



MEMORANDUM

APPLICABILITY OF ARTICLE 15(2)(C) OF THE F-GAS REGULATION TO EXPORTS OUTSIDE THE EU OF HFCs IN PRE-CHARGED EQUIPMENT

1. INTRODUCTION

1. Regulation (EU) No 517/2014 of the European Parliament and of the Council of 16 April 2014 on fluorinated greenhouse gases and repealing Regulation (EC) No 842/2006 ("F-Gas Regulation") provides for a reduction of the quantity of hydrofluorocarbons ("HFCs") placed on the market by imposing a quota system supervised by the European Commission ("Commission").¹ It also provides for certain exemptions to the quota system.² There is in particular an exemption for HFCs supplied directly by a producer (or an importer) to undertakings for export out of the Union, where those HFCs are not subsequently made available to any other party within the Union prior to export.³
2. This exemption is currently given a narrow interpretation, excluding exports of HFCs contained in pre-charged equipment. In Commission Implementing Regulation (EU) No 1191/2014 of 30 October 2014 determining the format and means for submitting the report referred to in Article 19 of Regulation (EU) No 517/2014 of the European Parliament and of the Council on fluorinated greenhouse gases ("Reporting F-Gas Regulation"), the Commission states that "[o]nly hydrofluorocarbons in bulk shall be reported, not quantities contained in products or equipment."⁴
3. This paper sets out the reasons why the exemption in Article 15(2)(c) of the F-Gas Regulation should cover exports of HFCs contained in pre-charged equipment. It demonstrates that the

¹ Article 15(1) F-Gas Regulation: "*The Commission shall ensure that the quantity of hydrofluorocarbons that producers and importers are entitled to place on the market in the Union each year does not exceed the maximum quantity for the year in question calculated in accordance with Annex V.*

Producers and importers shall ensure that the quantity of hydrofluorocarbons calculated in accordance with Annex V that that each of them places on the market does not exceed their respective quota allocated pursuant to Article 16(5) or transferred pursuant to Article 18."

² Article 15(2) F-Gas Regulation.

³ Article 15(2)(c) F-Gas Regulation.

⁴ Section 5C Reporting F-Gas Regulation.

current interpretation of the exemption cannot be reconciled with the text of the exemption (Section 2); goes against the object and purpose of the F-Gas Regulation (Section 3); is contrary to the principle of proportionality (Section 4); and is discriminatory (Section 5).

2. METHODOLOGY APPLIED TO THE CURRENT INTERPRETATION OF THE EXEMPTION IN THE PRESENT ANALYSIS

4. The exemption must be interpreted in line with the case-law of the Court of Justice of the European Union on the interpretation of EU law. The Court of Justice recognizes three approaches that are used in combination with a priority order. First the text of the provision (literal interpretation) must be examined. When a text of a provision is clear and unambiguous the Court considers that it is not its role to go beyond the legislative provision. In case of ambiguities, the Court will take into consideration the context of the law (systematic interpretation) and its purpose (teleological interpretation).
5. A literal or textual interpretation tries to explain the meaning of a normative text by looking at the "usual meaning" of the words contained herein. A systematic interpretation is a method of interpretation by reference to the general scheme of which the interpreted provision is part. This approach interprets a provision in a way that is consistent with its context. The Court has held that "*every provision of [EU] law must be placed in its context and interpreted in the light of the provisions of [EU] law as a whole*".⁵ A systematic interpretation often goes hand in hand with a teleological interpretation ("purpose-oriented" interpretation) that aims to secure the "*effet utile*" or effectiveness of the provision in question (also known as "functional interpretation"). In addition, provisions that are ambiguous or incomplete may be interpreted in the light of the objectives they pursue (teleological interpretation in the strict sense).
6. All three interpretative approaches support the claim that the exemption in Article 15(2)(c) of the F-Gas Regulation should also apply to exports out of the Union of HFCs contained in pre-charged equipment.

⁵ Case C-283/81 *CILFIT v Ministero della Sanità*, para. 18.

