JUDGMENT OF THE COURT OF FIRST INSTANCE (Second Chamber)

22 May 2007 *

In Case T-216/05,

Mebrom NV, established in Rieme-Ertvelde (Belgium), represented by C. Mereu and K. Van Maldegem, lawyers,

applicant,

v

Commission of the European Communities, represented by U. Wölker and X. Lewis, acting as Agents,

defendant,

ACTION for annulment of an alleged decision addressed to the applicant relating to the allocation of import quotas for methyl bromide for 2005, contained in the Commission's letter to the applicant of 11 April 2005,

* Language of the case: English.

THE COURT OF FIRST INSTANCE
OF THE EUROPEAN COMMUNITIES (Second Chamber),

composed of J. Pirrung, President, N.J. Forwood and S. Papasavvas, Judges,

Registrar: C. Kristensen, Administrator,

having regard to the written procedure and further to the hearing on 28 November 2006,

gives the following

Judgment

Legal and factual background

1. *Vienna Convention and Montreal Protocol*

1 By Council Decision 88/540/EEC of 14 October 1988 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 European Community became a party to the Vienna Convention for the protection of the ozone layer ('the Vienna Convention') and the Montreal Protocol on substances that deplete the ozone layer ('the Montreal Protocol').

2 Methyl bromide falls within the scope of the Montreal Protocol. It is a pesticide which is applied by fumigation and which is used essentially in agriculture since it penetrates soil with ease and is effective against a wide range of harmful elements. Its rapid degradation prevents contamination of the food chain and groundwater. For those reasons, methyl bromide was one of the five most commonly used pesticides in the world. However, it has the disadvantage that it depletes the ozone layer.

3 In 1997, the parties to the Montreal Protocol agreed to reduce in stages the production and importation of methyl bromide in developed countries until 31 December 2004 and, from 1 January 2005, to prohibit the production and importation of methyl bromide in developed countries other than for 'critical uses'.

4 Under Decision IX/6 of the parties to the Montreal Protocol ('Decision IX/6'), a use of methyl bromide is considered 'critical' only if the nominating party in respect of exemption of that use determines, first, that the lack of availability of methyl bromide for the use would result in a significant market disruption and, second, that there are no technically and economically feasible alternatives or substitutes available to the user that are acceptable from the standpoint of the environment and health and are suitable to the crops and circumstances referred to in the nomination.

5 Decision IX/6 also requires that the production and consumption of methyl bromide for critical use should be permitted only if:

— all technically and economically feasible steps have been taken to minimise the critical use and any associated emission of methyl bromide;

— methyl bromide is not available in sufficient quantity and quality from existing stocks of banked or recycled methyl bromide; and

— it is demonstrated that an appropriate effort is being made to evaluate, market and secure appropriate national regulatory approval of alternatives and substitutes.

2. *Regulation (EC) No 2037/2000*

6 The obligations arising under the Vienna Convention and the Montreal Protocol are currently implemented in the Community legal order by Regulation (EC) No 2037/2000 of the European Parliament and of the Council of 29 June 2000 on substances that deplete the ozone layer (OJ 2000 L 244, p. 1, 'the Regulation'). That measure sets out the rules applicable to the production, importation, exportation and use of certain substances that deplete the ozone layer, including methyl bromide.

7 Article 2 of the Regulation defines an 'undertaking' for the purposes of the Regulation as 'any natural or legal person who produces, recycles for placing on the market or uses controlled substances for industrial or commercial purposes in the Community, who releases such imported substances for free circulation in the Community, or who exports such substances from the Community for industrial or commercial purposes'. It also defines 'placing on the market' as 'the supplying or making available to third persons, against payment or free of charge, of controlled substances or products containing controlled substances covered by this Regulation'.

8 Article 3(2)(i)(d) of the Regulation prohibits the production of methyl bromide after 31 December 2004 other than, inter alia, for critical uses in accordance with Article 3(2)(ii) and the criteria laid down in Decision IX/6.

9 Article 3(2)(ii) of the Regulation provides:

'In the light of the proposals made by Member States, the Commission shall ... apply the criteria set out in Decision IX/6 of the Parties, together with any other relevant criteria agreed by the Parties, in order to determine every year any critical uses for which the production, importation and use of methyl bromide may be permitted in the Community after 31 December 2004, the quantities and uses to be permitted and those users who may take advantage of the critical exemption. Such production and importation shall be allowed only if no adequate alternatives or recycled or reclaimed methyl bromide [are] available from any of the Parties ...'

10 Article 3(4) of the Regulation provides that the Commission is to issue licences to users identified in accordance with the second subparagraph of Article 3(1) and Article 3(2)(ii) and is to notify them of the use for which they have authorisation and the substances and quantities thereof that they are authorised to use.

11 In addition, Article 4(2)(i)(a) to (c) of the Regulation provides that each producer or importer is to ensure that, from 1 January 1999 to 31 December 2004, it does not place on the market or use for its own account methyl bromide in quantities exceeding a certain percentage of the level of methyl bromide which it placed on the market or used for its own account in 1991.

12 Under Article 4(2)(i)(d) of the Regulation, and subject to Article 4(4) and (5), each producer and importer is to ensure that it does not place any methyl bromide on the market or use any for its own account after 31 December 2004.

13 Pursuant to Article 4(4) of the Regulation, that prohibition does not apply, inter alia, to the placing on the market or use of controlled substances where they are used to meet the licensed requests for critical uses of those users identified in accordance with Article 3(2) of the Regulation.

14 In addition, Article 4(5) of the Regulation provides that any producer or importer entitled to place controlled substances referred to in Article 4 on the market or to use them for its own account may transfer that right in respect of all or any quantities of that group of substances fixed in accordance with that article to any other producer or importer of that group of substances within the Community.

