

Questions:

1. Is it forbidden to create a right of pledge or other security right on emission rights held on an account in your national emissions trading registry?
2. Is it forbidden to levy an attachment on emission rights held on an account in your national registry?
3. If this is not forbidden, how can a security right and/or attachment on emission rights be effectuated in your jurisdiction? Is this explicitly regulated?
4. If pledge and/or attachment are possible, can these rights be recorded in your national registry? (this may be possible on the basis of Art. 24(1) of the Registry Regulation, EC 2216/2004, which provides that registries may contain additional information).

Country	Summary response	Full response
<p>AUSTRIA</p> <p>Fiebinger Polak Leon</p>	<p>No prohibition to create security right or levy attachment on emission rights.</p> <p>No specific regulation on how security right and/or attachment should be effectuated.</p>	<p>We quickly went through the EZG (Austrian Act on Trading Emission Certificates) and did not find an explicit regulation forbidding (or allowing) to create a right of pledge (or to levy an attachment) on emission rights. Neither in the comments of the Austrian legislator a hint on this topic could be found.</p> <p>As an emission certificate is declared as a good and has access to the commodity exchange trading pursuant to § 22 EZG it should be possible to create a right of pledge on it.</p> <p>The only questions remaining is how this right can be effectuated. There are no regulations in Austria on that question.</p> <p>A possible solution could be that the pledgor sets up a separate personal account within the national registry and instructs the national registry to hold the respective amount of emission certificates for the pledgee and to credit this amount to the pledgee's account.</p>
<p>BELGIUM</p> <p>Liedekerke Wolters Waelbroeck Kirkpatrick</p>	<p>No prohibition to create security right or levy attachment on emission rights.</p> <p>No specific regulation on how security right and/or attachment should be</p>	<p>In Belgium it is not explicitly forbidden to create a right of pledge or to levy an attachment on emission rights, as no such prohibition is provided for in the legislation implementing the ETS Directive.</p> <p>Consequently, it should be possible to use the procedure of attachment of movable</p>

	<p>effectuated.</p>	<p>property (as prescribed by the Civil Code) for the emission rights. This procedure requires the dispossession of the property. In the absence of any specific provisions with this respect concerning emission rights, the legal doctrine recommends the formal notification of the right of pledge to the federal authority keeping the national registry, with a request to such authority to duly file the notification and not to record any transfer of the emission rights, should this be asked for.</p> <p>Personally, I am not aware of any practical experience of our firm with this respect. I have not gotten in touch with our federal authority to check out if they have gained any experience or established an administrative practice with this respect.</p>
<p>BULGARIA Djingov, Gouginski, Kyutchukov & Velichkov</p>	<p>1. Individual emission rights as such may not be subject to security right. However, in case of floating charge (registered pledge) over all assets of pledgor, any emission rights held by pledgor will be covered by such charge.</p> <p>2. Attachment on emission rights as such is not allowed.</p> <p>3. Registered pledge over going concern of holder of emission rights as floating pool (see answer 1 above).</p> <p>4. Security right cannot be recorded in national emissions trading registry.</p>	<p>1. Emission rights do not qualify as collateral which may be subject to pledge or other security right under Bulgarian law. Therefore emission allowances may not be pledged as fixed charge under Bulgarian law. However if a registered pledge is created over the going concern of the holder of the emission allowances as floating pool of rights, obligations and factual relations, the emission allowances will form part of such floating charge.</p> <p>2. Bulgarian law does not allow the attachment of emission rights as interim injunction measure. However other interim injunction measures are possible. For example the competent court may prohibit the transfer of emission allowances by their holder as interim injunction which secures the enforcement of a future court decision against him or for preserving of the status quo (i.e. the factual or legal situation), so as to safeguard the rights and legitimate expectations, the recognition of which is sought from the competent court.</p> <p>3. The Bulgarian law does not provide for a specific procedure allowing the enforcement over emission allowances. In principal in case a registered pledge is established over the going concern of the holder of emission allowances as floating pool, the pledgee would be entitled to choose whether to search enforcement over</p>