3. THE CURRENT INTERPRETATION OF THE EXEMPTION CANNOT BE RECONCILED WITH THE TEXT OF THE EXEMPTION

7. There is no legal basis to interpret the exemption in Article 15(2)(c) of the F-Gas Regulation as not covering exports out of the Union of HFCs contained in pre-charged equipment. This conclusion is irrespective of the followed interpretation of EU law.

3.1 Literal interpretation

8. Article 15(2)(c) of the F-Gas Regulation provides that "*[t]his Article shall also not apply to the following categories of hydrofluorocarbons: (...) hydrofluorocarbons supplied directly by a producer or an importer to undertakings, for export out of the Union, where those hydrofluorocarbons are not subsequently made available to any other party within the Union, prior to export.*" (emphasis added)
9. Applying a literal interpretation, this provision would encompass all HFCs supplied to "an undertaking" that are subsequently exported. HFCs contained in exported pre-charged equipment are also HFCs that are exported outside the Union. Article 15(2)(c) of the F-Gas Regulation does not state, and it cannot be deduced from that provision, that the HFCs covered by the exemption are solely HFCs in bulk and not HFCs contained in pre-charged equipment. It is only in the subsequent Reporting F-Gas Regulation that the Commission has confined the scope of the exception to bulk HFCs. Neither can such an interpretation of that provision be drawn from any other provision of the F-Gas Regulation.
10. This argument is supported by referring by analogy to the General Court in *GHC v Commission*, where it held that "*it should be pointed out that Article 2 point (10) of Regulation No 517/2014 does not state, and it cannot be deduced from that article, that, in order to be regarded as 'placed on the market', the quantities of HFCs released for free circulation must also be actually sold, meaning that quantities released for free circulation but not yet sold would be excluded. Neither can such an interpretation of that article be drawn from any other provision of Regulation No 517/2014. Moreover, the Commission does not claim that to be the case.*"⁶
11. The reference to "*undertakings*" in Article 15(2)(c) of the F-Gas Regulation supports the argument that the exemption is not limited to exports of bulk HFCs. "*Undertaking*" is defined as "*any natural or legal person who (...) exports fluorinated greenhouse gases or products and*

⁶ Case T-847/14, *GHC v Commission*, para. 55.

equipment that contain such gases" (emphasis added).⁷ This direct reference to exporters of products and equipment that contain F-Gas in Article 15(2)(c) shows that the exemption should be interpreted as covering exports out of the Union of HFCs contained in pre-charged equipment.

12. This is further supported by the legislative history of the F-Gas Regulation. In the original Commission proposal, the concept of "*undertaking*" was not defined and there was no reference to an exemption for HFCs contained in exported pre-charged equipment.⁸ During a round of amendments made by the Council the concept of "*undertaking*" was defined,⁹ but there was no reference to "*any natural or legal person who (...) exports fluorinated greenhouse gases or products and equipment that contain such gases*" (emphasis added). In addition, the exemption for exported HFCs was expressly limited to "*hydrofluorocarbons supplied for direct export outside the Union*".¹⁰ (emphasis added)
13. This subsequently changed. In a later set of amendments, the concept of "*undertaking*" was defined as including any natural or legal person who "*exports fluorinated greenhouse gases*".¹¹ In addition, the exemption was amended to cover "*hydrofluorocarbons supplied directly by a producer or an importer to undertakings, for export [whether in bulk or contained within pre-charged equipment] out of the Union*".¹²
14. This again changed in a later set of amendments. The concept of "*undertaking*" was changed to include any natural or legal person who "*exports fluorinated greenhouse gases including products and equipment that contain such gases*".¹³ At the same time, the exemption was amended and the reference to fluorinated greenhouse gases contained within pre-charged equipment was removed.¹⁴ In the final version of the F-Gas Regulation that was adopted by

⁷ Article 2(30)(b) F-Gas Regulation.

⁸ Proposal for a Regulation of the European Parliament and of the Council on fluorinated greenhouse gases, COM/2012/0643 final - 2012/0305 (COD).

⁹ See Council Document 6899/13 of 27 February 2013, p. 12.

¹⁰ See Council Document 6899/13 of 27 February 2013, p. 28.

