

Environment - Finland

Emissions Trading Act amended

February 22 2010

[Background](#)
[Amendments](#)
[Comment](#)

Background

The Emissions Trading Act (683/2004, as amended) is based on EU Directive 2003/87/EC. It establishes a scheme for greenhouse gas emission allowance trading within the European Union and stipulates that an operator of an installation that emits greenhouse gases requires a permit from the Energy Market Authority and the emissions trading authority in Finland.

Until recently the act included no regulations regarding the bankruptcy of operators or the consequences thereof. The corresponding EU directive also lacks such provisions. Against the backdrop of the ongoing global financial crisis, the first bankruptcies of operators have taken place in Finland. Certain issues relating to the partially incomplete emissions trading regulation surfaced and the legislature rapidly initiated a process for amending the Emissions Trading Act in order to include provisions on the bankruptcy of an operator and the obligations of the bankruptcy estate. The amendments to the act were accepted by Parliament on January 15 2010 and entered into force on February 1 2010.

Prior to the amendments, one of the key open issues relating to emissions trading in Finland was the surrender of emission allowances in the event of bankruptcy. The Finnish bankruptcy legislation and Emissions Trading Act were in conflict regarding the obligations of a bankruptcy estate to surrender allowances for emissions generated prior to the bankruptcy. Whereas the bankruptcy legislation presupposes that individual debt incurred prior to the bankruptcy may not be paid to a single creditor, it could be argued that the Emissions Trading Act suggested that allowances relating to emissions generated regardless of bankruptcy be surrendered in full.

Amendments

Pursuant to the recent amendments to the act, the bankruptcy estate is obliged to monitor and verify the emissions of an installation included in its assets as and notify the authorities of changes concerning the operator or its activities. The bankruptcy estate is also liable to surrender annually a number of emissions allowances equal to the total emissions generated by the installation after declaring the operator bankrupt. Furthermore, the amendments have empowered the Energy Market Authority to offset from the account of the bankruptcy estate any allowances that have not been duly surrendered. Finally, the ban on disposing of emission allowances has been extended to apply to the bankruptcy estate.

The recent amendments principally oblige the bankruptcy estate to fulfil the ongoing obligations and liabilities of the operator under the Emissions Trading Act. However, although the obligation to surrender emission allowances under normal circumstances concerns emissions made during the entire preceding calendar year, the bankruptcy estate is obliged to return only such number of allowances that corresponds to the emissions generated after the initiation of the bankruptcy proceedings.

The approach chosen by the legislature regarding the bankruptcy estate's obligation to surrender allowances relates to Finnish bankruptcy legislation, which requires that all creditors be treated equally while remaining subject to the rules on the priority of creditors set out in the bankruptcy legislation. One of the cornerstone principles applicable to bankruptcy proceedings is that the bankruptcy estate may not pay individual debts incurred prior to the bankruptcy proceedings; rather, the assets of the estate must be distributed to all creditors in accordance with the applicable priority order.

Authors

[Sami Laine](#)



[Mikko Aaltonen](#)



æ

Since emission allowances have a financial market value, it could be argued that the surrender of emission allowances based on emissions generated prior to bankruptcy violates the principle of equality of creditors. On the other hand, in the absence of means through which the Energy Market Authority can offset or otherwise collect allowances to be surrendered, such allowances could be disposed of for the benefit of other creditors. However, this approach is problematic in view of the Finnish state's obligation to ensure that allowances are duly surrendered by the operators. Should an operator (or bankruptcy estate) fail to surrender the required allowances, liability towards the European Union to compensate such shortage would fall, by default, on the Finnish state.

Accordingly, the legislature has concluded that the active obligation of the bankruptcy estate to surrender allowances concerns only emissions generated after bankruptcy proceedings have been initiated. The Energy Market Authority has been given the right to offset against the account of the installation those allowances that have not been surrendered. However, such set-off should primarily apply to emissions generated after the initiation of bankruptcy proceedings (ie, concerning the allowances that the estate is obliged to surrender), although it may also apply to emissions made before bankruptcy.

The authority may waive its right to offset allowances in the event that the bankruptcy estate continues the business activities of the operator.

Finally, the act has been amended to extend the ban on disposing of emission allowances to bankruptcy estates. The amendment aims to prevent the sale of allowances where allowances relating to previous years have not been duly surrendered.

Comment

These amendments aim to clarify the consequences of the bankruptcy of emissions trading entities by regulating the continuous obligations of operators by which the bankruptcy estate is bound and setting out the rules on the surrender of emission allowances in bankruptcy proceedings. Although these amendments clarify bankruptcy-related issues pertaining to emissions trading to an extent, further clarification is likely to be necessary in the future – either through further legislation or case law. Bankruptcy is a multi-dimensional process that may involve numerous complicated legal issues that are difficult to foresee, both in general and with respect to emissions trading.

It remains to be seen whether the amended act will influence the legislatures of other European countries, since the bankruptcy of emissions trading entities is not addressed in EU Directive 2003/87/EC. Based on the Finnish experience, the lack of sufficient regulation in this area is likely to give rise to complicated interpretation issues and, therefore, amendments to the applicable law will be necessary.

For further information on this topic please contact [Sami Laine](mailto:sami.laine@krogerus.com) or [Mikko Aaltonen](mailto:mikko.aaltonen@krogerus.com) at Krogerus by telephone (+358 29 000 6200), fax (+358 29 000 6201) or email (sami.laine@krogerus.com or mikko.aaltonen@krogerus.com).

The materials contained on this website are for general information purposes only and are subject to the [disclaimer](#).

ILO is a premium online legal update service for major companies and law firms worldwide. In-house corporate counsel and other users of legal services, as well as law firm partners, qualify for a free subscription. Register at www.iloinfo.com.