Dear valued reader of the Emission News!

As we have announced since October 2014, the Emission Newsletter will be a paid subscription service from March 2015 onwards. The present issue is only partial readable, as it remains free of charge. Information about the paid version and on how to subscribe to the full version of the newsletter can be found [here](#) and on [www.emissionshaendler.com](http://www.emissionshaendler.com).

Penalty Risks for System Operators - Technical Reasons and Liability without Culpability according to the ECJ Judgement

The ECAS system and its problems with mobile communications as well as technical insufficiencies around the VET entry characterize the authorized account holders' workflow process in March of a running year. In this context a special attention should be drawn to the fact that a huge number of different technical reasons can cause an account lockout which can be avoided, however, by means of comparatively simple protection measures.

Emissionshändler.com® describe in the 2nd Part of Emission News 04-2016 established here how and in which form account lockouts and account closures can arise and how they can be avoided so that no risk for a penalty shows up. Especially the technical aspects on the system operator's side are awarded with detailed explanations.

The present Emission News were written by Emissionshändler.com® and emerged on the basis of an updated legal opinion being elaborated by the law office BBH Becker Büttner Held in Berlin for Emissionshändler.com®. Interested system operators are welcome to address themselves to BBH in order to require for a legal opinion being established on the basis of their individual situation and organisation.

The second part following this paragraph primarily deals with the technical aspects of penalty risks in the emission trade, why a register account is blocked respectively closed which can be followed by the probable impossibility of submitting certificates.

Penalty Risks For System Operators in the EU Emission Trade

In order to comprehend probable penalty charges in Emission Trading, a short explanation about the function method and sense of the Union Register is captured below.

The Union Register:

is the technical basis of the European Emission Trading but is not a trading platform
records the System Operators' possession of emission certificates
bases on the EU register Regulation comprises many different specifications about reporting obligations, cost, transactions, and security aspects
serves to prove the fulfilment of the European/individual-stated reduction commitments in accordance with the Kyoto protocol
is conducted centrally by

is administrated by the

The risks and duties of the system operators concerned as well as the tasks of further participating parties around the register account are presented in the graphic below, established by the law firm BBH Becker Büttner Held.
The EU Register Account Regulation 389/2013/EU in its version of 2nd May, 2013, serves as the essential basis. All rights and duties of the persons, institutions, and system operators concerned are included in this regulation.

The following explanations are basing on a legal opinion about risks in the EU emission trade, having been established for Emissionshändler.com® and verifying the topics 'liability of employees and elements of the system operator' and also the system operator's penalty duty.

In case of a penalty duty (100 Euro/t) operators and their employees usually assume that a penalty can only be caused by culpability. This opinion (which is, by the way, outdated since 2013) likely leads to the converse conclusion that no penalty can be expected as long as culpability does not show up. This assumption is wrong!

According to ECJ a Penalty Charge may be due without Culpability

After the sensational judgement of the European Court of Justice in 2013, system operators and their employees being entrusted with the register account can no longer assume that a penalty charge will be omitted for reasons of proportionality. Neither can they trust on technical inadequacies in the Union register which may protect them from a penalty charge. In other words: the reason why certificates are not submitted is unimportant. The penalty charge will always have to be borne by the operator

The consequences for operators resulting from this rule are worth being reconsidered under a general and a technical aspect.

Due to the confusing subject, the reason for a non-submission – leading to a penalty charge – should be subdivided into 6 main reasons. A non-submission takes place because

a) 

b) 

c) An access to the register account cannot be realized for technical reasons caused by the operator

d) An access to the register account can not be realized for technical reasons caused by the register system

e) A case of

f) due to human failure ( )

Already in advance it has to be pointed out that a reason for is very strictly limited and that the operator to pay the penalty charge in all other cases.
Reason for Penalty Charges – Lockout of Register Account

No certificates can be submitted from a register account. Thus the question arises how a lockout of a register account can happen. According to BBH Becker BüttnerHeld's listing being elaborated in the legal opinion mentioned before situations may arise where authorized account holders execute trials and activities which endanger the security and integrity of a union register.

Source: Legal Opinion law firm BeckerBüttnerHeld BBH, Berlin 2015

In practice this might especially be trials to account by means of the access passwords of colleagues because these are unattainable in their function of authorized account holders (holidays/illness, etc.).

More often, however, it could happen that some innovations on the VET entry cause an incomplete or a non-listing of a VET(Verified-Emission-Table) entry in due time 31st March. This in turn leads to a register account suspension on 1st April of a year which means that no certificates can be submitted for this state of account.

Especially are often faced with such kind of failure. They are hardly used to procedures like reporting, verifying the VET entry, and the submission of certificates and in many cases hardly personnel for authorized account holders.

