Reports of Cases

JUDGMENT OF THE GENERAL COURT (First Chamber)

16 June 2021 *

(Environment – Regulation (EU) No 517/2014 – Fluorinated greenhouse gases – Allocation of quotas for placing hydrofluorocarbons on the market – Plea of illegality – Article 16 of Regulation No 517/2014 and Annexes V and VI thereto – Principle of non-discrimination – Duty to state reasons)

In Case T-126/19,

Krajowa Izba Gospodarcza Chłodnictwa i Klimatyzacji, established in Warsaw (Poland), represented by A. Galos, lawyer,

applicant,

v

European Commission, represented by J.-F. Brakeland, A. Becker, K. Herrmann and M. Jáuregui Gómez, acting as Agents,

defendant,

supported by

European Parliament, represented by L. Visaggio, A. Tamás and W. Kuzmienko, acting as Agents,

and by

Council of the European Union, represented by K. Michoel and I. Tchórzewską, acting as Agents,

interveners,

APPLICATION based on Article 263 TFEU and seeking the annulment of the Commission decision of 11 December 2018 allocating a quota to the applicant of 4 096 tonnes of CO_2 equivalent of hydrofluorocarbons for the year 2019,

THE GENERAL COURT (First Chamber),

composed of H. Kanninen, President, M. Jaeger (Rapporteur) and O. Porchia, Judges,

* Language of the case: Polish.

Registrar: E. Coulon,

gives the following

Judgment

Background to the dispute, procedure and forms of order sought

Background to the dispute

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 (OJ 2014 L 150, p. 195) was adopted in the fight against greenhouse gas emissions.

2 According to recital 1 of Regulation No 517/2014, developed countries would need to reduce greenhouse gas emissions by 80% to 95% below 1990 levels by 2050 to limit global climate change to a temperature increase of 2 °C and thus prevent undesirable climate effects.

3 Hydrofluorocarbons (HFCs) are a category of fluorinated greenhouse gas that have higher global warming potential than carbon dioxide (CO_2) and are used, in particular, in refrigeration and air-conditioning systems, aerosols and the manufacture of insulating foam.

4 According to recital 13 of Regulation No 517/2014, gradually reducing the quantities of HFCs that can be placed on the market has been identified as the most effective and cost-efficient way of reducing emissions of those substances in the long term.

5 In order to implement that gradual reduction, Regulation No 517/2014 provides that the European Commission is to determine every year, inter alia, a maximum quantity of HFCs that may be placed on the EU market and HFC quotas, expressed in 'tonne(s) of CO_2 equivalent', which producers or importers are allowed to place on the market.

6 In that context, the Commission also set up, in accordance with Article 17 of that regulation, an electronic registry for quotas for placing HFCs on the market ('the HFC registry') and ensures its operation. Producers and importers active in the HFC sector are to register with the registry.

7 The applicant, Krajowa Izba Gospodarcza Chłodnictwa i Klimatyzacji, is a Polish undertaking registered in the HFC registry since 1 July 2014 as a 'new entrant on the market', that is to say an undertaking which has not reported placing on the market HFCs for the period from 2009 to 2012, referred to in Article 16(2) of Regulation No 517/2014, whose allocation of quotas of HFCs is based exclusively on the annual quantity of HFCs that they reported to the Commission as having been placed on the market in accordance with that provision.

8 For the year 2015, the applicant stated that it required 298 059 tonnes of CO_2 equivalent of HFCs and a quota of 65 004 tonnes of CO_2 equivalent was allocated to it. However, the applicant did not place any HFCs on the market in 2015.

9 For the year 2016, the applicant stated that it required 320 945 tonnes of equivalent CO_2 of HFCs and a quota of 47 690 tonnes of equivalent CO_2 was allocated to it. However, the applicant did not place any HFCs on the market in 2016.

10 For the year 2017, the applicant stated that it required 221 320 tonnes of equivalent CO_2 of HFCs and, according to the information provided by the applicant, a quota of 34 690 tonnes of equivalent CO_2 was allocated to it. By contrast, according to the information provided by the Commission, a quota of 34 060 tonnes of equivalent CO_2 was allocated to it. The applicant placed 34 047 tonnes of equivalent CO_2 on the market in 2017.

11 For the year 2018, the applicant stated that it required 218 915 tonnes of equivalent CO_2 of HFCs and a quota of 11 650 tonnes of equivalent CO_2 was allocated to it. According to provisional data, the applicant placed 15 884 tonnes of equivalent CO_2 on the market in 2018.

12 For the year 2019, the applicant stated that it required 207 433 tonnes of equivalent CO_2 of HFCs.

13 By the Commission decision of 11 December 2018 ('the contested decision'), a quota of 4 096 tonnes of CO_2 equivalent of HFCs was allocated to the applicant for the year 2019. It was informed of this by email of 12 December 2018.

Procedure and forms of order sought

14 By application lodged at the Court Registry on 21 February 2019, the applicant brought the present action.

15 On 29 May 2019, the Commission lodged the defence.

16 On 31 July 2019, the applicant lodged the reply.

17 On 19 September 2019, the Commission lodged the rejoinder.

18 The European Parliament and the Council of the European Union, having been granted leave to intervene in support of the form of order sought by the Commission, lodged their statements in intervention on 30 September 2019.

19 The Commission stated, on 14 October 2019, that it did not have any observations to make on the statements of intervention. The applicant adopted a position on the statements in intervention on 25 October 2019.

20 On 25 May 2020, the General Court (First Chamber), by way of measures of organisation of procedure pursuant to Article 89 of the Rules of Procedure of the General Court, put questions to the main parties and to the interveners.

21 On 10 July 2020, the main parties and the interveners responded to the questions asked by the Court.

22 On 27 July 2020, the Commission adopted a position on the applicant's response.

23 On 6 August 2020, the applicant adopted a position on the Commission's response.

24 On 26 October 2020, the General Court (First Chamber), by way of measures of organisation of procedure pursuant to Article 89 of the Rules of Procedure, put a new question to the Commission to which the Commission responded on 9 November 2020.

