

Insolvency Issues in Germany



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I. Withdrawal of allocation

What are the legal grounds for the withdrawal of an allocation to an insolvent AO for the rest of a trading period, if no further flights are performed?

- This is crucial as remaining allocation could lead to market distortions
- **ETS – Directive does not provide explicit legal ground**
- *Recital 20 of Directive 2008/101/EC* states the opposite:
 - “[...] Aircraft operators that cease operations should continue to be issued with allowances until the end of the period for which free allowances have already been allocated.”
- EU law provides **Art. 10 para. 5 RegReg**:
 - CA shall set the corresponding aircraft operator holding account to excluded status
 - Note: An issuance of allowances to an excluded account is not possible
- Art. 10 para. 5 RegReg is overriding Recital 20 of Directive 2008/101/EC → reflects the will of the EU legislator

→ **Withdrawal of allocation according to general rules under German Administrative Law**

II. Surrender obligation and sanctions

- ETS-Directive: No provisions regarding obligation to surrender and/or sanctions for insolvent AO
- Germany, no specific rules, **but** some decisions of the administrative court:
 - Insolvent AO has to surrender allowances
 - The administrator of insolvency is deemed to be an Aircraft Operator and has to generally perform the same duties
 - If insolvent AO fails to surrender allowances, the sanctions under the ETS will apply
 - Surrender obligation and sanctions have a preferable status over other debts during insolvency

Note: Many details are not fully resolved, some circumstances are controversial

- If AO is from third country, is law of the MS applicable?
- Different approach in each MS as insolvency laws are governed by national law
- In the following: Questionnaire for CAs to evaluate, if common approach under EU law is needed!

III. Exchange of experiences

- How many cases of insolvency (per year/since ETS began); and how much of their free allocation (number of allowances) was not allocated
- What happens to the free allocation, that was not allocated to the insolvent operator?
- any national law provisions that assist when an insolvency event occurs e.g. any requirement to notify, rules relating to the return/recovery of allowances, any insolvency related terms and conditions e.g. for the use of accounts in the Union Registry;
- What happens to the obligation to surrender in case of insolvency, do MS file an equivalent monetary debt in insolvency proceedings and how is this compatible to ETS rules?

III. Exchange of experiences (cont.)

- What happens to outstanding surrender obligations?
- How do MS enforce the legal obligations under the ETS, i.e. surrender of allowances or a sanction for non-surrendering:
 - Is the insolvent entity or the person acting on behalf of that entity still an operator under the ETS-Directive? (This is crucial in order to identify if the legal obligations under the ETS can be fulfilled)
 - Do you enforce sanctions in case the insolvent operator did not fulfill the obligation of surrendering, if e.g. the insolvent operator could not afford a sufficient amount of allowances
- Nationally where do EU ETS penalties sit in the hierarchy of distribution

Thank you for your attention!

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