15 Article 6(1) of the Regulation provides as follows:

'The release for free circulation in the Community or inward processing of controlled substances shall be subject to the presentation of an import licence. Such licences shall be issued by the Commission after verification of compliance with Articles 6, 7, 8 and 13.'

16 Article 6(3) and (4) of the Regulation sets out the information which a request for an import licence must state and allows the Commission to require a certificate attesting the nature of the substance to be imported. Article 8 of the Regulation

prohibits imports of controlled substances from States that are not party to the Montreal Protocol. Article 13 of the Regulation allows for derogations in certain circumstances, inter alia from the prohibition in Article 8 of the Regulation.

17 Article 7 of the Regulation is worded as follows:

'The release for free circulation in the Community of controlled substances imported from third countries shall be subject to quantitative limits. Those limits shall be determined and quotas allocated to undertakings for the period 1 January to 31 December 1999 and for each 12-month period thereafter in accordance with the procedure referred to in Article 18(2). They shall be allocated only:

(a) for controlled substances of groups VI and VIII as referred to in Annex I;

(b) for controlled substances if they are used for essential or critical uses or for quarantine and preshipment applications;

...'

18 Article 17 of the Regulation relates to the prevention of leakages of controlled substances and provides, inter alia, in Article 17(2) that the Member States are to define the minimum qualification requirements for the personnel involved in the fumigation of methyl bromide.

19 Article 18 of the Regulation provides that the Commission is to be assisted by a committee to which Articles 4 and 7 of Decision 1999/468/EC of the Council of 28 June 1999 laying down the procedures for the exercise of the implementing powers conferred on the Commission (OJ 1999 L 184, p. 23) apply.

3. *Application of Articles 6 and 7 of the Regulation: the changes that occurred on 1 January 2005*

20 The following information concerning the changes that occurred on 1 January 2005 in the application of Articles 3, 4, 6 and 7 of the Regulation is derived from the parties' pleadings and from their written replies to questions put by the Court.

21 Until 31 December 2004, the system of licences and quotas awarded under Articles 6 and 7 of the Regulation operated as follows. Every year, generally in September, importers submitted to the Commission a request for an import quota for the following year using a standard application form specifically designed for that purpose by the Commission. The quotas were usually allocated in January or February of the following year by means of Commission decisions containing an exhaustive list of the names of the importers whose requests had been accepted by the Commission and stating their individual quotas. For methyl bromide, the amount of the individual quotas was calculated on the basis of the historical market share in 1991 of the eight importers that were entitled to import quotas for controlled uses of methyl bromide.

22 Since 1 January 2005, the permitted quantities and uses and the undertakings eligible for exemptions for critical uses of methyl bromide have had to be determined each year by the Commission in accordance with the procedure laid down in Article 18(2) of the Regulation, the criteria set out in Decision IX/6, and any other criterion adopted by the parties to the Montreal Protocol.

23 In March of the preceding year, the Commission asks the Member States to submit their applications for critical uses of methyl bromide by 30 June. The Commission evaluates the applications, usually assisted by outside experts, and determines the quantities eligible for critical uses per crop per Member State.

24 The Commission then publishes a notice in the *Official Journal of the European Union* for all ozone depleting applications indicating that quotas will be set limiting the total quantity of methyl bromide that can be placed on the market for critical uses. It then draws up a decision determining the quantities of methyl bromide permitted to be used for critical uses.

25 Member States provide the Commission with figures indicating the stocks of methyl bromide available for critical uses and supply the names and addresses of each fumigator or fumigation company in operation, the quota per crop per fumigator, a plan of how the methyl bromide will be used in a manner consistent with the Regulation, and stocks per fumigation company per use. It is for the Member State to divide up the total quota between the fumigators in accordance with their own criteria.

26 The Commission has established an electronic system for the management and allocation of quotas by means of a website for Ozone Depleting Substances ('the ODS site'). Quotas and stocks are entered on that site for each fumigator. Each fumigator is required to register through his Member State and receives a password to access the ODS site, on which he can request a licence to import methyl bromide or have it produced when stocks are exhausted. The system is designed so that stocks are deducted from production or import quotas. A fumigator is issued with a licence allowing the drawdown of stocks using the ODS site. Once the stocks are exhausted, the fumigator can request an import or production licence. Fumigators can obtain licences only by using the ODS site.

27 Once the fumigator has received a quota, he can choose an importer registered on the ODS site and place an order with him to import the requisite quantity of methyl bromide. Requests for quantities forming part of an allocated quota must identify the importer. The Commission states by e-mail to the fumigator whether it accepts or refuses the request. If the request is accepted, the Commission 'signs off' the request and informs the Member State concerned. In order for him to be able to import, and in order that the product can be cleared through customs, the importer must then, on the fumigator's behalf, request and obtain an import licence signed by the Commission specific to the fumigator's request as regards the quantity, crop and Member State. An importer can accumulate import requests with a view to obtaining sufficient methyl bromide to meet several requests on a single import licence. The importer is then responsible for providing the fumigator with the correct quantity of methyl bromide.

28 The Member States are requested to report each year on the critical uses of methyl bromide, and this serves as a double check that the amount per use category has not been exceeded.

4. *The 2004 Notice to Importers*

29 On 22 July 2004, the Commission published a notice to importers in the European Union in 2005 of controlled substances that deplete the ozone layer, regarding the Regulation (OJ 2004 C 187, p. 11, 'the 2004 Notice') (see also paragraph 24 above).

30 According to point 1 of the 2004 Notice, it is addressed to undertakings that intend to import substances, including methyl bromide, into the European Community from sources outside the Community in 2005.