Register Account Lockout because of incorrect VET Entry

System operators who intend to avoid a possible blocking of the account should draw special attention to the subjects of the three different gases and should also arrange with the verifier the coordination of the VET entry. The title Summary of Greenhouse Gas Emissions in the emissions report (usually on page 8) informs beside the CO2 emissions also about the emissions of the plant of N2O (nitrous oxide/nitrogen oxide/laughing gas) and PFC (abbreviation for per- and poly-fluorinated chemicals). Most of the plants do

For this reason the PDF of the form management software includes no entry here. No entry means also . Is is not clear why does not show up always. It is a fact, however, that in these cases a “0” should be entered into the register account as a VET entry so that the system can register successfully the total of the emissions (and above all the CO2 emissions in this case).

Entry of three different kinds of emissions (make a new screen)

In any case it is necessary to get a confirmation of the entry as well as a . The confirmation consequently shows that beside the known CO2 emissions the N2O and PFC emissions are registered.
CO2 emissions being registered successfully

Lockout of the Register Account caused by refrained (not entirely confirmed) VET Entry
Since the EU accreditation and verification Regulation EU/600+601/2012 came into effect, the annual CO2 report is verified by two verifiers who usually are also capable to make the VET entry. However, it is also possible (and in fact also customary) that one of the authorized employees of the enterprise executes the VET entry which then happens as it can always be noticed in the EU register beginning.

A perfectly formulated verification order includes written rules who will realize at what time which tasks. Several options can be chosen:
1. registers the emissions quantities (according to annual report) which will be confirmed by a system operator's authorized account holder
2. registers the emissions quantities (according to annual report) which will be confirmed by a system operator's authorized account holder
3. Verifier 1 registers the emissions quantities (according to annual report) which will be confirmed
4. The system operator's registers the emissions quantities (according to annual report) which will be confirmed by
5. The system operator's registers the emissions quantities (according to annual report) which will be confirmed by

However, the above-mentioned options bear the risk of misunderstandings which can cause the situation that the system operator or the believe that always the other party starts the entry process/the confirmation process. As a consequence an account lockout happens as it can always be noticed in the EU register beginning.

Reason for Penalty Charges – Closing of the Register Account
The closing of a register account usually leads to In other words: A submission be rendered from a closed register account.

The reasons why a register account could be closed are listed in detail in the register Regulation 389/2013. Considering the above-mentioned graphic it is obvious that the most probable reason for a closing is the register regulation's infringement of article 25 paragraph 1. In this case the updated data of the register account are concerned for which the account holder is held responsible. If no update is made more than once and despite the authorities' invitation respectively the data are not (or no longer) in conformity with the truth, the closing of the account will be ordered. In this context it has to be observed, by the way, that in many cases also updates are concerned which have to be made by
the and which, according to article have to be effected within 10 days.

Reason for Penalty Charges – Technical Problems in the Register/ECAS

Technical difficulties in the Union register keeping an authorized account holder away from his duties are Consequently a prevented VET entry or the submission of certificates a problem.

Much more often, however, the ECAS system is concerned. This authentication system being preceded to the Union register is, under technical aspect, not a part of the Union register and has to be considered separately therefore. It is not really the question if the functioning of ECAS lies in the responsibility of the system operator or in that one of ECAS or the Union register. The reason is that according to experience a system operator is able to deal with ECAS problems if he wants. 99,99% of ECAS difficulties are problems with the receipt of confirmation SMS which are cell phone. But even if in case of a damage the Union register and not ECAS are supposed to be “blamed” according to the system operator's opinion, he will not succeed with this idea. According to the legal opinion of BBH Becker Büttner Held, so-called “technical disturbances” are divided under the following sectors:

Technical disturbance in the Union register and Technical disturbance in the sphere of the system operator

Source: BBH Becker Büttner Held – Legal Opinion 2015

As the ECAS system does not belong to the Union register and, according to the opinion of Emissionshändler.com®, has always to be assigned to the system operator, the highest risks will be found here – as the practice

As presently in calendar week 10 observed, hundreds of thousands Vodafone customers failed to have a clear reception for days which means that an undisturbed receipt of data cannot be guaranteed. ECAS problem – confirming SMS do not reach the addressee – fails to be recognised. Usually only one cell phone provider bears this problem, two providers at the same time very rarely and never three providers at the same time.

Solution Approach to avoid a Disturbance in Mobile Communication of ECAS

As a consequence of the above-mentioned experience everyone should be advised to deposit a second cell phone number of a further (another) provider in his ECAS account respectively have in store three SIM cards of different providers for his cell phone in order to be absolutely sure.

Of course also the cost aspect should but usually the occurrence of a penalty would be exorbitantly more expensive than a probable second and third contract with a provider. As exclusively the SMS function is necessary for the receipt of confirmation, this kind of contract can be concluded at less than 10 Euro/month. By the way, it is not advisable at all to use as these either do not support ECAS communication abroad or their credit can which entails also the deletion of the cell phone number. In case of problems with the ECAS mobile system, a second or third cell phone number deposited would enable an authorized account holder on application to his authority to regain his ability to act within a short time – mostly the next day.