		<p>the entire going concern as floating pool or over particular assets forming part of the going concern. Therefore enforcement over the emission allowances forming part of the going concern would be possible where the pledgee has chosen to enforce over the entire going concern as floating pool.</p> <p>4. No such recording may be done in the Bulgarian national registry for emission allowances. However, please note that the Bulgarian law allows the registration of an additional authorised representative within the meaning of Article 23 of European Commission Regulation 2216/2006, whose consent would be required to effect transfer or surrender of the allowances by their holder, which may serve as certain kind of security in favour of a third party. However the holder of the account would be entitled to withdraw such authorization at any time.</p>
<p>DENMARK</p> <p>Gorrissen Federspiel</p>	<p>Emission rights may be pledged and registered in the register of chattel mortgages.</p>	<p>In the Danish travaux préparatoires to the transposition of the directive into Danish law it is presumed that CO2 quotas may be pledged according to the Danish Act on Registration (Tinglysningsloven) chapter 7 and hence registered in the register of chattel mortgages.</p>
<p>ESTONIA</p> <p>Tark Grunte Sutkiene</p>	<p>No prohibition to create security right or levy attachment on emission rights.</p> <p>No specific regulation on how security right and/or attachment should be effectuated.</p> <p>Security right cannot be recorded in national emissions trading registry.</p>	<p>The Estonian law does not explicitly prescribe how to create a pledge over emission rights held on an account in the Estonian trading system. However, it is also not prohibited to create a pledge or other security rights or to levy an attachment on emission rights. According to the Law of Property Act, any transferable proprietary rights may be pledged if there is no explicit prohibition to pledge such rights. Thus, it is also possible to create a pledge over emission rights.</p> <p>As emission rights are considered to be transferable rights with pecuniary value, the general rules applicable to pledges over proprietary rights would be applicable. Basically, a pledge over emission rights can be created by a written agreement between the pledgee and the pledgor. However, the pledge cannot be recorded in the national trading system.</p>

<p>GERMANY</p> <p>Hengeler Mueller</p>	<p>No explicit prohibition to create security right on emission rights. However, it is not possible to create a right of pledge on emission rights under the current legal framework, as this cannot be recorded in the national emissions trading registry. The only realistic option to take security over emission rights is an assignment by way of security.</p> <p>No prohibition to levy attachment on emission rights. However, this cannot be recorded in the national emissions trading registry, the practical relevance is limited.</p>	<p>1. Summary</p> <p>Even though the legislator does not explicitly prohibit to create a right of pledge or other securities on emission allowances, the current legal framework does not provide sufficient substantial and/or procedural prerequisites to create such rights. The main reason is that in particular a right of pledge on allowances cannot be registered at the German Emission Trading Authority ("Deutsche Emissionshandelsstelle - DEHSt"). By consequence, only securities with no obligation to register may be of practical relevance, namely an assignment for security.</p> <p>Concerning possible attachments on emission allowances, there is no legislative prohibition in this regard either. However, as a (mandatory) attachment note cannot be registered at the DEHSt, its relevance in practice is rather limited.</p> <p>2. Legal Framework</p> <p>The European emission Trading Scheme ("EU ETS") has been implemented into national legislation by the TEHG and the corresponding Allocation Act for the current trading period ("ZuG 2012"). While the TEHG provides the main framework for emission trading activities and contains both regulatory and institutional elements, the ZuG 2012 regulates the allocation and auction of allowances based on the German National Allocation Plan II ("NAP") for the trading period 2008-2012.</p> <p>Entities involved in trading emission allowances (e.g. EUA, CER and ERU) have to register their accounts at the DEHSt which operates the German registry for emission trading in accordance with EC Regulation 2216/2004 and Decision 280/2004/EC.</p> <p>3. Transfer of and (Potential) Securities on Allowances</p> <p>The transfer of allowances and even more the creation of (potential) securities are</p>