31 At point II of the 2004 Notice, the Commission informs those undertakings that Article 7 of the Regulation requires that quantitative limits be determined and quotas allocated to producers and importers for, inter alia, methyl bromide. It also states as follows:

'Quotas shall be allocated for:

(a) methyl bromide, for quarantine and pre-shipment (QPS) as defined by the Parties to the Montreal Protocol; and for critical uses in accordance with Decisions IX/6, ExI/3 and ExI/4 and any other relevant criteria agreed by the Parties to the Montreal Protocol and Article 3(2)(ii) of the Regulation; both QPS and critical uses approved by the Commission, pursuant to Article 18 of the Regulation;

...'

32 At point VII of the 2004 Notice, the Commission notifies undertakings not in possession of a quota for controlled substances for 2004 which wish to apply for an import quota for 2005 that they should make themselves known to the Commission no later than 3 September 2004.

33 At point VIII of the 2004 Notice, the Commission informs undertakings with an import quota for controlled substances in 2004 that they should make a declaration by completing and submitting the relevant forms on the ODS site and that '[o]nly applications received by 3 September 2004 will be considered by [it]'.

34 At point IX of the 2004 Notice, the Commission states that it will consider applications and will set import quotas for each importer and producer. The allocated quotas will be shown on the ODS site and all applicants will be notified of the decision by post.

5. *The applicant's request*

35 Since 1996, the applicant has imported methyl bromide into the European Union in its own name and also on behalf of two other importers pursuant to a transfer of import quotas. The applicant was assigned import quotas from 1996 to 2004. In 2004 the applicant was assigned 37.46% of the total European Union quota.

36 Following publication of the 2004 Notice, on 30 August 2004 the applicant submitted to the Commission a declaration seeking, inter alia, a methyl-bromide quota for critical uses for 2005. It requested the allocation of a quota of 4 500 000 kg, which represents 2 700 000 Ozone Depleting Potential (ODP) kg.

37 On 10 December 2004, the applicant received an e-mail, which was sent by the Commission to all users of the ODS site, informing it that '[t]he quota for 2005 [would] be available on [its] website ... on ... 13 December 2004'. It stated that the 'import decision' was being prepared and would be notified to each importer as soon as it had been adopted. The Commission added that all imports as of 1 January 2005 would be attributed to the 2005 quota.

38 On 1 March 2005, in the absence of any further communication from the Commission regarding an import quota for 2005, the applicant sent a request to the Commission calling upon it to notify the applicant, pursuant to Article 7 of the Regulation and the 2004 Notice, of its decision to allocate the applicant a quota for the importation of methyl bromide for critical uses during 2005 in the European Union. It stated that it was entitled to such a quota because it had sent the application required by the Commission in the 2004 Notice on 30 August 2004. The applicant referred to the Commission's e-mail of 10 December 2004 and stated that it had not received any further information since that time, nor had its import quota been allocated, nor had it received any response concerning its application of 30 August 2004.

6. *The contested decision*

39 The Commission replied to that request by letter of 11 April 2005 ('the contested decision'), in which it informed the applicant that, under the Regulation, it was no longer possible to award import quotas to the applicant. It stated that the amount of methyl bromide allocated for individual critical uses had been determined following the procedure laid down in Article 3(2)(ii) of the Regulation and in accordance with Article 18 of the Regulation.

40 In the contested decision, the Commission stated that application of Article 3(2)(ii) of the Regulation requires the users to be identified and the quantities that can be used for critical uses to be specified. The Commission thus identified fumigators as users because, first, Article 17(2) of the Regulation requires Member States to define the minimum qualification requirements for personnel involved in the use of methyl bromide and, second, fumigation is the only possible use of this substance. The

Commission stated that it is now fumigators who must request authorisation to import or produce methyl bromide, if there are no stocks of recycled or reclaimed methyl bromide available from any of the parties to the Montreal Protocol.

41 The Commission also explained that, under Article 4(2)(i)(d) of the Regulation, the eight importers that had enjoyed a legal right to import quotas for controlled uses of methyl bromide, the size of each quota being calculated according to the historical market share in 1991, were no longer entitled to quotas for controlled uses of methyl bromide from 1 January 2005.

42 The Commission went on to state that the grace period provided for by Article 4(2)(ii) of the Regulation did not apply in this case as a result of Article 4(4) and (5). It considered that, according to the scheme of Article 4 of the Regulation, Article 4(4)(i)(b) prevails. According to the Commission, under that provision, the placing on the market and use of methyl bromide by undertakings other than producers and importers were to be permitted after 31 December 2004, as licensed requests for critical uses took effect on 1 January 2005. In the Commission's view, it followed that the historical market shares held by importers no longer formed the legal basis for imports of methyl bromide for critical uses.

43 The Commission concluded by stating that the import quotas had been replaced by strictly controlled quotas for critical uses that were to be allocated to fumigators and that the European market was open to any undertaking that might wish to import methyl bromide, provided that it had a valid licence to import methyl bromide for critical uses.

7. *Decision 2005/625/EC*

44 By Commission Decision 2005/625/EC of 23 August 2005 determining the quantities of methyl bromide permitted to be used for critical uses in the European Community from 1 January to 31 December 2005 pursuant to the Regulation (OJ 2005 L 219, p. 47) (see also paragraph 24 above), the Commission determined, under Article 3(2)(ii) of the Regulation and in accordance with the criteria in Decision IX/6, the quantities of methyl bromide permitted to be used for critical uses in the Community from 1 January to 31 December 2005.

Procedure

45 By an application lodged at the Registry of the Court of First Instance on 31 May 2005, the applicant brought the present action.

46 By a separate document lodged at the Court Registry on 18 July 2005, the Commission raised an objection of inadmissibility under Article 114(1) of the Rules of Procedure of the Court of First Instance. The applicant filed its observations on that objection of inadmissibility on 16 September 2005. By order of the Court of First Instance (Second Chamber) of 15 May 2006, the decision on the objection of inadmissibility was reserved for the final judgment and the costs were reserved.