¹¹ See Council Document 6899/2/13 of 26 June 2013, p. 14.

¹² See Council Document 6899/2/13 of 26 June 2013, p. 32.

¹³ See Council Document 6899/3/13 of 9 September 2013, p. 15.

¹⁴ See Council Document 6899/3/13 of 9 September 2013, p. 37.

the European Parliament and the Council, this is the wording that was kept, i.e. a direct reference to pre-charged equipment in the definition of the concept of "*undertaking*", with a general reference to the concept of "*undertaking*" in the exemption. This shows that the general reference to HFCs for export out of the Union clearly also includes exports of HFCs contained in pre-charged equipment.

15. Importantly, defining the concept of "*undertaking*" in the F-Gas Regulation as "*any natural or legal person who (...) exports (...) products and equipment that contain [HFCs]*" only makes sense if the exemption in Article 15(2)(c) also applies to exporters of HFCs contained in pre-charged equipment. Otherwise, there would not have been any added value in including exporters of products and equipment that contain HFCs in the definition of "*undertaking*". While it is used in other provisions of the F-Gas Regulation, there is no other provisions where it would have been necessary to expressly include exporters of products and equipment that contain HFCs in the definition of "*undertaking*".

3.2 Systematic interpretation

16. As explained in more detail below, the object and purpose of the F-Gas Regulation is to reduce emissions of F-Gas in the Union. By applying a systematic interpretation and placing Article 15(2)(c) in its context and interpreting it in the light of the provisions of the F-Gas Regulation, it is clear that the F-Gas Regulation is not concerned with emissions of F-Gas outside the Union. An analysis of the other provisions of the F-Gas Regulation supports the argument that the exemption in Article 15(2)(c) is not limited to exports of bulk HFCs.
17. First, the other exemptions in Article 15(2) of the F-Gas Regulation are very specific. The exemptions in Article 15(2)(b), (d) and (e) refer specifically to the "*use*" of HFCs. This shows that whenever the exemptions in Article 15(2) are meant to be limitative, this is expressly mentioned. There is no such specific limitation in Article 15(2)(c) of the F-Gas Regulation, for instance by referring to direct exports of HFCs in bulk. Rather, the exemption is phrased in a more general manner, covering both exports of HFCs in bulk as well as exports of HFCs contained in pre-charged equipment.

18. Second, there is an exemption in the F-Gas Regulation for producers or importers of less than 100 tonnes of CO₂ equivalent of HFCs per year.¹⁵ At the same time, under the F-Gas Regulation HFCs contained in pre-charged equipment must be accounted for within the quota system since 1 January 2017.¹⁶ Initially, the Commission did not interpret the "100 tonnes of CO₂ equivalent of HFCs per year" exemption to cover HFCs imported in pre-charged equipment. Later on the Commission accepted that the reference to the quota system in Article 14(1) of the F-Gas Regulation implies that the threshold of 100 tonnes CO₂ equivalent of HFCs per year also applies to pre-charged equipment.
19. The reasoning was that Article 14 was intended to ensure that HFCs contained in pre-charged equipment would be subject to the same regime as HFCs in bulk and not to impose stricter rules. However, by not interpreting the exemption in Article 15(2)(c) of the F-Gas Regulation to also cover exports of HFCs contained in pre-charged equipment, HFCs contained in pre-charged equipment are not subject to the same regime as HFCs in bulk. While HFCs exported in bulk are not counted towards the quota, HFCs exported in pre-charged equipment would be. Conversely, HFCs in pre-charged equipment would be included in the quota regardless of whether it is imported (as it would be caught pursuant to Article 14(1)), or exported (as it would not benefit from the exemption under Article 15(2)(c)).
20. Third, the mere fact that Article 14 expressly refers to pre-charged equipment placed on the market in the EU includes such pre-charged equipment in the quota system confirms that it is only equipment that is effectively placed on the market that should be accounted for. It would otherwise have sufficed for Article 14(1) to refer to imported pre-charged equipment as all other pre-charged equipment (i.e. manufactured in the EU for domestic or export sales) would already be covered. The reason why Article 14(1) is not confined to imports is because the scope of Article 14 more generally is to address the specific provisions that apply to the "regulated flows" of HFCs contained in pre-charged equipment (i.e. those placed on the market). These do not include the flows which are exported (be it in bulk or in pre-charged equipment) as those fall within the scope of the exemption. In the same vein, the above

