# JUDGMENT OF THE COURT OF FIRST INSTANCE
(First Chamber, Extended Composition)
16 October 1996 *

In Case T-336/94,

**Efisol SA**, a company incorporated under French law, having its registered office in Paris, represented by Jacques Buhart, of the Paris Bar, and Jean-Yves Art, of the Brussels Bar, with an address for service in Luxembourg at the Chambers of Arendt et Medernach, 8-10 Rue Mathias Hardt,

applicant,

v

**Commission of the European Communities**, represented by Marc H. van der Woude, of its Legal Service, acting as Agent, with an address for service in Luxembourg at the office of Carlos Gómez de la Cruz, also of its Legal Service, Wagner Centre, Kirchberg,

defendant,

APPLICATION under Article 178 and the second paragraph of Article 215 of the EC Treaty seeking compensation for the damage occasioned by the refusal to grant licences to import chlorofluorocarbon 11 into the Community,

* Language of the case: French.

THE COURT OF FIRST INSTANCE
OF THE EUROPEAN COMMUNITIES
(First Chamber, Extended Composition),

composed of: A. Saggio, President, C. W. Bellamy, A. Kalogeropoulos, V. Tiili and R. M. Moura Ramos, Judges,

Registrar: H. Jung,

having regard to the written procedure and further to the hearing on 14 May 1996,

gives the following

## Judgment

### Legal framework and facts

1 On 14 October 1988 the Council adopted Decision 88/540/EEC concerning the conclusion of the Vienna Convention for the protection of the ozone layer and the Montreal Protocol on substances that deplete the ozone layer (OJ 1988 L 297, p. 8). The obligations arising under that Convention and Protocol were implemented within the Community legal order by Council Regulation (EEC) No 594/91 of 4 March 1991 on substances that deplete the ozone layer (OJ 1991 L 67, p. 1), as amended by Council Regulation (EEC) No 3952/92 of 30 December 1992 speeding up the phasing-out of substances that deplete the ozone layer (OJ 1992 L 405, p. 41). The substance at issue in the present case, chlorofluorocarbon 11 (hereinafter 'CFC 11'), falls within the scope of Regulation No 594/91.

2 Article 3 of Regulation No 594/91 provides that the release into circulation in the Community of substances imported from third countries is to be subject to quotas allocated by the Community to undertakings in accordance with the procedure set out in Article 12 of Regulation No 594/91. Article 12 provides, *inter alia*, for the delivery of an opinion by a management committee composed of a Commission representative and representatives of the Member States. Quantitative limits are laid down in Annex II to Regulation No 594/91, although the amounts in question may be amended by the Commission.

3 Once a quota has been allocated to an undertaking, that undertaking is required under Article 4 of Regulation No 594/91 to obtain an import licence from the Commission in order to be able in practice to bring the substance concerned into the Community. To that end, the undertaking must submit to the Commission a request containing a description of the substance concerned, a statement of the quantity to be imported and the place and date of proposed importation.

4 On 10 July 1993 the Commission published Notice 93/C 188/04, addressed to importers in the European Community of controlled substances that deplete the ozone layer, regarding Regulation (EEC) No 594/91 as amended by Regulation (EEC) No 3952/92 (OJ 1993 C 188, p. 5) calling on them to apply for allocation of an import quota for 1994. For that purpose, interested undertakings were able to find, at Annex II to the Notice, a form requiring them to state, *inter alia*, the country of exportation and to indicate, of the four possible uses, that to which the substance concerned was to be put, namely: recycling or reclamation, destruction by an approved technology, feedstock use in the manufacture of other chemicals, or other usage.

5 On 18 November 1993, in reply to the Notice of 10 July 1993, the applicant applied for an import quota of 1 800 tonnes of CFC 11 for 1994. In that application, after crossing out the four possible intended uses, the applicant wrote 'OK' against the heading 'other usage' and included beside it the words 'production of polyurethane foam'.

6 A Commission official informed the applicant by telephone on 19 November 1993 that a quota for 1 800 tonnes of CFC 11 could not be granted for 'other usage' and that it was necessary to specify what use was to be made of the substances in question. Following that discussion, the applicant amended its application by fax of 19 November 1993, stating that the imported substance would be for 'feedstock use in the manufacture of other products' and specifying that the manufacture in question would be the production of polyurethane foam.