25 When asked by the Court to define its position on the Commission's response, the applicant failed to submit any comments.

26 The applicant claims that the Court should:

– 'annul Article 16 of Regulation … No 517/2014 … on which the contested decision is founded, and as a result find that the contested decision is flawed in that regard';

– order the Commission to pay the costs.

27 The Commission contends that the Court should:

– dismiss the action;

– order the applicant to pay the costs.

28 The interveners claim that the action should be dismissed.

29 Since the parties did not request a hearing, the Court (First Chamber) decided, pursuant to Article 106(3) of the Rules of Procedure, to give judgment without an oral procedure.

Law

Subject matter of the action

30 By its action, the applicant asks the Court, according to the wording of the forms of order sought, to 'annul Article 16 of Regulation … No 517/2014 … on which the contested decision is founded, and as a result find that the contested decision is flawed in that regard'.

31 However, it is apparent from the text of the application that the request should be understood, as the Commission acknowledged in the defence, as seeking the annulment of the contested decision and, to that end, raising a plea of illegality under Article 277 TFEU in respect of Article 16 of Regulation No 517/2014.

Admissibility of the plea of illegality

32 The Commission submits that the plea of illegality raised by the application is inadmissible. In that regard, it claims, first, that the application is not sufficiently precise with regard to the specific provisions covered by that plea of illegality, second, that the applicant raises for the first time, and thus out of time, the plea of illegality in respect of Article 16(5) of Regulation No 517/2014 and Annex V thereto in the response to the question asked by the Court, third, that the legal connection between the contested decision and the provisions covered by the plea of illegality has not been established and, fourth, that the applicant has no interest in bringing proceedings, in so far as it targets, by its plea of illegality, Article 16(2) and (3) of Regulation No 517/2014.

33 It is settled case-law that a plea of illegality raised indirectly under Article 277 TFEU, when challenging in the main proceedings the legality of another measure, is admissible only if there is a link between the contested measure and the provision forming the subject matter of the plea. Since the purpose of Article 277 TFEU is not to enable a party to contest the applicability of any act of general application in support of any action whatsoever, the scope of a plea of illegality must be limited to what is necessary for the outcome of the proceedings. It follows that the general measure claimed to be illegal must be applicable, directly or indirectly, to the issue with which the action is concerned and there must be a direct legal connection between the contested individual decision and the general measure in question (see judgment of 30 April 2019, *Wattiau* v *Parliament*, T-737/17, EU:T:2019:273, paragraph 56 and the case-law cited).

34 However, it is also settled case-law that Article 277 TFEU must be interpreted sufficiently broadly to enable effective judicial review of the legality of acts of general application adopted by the institutions in favour of persons excluded from direct actions against such acts. Thus, the scope of Article 277 TFEU must extend to acts of the institutions which were relevant to the adoption of the decision forming the subject matter of the action for annulment, in the sense that that decision must essentially be based on them, even if such acts did not formally constitute the legal basis of that decision (see judgment of 30 April 2019, *Wattiau* v *Parliament*, T-737/17, EU:T:2019:273, paragraph 57 and the case-law cited). In addition, the rules of one single regime cannot, for the purposes of examining the objection of illegality, be artificially separated (see, to that effect, judgment of 8 September 2020, *Commission and Council* v *Carreras Sequeros and Others*, C-119/19 P and C-126/19 P, EU:C:2020:676, paragraph 76).

35 In that regard, first, it must be noted that the applicant identified in a sufficiently clear manner the provisions against which the plea of illegality is directed.

36 As is apparent from the applicant's first head of claim, the applicant targets, by its plea of illegality, Article 16 of Regulation No 517/2014. It must also be noted that Article 16 of Regulation No 517/2014 refers to Annex V thereto and that Annexes V and VI refer to Article 16, so that the plea of illegality must be understood as being directed against Article 16 of Regulation No 517/2014, read in conjunction with Annexes V and VI thereto. Lastly, it is clear from the application that the applicant alleges that the system for allocating quotas of HFCs is illegal on account, in particular, of discrimination against undertakings which have not reported placing on the market HFCs for the period from 2009 to 2012 ('new entrants') in relation to undertakings which have reported placing on the market HFCs for that period ('incumbent undertakings'). In so doing, the applicant targets the entire regime established by Article 16 of Regulation No 517/2014, read in conjunction with Annexes V and VI thereto.

37 It also follows that the Commission's claim that the applicant raised at a late stage of the proceedings, and thus out of time, the plea of illegality in respect of certain provisions of the regime in question has no basis in fact.

38 Second, so far as concerns the alleged lack of a legal connection between the provisions covered by the plea of illegality and the contested decision, it must be noted, on the one hand, that the contested decision was taken pursuant to Article 16(5) of Regulation No 517/2014, on the basis of a declaration made by the applicant under Article 16(2) of that regulation. On the other, the quota allocated to the applicant under that decision depends on the number of new entrants, the volume of quotas requested by new entrants, and the volume of quotas allocated, respectively, to incumbent undertakings and new entrants for whom a reference value has already been established on the date on which the contested decision was adopted (see paragraph 57 above),

so that the contested decision is necessarily based, directly or indirectly, on all the rules for the allocation of quotas set out in Article 16 of that regulation and the annexes to which that article refers.

39 Moreover, in the circumstances of the present case, where the regime covered by the plea of illegality consists of a combination of rules laid down in Article 16 of Regulation No 517/2014 and Annexes V and VI thereto, it would be artificial for the Court to divide the regime into its various provisions for the purposes of examining the plea of illegality.

40 In the light of the foregoing, it must be considered that the connection required between the provisions covered by the plea of illegality and the contested decision has been established.