47 Upon hearing the report of the Judge-Rapporteur, the Court put questions in writing to the applicant and the Commission by way of measures of organisation of procedure under Article 64 of the Rules of Procedure of the Court of First Instance. The parties replied within the time-limit allowed.

48 By a document lodged at the Court Registry on 26 June 2006, the Commission submitted its defence.

49 Pursuant to Article 47(1) of the Rules of Procedure, the Court decided that a second exchange of pleadings was not necessary. The written procedure was closed on 5 July 2006.

50 Upon hearing the report of the Judge-Rapporteur, the Court decided to open the oral procedure. The parties presented oral argument and replied to the questions put to them by the Court at the hearing on 28 November 2006.

Forms of order sought

51 The applicant claims that the Court should:

— dismiss the arguments submitted in the objection of inadmissibility;

— declare the application admissible and well founded or, in the alternative, join the questions on admissibility to the examination of the substance, or, in the further alternative, reserve its decision on standing until judgment in the main proceedings;

— annul the contested decision;

— order the Commission to allocate a 12-month quota to the applicant pursuant to Article 7 of the Regulation;

— order the Commission to pay the costs.

52 The Commission contends that the Court should:

— dismiss the action;

— order the applicant to pay the costs.

Law

1. *Admissibility*

53 The Commission raises an objection of inadmissibility by which it submits that the request for an order that the applicant be allocated an import quota and the application for annulment are inadmissible.

The request for an order directing the Commission to allocate an import quota to the applicant

Arguments of the parties

54 The Commission considers that, according to the case-law, the Court of First Instance has no power when seised under Article 230 EC to issue directions to the Commission and that, accordingly, the request that a direction be issued is inadmissible.

55 The applicant points to Article 233 EC and states that, if the contested decision were annulled, the only possible way for the Commission to comply with the judgment would be to grant the applicant a 12-month quota. The applicant submits that its request must be considered in that context.

Findings of the Court

56 In an action for annulment founded on Article 230 EC, the jurisdiction of the Community judicature is confined to reviewing the legality of the contested measure and, according to settled case-law, the Court of First Instance cannot, in the exercise of its jurisdiction, issue directions to the Community institutions (Case C-5/93 P *DSM* v *Commission* [1999] ECR I-4695, paragraph 36, and Case T-145/98 *ADT Projekt* v *Commission* [2000] ECR II-387, paragraph 83). If the contested measure is annulled, it is for the institution concerned to adopt, in accordance with Article 233 EC, the necessary measures to comply with the judgment annulling that measure (Case T-67/94 *Ladbroke Racing* v *Commission* [1998] ECR II-1, paragraph 200, and *ADT Projekt* v *Commission*, paragraph 84).

57 It follows that the head of claim seeking an order that the Court issue a direction to the Commission to allocate an import quota to the applicant must be dismissed as inadmissible.

The action for annulment

Arguments of the parties

58 The Commission submits that the contested decision is not a measure producing binding legal effects so as to affect the interests of the applicant and that the action for annulment is therefore inadmissible.

59 The applicant considers that the action is admissible but requests the Court to examine the substance of the case before ruling on the admissibility of the action. It takes the view that the admissibility of the present case cannot be fully appraised until a review has first been carried out of its underlying substance.

Findings of the Court

60 In the interest of the proper administration of justice, the Court considers it appropriate in the circumstances of the case to rule first on the substantive issues before examining the issues of admissibility (see, to that effect and by analogy, Case 64/82 *Tradax* v *Commission* [1984] ECR 1359, paragraph 12, and Joined Cases T-125/96 and T-152/96 *Boehringer* v *Commission and Council* [1999] ECR II-3427, paragraph 58, confirmed on appeal in Case C-23/00 P *Council* v *Boehringer* [2002] ECR I-1873, paragraph 52).

2. *Merits*

61 The applicant puts forward four pleas in law in support of its action for annulment. By its first plea, it submits that the Commission misapplied the legal framework established in the Regulation and, by its second plea, that the Commission infringed Article 7 of the Regulation. It is appropriate to consider both of those pleas together. The applicant then submits, by its third plea, that the Commission went beyond the legal framework laid down in Article 7 of the Regulation and exceeded the mandate conferred on it by the Parliament and the Council in the Regulation. Lastly, by its fourth plea, the applicant maintains that the Commission breached the principle of legal certainty and the principle of the protection of legitimate expectations.

The first and second pleas, alleging misapplication of the relevant legal framework and infringement of Article 7 of the Regulation

Arguments of the parties

62 In its first plea, the applicant claims that, by failing to allocate quotas to importers, the Commission misapplied the legal framework established in the Regulation. By stating that, as from 1 January 2005, only fumigators can request permission to import methyl bromide and that importers can no longer obtain quotas, the Commission confuses the provisions of the Regulation on permitted quotas and the procedure for calculating their amount with the provisions and procedures relating to the identity of the undertakings allowed to import the quantities thus calculated.

63 More specifically, the applicant submits that, under Article 3(2)(ii) of the Regulation, the amount of the quota is to be fixed by the Commission in accordance with the procedure laid down in Article 18(2) of the Regulation and the criteria set out in Decision IX/6. The applicant does not therefore dispute that the amount of permitted quotas as from 1 January 2005 is no longer calculated on the basis of the eight importers' historical production volumes.

64 However, according to the applicant, this does not mean that the importers which had the right before 1 January 2005 to import quotas for controlled uses of methyl bromide can be excluded from carrying out their activities. Such an interpretation would be incompatible with Articles 6 and 7 of the Regulation, which grant importers, not users, the right to obtain an import licence and a 12-month quota. Moreover, under Article 4(5) of the Regulation, importers are also entitled to transfer their right to another importer.

65 In addition, the Commission's interpretation would entail current importers being obliged to close their businesses, since they would be excluded from the new system of importation envisaged by the Commission. That would be at odds with the freedom to pursue a trade, which, the applicant submits, is part of the common legal heritage of all Member State jurisdictions and of the general principles of Community law.

