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## Emission News 03-2016

### Practical Information for Emission Trading

Edition 15.02.2016

## Liability Risks for System Operators of the CO<sub>2</sub>-Trading - Also appointed Employees are concerned by the Law governing Administrative Offences

If the managing directors or executives of mandatory emissions trade's system operators try to get informed about possible risks in this field, they just use to hear the words “100 Euros fine per ton CO<sub>2</sub>”, an amount which becomes due at the end of April for the past year in case of a non-submission. Without further detailed knowledge about the subject, however, the question arises less frequently how commissioned employees happen to commit such a failure and how, above all, this scenery of a penalty duty could be avoided economically.

It is amazing that operators rarely or never ask themselves how liability risks in accordance with the Administrative Violations Law OwiG happen to be managed and who in the Company would in which way be held responsible.

In fact the administrative offences seem to contain a kind of direct liability which finds its way through to commissioned employees as there are authorized account holders and annual report authors. It means that not only managing directors and executives are held responsible for administrative offences. Emissionshändler.com® explains in the first part of **Emission News 03-2016** drawn up here how and in which form liabilities in accordance with OwiG arise, on which level of the EU and the national legislation they find application and how these risks can be reduced in a way that is economically representative. Also criminal aspects will be treated here.

The present Emission News are written by Emissionshändler.com®. They appeared on the basis of a current legal opinion having been established by the law office BBH Becker Büttner Held in Berlin. The legal opinion was written for Emissionshändler.com®. Interested operators are welcome to address themselves to BBH in order to get established an expert opinion which refers to their individual situation and organisation.

The following **first part** about liability risks in emission trading refers to all commercial aspects of liability reasons. These will find a completion in the second part appearing later under **Emission News 04-2016** where the technical aspects of a liability will be treated.

### What is the legal basis for possible liabilities in Emission Trading?

If a system operator or a person being responsible for the operating process asks himself who under what circumstances will be held liable for mistakes or failures in emissions trading, it will first of all be interesting to know which laws and regulations have to be observed in this context.

Primarily a difference is made between laws, regulations, decisions, and guidelines. The normal “person concerned” usually only knows a little bit or nothing about these different rules. Furthermore a difference should be made between German and European level of the relevant legal basis.

These are on the level of the **European Union**:

- Emissions Trading Directive 2003/87/EG,
- EU decision 2011/278 (*determination of EU wide transitional regulations for the harmonization of free allocated emission certificates*)
- Monitoring regulation 601/2012/EU
- Register account regulation 389/2013/EU



These are on the level of **Germany**:

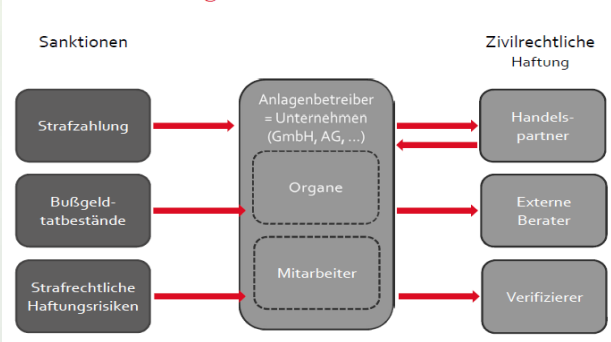
- Emissions Trading Regulation EHV 2020 (*regulation to realize the Emissions Trading Scheme for greenhouse gas in the trading period between 2013 and 2020*)
- Emissions Trading Scheme for greenhouse gas TEHG
- Assignment Ordinance ZuV 2020
- Law against Administrative Offence OwiG
- Criminal code StGB

### Which Elements of an Enterprise and what Persons are held responsible in case of Violating the Administration Offence OwiG?

A closer consideration of the circumstances under which persons or elements of companies become liable reveals the fact that beside the enterprise itself also persons being entrusted and appointed with tasks of the CO2 emission trade might be affected. Also elements of the enterprise like managing directors, the Board of directors and in most cases persons bearing responsibility for the company (plant managers etc.) can be confronted with the duty to be held liable.

