

EU ETS – WHO IS LIABLE TO THE AUTHORITIES: SHIPOWNERS OR MANAGERS?

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A hotly debated topic regarding the extension of the EU Emission Trading Scheme ("EU ETS") to include maritime emissions, is who should be responsible for submitting emissions allowances on the relevant submission date (the "submission date") to the relevant administering authority ("ETS obligations"), in particular in instances where a shipowner has delegated the responsibility to comply with the ISM Code to a manager. In such cases, should a shipowner and its manager decide in their bilateral management agreement which of them is responsible for ETS obligations ("Option 1")? Or should the manager *always* be responsible for those obligations provided the shipowner has delegated

responsibility to comply with the ISM Code to him ("Option 2")?

This question is of particular importance for ship managers who manage ships which are not owned by the manager's group, as the assumption of ETS obligations vis-à-vis the administering authority is associated with high risks. Depending on the trade and emissions of a ship, the costs will likely amount to an average of €500,000 pa – and could be even higher.

If a manager's responsibility falls under Option 2, it is responsible for submitting the allowances to the administering authority on the submission date. A manager will want to arrange in the management agreement with the shipowner that the latter must provide the manager with sufficient allowances so that it can fulfil its ETS obligations. In the case, for example, of a time charter, the shipowner will try to agree with the time charterer that it must either procure the allowances for the ship it has chartered or reimburse the shipowner for the procurement costs.

However, if the shipowner does not transfer the allowances to the manager, or if it becomes insolvent and the allowances fall into insolvency estate, the manager is left empty-handed while remaining responsible for compliance with ETS obligations.

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One would have thought that the EU legislator would favour Option 2, which "is aligned with the existing application of the shipping company definition used in IMO and EU legislation in the last 20 years" (page 4 of an undated Concept Note – implementing act on the rules relating to the administration of shipping companies by administering authorities in respect of a shipping company, pursuant to Article 3gf of Directive 2003/87/EC). However, it would seem that the EU legislator is now keen to implement Option 1.

The EU Commission published a draft on 1 September 2023 entitled "Commission Implementing Regulation (EU) laying down rules for the application of Directive

2003/87/EC of the European Parliament and Council as regards the administration of shipping companies by administering authorities in respect of a shipping company". In simple terms, the draft says that, in principle, the shipowner is responsible for complying with ETS obligations concerning the administering authority. However, if a manager has assumed the responsibility to comply with the ETS obligations on the basis of a management agreement with the shipowner, it is obliged to submit the allowances vis-à-vis the administering authority. The parties are therefore able to choose who is responsible for complying with the obligations. If the manager is responsible, it must provide the administering authority with a document clearly indicating that it has been duly mandated by the shipowner to comply with ETS obligations (Article 1 paragraph 2) together with the usual contact details (Article 1 paragraph 3). Where no document has been provided to the administering authority, the shipowner will be considered the entity responsible for ETS obligations (Article 1 paragraph 4).

How should the regulations proposed in the draft be assessed? Some regulations are vague, but the core statement is that a manager is not always automatically obliged to comply with ETS obligations. Due to the high risk involved, managers in particular would welcome the implementation of Option 1. In fact, Option 1 also gives the parties more leeway to determine how they want to distribute obligations and risks. If a manager is not responsible for ETS obligations, this should be explicitly stated in the management agreement. If a shipowner wishes to entrust a manager with responsibility for ETS obligations this must also be regulated in detail in the management agreement. The manager will want to ensure that it receives the allowances regularly from the shipowner (who should in turn receive them, in case of a time charter, from the time charterer) so that he can submit the allowances to the administering authority on the submission date. If the shipowner does not want to provide the manager with the allowances before the submission date (i.e. because the shipowner does not want to bear the insolvency risk of the manager), the parties will have to consider appointing a trustee to hold the allowances in trust for them both.

The draft is still to be passed by the Commission. It can be commented on via the EU website until 28 September 2023. Somewhat controversially, the options are also being discussed by member states. The Commission must adopt a final regulation in the fourth quarter of 2023, before the EU ETS for shipping enters into force on 1 January 2024. Even though many issues remain undecided, shipowners and managers in particular must now begin to work on adapting charter parties, management agreements and other documentation to confirm with what the final regulations will likely entail.

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