66 Lastly, the Commission's interpretation would distort competition rather than open it up, since it would exclude importers from competing with users in the market for the importation and sale of methyl bromide.

67 In its second plea, the applicant takes the view that Article 7 of the Regulation explicitly obliges the Commission to make the release for free circulation in the Community of controlled substances, including methyl bromide, subject to quotas allocated directly to importers for each 12-month period after 31 December 1999.

68 According to the applicant, the Commission acknowledged its obligation to grant quotas to importers at point IX of the 2004 Notice. Moreover, the subsequent correspondence corroborates the view that the Commission was aware of and acknowledged the applicant's individual right to obtain an individual 12-month quota for 2005. In the applicant's view, there is thus no doubt concerning the Commission's obligation under secondary law to allocate a quota to the applicant. In accordance with the 2004 Notice, on 30 August 2004 the applicant submitted to the Commission its declaration to enable it to import methyl bromide in 2005.

69 The applicant points out that the Commission failed to refer to Article 7 of the Regulation in the contested decision, even though the applicant had explicitly based its request on that provision in its letter of 1 March 2005. The Commission simply indicated that fumigators may obtain import quotas, which the applicant does not contest. However, the applicant does contest the conclusion, first, that importers which at that time had the right to import quotas were no longer entitled to quotas after 1 January 2005 and, secondly, that importers' quotas had been replaced by quotas allocated to fumigators. The applicant considers that that statement conflicts with Article 7 of the Regulation and infringes the applicant's rights to import quotas conferred by that provision.

70 With regard to the first plea, the Commission submits that the legal regime for the importation of methyl bromide changed on 1 January 2005 as a result of Article 4(2)(ii) of the Regulation. The Commission points out that, as of that date, the Community was under an obligation to ban the use of methyl bromide except, inter alia, for critical uses. In accordance with Decision IX/6 and Article 3(2)(ii) of the Regulation, the regime in place under Article 4(2)(i) of the Regulation could no longer serve as a basis for granting import licences after 31 December 2004. From

1 January 2005, it was for fumigators to apply for such a licence before requesting importers, such as the applicant, to import the amount of methyl bromide granted under the licence. The Commission considers that the change in the applicant's position is a direct result of Article 3(2)(ii) of the Regulation, which brought to an end the allocation of quotas calculated on the basis of historical quantities. However, according to the Commission, that change does not in any way mean that companies such as the applicant have to cease trading.

71 With regard to the second plea, the Commission points out that Article 7 of the Regulation provides that quotas are to be allocated to undertakings. Since Article 7(b) of the Regulation refers to critical uses, the Commission submits that that provision should be read and understood in the light of Article 3(2) of the Regulation to determine which undertakings exactly should be allocated quotas for critical uses of methyl bromide after 1 January 2005. The undertakings to which quotas should be allocated are therefore fumigators and not importers. The Commission maintains that Article 7 follows logically from Article 6, which establishes the principle that the importation of methyl bromide is not free but subject to obtaining and presenting a valid import licence. These two provisions complement each other.

72 Finally, the Commission submits that the 2004 Notice and its e-mail of 10 December 2004 are of a general nature, relate to all ozone depleting substances and do not expressly state that quotas will be allocated to importers for critical uses of methyl bromide in 2005. The Commission points out that, on the contrary, point II(a) of the 2004 Notice refers to Article 3(2)(ii) of the Regulation, and it thus indicates that quotas will be allocated in accordance with that provision. In addition, the Commission stated at the hearing that, as a result of that reference, the 2004 Notice may be distinguished from the 2003 Notice.

Findings of the Court

73 The essential feature of the system established by the Commission on 1 January 2005 is the fact that it defined the users within the meaning of Article 3(2)(ii) of the Regulation who may take advantage of the critical exemption as being fumigators. The Commission also decided, under Article 7 of the Regulation, that import quotas were no longer to be granted to importers but that, in 2005, quotas were to be allocated to fumigators as users. The system also provides that importation requires issue of a licence to the fumigator and, in addition, to the importer. Lastly, the Commission decided under the new system to limit the importation by importers of methyl bromide on a case by case basis, licences being issued only where the conditions for the placing of controlled substances on the market set out in the second indent of Article 4(4)(i)(b) of the Regulation are met. Thus, it is no longer possible for importers to build up stocks of methyl bromide for sale to users.

74 With regard to the alleged infringement of Article 7 of the Regulation and the applicant's claim that the system established by the Commission with effect from 1 January 2005 constitutes a misapplication of the relevant provisions of the Regulation, it is to be noted, first, that the wording of Article 7 of the Regulation, which governs not just the importation of methyl bromide but that of all controlled substances from third countries, does not specify that import quotas must be granted to importers but provides that quotas must be allocated to undertakings and, according to the definition in Article 2 of the Regulation, that term includes producers, recyclers, users, importers and exporters of controlled substances. The wording of Article 7 therefore leaves the Commission free to choose which categories of undertaking from among those referred to in Article 2 of the Regulation, including fumigators in their capacity as users, are to receive quotas under that provision. It follows that the Commission is not obliged under Article 7 to allocate import quotas to importers.

75 Secondly, Article 3(2)(i)(d) of the Regulation prohibits the production of methyl bromide after 31 December 2004. Further, Article 3(2)(ii) provides that the Commission is to apply the criteria set out in Decision IX/6 in order to determine every year any critical uses for which the production, importation and use of methyl bromide may be permitted in the Community after 31 December 2004, the quantities and uses to be permitted and those users who may take advantage of the critical exemption. Article 3(2)(ii) also stipulates that such production and importation are to be allowed only if no adequate alternatives or recycled or reclaimed methyl bromide are available from any of the parties to the Montreal Protocol.