41 Third, with regard to the applicant's alleged lack of interest in bringing proceedings, the Commission's argument is based on the premiss that Article 16(2) and (3) of Regulation No 517/2014 can be separated, for the purposes of examining the plea of illegality, from the other provisions of that article and from the annexes to which it refers. However, it need only be noted that it is apparent from paragraphs 38 and 39 above that that premiss is, in the present case, incorrect.

42 Moreover, if the Commission's argument relating to Article 16(2) of Regulation No 517/2014 were to be upheld, this would deprive Article 277 TFEU of its effectiveness. The Commission acknowledges that no quota could be allocated to the applicant in the event that the provision in question disappeared from the legal order, thus removing the applicant's legal interest in claiming that provision to be illegal. Such a position is tantamount to denying individuals the possibility of challenging the lawfulness of the conditions under which a right is granted.

43 In the light of the foregoing, it must be found that the plea of illegality raised by the applicant is admissible.

Substance

44 By its action, the applicant seeks the annulment of the contested decision. In that regard, it raises a plea of illegality in respect of the system for allocating quotas established by Regulation No 517/2014.

45 In support of that plea of illegality, the applicant raises two grounds for complaint alleging, first, breach of the principle of non-discrimination and, second, inadequate statement of reasons.

The ground for complaint alleging breach of the principle of non-discrimination

46 By its first ground for complaint, the applicant claims that the rules for allocating quotas established by Regulation No 517/2014 breach the principle of non-discrimination in that they create an unjustified difference in treatment between new entrants and incumbent undertakings. The Commission, supported by the Council and the Parliament, dispute the applicant's argument.

47 In accordance with settled case-law, the general principles of non-discrimination and equal treatment require that comparable situations must not be treated differently and different situations must not be treated in the same way unless such treatment is objectively justified (see judgment of 16 December 2008, *Arcelor Atlantique and Lorraine and Others*, C-127/07, EU:C:2008:728, paragraph 23 and the case-law cited).

48 It is therefore necessary to examine, first of all, whether the difference in treatment referred to by the applicant applies to comparable situations, then, whether that difference in treatment gives rise to disadvantages and, lastly, whether that difference in treatment is objectively justified.

– *The existence of a difference in treatment in comparable situations*

49 With regard to the applicant's claim relating to a difference in treatment between new entrants and incumbent undertakings, it should be noted that a breach of the principle of equal treatment as a result of different treatment presumes that the situations concerned are comparable, having regard to all the elements which characterise them (judgment of 16 December 2008, *Arcelor Atlantique and Lorraine and Others*, C-127/07, EU:C:2008:728, paragraph 25).

50 In accordance with the case-law, the elements which characterise different situations, and hence their comparability, must in particular be determined and assessed in the light of the subject matter and purpose of the EU act which makes the distinction in question. The principles and objectives of the field to which the act relates must also be taken into account (see judgment of 16 December 2008, *Arcelor Atlantique and Lorraine and Others*, C-127/07, EU:C:2008:728, paragraph 26 and the case-law cited).

51 In the present case, it is necessary, in the first place, to outline the operation of the HFC quota system established by Regulation No 517/2014.

52 The Commission allocates undertakings a quota for the placing of HFCs on the market each year in accordance with Article 16(5) of Regulation No 517/2014, read in conjunction with Annex VI thereto.

53 In the determination of quotas to be allocated to undertakings, Regulation No 517/2014 draws a distinction, in Annex VI thereto, between undertakings for which reference values have been determined and undertakings for which no reference value has been established.

54 Each undertaking for which a reference value has been established receives, in accordance with point 1 of Annex VI to Regulation No 517/2014, a quota corresponding to 89% of the reference value multiplied by the percentage indicated in Annex V for the respective year.

55 By contrast, undertakings for which no reference value has been established and which have submitted a declaration under Article 16(2) of Regulation No 517/2014 receive, in accordance with point 2 of Annex VI to that regulation, a quota determined on the basis of a calculation carried out in several steps.

56 First of all, the total quantity of HFCs that can be allocated to those undertakings is determined. To that end, the sum of the quotas allocated to undertakings for which a reference value has been established is subtracted from the maximum quantity for the given year set out in Annex V

to Regulation No 517/2014. Next, each undertaking receives a quota corresponding to the quantity requested, the quantity still available and the number and significance of other declarations submitted under Article 16(2) of Regulation No 517/2014.

57 In the second place, it should be noted that, in principle, a reference value can be established for any undertaking. The reference value is based on the quantity of HFCs that an undertaking has lawfully placed on the EU market in the past, during a certain period, and is determined by the Commission, by means of an implementing act, for a period of three years.

58 However, during the first phase of the application of Regulation No 517/2014, reference values were determined only for incumbent undertakings based, in accordance with Article 16(1) of that regulation, on the annual average of the quantities of HFCs they reported to have placed on the market from 2009 to 2012.

59 In that regard, on 31 October 2014, the Commission adopted Implementing Decision 2014/774/EU determining, pursuant to Regulation No 517/2014, reference values for the period 1 January 2015 to 31 December 2017 for each producer or importer who has reported placing on the market HFCs under Regulation (EC) No 842/2006 of the European Parliament and of the Council (OJ 2014 L 318, p. 28) ('the Implementing Decision of 31 October 2014'), by which it established reference values only for incumbent undertakings.

60 In accordance with Article 16(3) of Regulation No 517/2014, the Commission determines, every three years thereafter, the reference values for the undertakings in question on the basis of the annual average of the quantities of HFCs lawfully placed on the market.

61 Accordingly, on 24 October 2017, the Commission adopted Implementing Decision (EU) 2017/1984 determining, pursuant to Regulation No 517/2014, reference values for the period 1 January 2018 to 31 December 2020 for each producer or importer which has lawfully placed on the market HFCs from 1 January 2015 as reported under that Regulation (OJ 2017 L 287, p. 4) ('the Implementing Decision of 24 October 2017').