¹⁵ Article 15(2) F-Gas Regulation: *This Article shall not apply to producers or importers of less than 100 tonnes of CO₂ equivalent of hydrofluorocarbons per year.*

¹⁶ Article 14(1) F-Gas Regulation: *From 1 January 2017 refrigeration, air conditioning and heat pump equipment charged with hydrofluorocarbons shall not be placed on the market unless hydrofluorocarbons charged into the equipment are accounted for within the quota system referred to in Chapter IV.*

interpretation is confirmed by the fact that the requirements in terms of documentation and verification only apply to pre-charged equipment which is placed on the market (in accordance with Article 14(2)). There is no such documentation requirement in relation to exported pre-charged equipment. This confirms that these flows fall within the scope of the exemption.

4. THE CURRENT INTERPRETATION GOES AGAINST THE OBJECT AND PURPOSE OF THE F-GAS REGULATION

21. A teleological or functional interpretation of the exemption confirms that HFCs contained in pre-charged equipment exported out of the Union should not be included in the quota. The reason why exports of HFCs outside the Union (whether made directly by the producer or through an intermediary) are not covered by the quota is because there are no emissions in the Union from such HFCs. There are equally no emissions in the Union from HFCs contained in pre-charged equipment exported out of the Union. Excluding HFCs contained in exported pre-charged equipment from the exemption contained in Article 15(2)(c) would be contrary to the object and purpose of the F-Gas Regulation.
22. The objective of the F-Gas Regulation is the reduction of emissions of F-Gas in the Union. The Regulation discusses the necessary reductions in greenhouse gas ("GHG") emissions in the Union in order to achieve the goal of limited global climate change to a temperature increase of 2°C.¹⁷ In particular, it discusses the necessary reductions in F-Gas emissions in the Union, and states that "*more can be done to reduce emissions of fluorinated greenhouse gases in the Union*".¹⁸ (emphasis added)
23. The F-Gas Regulation states that the gradual reduction of "*the quantities of hydrofluorocarbons that can be placed on the market has been identified as the most effective and cost-efficient way*

¹⁷ Recital 2 F-Gas Regulation: "(...) In [the] Roadmap, the Commission laid out a cost-effective way of achieving the necessary overall emission reductions in the Union by 2050. That roadmap establishes the sectoral contributions needed in six areas. Non-CO2 emissions, including fluorinated greenhouse gases but excluding non-CO2 emissions from agriculture, should be reduced by 72 % to 73 % by 2030 and by 70 % to 78 % by 2050, compared to 1990 levels. If based on the reference year 2005, a reduction in non-CO2 emissions, except those from agriculture, of 60 % to 61 % by 2030 is required. Fluorinated greenhouse gas emissions were estimated at 90 million tonnes (Mt) of CO2 equivalent in 2005. A 60 % reduction means that emissions would have to be reduced to approximately 35 Mt of CO2 equivalent by 2030. Given estimated emissions of 104 Mt of CO2 equivalent in 2030 based on the full application of current Union legislation, a further decrease of approximately 70 Mt of CO2 equivalent is required." (emphasis added)

¹⁸ Recital 4 F-Gas Regulation.

of reducing emissions of those substances in the long term",¹⁹ and that "[t]o implement the gradual reduction of the quantities of hydrofluorocarbons that can be placed on the Union market, the Commission should allocate quotas to individual producers and importers for the placing of hydrofluorocarbons on the market in order that the overall quantitative limit for the placing hydrofluorocarbons on the market is not exceeded."²⁰