Usually, however, those company members are excluded from the liability who had been active (only once) on duty instruction. In such cases a member liability continues to be applied which means that the managing director/the Board of directors will be held responsible.

#### Überblick Haftungsfälle



Source: Expert Opinion of Law Office BeckerBüttnerHeld BBH Berlin, 2015

### Liabilities of Employees and Representatives in the Emissions Trade

A difference is made between employees and representatives of a factory: People with fix and permanent responsibilities (even if these might be very small) and such employees who are acting exclusively on duty instruction and who are not firmly and permanently assigned with duties around the EU emission trade.

Those employees who are dealing with firmly determined responsibilities about and around the emission trade use to occupy a main **function** respectively job descriptions in the factory as there are for example:

- Environmental Officer
- Quality Manager
- Risk Management Officer
- Purchaser
- Technical Manager (not Plant Manager)
- IT Manager

Due to their function they take care rarely but regularly in the course of a year for **tasks** like

- Writing the Emission report
- Writing the information about the operations
- Maintenance of the updated monitoring plan
- Ensuring the VPS access, software updates
- Purchasing emission rights
- Return of emission rights in the register account
- Updating of Plant and Enterprise data in the register account
- Ensuring the ECAS access and access to data of authorized account holders
- Registration of VET quantities, monitoring of the verifiers' activities
- etc.

All above-mentioned **tasks** are to a major part always assigned to one of the formerly stated **functions** and usually not to a responsible person like a managing director or a plant manager.

For this reason the functions are executed by employees who have been assigned to a task independently and on their own responsibility.

- **Consequently this person can be held liable in the same manner as the legal representative (element) of the enterprise!**

#### Haftungsfragen (2)

b. Haftung der **betrauten Person** nach dem OWiG:

**§ 9 Abs. 2 OWiG**  
Ist jemand von dem Inhaber eines Betriebes oder einem sonst dazu Befugten

1. beauftragt, den Betrieb ganz oder zum Teil zu leiten, oder
2. ausdrücklich beauftragt, in eigener Verantwortung Aufgaben wahrzunehmen, die dem Inhaber des Betriebes obliegen,

und handelt er auf Grund dieses Auftrages, so ist ein Gesetz, nach dem besondere persönliche Merkmale die Möglichkeit der Ahndung begründen, auch auf den Beauftragten anzuwenden, wenn diese Merkmale zwar nicht bei ihm, aber bei dem Inhaber des Betriebes vorliegen. [...]

- ▶ Voraussetzung: Mit selbstständiger, eigenverantwortlicher Aufgabenwahrnehmung betraut
- ▶ Folge: Beauftragte Person haftet wie der gesetzliche Vertreter
- ▶ Vorschrift greift nicht bei Personen, die lediglich auf dienstliche Anweisung hin tätig werden – hier bleibt es bei der Organhaftung

Source: Expert Opinion of Law Office BeckerBüttnerHeld BBH Berlin, 2015



By now we find out where the problem is situated:

- **If many functions and persons of a company can be held responsible for liability in such a small but sensible sector like emission trade while their activities cannot simultaneously be co-ordinated or verified sufficiently, it will be predictable that a mistake might be destined to entail a liability any time soon.**

### Managing Directors and Board of Directors Being Held Liabile in the Emission Trade

If we try to find the reasons why liability can be carried over to a managing director or a Board of directors of an emission trading system, we will soon see that this happens because these responsible persons use to be attributed with “operational characteristics”. Managing directors or executives of medium-sized mandatory emission trading enterprises, however, are usually not in charge with tasks of emissions trading because their employees take care for these. That is why a liability might not only overtake the management but probably also the employees (see also previous chapter).

A managing director or executive only escapes from a liability if he is able:

- a) to “transfer” this liability to a responsible employee, for example because he can prove that the employee acted by gross negligence or deliberately despite excellent qualification (or even refrained from acting respectively “omitted” acting)

OR

- b) to deliver the proof that violation of OWiG law by means of suitable measures has been aggravated essentially as for example by means of regular employees' training and double or triple protection.