62 Whilst, by the Implementing Decision of 31 October 2014, a reference value was established only for incumbent undertakings, the Implementing Decision of 24 October 2017 established a reference value for incumbent undertakings and new entrants that have submitted declarations under Article 16(2) of Regulation No 517/2014 and placed on the market HFCs for the period concerned.

63 In the third place, it must be noted that it is apparent from the foregoing that incumbent undertakings and new entrants are treated differently.

64 In that regard, on the one hand, it should be borne in mind that, pursuant to Article 16(1) of Regulation No 517/2014, read in conjunction with point 1 of Annexes V and VI thereto, each incumbent undertaking received, in respect of the first three-year period, a quota corresponding to 89% of the maximum quantity of HFCs that can be placed on the market in the European Union each year, whereas each new entrant received only 11% of that quantity for the period in question.

65 On the other, although new entrants may receive a reference value when new reference values are set on a triennial basis, the fact remains that, notwithstanding this option, the difference in treatment has persisted over time, as demonstrated by the information provided by the Commission and the simulation carried out by the Commission in response to questions asked by the Court.

66 Of the total quantity allocated in 2015 (183.1 million tonnes of CO_2 equivalent), 162.9 million tonnes of CO_2 equivalent was allocated to incumbent undertakings and 20.1 million tonnes of CO_2 equivalent was allocated to new entrants. Of the total quantity allocated in 2016 (170.3 million tonnes of CO_2 equivalent), 151.6 million tonnes of CO_2 equivalent was allocated to incumbent undertakings and 18.7 million tonnes of CO_2 equivalent was allocated to new entrants. Of the total quantity allocated in 2017 (170.3 million tonnes of CO_2 equivalent), 151.4 million tonnes of CO_2 equivalent was allocated to incumbent undertakings and 18.9 million tonnes of CO_2 equivalent was allocated to new entrants for which a reference value had not yet been established. Of the total quantity allocated in 2018 (101.5 million tonnes of CO_2 equivalent), 93.5 million tonnes of CO_2 equivalent was allocated to undertakings for which a reference value had been established (78.2 million tonnes of CO_2 equivalent to incumbent undertakings) and 7.9 million tonnes of CO_2 equivalent was allocated to new entrants for which a reference value had not yet been established. Lastly, of the total quantity allocated in 2019 (100.3 million tonnes of CO_2 equivalent), 91.1 million tonnes of CO_2 equivalent was allocated to undertakings for which a reference value had been established (78 million tonnes of CO_2 equivalent to incumbent undertakings) and 9.1 million tonnes of CO_2 equivalent was allocated to new entrants for which a reference value had not yet been established. In addition, a substantial proportion of the total quantity available is reserved for incumbent undertakings over the years, still representing about 30% for the year 2030.

67 In the fourth place, contrary to what the Commission, Council and Parliament claim, incumbent undertakings and new entrants are in a comparable situation in the light of the aim of Regulation No 517/2014.

68 The aim of Regulation No 517/2014 is to establish a quota system for the placing of HFCs on the market.

69 According to recital 13, Regulation No 517/2014 seeks to reduce emissions of HFCs in the long term by gradually reducing the quantities of HFCs that can be placed on the market.

70 That objective forms part of the European Union's policy to limit global climate change to a temperature increase of 2 °C and thus prevent undesirable climate effects as stated in recital 1 of Regulation No 517/2014.

71 In view of these elements, incumbent undertakings and new entrants are in a comparable situation.

72 Both incumbent undertakings and new entrants require quotas for the placing of HFCs on the market.

73 The effect of greenhouse gas emissions is the same regardless of whether they result from the placing of HFCs on the market by an incumbent undertaking or by a new entrant.

74 The Commission's argument based on the fact that incumbent undertakings are in a different situation on account of their investments and legitimate expectations is not relevant for examining the comparability of situations in the light of the objective of Regulation No 517/2014.

75 The same applies to the Commission's argument based on the fact that, in the light of the aim gradually to reduce HFC emissions, new entrants are in a different situation to that of incumbent undertakings in that the former are undertaking a new activity and the latter are continuing an activity previously carried out in the past.

76 The difference in situation alleged by the Commission is not relevant for examining the comparability of the situations in question. The aim of Regulation No 517/2014 is to establish a quota system for the placing of HFCs on the market in order gradually to reduce HFC emissions. In the light of the maximum quantity available and its gradual reduction, incumbent undertakings and new entrants are in a comparable situation.

77 It must therefore be found that incumbent undertakings and new entrants are, for the purposes of examining the rules for allocating quotas in the light of the principle of equal treatment, in a comparable situation whilst being treated differently.

78 By contrast, so far as concerns, in particular, small to medium-sized enterprises (SMEs) of central and eastern European Member States, the applicant has not put forward any evidence to conclude that the system for allocating quotas in question indirectly discriminates against them.

79 Lastly, in so far as the applicant claims a difference in treatment between not two but three categories of operators – incumbent undertakings, new entrants for which a reference value was established for the period from 2018 to 2020, and new entrants for which a reference value has not yet been established – it should be noted that it refers, at the same time, to the establishment, by Regulation No 517/2014, of 'two methods of regulation' and that it draws a contrast between the situation of incumbent undertakings and that of new entrants, whether or not a reference value has been established in their regard. The argument put forward by the applicant should therefore be understood as being directed solely against the alleged discrimination between incumbent undertakings and new entrants.

80 In the light of the foregoing, it must be found that incumbent undertakings and new entrants, notwithstanding the fact that they are in comparable situations with regard to the object and purpose of Regulation No 517/2014, are treated differently.

