of the Commission on a request for information from the European Ombudsman
- Strategic Initiative SI/7/2017/JN - Article 28 of Regulation (EC) 1005/2009

I. BACKGROUND/SUMMARY OF THE FACTS/HISTORY

In the 1970s scientists discovered that certain man-made substances deplete the ozone layer leading to an increased level of ultraviolet radiation reaching the earth. This led to the 1987 adoption of the Montreal Protocol and to European Union legislation¹ controlling ozone-depleting substances ("ODS"). The legislation currently in force is the Regulation (EC) No 1005/2009 on substances that deplete the ozone layer ("the Regulation").

II. THE REQUEST

The Commission has been asked to provide information on the inspection regime established by Article 28 of the Regulation by answering, to the extent that information is available, seven questions listed in a letter dated 24 July 2017.

III. THE COMMISSION'S COMMENTS TO THE REQUEST

The current inspection regime has been in place for over 30 years; it was last evaluated in 2008. The next evaluation of the Regulation will be carried out by independent contractor in 2018.

1) How do the Commission and the competent Member State authorities implement Article 28 of the Regulation?

The Commission implements Article 28 of the Regulation through the sharing and exchange of information that allows investigations to take place. Member States may undertake inspections as part of such investigations. The Commission does not have a procedure for initiating inspections but follows the steps set out below when initiating investigations:

1. The Commission provides information to the Member State concerned about a case and asks for follow-up.
2. The Member State assesses the case, takes action and responds to the Commission.
3. The Commission assesses if the actions of the Member State are appropriate.
4. If actions are insufficient, the Commission requests further action.

An overview of the Article 28 inspection structure is provided in a study on the EU role in environmental inspections².

The Commission has not collected information on how Member States implement Article 28 of the Regulation.

¹ A common position was established by the Member States for the first time in 1978. The first Council Decision dates from 1980 and the first Council Regulation was adopted in 1988. This first Council Regulation was repealed and replaced by updated legislation four times (in 1991, 1994, 2000 and 2009).

² <http://ec.europa.eu/environment/legal/law/pdf/Environmental%20Inspections.pdf>, page 65, section 3.1.1.

2) The Regulation says that in deciding on inspections, the competent authorities should follow a “risk-based approach”. When, on what grounds and under what circumstances do Member States carry out inspections?

The Commission has not collected information on how Member States follow the "risk based approach" referred to in Article 28 of the Regulation.

When, on what grounds and under what circumstances does the Commission use its power to request Member States to carry out inspections?

The Commission may be able to suggest that a Member State carries out an inspection as part of its investigations, however, this, in practice, has not occurred.

3) Has the Commission used the option for its officials to attend inspections and to assist Member State authorities in their duties? If so, please provide details.

The Commission assists Member State authorities in the performance of their duties by the sharing and exchange of information. One example was the provision of Commission expertise in a Spanish court case concerning the illegal trade of hydrochlorofluorocarbons (HCFC) in 2012. The Commission has not attended a Member State inspection.

4) What has the Commission done so far to discharge its duty to “take appropriate action to promote an adequate exchange of information and cooperation between national authorities and between national authorities and the Commission”? How does the exchange of information function in practice?

The Commission exchanges information and cooperates with Member States' authorities on daily basis. The Commission is in regular contact with stakeholders who deal with ozone-depleting substances and copies the relevant competent authority of the Member State concerned in all correspondence. This allows the competent authority the possibility to undertake an investigation or to exchange information with the Commission or relevant competent authority of another Member State.

The Commission may identify inconsistent data, or factual information, indicating a misapplication of the Regulation from the following sources:

- ODS Licensing System³ and labODS Registry⁴,
- Reporting under Article 26⁵,
- Reporting under Article 27⁶,
- Concerns communicated by stakeholders⁷.

The Commission informs Member States about cases of potential non-compliance by:

- Annual confidential reports on imports, exports and production of ODS,

³ The ODS Licensing System is an online platform for applying for licences for the import and export of ozone-depleting substances. The Commission issues these licences (Article 18).

⁴ The labODS Registry is an online platform for applying for authorisations to use ozone-depleting substances for laboratory and analytical purposes in the EU. The Commission issues these authorisations (Article 10(4)).

⁵ Each Member State must report annually on illegal trade and use of halons (Article 26).

⁶ Each company producing, importing and/or exporting to/from the EU, as well as feedstock and process agent users and destruction facilities must annually report transactions of ozone-depleting substances (Article 27).

⁷ Dedicated functional mailbox of the Commission: over 3 000 e-mails are exchanged annually on import and export licences, labODS authorisations and information on the implementation of the Regulation.

- Overview tables with ODS quantities licenced and quota allocated,
- Providing access to all labODS authorisations and licences issued and rejected (Member States' authorities have direct access to the ODS Licensing System and labODS Registry),
- Annual meetings of the ODS Committee,
- Correspondence with individual competent authorities,
- Copying competent authorities in correspondence with stakeholders.

5) As regards how the inspections are conducted:

How do the Commission and Member State authorities ensure that the inspections are thorough and effective?

How do they ensure that undertakings' fundamental rights set out in the EU Charter of Fundamental Rights are respected?

It is not apparent that the Commission has the ability to carry out its own inspections on the basis of Article 28. However, as explained in the responses to questions 1 and 4 above, the Commission has a close and effective relationship with Member States' authorities which will investigate (and if necessary inspect) transactions when requested to do so by the Commission. While the Commission has not carried out any inspections to date on the basis of this Article, it is noted that compliance with the EU Charter of Fundamental Rights should, where appropriate, be ensured in the future.

The Commission does not have any information on Member States' actions in this respect.

6) How do the Commission and Member State authorities ensure an adequate follow up to inspections?

In the event that the Commission and the Member States were to carry out inspections they would liaise to ensure that all issues were resolved. In this way an adequate follow-up would be established.

7) How do the Commission and Member States ensure the transparency of inspections and specifically of their planning and reporting as proposed in Recommendation 2001/331?

Inspections under the Regulation have not been subject to discussions within IMPEL (EU network of inspectors). However, should future inspections be undertaken by the Commission the requirements of Recommendation 2001/331 would be considered in the planning and reporting of the work.

IV. CONCLUSIONS

The current regime is well-established and works well from the perspective of the Commission's daily work and communication with stakeholders.