#### Haftungsfragen

- a. Haftung des **Geschäftsführers** nach dem OWiG:

§ 9 Abs. 1 OWiG - Handeln für einen anderen  
Handelt jemand

1. als **vertretungsberechtigtes Organ** einer juristischen Person oder als Mitglied eines solchen Organs,
2. als vertretungsberechtigter Gesellschafter einer rechtsfähigen Personengesellschaft oder
3. als gesetzlicher Vertreter eines anderen,

so ist ein Gesetz, nach dem besondere persönliche Eigenschaften, Verhältnisse oder Umstände (besondere persönliche Merkmale) die Möglichkeit der Ahndung begründen, auch auf den Vertreter anzuwenden, wenn diese Merkmale zwar nicht bei ihm, aber bei dem Vertretenen vorliegen.

- ▶ Geschäftsführer ist als vertretungsberechtigtes Organ selbst verpflichtet -> Die Betreibereigenschaft wird ihm zugerechnet
- ▶ Eine Haftung ist nur dann ausgeschlossen, wenn Beweis gelingt, dass Verstoß durch geeignete Maßnahmen wesentlich erschwert wurde (z.B. regelmäßige Schulung, doppelte Absicherung usw.)

Source: *Expert Opinion of Law Office BeckerBüttnerHeld BBH Berlin, 2015*

The consequence of such liability cases is that managing directors and executives either charge themselves completely with all tasks of emission trading (which certainly can be considered as an erroneous way) or

- **train and supervise their varied employees in their various functions more often (considerable effort, high cost, no final safety)**

and

- **occupy all responsible positions three or four times in order to be protected against failure (very high cost)**

or

- **Make an economically reasonable outsourcing of emission trade's sensible partial sectors** (see info box page 4)

### Survey of Administrative Offences and Penalty Duty

Administrative offences according to OWiG are foreseen for all following duties of the system operator in the obligatory emission trade as far as he or his commissioned employees are offending it (also in case of negligence). Administrative offences must not be confused with a penalty duty. This may occur anyway respectively on its own.

Law	Duty	Fine
TEHG §32 article 1 n° 1 and TEHG §32 article 2	Reporting in accordance with the rules conforming with §5 art. 1, annex 2 part 1 page 1	Up to <b>500.000 €</b> for intent, 50.000 € for negligence
TEHG §32 art. 3 n° 3	Announcement of an intended modification of the system activities with effects on emissions according to §4 art. 5 p. 1	Up to <b>50.000 €</b>
TEHG §32 art. 3 n° 4	Submission of the monitoring report in time according to §6 art. 3	Up to <b>50.000 €</b>
TEHG §32 art. 3 n° 7	DEHST enabling an access to the plant, allow a verification, provide information, present documents according to §20 art. 2	Up to <b>50.000 €</b>
ZuV § 31 art. 2 n°	Information about relevant intentions about planned or real modification of capacity, the activity rate and the plant operation according to § 22 art. ZuV	Up to <b>500.000 €</b> for intent, up to <b>50.000 €</b> for negligence
ZuV §31 art. 2 n° 3	Disclosure requirement about essential capacity reductions and cessation	Up to <b>50.000 €</b>

The well-known **penalty duty** may be added to the administrative offences listed above which, according to TEHG § 30, provide a penalty of **100 Euro** per emitted ton of CO2 if no emission rights had been presented for the expired year. This could mean an



existence threatening situation in many cases for a medium-sized enterprise or a little airline with an annual emission of 25,000 t as a penalty of 2.5 million Euro would be due.

### Liabilities of the Company in accordance with the Administrative Offence OwiG in the Emissions Trading System

According to the Administrative Violations OwiG § 30 article 1 number 5, also Companies can be blamed to take over a liability and a fine. The law says:

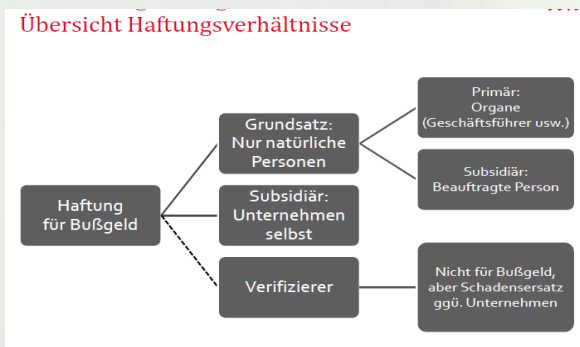
- “another person who acts responsible for the management of a business or an enterprise of a juridical person or for a personal union mentioned in number 2 or 3 which also includes the supervision of the management board or other executions of supervisory powers in a leading position, commits a criminal or administrative offence **by which obligations hurting the juridical person or the personal union have been violated or the juridical person or the personal union became richer or were supposed to become richer, a fine can be set against this person.**”

This means in practice that by through the managing director's or plant manager's liability also a liability of the enterprise can be generated.