– *The existence of a disadvantage resulting from a difference in treatment of comparable situations*

81 According to the case-law, for the EU legislature to be accused of breaching the principle of equal treatment, it must have treated comparable situations differently, thereby subjecting some persons to disadvantages as opposed to others (see judgment of 16 December 2008, *Arcelor Atlantique and Lorraine and Others*, C-127/07, EU:C:2008:728, paragraph 39 and the case-law cited).

82 In the present case, the Commission does not dispute that the difference in treatment of new entrants in relation to incumbent undertakings results in disadvantages for the former. In any event, it is sufficient to refer, in order to establish the existence of such disadvantages, to the elements set out in paragraphs 63 to 66 above.

83 In those circumstances, it must be found that the difference in treatment of incumbent undertakings and new entrants leads to disadvantages for the latter.

– *The justification for the difference in treatment of comparable situations*

84 According to the applicant, the difference in treatment of incumbent undertakings and new entrants is arbitrary and is in no way justified. In that regard, it criticises, in particular, the legislature for having adopted the quota allocation key without carrying out a proper analysis of the data or, in any event, without setting out the data in question. In practice, the system established leads to a 'huge disproportion' in the allocation of quotas. The discrimination is, moreover, exacerbated by the increase in the number of new entrants, in so far as incumbent undertakings can earn a significant income stream from the sale of their quotas and also obtain quotas from the reserve.

85 The Commission, supported by the Council and the Parliament, disputes the argument put forward by the applicant.

86 A difference in treatment is justified if it is based on an objective and reasonable criterion, that is, if the difference relates to a legally permitted aim pursued by the legislation in question, and it is proportionate to the aim pursued by the treatment (see judgment of 16 December 2008, *Arcelor Atlantique and Lorraine and Others*, C-127/07, EU:C:2008:728, paragraph 47 and the case-law cited).

87 Since a legislative act is concerned in the present case, it should be borne in mind that it is for the EU legislature to demonstrate the existence of objective criteria put forward as justification and to provide the Union judicature with the necessary information for it to verify that those criteria do exist (see, to that effect, judgment of 16 December 2008, *Arcelor Atlantique and Lorraine and Others*, C-127/07, EU:C:2008:728, paragraph 48 and the case-law cited).

88 The case-law acknowledges that in the exercise of the powers conferred on it the EU legislature has a broad discretion where its action involves political, economic and social choices and where it is called on to undertake complex assessments and evaluations. In addition, where it is called on to restructure or establish a complex system, it is entitled to have recourse to a step-by-step approach and to proceed in the light of the experience gained (see judgment of 16 December 2008, *Arcelor Atlantique and Lorraine and Others*, C-127/07, EU:C:2008:728, paragraph 57 and the case-law cited).

89 However, even where it has such a discretion, the EU legislature is obliged to base its choice on objective criteria appropriate to the aim pursued by the legislation in question, taking into account all the facts and the technical and scientific data available at the time of adoption of the act in question (see judgment of 16 December 2008, *Arcelor Atlantique and Lorraine and Others*, C-127/07, EU:C:2008:728, paragraph 58 and the case-law cited).

90 In that regard, it should be noted that the EU legislature's broad discretion, which implies limited judicial review of its exercise, applies not only to the nature and scope of the measures to be taken but also, to some extent, to the finding of the basic facts (see judgment of 3 December 2019, *Czech Republic* v *Parliament and Council*, C-482/17, EU:C:2019:1035, paragraph 78 and the case-law cited).

91 Such judicial review, even if it has limited scope, requires that the EU institutions that have adopted the act in question must be able to show before the Court that in adopting the act they actually exercised their discretion, which presupposes the taking into consideration of all the relevant factors and circumstances of the situation the act was intended to regulate. It follows that the institutions must at the very least be able to produce and set out clearly and unequivocally the basic facts which had to be taken into account as the basis of the contested measures of the act and on which the exercise of their discretion depended (see judgment of 3 December 2019, *Czech Republic* v *Parliament and Council*, C-482/17, EU:C:2019:1035, paragraph 81 and the case-law cited).

92 Lastly, when exercising its discretion, the EU legislature must, in addition to the principal objective, fully take into account all the interests involved. In examining the burdens associated with various possible measures, it must be considered that, even if the importance of the objectives pursued is such as to justify even substantial negative economic consequences for certain operators, the EU legislature's exercise of its discretion must not produce results that are manifestly less appropriate than those that would be produced by other measures that were also suitable for those objectives (see judgment of 16 December 2008, *Arcelor Atlantique and Lorraine and Others*, C-127/07, EU:C:2008:728, paragraph 59 and the case-law cited).

93 Consequently, for the purposes of examining the justification for the difference in treatment found in the present case, it is necessary to examine, in the first place, whether the assessment of the EU legislature is based on consideration of the relevant data and whether the difference in treatment between incumbent undertakings and new entrants is based on objective and reasonable criteria with regard to the aim pursued by the legislation.

94 In that regard, it should be noted that, according to Article 16(1) of Regulation No 517/2014, the criterion on which the difference in treatment is based is whether or not the undertaking has reported data under Article 6 of Regulation (EC) No 842/2006 of the European Parliament and of the Council of 17 May 2006 on certain fluorinated greenhouse gases (OJ 2006 L 161, p. 1), concerning the placing on the market of HFCs from 2009 to 2012. Depending on the case, the undertaking is subject to the system provided for in Article 16(1) or (2) of Regulation No 517/2014.

95 The elements on which the legislature relied and the considerations which led to the choices made are apparent from the legislative process in adopting Regulation No 517/2014.

96 It is clear from the Proposal for a Regulation of the European Parliament and of the Council of 7 November 2012 on fluorinated greenhouse gases (COM/2012/643 final – 2012/0305 (COD); 'the Proposal for a Regulation'), that the Commission relied on the working document of 7 November 2012 formulated by the Commission services (Impact Assessment – Review of Regulation (EC) No 842/2006 on certain fluorinated greenhouse gases (SWD(2012) 364 final); 'the Impact Assessment') accompanying that proposal.