24. This is also confirmed by the General Court which held that *"it must be noted that the objective of Regulation No 517/2014, as mentioned in its Recitals 13 and 14, is the gradual reduction of the quantities of HFCs that can be placed on the Union market, in order to reduce emissions of those substances in the long term."*²¹ (emphasis added)
25. The fact that the focus of the F-Gas Regulation are the emissions of F-Gas in the Union is also clear from the manner in which exports of HFCs are treated. Direct exports by producers of bulk HFCs do not count towards the quota, as these are never placed on the Union market. In addition, the exemption provided for in Article 15(2)(c) provides that even HFCs placed on the Union market, but subsequently exported, are not counted in the quota.
26. When Article 1 states that *"[t]he objective of this Regulation is to protect the environment by reducing emissions of fluorinated greenhouse gases"*, it is therefore evident that this refers to *"emissions of fluorinated greenhouse gases"* in the Union.
27. This is also the reason behind Article 14 of the F-Gas Regulation, whereby HFCs contained in imported pre-charged equipment are counted in the quota. This is in line with the object and purpose of the F-Gas Regulation as there would be emissions in the EU from such imported pre-charged equipment.
28. On the other hand, interpreting the exemption in Article 15(2)(c) of the F-Gas Regulation as not covering exports out of the Union of HFCs contained in pre-charged equipment goes against the object and purpose of the F-Gas Regulation. There are no emissions in the Union from HFCs contained in pre-charged equipment that is not placed on the market, but exported out of the Union.

¹⁹ Recital 13 F-Gas Regulation.

²⁰ Recital 14 F-Gas Regulation.

²¹ Case T-847/14, *GHC v Commission*, para. 44.

29. This is also expressly acknowledged by the Commission when it states that "[t]he treatment of direct exports of products or equipment containing HFCs by producers or designated dealers is no issue for the environmental integrity of a phasedown system focused on the EU market, as emissions from exported HFCs would occur outside the EU."²² (emphasis added)

5. THE CURRENT INTERPRETATION IS CONTRARY TO THE PRINCIPLE OF PROPORTIONALITY

30. The F-Gas Regulation states that "[i]n accordance with the principle of proportionality, as set out in [Article 5 of the Treaty on European Union], this Regulation does not go beyond what is necessary in order to achieve those objectives".²³
31. In this respect, the Treaty on European Union ("TEU") provides that the use of Union competences is governed by the principle of proportionality,²⁴ which is a general principle of EU law.²⁵ It also provides that "[u]nder the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties."
32. By not interpreting the exemption in Article 15(2)(c) of the F-Gas Regulation to cover exports of HFCs contained in pre-charged equipment, the current interpretation is contrary to the principle of proportionality. The current interpretation of the exemption goes beyond what is necessary to achieve the objective of the F-Gas Regulation. This is clear from the Commission's own assessment that "[t]he treatment of direct exports of products or equipment containing HFCs by producers or designated dealers is no issue for the environmental integrity

²² Commission Staff Working Paper Impact Assessment Review of Regulation (EC) No 842/2006 on certain fluorinated greenhouse gases Accompanying the document Proposal for a Regulation of the European Parliament and the Council on fluorinated greenhouse gases (SWD/2012/0364 final), Annex X, Section 3.3.

²³ Recital 26 F-Gas Regulation.

²⁴ Article 5(1) TEU.

²⁵ With respect to the principle of proportionality, the European Court of Justice has held that "according to settled case-law, the principle of proportionality is one of the general principles of Community law and requires that measures implemented through Community law provisions be appropriate for attaining the legitimate objectives pursued by the legislation at issue and must not go beyond what is necessary to achieve them". While recognizing that "in the exercise of the powers conferred on it the Community legislature must be allowed a broad discretion in areas in which its action involves political, economic and social choices and in which it is called upon to undertake complex assessments and evaluations", the Court nevertheless stressed that this did not mean that legislative action by the Union could escape judicial review: "even though it has a broad discretion, the Community legislature must base its choice on objective criteria. Furthermore, in assessing the burdens associated with various possible measures, it must examine whether objectives pursued by the measure chosen are such as to justify even substantial negative economic consequences for certain operators" (case C-58/08 *Vodafone and Others*, paras. 51-53).

of a phasedown system focused on the EU market, as emissions from exported HFCs would occur outside the EU."²⁶