7 By letter of 10 December 1993, the applicant drew the Commission's attention once again to the importance of the requested allocation, pointing out that its two factories in France, which used CFC 11 for the production of polyurethane panels, were not yet equipped to use CFC substitutes and that it was absolutely necessary for it to import CFC from Ukraine or from a country belonging to the Commonwealth of Independent States.

8 By Decision 94/84/EC of 4 February 1994 allocating import quotas for the fully halogenated chlorofluorocarbons 11, 12, 113, 114 and 115, the other fully halogenated chlorofluorocarbons, halons, carbon tetrachloride and 1, 1, 1-trichloroethane for the period 1 January to 31 December 1994 (OJ 1994 L 42, p. 20), the Commission laid down import quotas for 1994. In Annex 2 to that decision, the applicant is included among the importers to which quotas are allocated for imports of CFC 11 'for ... use as feedstock in the manufacture of other chemicals'.

9 On 15 February 1994, the applicant sent to the Commission a request dated 24 January 1994 for import licences in respect of two consignments of CFC 11 from Russia. Some days later, on 17 and 21 February 1994, the applicant placed orders for those consignments with its Russian supplier.

10 By fax of 24 February 1994, the Commission informed the applicant of its refusal to grant it import licences. It explained that it had so decided at the request of the French Ministry of the Environment, which took the view that the imported substances would be put to uses other than that of feedstock in the manufacture of chemicals. The Commission also explained in that fax that '"feedstock" uses are those manufacturing processes that result in the controlled substances being entirely consumed (ie., destroyed, decomposed etc.) except for trace quantities' and that 'although Efisol claimed that the imported substances were for "feedstock" uses, it also informed the Commission that the substances would be used in the production of polyurethane foam. This is, of course, a use that does not fall under the definition of "feedstock" use. Unfortunately, this fact was not identified until now'.

11 At the time when that decision was taken by the Commission, two trains had already left, one bound for France with a consignment of CFC 11, the other bound for the former Soviet Union with the intention of picking up a second consignment of the same substance.

12 Several discussions ensued between the applicant and the Commission with a view to resolving the problems which the refusal to grant the import licences had created for the applicant. However, all negotiations to that end were ultimately unsuccessful. The applicant thereupon informed the Commission, by letter of 10 March 1994, that it would be seeking reparation from the Community judicature in respect of the costs linked to the transport of the first consignment that had already been completed, the costs linked to the fact that the train left empty when it went to load the second consignment, and the damage occasioned by the production and market losses or associated with any other injury resulting from the refusal to grant the import licences.

13 On 6 May 1994, Mr Y. Paleokrassas, a Member of the Commission, wrote to the applicant confirming, first, that the import licences could not be granted, given that the actual use to which the substances for importation were to be put, namely the production of polyurethane foam, did not correspond to the authorization

given for feedstock use in the manufacture of other chemical products ('feedstock uses') and, second, that the Commission's departments would remain at the applicant's disposal in order to discuss appropriate solutions.

14 By fax of 9 June 1994, the applicant sent to the Commission a table 'setting out the direct damage suffered by Efisol'. That table described the costs relating to two principal operations, which were subdivided into a number of headings. The first operation, entitled 'first train', included the purchase of the product, the return transport between the European Union and Russia, insurance, and transport within the European Union. The second operation, entitled 'second train', covered the return transport between the European Union and Russia, and the additional purchase costs consisting of the costs of purchasing CFC 11 from the Community supplier less the costs of purchasing from the Russian supplier. Those costs totalled FF 2 267 475 overall.

15 By letter of 20 June 1994, the Commission rejected the claim for compensation, stressing that any serious misconduct in the case had to be attributed to the applicant, which had 'attempted to mislead the Commission's departments as to the exact use to which the substances concerned were to be put' and had 'entered into commitments with a Russian supplier before the quota had even been allocated to it'.

## Procedure and forms of order sought by the parties

16 It was in those circumstances that, by application lodged at the Registry of the Court of First Instance on 14 October 1994, the applicant brought the present action.