97 As set out in point 2 of the Impact Assessment and point 2 of the Proposal for a Regulation, the Commission gathered extensive technical advice from a number of expert studies, including a comprehensive preparatory study for the review of Regulation No 842/2006. A 47-member group of experts from the various industry sectors, Member States and non-governmental organisations (NGOs) was asked to provide guidance and technical input for this study. The Joint Research Centre (JRC) also did a macro-economic analysis of policy options.

98 In addition, the Commission carried out a broad consultation with stakeholders, including a three-month public online consultation from 26 September to 19 December 2011. Of the 261 stakeholders who replied in the online consultation, 164 (75%) were from industry. Furthermore, at least 47 out of the 161 stakeholders consulted represented the views of SMEs.

99 Lastly, the Commission carried out an open hearing in Brussels (Belgium) on 13 February 2012 attended by over 130 stakeholders representing industry, Member States, NGOs and the Parliament. The hearing allowed stakeholders to provide feedback and to express views on the various options.

100 The reasons that led the legislature to allocate, as a matter of principle, quotas based on the quantity of HFCs previously placed on the market are set out, in particular, in pages 164 to 166 of the Impact Assessment.

101 It is clear, first of all, that the legislature, having examined the options of allocation through auctioning or free allocation, opted for the second option.

102 On the one hand, it considered that allocation through auctioning was disproportionate to the size of the market addressed. On the other, it considered that the fact that the market in question is highly concentrated could hamper the functioning of an auctioning system.

103 With regard, next, to the choices made by the legislature, it is clear from the Impact Assessment that the legislature, having examined the options of quota allocation based on demand or quota allocation based on past emissions, opted to apply, in principle, the second option.

104 In that regard, the legislature took as its point of reference, as is apparent from the Impact Assessment, the experience acquired in the context of the quota system established for substances that deplete the ozone layer. It resulted that some undertakings seem to exaggerate their demand in their declarations, to the detriment of those providing a more realistic estimate. It was therefore considered that 'massive over-declarations' had the potential to disrupt the functioning of the quota allocation mechanism.

105 So far as concerns, lastly, the quota allocation key, it is clear from recital 15 of Regulation No 517/2014 that the difference in treatment results from the policy choice of the legislature to allocate quotas on the basis of the quantity of HFCs placed on the market during the reference period from 2009 to 2012, whilst reserving 11% of the overall quantitative limit for new entrants, 'in order not to exclude small undertakings … who have not placed on the market 1 tonne or more of fluorinated greenhouse gases in the reference period'.

106 In that regard, the Commission, on the basis of data relating to the period between 2007 and 2011 communicated to it by undertakings active on the HFC market, in accordance with Regulation No 842/2006, concluded, as is apparent from the Impact Assessment, that, in view of the maturity of the market in bulk HFC a share of 5% of the historic baseline should be sufficient to satisfy the demand of new entrants.

107 The quota allocation key put forward by the Commission was the subject of discussions during the legislative process. Moreover, in the course of the legislative procedure, Member States discussed in the Council the volume of the reserve for new entrants and examined whether to increase it to 15 to 20% of the total quantity of HFCs. In that context, a meeting of the Working Party on the Environment was held on 13 September 2013 with the aim of encouraging Member States to

decide, in particular, on an adequate volume to be reserved for new entrants. At the end of the discussions, an agreement was reached in favour of the quota allocation key established by Regulation No 517/2014.

108 In the light of the foregoing, the arguments put forward by the applicant cannot be upheld.

109 On the one hand, the applicant's claim that the legislature should have followed the trading system for CO_2 emissions, which would have prevented the current alleged abuses of the HFC market, is not substantiated.

110 On the other, the applicant's criticism that the quota allocation key is arbitrary and was established by the legislature without having carried out the necessary analysis or without having been based on relevant data has no factual basis, as is apparent from paragraphs 105 to 107 above. In addition, it should be noted that the determination of the quota allocation key reflects political choices, in the present case the forecast of the proportion of the allowances necessary to provide sufficient access to new entrants on the HFC market, in the light of which the case-law recognises that the legislature has a broad discretion.

111 In the light of the foregoing, it must be held that the legislature's decision to differentiate between incumbent undertakings and new entrants is based on the consideration of relevant data and that the difference in treatment takes account of appropriate, objective criteria in order to ensure the proper functioning of the quota allocation system and to guarantee sufficient market access for new entrants.

112 In the second place, for the purposes of examining the justification put forward for the difference in treatment, it is necessary to examine, in accordance with the case-law referred to in paragraphs 86 and 92 above, whether the difference in treatment is proportionate to the aim pursued and whether, therefore, the legislature has exceeded its margin of discretion by failing to take account of the interests involved or by adopting measures producing results that are manifestly less appropriate than those produced by other equally appropriate measures to achieve the objectives pursued.

113 In that regard, it must be held that the legislature took account of the interests of new entrants by establishing a reserve in respect of the first three-year quota allocation period fixed at 11% of the quantity of HFCs that can be placed on the market.

114 However, the applicant considers that the difference in treatment between incumbent undertakings and new entrants is not proportionate, in so far as the legislature exceeded its margin of discretion by compounding the disadvantages for new entrants.

115 According to the applicant, new entrants are disadvantaged in several ways.

116 First, the number of new entrants is continually growing, with the result that the quantity available for each new entrant decreases at a proportional rate. By contrast, the quantities available for incumbent undertakings is unaffected by the growing number of undertakings active on the market.

117 Second, new entrants cannot predict the quantity of future quota allocations, which makes it difficult to plan activities. By contrast, incumbent undertakings know precisely the quantity of HFCs that they can place on the market until 2030.

118 Third, incumbent undertakings earn a significant income stream from the 'sale' of their quotas to the detriment of new entrants, which further demonstrates the vast quantities allocated to incumbent undertakings.