### Survey over Liability Relationships

Looking at the survey in conformity with the previous chapters, we learn from this overview who will be held liable in case of administrative offences. And we see that usually natural persons are concerned and the enterprise only in the second row.

If we talk about the persons, managing directors and executives will be held liable first – even if these have nothing at all to do with practical tasks and duties. The persons in charge will be confronted with liability only in the second place.



Source: Expert Opinion of Law Office BeckerBüttnerHeld BBH Berlin, 2015

The verifier takes over a special role in this above-mentioned survey as he can only be held liable

indirectly in case of a damage, see also chapter below in this context.

#### Infobox

#### The account package minimizes legal risks

Possible legal sanctions can be greatly minimized proactively by several (at least 4) authorized representatives of the plant operator who have at least registered two different mobile numbers from different providers at DEHSt. In case if it is not feasible, because not only the training of agents, but also the necessary training would negatively affect the budget, it makes sense to hire an external account representative. This external account rep is the proposed or factual authorized representative of the company and thus can be active within a few minutes, thereby minimizing the risk of mistakes, late or absent transactions of the operator almost to zero.



#### CO<sub>2</sub> account package

The CO<sub>2</sub>-account-package from Emissionshändler.com® frees the company largely of high risks, which can occur because of improper accounting or because of a technical or human error.

The establishment of an external account representative by Emissionshändler.com® who also supervises the administrative and legal appointments of the company as well compensate the failure of authorized representative (BV) and / or their actions through the often-updated registry software support.

Detailed information about CO<sub>2</sub>-account-package can be found on <https://www.emissionshaendler.com/en/home.html>, via a free telephone line in Germany 800-59060002 or by email [info@emissionshaendler.com](mailto:info@emissionshaendler.com).

### Verifier's Liabilities in accordance with the Administrative Offence OwiG in the Emissions Trading System

It is comprehensible from the view of a system operator if he hopes that a verifier in charge inspecting an annual report, a notification to operation, a monitoring plan, or a capacity increase request would be included in liability duties.

This is not the case, however, because according to the administrative offence OwiG, the verifier cannot be charged with the duty to pay a fine. Theoretically excluded from this regulation are of course liabilities for damages by civil law which can be enforced against the system operator. These claims, however, are mostly not applicable in practice because they have been excluded before in the bilateral contract



between operator and verifier. Especially a little number of operators (but in fact still existing) should think about this. Every time they involve their long-standing “house and home verifier” into a “consulting situation” due to lack of complete professional competence of their own because they intend to renounce of external competence of advisers in order to save cost. As a result, not only the sworn in verifier and his “independence” but also the operator and his commissioned employees could suffer from enormous consequences regarding fines and liabilities.

### **Criminal Liability Risks of a System Operator**

Criminal liability risks might just play an unimportant role in the system operators' minds as they can hardly imagine getting involved into a criminal process and being prosecuted for it.

In some cases, however, they might be taken by a surprise because their feeling of security might turn out to be wrong. Emission trading can keep very high risks for system operators.

First of all the culpability can (but must not) be divided into three causes: intent, negligence, and carelessness.

Delicti which could be relevant in this context are:

- Subsidy fraud § 264 criminal code StGB
- Non-permitted operation of systems § 327 criminal code StGB
- Money laundering § 261 criminal code StGB

Normally the reproach of a subsidy fraud means having submitted wrong information for licensing procedures and/or allocation methods for which the system operator acted grossly negligently or intentionally. Such a scenery of subsidy fraud as well as emitting greenhouse gases without approval despite emission trading obligation is highly unlikely in Germany.