Closely considered the solution by means of a second and third SIM card should not only be applied for one authorized account holder of a register account but for all. It is almost meaningful to invest these costs in an external service provider who already disposes of such equipment and would also provide the know-how of a legally compliant register account management (see info box page 7).

Reason for Penalty Charges – Technical Problems on the Operator’s Side

In order to achieve an unimpeded access to the register system, much more obstacles may have to be overcome than an authorized account holder (BV) usually can imagine. The following
(incomplete) list shows why a successful access to the register (and consequently the penalty) cannot take place:

1) The authorized account holder BV was never signed in to the register system because until he always had cooperators/colleagues who used their own access.

2) The authorized account holder BV was in fact signed in to the system before but not afterwards. Thus his (new) registration is not.

3) The authorized account holder BV only achieves access to the ECAS system but not to.

4) The authorized account holder BV set a language in the ECAS system and consequently finds no way to get along with the register system.

5) After a new registration the authorized account holder BV did not apply for a password within and consequently his registration expired.

6) The activating key being sent to the authorized account holder BV by letter has not been activated after.

7) The authorized account holder BV.

8) The authorized account holder BV forgot/lost his password or never used it.

9) The authorized account holder BV entered his password times, he is blocked.

10) The authorized account holder's e-mail address is not a personalized one but a address which is also assigned to another authorized account holder BV.

11) The authorized account holder BV changed his e-mail address in the register system but not in the Access will be denied.

12) The mobile phone number has been modified by the authorized account holder BV in the register system but not in the , access will be denied.

13) The mobile phone number is not assigned to the respectively has not been confirmed.

14) The modification of an authorized account holder's mobile phone number has not been confirmed separately by him.

15) The mobile phone number has been assigned to one authorized account holder (general service phone).

16) By means the authorized account holder BV gave his mobile phone number intentionally to another authorized account holder BV, too, in order to receive his SMS on his mobile phone.

17) are out of order respectively the authorized account holder stays in coverage.

18) Mobile confirmations for SMS are not received abroad (for example prepaid cards in many cases!)

19) A credit on a prepaid card abroad.

20) The authorized account holder's mobile phone is unavailable (lost, battery pack empty, SIM card damaged, etc.)

21) The Internet access of the authorized account holder's PC is disturbed, a firewall blocks.

22) Both authorized account holders use the same PC (ECAS dialling problems due to).

23) The link for dialling ECAS is unknown ( ).

24) The authorized account holder BV is blocked because he did not meet his update obligations.

25) The authorized account holder BV has been blocked because he tried to get access to the register by means of another account holder's admittance.

26) The authorized account holder BV gets no admittance because the register account has been blocked. The reasons might be – for example:

a) due to the failure to send to the registry operator.

b) due to violation against residence requirements.

c) due to March, this because of updates on the account.

d) due to non-submission of required personal documents.

27) The authorized account holder BV gets no access because the register account has been closed. The reason might be an register account which includes incorrect and outdated information.

28) The authorized account holder BV failed to see that he wanted to get logged in to the register.

Each one of the above-mentioned items (and several more) may cause a non-submission of certificates respectively lead to a delayed submission.

But in cases it might be late because especially at the end of March and in April no time is left to bring about decisive modifications until 30th April.

This means according to guideline 2003/87/EG Article 16 (3) a penalty charge of at least 100 Euro/t for the non-submitted emissions of the previous year. Hardly anyone of the operators knows, by the way, that the sanctions of 100 Euro/t have even been raised since 2013 as the newly created guideline 2003/87/EU, article 16(4) prescribes: Certificates being delivered after 1st January, 2013, include a sanction in case of emission excess in accordance with the European consumer price index.

Summary about the VET Entry and about Obstacles in the Register Account.
A closer view unveils a huge number of reasons why a register account can become a risk factor. An account lockout and an account closure can prevent the submission which can cause a penalty charge. Emanating from the fact that according to the ECJ judgement all reasons for a non-submission will have to be borne by the system operator, except force majeure, the elimination of all risks in conformity with the usual risk management rules can hardly be realized with own staff. However, a remaining risk of estimated 1 – 2% for a penalty fee and/or a liability or administrative offence being accepted by the plant manager, the responsible staff should get along easily with such a solution. However, in this context the question occurs if compliance rules and risk management rules cannot be taken away completely from a plant respectively if one or another insurance policy could be abolished as it uses to cover only small risks.

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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.

CO₂ account package
The CO₂-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 compensates the failure of authorized representative (BV) and / or their actions through the often-updated registry software support. Detailed information about CO₂-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.

Kind emission regards
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