119 Fourth, contrary to recital 15 of Regulation No 517/2014, incumbent undertakings can acquire quotas from the reserve, further compounding the discrimination against new entrants.

120 Lastly and fifth, the difference in treatment is all the more serious since new entrants cannot actually use the quotas allocated to them. Importing HFCs at less than full capacity of a container is virtually impossible. The small quantity of HFCs allocated to them is not enough to import HFCs in a quantity sufficient to fill a container.

121 Those arguments cannot be upheld.

122 First of all, it should be noted that, in accordance with Article 16(3) of Regulation No 517/2014, reference values are established for new entrants on the basis of the quantities of HFCs lawfully placed on the market during the reference period.

123 Accordingly, new entrants are no longer restricted to being allocated future quotas by virtue of an application made under Article 16(2) of Regulation No 517/2014, but receive quotas based on the reference value established for each of them. The disadvantages alleged by the applicant are therefore only temporary. In addition, a reference value could have been calculated in respect of the applicant under the Implementing Decision of 24 October 2017 if it had placed on the market HFCs in accordance with the quotas allocated to it for the years 2015 and 2016.

124 Next, it is worth highlighting the development of quota allocation. In that regard, it is clear from the data, which is not disputed by the applicant, from the simulation carried out by the Commission in response to a question from the Court that the proportion of quotas allocated from the reserve increases year on year. Accordingly, in 2030, 40 to 55% of all the quantities available for all undertakings will be allocated from the reserve. At the same time, the proportion of quantities reserved for incumbent undertakings is continually decreasing, likely to fall from 89% in 2015 to approximately 33% in 2030.

125 Furthermore, it is wrong to criticise the legislature for the fact that the system for allocating quotas established by Regulation No 517/2014 is not consistent with recital 15 thereof.

126 It should be borne in mind that, in accordance with recital 15 of Regulation No 517/2014, 11% of the overall quantitative limit should 'initially' be reserved for new entrants. It is apparent from point 3 of Annex VI to that regulation that requests made in the declarations of incumbent undertakings submitted under Article 16(2) of that regulation are granted, in respect of the period from 2015 to 2017, only after the allocation of quotas to new entrants, which means that, during the first three-year period, the reserve of 11% was available to new entrants in its entirety.

127 Furthermore, with regard to the argument relating to the income generated by the 'sale' of quotas, it is common ground that it follows from the figures provided by the Commission in response to a question from the Court that, each year, incumbent undertakings transferred a very large percentage of the quotas allocated to them. By way of example, in 2017, 151.4 million tonnes of CO_2 equivalent of HFCs were allocated to incumbent undertakings, which transferred 63.1 million tonnes of CO_2 equivalent.

128 However, the Commission maintains, without being contradicted by the applicant in that regard, that the vast majority of those transfers were carried out between undertakings of the same group and that only a small fraction of those transfers concerned new undertakings.

129 In those circumstances, the applicant's theory that incumbent undertakings, unlike new entrants, benefit from a significant income stream generated by the 'sale' of quotas cannot be upheld.

130 Likewise, the argument based on the alleged difficulty of filling containers due to the very small quantity of quotas allocated to new entrants cannot be upheld.

131 On the one hand, the possibility that the quota allocated is not enough to import HFCs in a quantity sufficient to fill a container is both hypothetical and extremely uncertain and the legislature cannot be criticised for not taking it into account. On the other, and in any event, the Commission claims, without being contradicted by the applicant, that it is possible for several undertakings allocated low volume quotas to combine their low volumes in order to reach the minimum volume required to fill a container.

132 Lastly, as regards the number of new entrants, it is true that is has increased significantly, which has resulted in the quantities of HFCs available for new entrants decreasing at a proportional rate, whereas the quantities available for incumbent undertakings has been unaffected by the growing number of new entrants.

133 However, contrary to what the applicant claims, that effect does not imply that the legislature exceeded its margin of discretion.

134 In that regard, it must be noted, first, that, in accordance with the principles set out in paragraph 92 above, the importance of the objective of protecting the environment and, in particular, of gradually reducing HFC emissions may justify negative economic consequences for certain operators.

135 Second, the importance of reducing the quantities of HFCs available to new entrants according to their number is mitigated by two factors.

136 On the one hand, as is pointed out in paragraph 57 above, a reference value can be established for new entrants and the allocation of quotas is no longer, therefore, based on the growing number of new entrants.

137 On the other, as stated in paragraph 124 above, the proportion of quantities of HFCs allocated from the reserve, and therefore available to new entrants, continues to increase year on year, whereas the proportion of quantities available for allocation to incumbent undertakings is continually decreasing.

138 Third, in accordance with the case-law referred to in paragraph 89 above, the legislature must take into account all the facts and the technical and scientific data available at the time of adoption of the act in question.

139 However, the applicant has not argued that the legislature, at the time of adoption of Regulation No 517/2014, knew or should have known that the number of new entrants would increase considerably.

140 Fourth, in so far as the quantity of HFCs available in the reserve is capped, the increase in the number of new entrants necessarily results in the quantity available for each new entrant decreasing with the growing number of new entrants.

141 However, on the one hand, as is apparent from paragraph 111 above, the applicant has not succeeded in calling into question the fact that the system for allocating quotas established by Regulation No 517/2014 results from a choice made by the legislature based on appropriate, objective criteria.

142 On the other, the applicant, in addition to its unsupported claim that the legislature should have established a system identical to the trading system for CO_2 emissions, has not sought to demonstrate that the legislature could have adopted less restrictive but equally effective alternative measures in order to establish that it exceeded its broad margin of discretion.

143 In those circumstances, it must be found that the negative consequences resulting, for new entrants, from the increase in number of new entrants do not imply that the legislature exceeded its broad margin of discretion.