Much more often than expected system operators find themselves in a situation where they could violate the money laundering law according to § 261 criminal code StGB because emission rights are used for “laundering” of money originating from tax evasion and other illegal trades.

Emission rights of dubious origin use to be offered below market price at the market. For this reason system operators are confronted with purchase or exchange offers which can only be realised with losses for the purchasers.

The criminal act of the system operator is his participation in money laundering. He supported this

procedure by conclusion of a purchase/exchange business. His support on disguising the origin and prevention of enlightenment make him culpable.

#### **Infobox**

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**BBH Becker Büttner Held**

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In this context the system operator should be aware that the fact of money laundering does not only include the **intended** act but also the **careless** money laundering process. The fact of levity is given as soon as the system operator enters into a business although doubts about its legality should have come into his mind.

In most cases the employee in charge will purchase emission certificates only under the criteria “price by comparison”, in some cases without the possibility of knowing the provider or having the chance to verify him. So by selecting the cheapest offer, it can happen easily that the purchaser gets lightly-minded into a money laundering business without even knowing.

Due to the traceability of emission certificates' ways, the police and prosecutor may years later knock on the clueless system operator's door and accuse him justifiably having committed a “carelessness” according to § 261 article 5 of criminal code StGB which can even mean imprisonment for the managing director/executive or his employees in charge.

- **§ 261 article 5 of criminal code StGB: The person who in cases of article 1 or 2 does not carelessly recognise that the subject of an unlawful act mentioned in article 1, will be charged with imprisonment of up to two years or with a fine.**



Moreover, the legislator is entitled to confiscate also the corresponding certificates according to § 261 article 7 of criminal code StGB which can mean an additional economic setback for the operator.

Considering the above-mentioned risks and dangers, it makes sense for system operators of medium-sized enterprises who intend to buy certificates once or twice a year (or even less frequently) to cover their needs from reliable and well-known sources respectively entrust such a business to an experienced adviser. In order to fend off the biggest risks, a system operator and his co-operator in charge of purchases should never deal with unknown sellers from abroad and take special care in case

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Kind emission regards

Michael Kroehnert

### Infobox

#### *New developments in the aviation*

*ICAO, the International Civil Aviation Organization, has released plans for the first global carbon dioxide (CO2) emissions standards for passenger aircraft this week.*

*The standard, developed by ICAO's Committee on Aviation Environmental Protection (CAEP) would not only be applicable to new aircraft type designs as of 2020, but also to new deliveries of current in-production aircraft types from 2023. A cut-off date of 2028 for production of aircraft that do not comply with the standard was also recommended. In its current form the standard equitably acknowledges CO2 reductions arising from a range of possible technology innovations, whether structural, aerodynamic or propulsion-based. The proposed standard is especially stringent for larger aircraft over 60 tonnes, which account for more than 90% of international aviation emissions.*

*"The goal of this process is ultimately to ensure that when the next generation of aircraft types enter service, there will be guaranteed reductions in international CO2 emissions," said Olumuyiwa Benard Ali, president of the ICAO Council.*

*The new standard faced a mixed welcome. Of course both Airbus and Boeing support the global agreement on the new emissions standard. But the European Union, which has been pushing for tight emissions regulations, stated that "... it is an important step ..." and the European environmental group Transport & Environment announced that the introduction of a new standard is "...just business as usual for the aviation industry ..."*

*In an overall look at the state of the industry by the author of this article it must be said that all eyes remain on the outcome of the ICAO 2016 assembly this September, where it is expected that ICAO will announce plans for a Global Market Based mechanism to curb aviation emissions. If ICAO will not come up with a tangible way to achieve reductions in – not just stabilise – greenhouse gas emissions then intercontinental flights could be brought back into EU legislation, referring to the temporary reduction in scope of the Aviation EU ETS to just intra-European flights that expires at the end of this year. This means EU ETS will 'snap back' to 100% Fullscope on Jan 1st 2017.*

*In case of questions about the 2016 aviation ETS compliance requirements, the author can be reached at any time.*

In cooperation with ETS Verification, the verification body for aircraft operators

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