76 It is also to be noted that Article 4(2)(i)(d) of the Regulation prohibits the placing on the market of controlled substances after 31 December 2004, subject to Article 4(4) and (5). The second indent of Article 4(4)(i)(b) provides that the prohibition under Article 4(2)(i)(d) does not apply to the placing on the market or use of methyl bromide where it is used to meet the licensed requests for critical uses of those users identified in accordance with Article 3(2) of the Regulation.

77 It follows that, under Articles 3 and 4 of the Regulation, the use and placing on the market of methyl bromide in 2005 are strictly confined to critical uses. It is clear from those provisions that methyl bromide is to be available within the Community only where there is specific need for a critical use.

78 Thirdly, Article 6(1) of the Regulation provides that the importation of methyl bromide into the Community requires an import licence but it does not specify either who is to be granted a licence or the number of licences to be issued per import transaction. Therefore, the grant of two licences for each importation operation, the first to the user and the second to the importer, as provided for by the

system established by the Commission with effect from 1 January 2005, is consistent with that provision. Moreover, Articles 6 and 7 of the Regulation are complementary provisions in that both articles together seek to control and limit the amounts of controlled substances imported into the Community.

79 Consequently, in view of the restrictions on the production, use and placing on the market of methyl bromide imposed by Article 3 and 4 of the Regulation, it follows from the overall scheme of the Regulation that the purpose of Articles 6 and 7 thereof is to ensure that the importation of methyl bromide does not go beyond what is strictly necessary for the critical uses specifically identified.

80 The Commission's interpretation of Articles 3, 4, 6 and 7 of the Regulation, which entails no longer allocating import quotas to importers and limiting imports of methyl bromide on a case by case basis, thus preventing importers from building up stocks, therefore gives practical effect to those provisions and ensures that they are applied coherently and in a manner that corresponds to the overall scheme and the objectives of the Regulation, which seeks to limit, in particular, the production and use of methyl bromide, in order to protect the ozone layer.

81 That analysis is not affected by the fact that Article 7 of the Regulation does not expressly provide that, with effect from 1 January 2005, the system to be applied is to change with regard to methyl bromide. It is clear from paragraphs 74 to 80 above that the Commission did not, as the applicant maintains, confuse two separate systems, namely, on the one hand, the system under Articles 3 and 4 of the Regulation and, on the other hand, the system under Articles 6 and 7 of the Regulation, but correctly interpreted those provisions as a whole in a manner which is consistent with the overall scheme of the Regulation.

82 Likewise, with regard to the argument alleging infringement of Article 4(5) of the Regulation, which permits any importer entitled to place controlled substances on the market to transfer that right to other importers thus entitled within the Community, it must be noted that, under Article 4(2)(i)(d) of the Regulation, producers and importers are no longer entitled after 31 December 2004 to place methyl bromide on the market, except for the amounts permitted on a case by case basis under the second indent of Article 4(4)(i)(b) and Article 3(2)(ii) of the Regulation. It follows, first, that the right to transfer conferred on importers in 2005 under Article 4(5) of the Regulation is limited solely to the amounts permitted on a case by case basis and, secondly, that importers may exercise that limited right to transfer without being in possession of an import quota, as the applicant acknowledged at the hearing. Therefore, the Commission is not obliged by Article 4(5) of the Regulation to grant import quotas to importers.

83 In the light of the foregoing, it must be held that the Commission was not obliged under the Regulation to award an import quota in 2005 to the applicant as an importer and that the new system established by the Commission from 1 January 2005 constitutes a lawful application of Articles 3, 4, 6 and 7 of the Regulation that is compatible with those provisions. In those circumstances, it is not necessary to examine whether the Commission could have done otherwise and continued after 31 December 2004 to award import quotas to importers.

84 With regard to the applicant's reference to the 2004 Notice, the Commission stated at point II of that notice that the import quotas provided for in Article 7 of the Regulation were to be awarded in 2005 for methyl bromide for critical uses, in accordance with Decision IX/6 and with Article 3(2)(ii) of the Regulation, which provides that production and importation are to be allowed only if no adequate alternatives or recycled or reclaimed methyl bromide are available from any of the parties. The Commission also indicated at the hearing that that reference to Decision IX/6 and to Article 3(2)(ii) of the Regulation distinguished the 2004 Notice from the text of the corresponding 2003 Notice, which did not contain such a reference. It follows that an alert reader, such as the applicant, was able to infer from

the 2004 Notice that in 2005 the Commission intended no longer to apply Article 7 of the Regulation in the same manner as in 2004 and that import quotas would be granted in 2005 in accordance with Decision IX/6 and Article 3(2)(ii) of the Regulation. Lastly, the terms in which points II and IX of the 2004 Notice are couched, in that they refer to producers and importers, not fumigators, can be explained by the fact that the 2004 Notice relates to all ozone depleting substances, as the Commission points out, and by the fact that there are no specific provisions dealing only withy methyl bromide. The Court therefore considers that the 2004 Notice does not call into question the Commission's decision not to allocate an import quota to the applicant in 2005.

85 Next, it must be held that the applicant's argument based on the e-mail of 10 December 2004 cannot succeed. It was not an e-mail sent to the applicant individually confirming that it would be allocated an individual quota for methyl bromide for critical uses but an e-mail sent to all the users of the ODS site announcing that all quotas were to be published, for all controlled substances and for all their uses. It follows that that e-mail does not call into question the Commission's interpretation of the Regulation.

86 The Court also holds that the Commission's interpretation of the Regulation cannot be regarded as leading to distortion of competition in the market. Contrary to the applicant's submission, importers are not prevented from competing with fumigators in the market for the importation and sale of methyl bromide. Thus, as submitted by the Commission, the change which occurred on 1 January 2005 does not in any way mean that companies such as the applicant must cease trading. It simply means that such traders may no longer apply for import licences in order to build up stocks of that product which they will then sell on to the actual users.