33. In addition, the current interpretation goes against the Commission's 'Blue Guide' on the implementation of EU products rules 2016. The 'Blue Guide' specifically states with respect to the notion of "making available on the market" that "*[s]upplying a product is only considered as making available on the Union market, when the product is intended for end use on the Union market. The supply of products whether for further distribution, for incorporation into a final product, or for further processing or refinement with the aim to export the final product outside the Union market is not considered as making available.*"²⁷ In this respect, it further clarifies that "*'Use' refers to the intended purpose of the product as defined by the manufacturer under conditions which can be reasonably foreseen. Usually, this is the end use of the product.*"²⁸
34. With respect to the notion on "placing on the market", the Blue Guide specifically states that "*[a] product is placed on the market when it is made available for the first time on the Union market.*"²⁹ In particular, "*[p]lacing on the market is considered not to take place where a product is (...) manufactured in a Member State with a view to exporting it to a third country (this includes components supplied to a manufacturer for incorporation into a final product to be exported into a third country).*"³⁰
35. It could be claimed that the current interpretation would be coherent with the Montreal Protocol, and that any use of HFCs in manufacturing, including the filling of equipment, is considered as own consumption, regardless of whether the equipment is exported or placed on the domestic market. The system as currently administered goes, however, beyond the

²⁶ Commission Staff Working Paper Impact Assessment Review of Regulation (EC) No 842/2006 on certain fluorinated greenhouse gases Accompanying the document Proposal for a Regulation of the European Parliament and the Council on fluorinated greenhouse gases (SWD/2012/0364 final), Annex X, Section 3.3.

²⁷ Commission Notice — *The 'Blue Guide' on the implementation of EU products rules 2016*, OJ C 272, 26.7.2016, p. 1, Section 2.2.

²⁸ Commission Notice — *The 'Blue Guide' on the implementation of EU products rules 2016*, OJ C 272, 26.7.2016, p. 1, Section 2.2.

²⁹ Commission Notice — *The 'Blue Guide' on the implementation of EU products rules 2016*, OJ C 272, 26.7.2016, p. 1, Section 2.3.

³⁰ Commission Notice — *The 'Blue Guide' on the implementation of EU products rules 2016*, OJ C 272, 26.7.2016, p. 1, Section 2.3.

Montreal Protocol. The Montreal Protocol only applies to bulk HFCs, while the F-Gas Regulation also applies to HFCs contained in pre-charged equipment. For instance, in the Montreal Protocol, HFCs contained in imported equipment are not included in the limits but accounted for in the country of manufacture.³¹ This is contrary to the system currently administered by the Commission whereby HFCs contained in imported pre-charged equipment are counted under the quota system. In addition, such an interpretation would also go against the guidance provided in the 'Blue Guide', as explained above.

36. Another invoked reason for not including exports of pre-charged equipment in the exemption in Article 15(2)(c) of the F-Gas Regulation is that this would not be practicable and would render the system unmanageable.³² This claim is equally baseless. The Court has confirmed that, "*nothing in Regulation No 517/2014 provides that the Commission cannot, if necessary, request further information from the undertakings concerned.*"³³ The Commission has itself stated that the F-Gas Regulation "*did not contain anything expressly prohibiting that.*"³⁴ Consequently, the Commission can impose sufficiently strict notification and other evidentiary requirements on manufacturers of pre-charged equipment that is exported outside of the Union in order for them to benefit from the exemption in Article 15(2)(c) of the F-Gas Regulation. The General Court itself considers with respect to similar additional requirements that "*in view of the small number of undertakings affected, it is not certain that this would have entailed significant administrative costs, delayed the (...) procedure or led to a particular risk of manipulation, as the Commission suggests.*"³⁵ (emphasis added)

³¹ See, for instance, Explanatory Memorandum of the House of Representatives of the Parliament of the Commonwealth of Australia regarding Ozone Protection and Synthetic Greenhouse Gas Management Legislation Amendment Bill 2017, para. 12.