17 Upon hearing the report of the Judge-Rapporteur, the Court decided to open the oral procedure without any preparatory inquiry. In the context of measures of procedural organization, however, the parties were requested to reply in writing to a number of questions prior to the hearing.

18 At the public hearing on 14 May 1996, the parties presented oral argument and replied to the Court's oral questions.

19 The applicant claims that the Court should:

— order the defendant to pay compensation for the damage suffered by the applicant, in the amount of FF 2 242 703 plus default interest at the rate of 8% *per annum* with effect from the date on which the Court of First Instance gives judgment;

— order the defendant to pay the costs.

20 The defendant contends that the Court should:

— dismiss the application;

— order the applicant to pay the costs.

**The single plea in law, based on the principle of the protection of legitimate expectations**

*Summary of the parties' arguments*

21 The applicant claims that the refusal to grant it import licences amounts to an infringement of the principle of the protection of legitimate expectations and thus constitutes unlawful conduct. In particular, by its decision to allocate a quota to the applicant, the Commission aroused justified expectations that the corresponding import licences would subsequently be granted.

22 According to the applicant, it follows clearly from Regulation No 594/91 that the grant of import licences is not a measure independent of the allocation of a quota, but that, on the contrary, the Commission is under an obligation to grant import licences once it has allocated a quota. In reaching that conclusion, the applicant relies on the English version of the second sentence of Article 4(1) of Regulation No 594/91, which is worded as follows: 'This licence shall be issued by the Commission.' It also cites the Notice of 10 July 1993, in which the Commission itself stated that it 'will set the quotas for each importer ... and issue on the basis of the set quotas import licences in the terms of Article 4 of the regulation'. The automatic connection between the allocation of a quota and the grant of the corresponding licences is also, it argues, evident in the Commission's letter of 25 January 1994, in which the applicant was informed that the requested quota would be allocated to it and the Commission stated that 'once the authorization procedure has been officially confirmed (in approximately ten days), requests for import licences and information concerning the procedure to be followed in applying for a licence shall be sent to you as soon as possible'.

23 It follows, according to the applicant, that if the Commission allocates a quota while fully aware of the use to which the recipient intends to put it, the Commission is obliged subsequently to grant the licences necessary for the importation of the substances intended for that use.

24 The applicant further submits that it was impossible to foresee that the Commission would interpret the production of polyurethane foam as not coming within the category of 'use as feedstock in the manufacture of other chemicals'. That interpretation implies that the expression 'use as feedstock in the manufacture of other chemicals' refers exclusively to production processes involving the elimination of the CFCs used, a meaning different from the usual definition. The applicant also notes that the expression 'use as feedstock in the manufacture of other chemicals' was not, at the material time, defined in any published text. An explanation was first published subsequently, on the occasion of the publication of import quotas for 1995 in Notice 94/C 215/02, addressed to importers in the European Community of controlled substances that deplete the ozone layer, regarding Regulation (EEC) No 594/91 as amended by Regulation (EEC) No 3952/92 (OJ 1994 C 215, p. 2).

25 Finally, the applicant emphasizes that it indicated, in all of the documents which it sent to the Commission, that the imported CFC would be used to produce polyurethane foam. It is therefore unable to see how it could have misled the Commission as to the intended use of the CFC 11 which it sought to import. Moreover, the Commission itself acknowledged in its fax of 24 February 1994 that the applicant had been acting in good faith.

26 The Commission first of all takes the view that the grant of import licences under Article 4 of Regulation No 594/91 does not have to follow automatically on the allocation of a quota under Article 3 of Regulation No 594/91. The system of applying for licences seeks to ensure compliance with the decisions allocating quotas, thereby enabling the Commission to verify on each occasion whether the applicant undertaking is complying with the limits and the conditions for use of the quota which it holds and whether the imports declared are from a country which is a Contracting Party to the Montreal Protocol.

27 The Commission points out that, in the present case, the quota allocated to the applicant related to a specific quantity, a specific substance and a specific use, namely 1 800 tonnes of virgin CFC 11 for 'use as feedstock in the manufacture of other chemicals'. The Commission stresses that it refused to grant the import licences on the legitimate ground that it had transpired that the imported CFC 11 would not be used for the purpose envisaged by the decision allocating the quota. It also points out that this refusal did not in any way imply a withdrawal of the measure allocating the quota, since the applicant retained its right to import the substance, within the limits and under the conditions set out in the allocating decision.