87 Finally, it is settled case-law that the right to freedom to pursue a trade or profession is not absolute but must be viewed in relation to its social function. Its exercise may therefore be restricted, provided that such restrictions correspond to objectives of general interest pursued by the Community and that they do not constitute, with regard to the aim pursued, a disproportionate and intolerable interference which infringes upon the very substance of the rights thus guaranteed (Case 5/88 *Wachauf* [1989] ECR 2609, paragraphs 17 and 18, and Case C-295/03 P *Alessandrini and Others* v *Commission* [2005] ECR I-5673, paragraph 86).

88 In the present case, the new system introduced by the Commission on 1 January 2005 simply changed the circumstances in which methyl bromide is imported and does not mean that the applicant is obliged to cease trading. Even if the new system were to be regarded as a restriction, the Court observes that the general interest pursued by the Community is, in this instance, the protection of the ozone layer and the Court considers that any restriction there may be is justified, in any event, by the fact that it is imposed in application of the Regulation in a way which is consistent therewith (paragraphs 74 to 83 above), and cannot be regarded as disproportionate or intolerable or as infringing upon the very substance of that right, since the applicant can continue to pursue its previous economic activities.

89 In the light of the above, the first and second pleas must be rejected.

The third plea, alleging lack of competence (ultra vires)

Arguments of the parties

90 The applicant considers that, by not granting it a quota for the importation of methyl bromide into the European Union, the Commission went beyond the legal

framework provided in Article 7 of the Regulation and thereby exceeded the mandate conferred on it by the Parliament and the Council in the Regulation.

91 In its view, it is settled case-law that an implementing act which is adopted pursuant to the provisions of a basic regulation must be annulled where it has modified the scope of the obligations imposed without following the legislative procedure prescribed by the Treaty. Where an implementing act is a derogating act in that it lays down criteria departing from those in the basic act, it cannot be adopted without Parliament first being consulted.

92 Similarly in this case, Article 7 of the Regulation requires the Commission to grant import quotas for the release of methyl bromide into free circulation in the Community. Only the Community legislature is empowered to decide that import quotas should no longer be granted to importers after 31 December 2004. Until such a decision is made, the Commission is obliged to continue granting the import quotas and any refusal to do so is illegal.

93 The Commission considers that the third plea is a re-run of the second plea and refers to its submissions in that regard. It does, however, point out that it did actually determine the quotas for methyl bromide to be used for critical uses in Decision 2005/625 and observes that the applicant did receive import licences and was able to trade.

Findings of the Court

94 The Court has held, in its examination of the first and second pleas, that Article 7 of the Regulation did not oblige the Commission to grant an import quota to the

applicant for 2005 and that the Commission's application of the Regulation in the new system established on 1 January 2005 is compatible with the provisions of the Regulation. In so far as the contested decision informs the applicant that, under the new system, it may no longer receive an import quota, it constitutes a measure adopted by the Commission that is properly based on the Regulation and is not ultra vires. The Commission did not, therefore, by adopting the contested decision, encroach upon the powers of the Council or upon those of the Parliament.

95 It follows that the third plea must be rejected.

The fourth plea, alleging breach of the principle of the protection of legitimate expectations and the principle of legal certainty

Arguments of the parties

— Arguments of the applicant

96 The applicant submits that, by denying its right to obtain an import quota on the basis of Article 7 of the Regulation, the 2004 Notice and the subsequent e-mail exchanges, the Commission breached the applicant's legitimate expectation to be allocated an import quota and infringed the principle of legal certainty.

97 According to the applicant, the principle of legal certainty requires that those subject to the law should not be placed in a situation of uncertainty as to their rights and obligations, that Community rules define with certainty and without any ambiguity the rights of the persons affected by them, and that measures be taken to ensure that situations and legal relationships governed by these rules remain foreseeable. In the present case, the Commission's refusal to grant an import quota to the applicant and its decision to replace importers' quotas with quotas granted to users render the whole system for the importation of methyl bromide into the European Union unpredictable and contrary to the Regulation.

98 According to the applicant, the concept of legitimate expectations constitutes an important corollary to the principle of legal certainty and requires that those who act in good faith on the basis of the law as it is or seems to be should not be frustrated in their expectations. The case-law confirms that a mere administrative practice or concession that is not contrary to the legislation in force and does not involve the exercise of discretion may give rise to a legitimate expectation on the part of the persons concerned, and that the expectation does not necessarily have to be founded on a communication which is generally applicable (Case 84/85 *United Kingdom* v *Commission* [1987] ECR 3765; order in Case C-152/88 R *Sofrimport* v *Commission* [1988] ECR 2931; and Case T-310/00 *MCI* v *Commission* [2004] ECR II-3253, paragraph 112).

99 The applicant's legitimate expectation to be granted a quota for the importation of methyl bromide during 2005 is based on the clear wording of Article 7 of the Regulation and on the Commission's written statements, including the 2004 Notice and the various e-mails sent to the applicant. The applicant states that, on the basis of that expectation, it submitted its 2004 declaration and legitimately expected to be granted an import quota for 2005. By refusing to allocate it a quota for the importation of methyl bromide during 2005, the Commission breached the applicant's legitimate expectations.

— Arguments of the defendant

100 The Commission considers that the applicant was not given precise assurances that it would be allocated a quota for the placing of methyl bromide into free circulation in 2005. It also submits that a prudent and alert economic operator such as the applicant knew or should have known that as from 1 January 2005 it was prohibited to use methyl bromide or to place methyl bromide on the market on its own account, since that prohibition is set out in Article 4(2)(i)(d) of the Regulation. The applicant also knew that only critical uses of methyl bromide would be permitted after that date, pursuant to Article 4(4)(i)(b) of the Regulation. In the Commission's view, it follows that the applicant knew that the system established under Article 4(2)(i)(a) to (c) of the Regulation, whereby quotas were allocated to registered importers on the basis of reference quantities from 1991, could no longer apply as from 1 January 2005. The Commission considers that the applicant expected the quota system and the manner in which quotas were allocated for critical uses of methyl bromide to change from that date on.