³² Commission Staff Working Paper Impact Assessment Review of Regulation (EC) No 842/2006 on certain fluorinated greenhouse gases Accompanying the document Proposal for a Regulation of the European Parliament and the Council on fluorinated greenhouse gases (SWD/2012/0364 final), Annex X, Section 3.3.

³³ Case T-847/14, *GHC v Commission*, para. 61.

³⁴ Case T-847/14, *GHC v Commission*, para. 61.

³⁵ Case T-847/14, *GHC v Commission*, para. 61; while this statement was made in the context of counting the difference in year-end stocks for determining the quantities of HFCs "placed on the market" for the purposes of Article 2(10) of the F-Gas Regulation, it can be applied by analogy.

6. THE CURRENT INTERPRETATION IS DISCRIMINATORY AND NEGATIVELY AFFECTS THE COMPETITIVE POSITION OF UNION MANUFACTURERS ON THE MARKET

37. The Court of Justice has held that "*the principle of equal treatment or non-discrimination requires that comparable situations must not be treated differently and that different situations must not be treated in the same way unless such treatment is objectively justified.*"³⁶ In addition, "*a difference in treatment, which, by excluding all undertakings located in another Member State, operates mainly to the detriment of the latter undertakings, amounts to indirect discrimination on the basis of nationality*".³⁷
38. The current interpretation of the exemption imposes a requirement that EU manufacturers of pre-charged equipment exported outside the Union ensure that the HFCs charged therein are accounted for within the quota system. Non-EU manufacturers do not have any such obligation imposed on them. This operates to the detriment of the EU manufacturers active on export markets, who are discriminated against indirectly on the basis of their (EU) nationality.
39. This has significant negative effects on the competitive position of Union manufacturers of pre-charged equipment on the international market. They are subject to higher costs and a limited pool of HFCs, whether they export their equipment or sell it domestically. Equipment manufacturers in third countries have access to a far larger, and depending on the country currently unlimited, pool of HFCs, including HFCs produced in the Union. This places them at a competitive advantage *vis-à-vis* Union equipment manufacturers.
40. As explained above, the purpose of the F-Gas Regulation is to limit the GHG emissions resulting from the use of HFCs in the EU. What is relevant under the F-Gas Regulation is the use of the HFCs within or outside the EU. The criterion used through the current interpretation (production of pre-charged equipment outside or inside the EU) however results in a sanctioning of the pre-charging of the equipment in the EU rather than the actual emissions resulting from the use of the HFCs. The discriminatory treatment can therefore not be justified in view of the objectives of the F-Gas Regulation.

³⁶ Case C-580/12 P *Guardian Industries and Guardian Europe v Commission*, para. 106.

³⁷ C-412/04 *Commission v Italy*, para. 66.

41. The application of the current interpretation has the perverse effect that manufacturing of pre-charged equipment in the Union for the export market will be significantly discouraged and potentially disappear. This manufacturing, together with the jobs sustained by such manufacturing, will move outside the Union. Not only would this harm the Union manufacturers, it would harm the Union as a whole.
42. The fact that the current approach makes no sense and is discriminatory is even more obvious if third countries would have the same system as the EU with respect to F-Gases. Exports of HFCs contained in pre-charged equipment to such countries would be subject to double counting. The manufacturer of the pre-charged equipment would have to ensure that the HFCs it uses are accounted for in the EU quota system. An importer of the same equipment in the third country would however equally require a quota authorisation to import the pre-charged equipment in the third country. In this respect, it should be noted that the UK Department for the Environment, Food and Rural Affairs has indicated that it is likely that the UK will set up a standalone system similar to that in the F-Gas Regulation.³⁸ This would cause significant problems for manufacturers of pre-charged equipment and significantly distort cross-border trade. Only domestic production for domestic sales would avoid a "double counting" of the HFCs quota – all other cross-border trade flows of HFCs in pre-charged equipment would suffer from a double counting.

³⁸ See "Written evidence submitted by the Environmental Investigation Agency" to the UK Parliament Environmental Audit Committee in the context of the "UK progress on reducing F-Gas emissions inquiry", available at <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/environmental-audit-committee/fgases/written/74605.html>.