28 The Commission confirms that, if it had taken account of the fact that the applicant intended to use the imported CFC 11 to produce polyurethane foam, it would never have allocated the quota, since such production does not clearly involve a process entailing the complete elimination of the CFCs and does not therefore constitute use of CFCs corresponding to a 'use as feedstock in the manufacture of other chemicals'. However, the Commission adds that it was not obliged to take account of that information since the system governing the allocation of quotas is

administered on the basis of the data required by the quota application forms and the applicant, on its form, had indicated that the imported substances would be employed for 'feedstock use in the manufacture of other chemicals'. The Commission further points out that it receives each year some sixty applications for quotas, which, in its view, is another reason why it is under no obligation, when the quotas are being allocated, to take account of the nature of the industrial activities of applicant undertakings.

29 For the rest, the Commission expresses surprise that the applicant denies being aware that the expression 'use as feedstock in the manufacture of other chemicals' implies that the manufacturing process involved is one in which CFCs are eliminated. The Commission takes the view that the expression 'use as feedstock in the manufacture of other chemicals' is a key concept in the operation of international and Community rules on substances that deplete the ozone layer. In those circumstances, the applicant's lack of awareness cannot be justified by the fact that the Commission had not, at the material time, published a definition. The meaning of that expression follows, moreover, from the grouping together of the concepts of destruction and use as feedstock contained in the first sentence of the eleventh indent of Article 2 of Regulation No 594/91.

*Findings of the Court*

30 Under the second paragraph of Article 215 of the Treaty and the general principles to which that provision refers, Community liability depends on fulfilment of a set of conditions as regards the unlawfulness of the conduct alleged against the institution, the fact of damage and the existence of a causal link between the conduct in question and the damage complained of (see, for instance, Case 153/73 *Holtz & Willemsen* v *Council and Commission* [1974] ECR 675, point 7). It is therefore necessary to examine first of all whether the conduct alleged against the Commission in this case is vitiated by illegality and, in particular, by an infringement of the principle of the protection of legitimate expectations, as the applicant claims.

31 According to consistent case-law, the principle of the protection of legitimate expectations forms part of the Community legal order (Case 112/77 *Töpfer* v *Commission* [1978] ECR 1019, paragraph 19). The right to rely on that principle extends to any individual who is in a situation in which it is apparent that the Community administration, by giving him precise assurances, has led him to entertain justified expectations (Case T-534/93 *Grynberg and Hall* v *Commission* [1994] ECR-SC II-595, paragraph 51, and Case T-571/93 *Lefebvre and Others* v *Commission* [1995] ECR II-2379, paragraph 72). On the other hand, if a prudent and discriminating trader could have foreseen the adoption of a Community measure likely to affect his interests, he cannot avail himself of that principle if the measure is then adopted (Case 78/77 *Lührs* v *Hauptzollamt Hamburg-Jonas* [1978] ECR 169, point 6, and Case 265/85 *Van den Bergh en Jurgens* v *Commission* [1987] ECR 1155, paragraph 44).

32 In the light of these principles, it is necessary to consider whether the applicant could, by reason of the fact that an import quota had been allocated to it, have had a reasonable expectation that the import licences applied for would subsequently be granted and whether, as a prudent and discriminating trader, it could not have foreseen the Commission's refusal to grant those licences.

33 In this regard, the Court notes at the outset that there are two stages in the administrative procedure laid down in Regulation No 594/91 for obtaining authorization to import into the Community substances that deplete the ozone layer: first, the allocation of a quota under Article 3 of Regulation No 594/91 and, second, the issue, pursuant to Article 4 thereof, of one or more import licences corresponding to the quota allocated. It follows that the right to import a substance, accorded when a quota is allocated, takes effect only once an import licence has been issued.