144 In the light of the foregoing, it cannot be concluded from the examination of the different arguments put forward by the applicant that the legislature exceeded its broad margin of discretion by adopting measures producing results that are manifestly less appropriate than those that would be produced by other measures that are also suitable for the objectives pursued.

145 In those circumstances, it must be found that the difference in treatment between incumbent undertakings and new entrants is proportionate and justified. Consequently, the first ground for complaint must be dismissed as unfounded.

The ground for complaint alleging breach of the duty to state reasons

146 By its second ground for complaint, the applicant claims that the legislature failed to provide adequate reasoning for the rules for allocating quotas of HFCs.

147 That ground for complaint, which is in no way substantiated, cannot be upheld.

148 In accordance with settled case-law, the statement of reasons must be appropriate to the measure at issue and must disclose in a clear and unequivocal fashion the reasoning followed by the institution which adopted the measure in question, in such a way as to enable the persons concerned to ascertain the reasons for the measure and to enable the competent Court to exercise its power of review (see judgment of 12 September 2017, *Anagnostakis* v *Commission*, C-589/15 P, EU:C:2017:663, paragraph 28 and the case-law cited).

149 Likewise, the requirement to state reasons must be assessed by reference to the circumstances of the case. It is not necessary for the reasoning to go into all of the relevant facts and points of law, since the question whether the statement of reasons for a measure meets the requirements of Article 296 TFEU must be assessed with regard not only to its wording but also to its context and to all the legal rules governing the matter in question (see judgment of 12 September 2017, *Anagnostakis* v *Commission*, C-589/15 P, EU:C:2017:663, paragraph 29 and the case-law cited).

150 Furthermore, it is apparent from settled case-law that the scope of the obligation to state reasons depends on the nature of the measure in question and, in the case of measures of general application, the statement of reasons may be confined to indicating the general situation which led to its adoption, on the one hand, and the general objectives which it is intended to achieve, on the other. In that context, the Court has held, in particular, that if the contested measure clearly discloses the essential objective pursued by the institution, it would be excessive to require a specific statement of reasons for the various technical choices made (see judgment of 30 April 2019, *Italy* v *Council (Fishing quota for Mediterranean swordfish)*, C-611/17, EU:C:2019:332, paragraph 42 and the case-law cited).

151 In addition, it follows from the case-law that the information included in the impact assessment may be taken into account to determine whether the institution which adopted the measure discharged its duty to state reasons (see, to that effect, judgments of 4 May 2016, *Poland* v *Parliament and Council*, C-358/14, EU:C:2016:323, paragraphs 123 and 124, and of 22 November 2018, *Swedish Match*, C-151/17, EU:C:2018:938, paragraph 80).

152 By contrast, it should be borne in mind that, where the EU institutions enjoy a broad discretion and, in particular, when they are required to make choices that are, in particular, of a political nature and to undertake complex assessments, judicial review of the assessments that underpin the exercise of that discretion must consist in determining the absence of manifest errors (see judgment of 19 December 2019, *Puppinck and Others* v *Commission*, C-418/18 P, EU:C:2019:1113, paragraph 95 and the case-law cited).

153 If, therefore, the broad discretion of the institutions is subject to limited judicial review, with the aim of determining, inter alia, the sufficiency of its statement of reasons and the absence of manifest errors of assessment (judgment of 19 December 2019, *Puppinck and Others* v *Commission*, C-418/18 P, EU:C:2019:1113, paragraph 96), that limited review of the statement of reasons must nevertheless be effective.

154 In the present case, with regard to the difference in treatment of economic operators in terms of the allocation of quotas, it should be noted that the reasons that led to the legislature establishing the allocation of HFC quotas on the basis of past emissions and those relating to the quota allocation key for the quantities available are set out in recitals 15 and 16 of Regulation No 517/2014 and in the Impact Assessment. As noted in paragraphs 100 to 107 above, pages 164 to 166 of the Impact Assessment set out the reasons that led to the legislature choosing a system based on the allocation of quotas based on past emissions, completed by quotas allocated to new entrants on request.

155 Admittedly, the Impact Assessment stated that, with regard to the maturity of the market in bulk HFC, it was sufficient to reserve 5% of the quantities available for new entrants, whereas the key for the allocation of quotas between incumbent undertakings and new entrants is respectively 89% and 11%, and that the reasons that led to the legislature adopting that allocation key are not set out in Regulation No 517/2014.

156 However, it is apparent from the case-law referred to in paragraph 150 above that if the contested measure clearly discloses the essential objective pursued by the institution, it would be excessive to require a specific statement of reasons for the various technical choices made.

157 Lastly, it must be found that, in any event and as demonstrated by the examination of the first ground for complaint, the reasoning adopted enabled the applicant to understand the justifications for the measure at issue and the Court to exercise its power of review.

158 In those circumstances, the second ground for complaint must be dismissed as unfounded, as must, consequently, the plea of illegality raised by the applicant.

159 In the light of all the foregoing, and since the action is based only on the plea of illegality raised under Article 277 TFEU in respect of Article 16 of Regulation No 517/2014, the action must be dismissed.

Costs

160 Under Article 134(1) 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. Under Article 138(1) of the Rules of Procedure, Member States and institutions which have intervened in the proceedings are to bear their own costs.

161 Since the applicant has been unsuccessful, it must be ordered to bear, in addition to its own costs, those incurred by the Commission, in accordance with the latter's pleadings. The interveners must bear their own costs.

On those grounds,

THE GENERAL COURT (First Chamber)

hereby:

1. **Dismisses the action;**

2. **Orders Krajowa Izba Gospodarcza Chłodnictwa i Klimatyzacji to bear its own costs and to pay those incurred by the European Commission;**

3. **Orders the Council of the European Union and the European Parliament to bear their own costs.**

Kanninen Jaeger Porchia

Delivered in open court in Luxembourg on 16 June 2021.

[Signatures]