Findings of the Court

101 With regard, first, to the alleged breach of the principle of the protection of legitimate expectations, it is to be noted first of all that Article 7 of the Regulation, which refers only to undertakings, and not to importers, does not guarantee importers that they will be allocated quotas and that Articles 3, 4 and 6 of the Regulation do not give rise to a legitimate expectation such as that claimed by the applicant either.

102 Next, it was pointed out at paragraph 84 above that the reference in point II of the 2004 Notice to Decision IX/6 and to Article 3(2)(ii) of the Regulation indicates that import quotas would be granted after 1 January 2005 in accordance with those

provisions. Moreover, it was found at paragraph 84 above that that reference distinguished the 2004 Notice from the text of the corresponding 2003 Notice and that it followed that an alert reader such as the applicant was able to infer from the 2004 Notice that the Commission intended to change its former practice in 2005. It must therefore be concluded that the 2004 Notice does not provide assurance to importers that they will receive import quotas.

103 It is clear from the case-law, as the Commission submits, that a prudent and alert economic operator who could have foreseen the adoption of a Community measure likely to affect his interests cannot rely on the principle of the protection of legitimate expectations if such a measure is adopted (Joined Cases C-182/03 and C-217/03 *Belgium and Forum 187* v *Commission* [2006] ECR I-5479, paragraph 147, and Case T-336/94 *Efisol* v *Commission* [1996] ECR II-1343, paragraph 31). In that regard, it should be noted that the applicant is one of the eight importers which were the only undertakings entitled to import methyl bromide into the Community until 2004 and that any change in the system applicable to methyl bromide has great economic importance for its import activities. In those circumstances, the Court considers that a diligent undertaking in the applicant's position should have sought specific information concerning forthcoming changes. It should be noted in that regard that the applicant has acknowledged that, in accordance with Articles 3 and 4 of the Regulation, it expected changes in the system applicable to methyl bromide as from 1 January 2005.

104 The applicant was therefore under such a duty to exercise diligence in the circumstances of the case.

105 It must also be noted that, according to the case-law, a person may not plead infringement of the principle of the protection of legitimate expectations unless he has been given specific assurances by the administration (*Belgium and Forum 187* v *Commission*, paragraph 147, and *Efisol* v *Commission*, paragraph 31). In the present case, the Commission rightly submits that it did not give the applicant specific assurances.

106 It is also clear from the case-law that a prior administrative practice on the part of the Commission that has been made public may, in the absence of indications to the contrary, give rise to a legitimate expectation that the same rules will be applied, particularly if there is nothing to distinguish the communications of the Community institution concerned from its previous communications (*MCI* v *Commission*, paragraph 112; see also, to that effect, *United Kingdom* v *Commission*, paragraphs 9 to 27, and *Sofrimport* v *Commission*, paragraphs 17 to 23). However, those principles cannot be applied here. In the present case, point II of the 2004 Notice is distinguished by the reference to Decision IX/6 and to Article 3(2)(ii) of the Regulation, from which it is apparent that in 2005 import quotas would no longer be granted in accordance with the Commission's earlier practice but in accordance with that provision.

107 Finally, the Commission's e-mail of 10 December 2004 was sent to all the users of the ODS site and announced that all of the quotas were to be published, for all controlled substances and for all their uses. It follows that it did not in any way guarantee that the applicant would be granted an individual quota for methyl bromide for critical uses. In so far as the applicant refers to further e-mails from the Commission, it should be noted that it has failed to adduce any evidence in that regard in these proceedings and indeed to identify the e-mails it refers to.

108 Secondly, with regard to the alleged infringement of the principle of legal certainty, according to the case-law that principle is a fundamental principle of Community law which requires, in particular, that rules should be clear and precise, so that individuals may be able to ascertain unequivocally what their rights and obligations are and may take steps accordingly. However, where a degree of uncertainty regarding the meaning and scope of a rule of law is inherent in the rule, it is necessary to examine whether the rule of law at issue displays such ambiguity as to prevent individuals from resolving with sufficient certainty any doubts as to the scope or meaning of that rule (see, to that effect, Case C-110/03 *Belgium* v *Commission* [2005] ECR I-2801, paragraphs 30 and 31).

109 In the present case, having regard, primarily, to the provisions of the Regulation (see paragraphs 74 to 83 above) but also to the wording of the 2004 Notice (see paragraphs 84 to 102 above), it was not unforeseeable for importers in the applicant's position either that the import quota which the applicant lays claim to would not be granted or that import quotas allocated to importers would be replaced by quotas allocated to users. It follows that neither the Regulation nor the 2004 Notice prevented individuals from resolving with sufficient certainty any doubts as to the scope or meaning of Article 7 of the Regulation.

110 In light of the foregoing, the fourth plea must be rejected.

111 Since the four pleas put forward by the applicant in support of its application for annulment of the contested decision have been rejected, the application must be declared unfounded, and it is unnecessary to rule on the Commission's objection of inadmissibility.

112 Accordingly, the action must be dismissed in its entirety.

Costs

113 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the applicant has been unsuccessful, it must be ordered to pay the costs in accordance with the form of order sought by the Commission.

On those grounds,

THE COURT OF FIRST INSTANCE (Second Chamber)

hereby:

1. Dismisses the action;

2. Orders the applicant to bear its own costs and those incurred by the Commission.

Pirrung Forwood Papasavvas

Delivered in open court in Luxembourg on 22 May 2007.

E. Coulon J. Pirrung

Registrar President