34 It follows from all of the foregoing that the applicant could not, in good faith, have expected that import licences would be issued to it. No expectation could be derived from the allocation to it of an import quota, since that is merely the first stage in securing an effective right to import a substance. In those circumstances,

the Court takes the view that, in contrast to the applicant, a prudent and discriminating trader would not have set in motion the transport by train of the consignments ordered without awaiting the Commission's decision on the application for import licences and without taking the precautions necessary to safeguard its interests in the event of its application for licences being rejected. Furthermore, the Court of Justice has stated in its case-law that a finding that legitimate expectations have arisen cannot be made where the measure liable to give rise to such expectations has been withdrawn by the administration within a reasonable period (Case 15/85 *Consorzio Cooperative d'Abruzzo* v *Commission* [1987] ECR 1005, paragraphs 12 to 17). In the present case, the import quota was allocated to the applicant on 4 February 1994. The latter sent its application for the grant of licences to the Commission on 15 February 1994 and the licences were refused on 24 February 1994. The Court considers that, in those circumstances, the administration acted within a reasonable period. It follows that, by beginning to place its import orders on 17 February 1994, a mere two days after submitting those applications for import licences and without awaiting the outcome, the applicant jeopardized its position by its own actions.

35 The Court also takes the view that, as an undertaking making active use of chemical substances, in particular those coming within the scope of Regulation No 594/91, the applicant was in a position to realize that the use to which it intended putting those substances clearly did not correspond to that for which a quota had been allocated to it, that is to say 'use as feedstock in the manufacture of other chemicals'. In its quota application, the applicant designated the category 'feedstock use in the manufacture of other products' and not that of 'feedstock use in the manufacture of other chemicals', which suggests that it was already aware at that stage that the description of polyurethane foam as a chemical might be open to question. In the light of those factors, the Commission's ultimate refusal cannot be treated as unforeseeable.

36 Moreover, a legitimate expectation cannot arise from conduct on the part of the administration which is inconsistent with Community rules (Case 316/86 *Hauptzollamt Hamburg-Jonas* v *Krücken* [1988] ECR 2213, paragraph 23). In that regard, the Commission allocated to the applicant a quota for the importation of CFC 11 for 'use as feedstock in the manufacture of other chemicals', notwith-

standing the fact that the applicant had, in both the initial and the amended versions of its application, clearly indicated that it intended to use the imported CFC 11 for the production of polyurethane foam. To describe polyurethane foam as a 'chemical' is imprecise from a scientific point of view. Moreover, pursuant to the rules and definitions agreed on by the Community at international level (see paragraph 1), polyurethane foam cannot be treated as a product in the manufacture of which CFC 11 can be described as having a 'use as feedstock in the manufacture of other chemicals' since it is not eliminated in the production process. These details were, in particular, submitted by the Commission at the hearing and were not contested by the applicant. It follows that, by allocating a quota to the applicant precisely for that category of use, when it knew or ought to have known that the applicant intended to produce polyurethane foam, the Commission misapplied the Community rules in force, in particular Article 3 of and Annex II to Regulation No 594/91, as well as its Notice of 10 July 1993. The Commission's conduct was thus inconsistent with the Community rules and could not therefore give rise to justified expectations on the applicant's part.

37 It follows from all of the foregoing that the application must be dismissed, without its being necessary to consider whether the applicant has demonstrated the existence of damage and a causal connection between that damage and the conduct alleged against the Commission.

## Costs

38 Although the applicant has been unsuccessful in its submissions, it is none the less necessary, for the purpose of determining costs, to take account of the defendant's conduct, which was inconsistent with the Community rules. In those circumstances, the applicant cannot be criticized for having instituted proceedings before the Court for an assessment of that conduct, as well as of any damage which may have resulted from it. It must be held that the defendant's conduct contributed to the creation of the dispute.

39 It is necessary therefore to apply the second subparagraph of Article 87(3) of the Rules of Procedure, according to which the Court may order a party, even if successful, to pay the costs of proceedings which, by its own conduct, it has caused the opposite party to incur (see, *mutatis mutandis*, Case 263/81 *List* v *Commission* [1983] ECR 103, paragraphs 30 and 31), and to order the Commission to pay the whole of the costs.

On those grounds,

THE COURT OF FIRST INSTANCE
(First Chamber, Extended Composition)

hereby:

**1. Dismisses the application;**

**2. Orders the Commission to pay the whole of the costs.**

Saggio Bellamy Kalogeropoulos

Tiili Moura Ramos

Delivered in open court in Luxembourg on 16 October 1996.

H. Jung A. Saggio

Registrar President