		<p>dependent on, inter alia, the legal nature of allowances. Although the legal nature has not been defined by law and is subject to controversial discussions, the prevailing position considers allowances as subjective public law rights and therefore as immaterial assets. As far as transfer of and securities on allowances are concerned, provisions of the German Civil Code ("Bürgerliches Gesetzbuch - BGB") apply. In practice, the transfer of ownership takes place by mutual agreement to transfer (sale or trading contract) and subsequent registration at the DEHSt. Furthermore, Sec. 16 (2) TEHG provides an comprehensive protection of good faith in favour of the registered owner. Accordingly, the register shall be deemed correct once the registration of the allowances has taken place, unless the recipient of the allowance has knowledge of the incorrectness of the registry at the date of allocation.</p> <p>In consideration of the legal nature of allowances as immaterial rights, two different securities have to be considered:</p> <ul style="list-style-type: none"> • <u>Right of Pledge</u>: According to Sec. 1273, 1274 BGB, a right of pledge can be created on an immaterial right based on the same provisions that apply to its transfer of ownership. Consequently, creating a right of pledge on allowances would require a registration at the DEHSt. However, pursuant to Sec. 14 (1) TEHG, the German registry does not provide specific tables or sections for the registration of encumbrances or securities respectively. This is in line with Annex II of EC Regulation 2216/2004 according to which national registries are not obligated to implement tables for any kind of material restrictions. Correspondingly, in 2007 the German legislator amended Sec. 14 (1) TEHG by suspending the legal possibility of registering encumbrances or other restrictions. As a result and in accordance with the prevailing opinion, it is not possible to create a right of pledge on allowances (at least) under the current legal framework. • <u>Assignment for Security</u>: The only realistic possibility to take security over
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		<p>emission allowances in German accounts is an assignment by way of security. However, as this restriction of transfer is not subject to registration at the DEHSt, the assignor remains in the legal position to transfer the encumbered allowance to a third party as long as he is registered as the owner (Sec.16 (2) TEHG). In order to protect the legal position of the assignee, the allowances would have to be transferred to the assignee's account, provided he is also registered at the DEHSt. Against this background, detailed provisions have to be agreed between the parties involved to ensure the transfer and retransfer of the respective allowances.</p> <p>4. Attachment on Allowances</p> <p>In principle, attachments can be levied on immaterial rights and therefore also on emission allowances. However, the formal attachment note necessary to ensure that the respective right cannot be transferred is not subject to registration at the DEHSt. Consequently, a third party may acquire emission allowances in good faith pursuant to Sec. 16 (2) TEHG, which undermines an effective attachment procedure and, thus, limits the practical relevance of attachments on allowances as such.</p>
<p>HUNGARY</p> <p>Forgó, Damjanovic és Társai Ügyvédi Iroda</p>	<p>No prohibition to create security right or levy attachment on emission rights.</p> <p>No specific regulation on how security right and/or attachment should be effectuated.</p> <p>Uncertain whether pledge can be recorded in national emissions trading registry.</p>	<p>The Hungarian legal rules (Act 15 of 2005 on the trade of emission units, and Government Decree 213 of 2006 containing subordinated legislation) do not prohibit or regulate explicitly the pledging or the levying an attachment on emission rights.</p> <p>As emission rights are considered to be transferable rights with pecuniary value our view is that they may be the subject of pledging or the levying an attachment.</p> <p>In principle pledge on rights can be established by an agreement, and if the relevant legal rules regulating a certified public registry so provide, it is also a condition that the pledge must be registered in such certified public registry. As I</p>

		<p>said, the Hungarian legal rules do not explicitly regulate the pledging of emission rights, and therefore, our interpretation is that in order to establish a pledge on emission rights no registration in the national registry is necessary.</p> <p>In lack of legal rules, it is uncertain whether registration of such pledge would be at all possible in the national registry.</p>
<p>IRELAND</p> <p>Arthur Cox</p>	<p>No prohibition to create security right or levy attachment on emission rights.</p> <p>No specific regulation on how security right and/or attachment should be effectuated, but emission rights may be subject of mortgage or charge.</p>	<p>We believe the position in Ireland is as follows (using your numbering):</p> <ol style="list-style-type: none"> 1. There is no prohibition in Ireland. 2. There is no prohibition in Ireland. 3. The creation and enforcement of security over greenhouse gas allowances is not explicitly regulated. Allowances may be the subject of mortgage or charge. As the allowances are intangible, no pledge, lien or physical security is possible. 4. These rights cannot be recorded in the Registry. The security holder can be registered as Additional Authorised Representative, whose signature is required to effect transfer or surrender of the allowances - thereby protecting the security.
<p>LITHUANIA</p> <p>Lawin</p>	<p>No prohibition to create security right or levy attachment on emission rights.</p> <p>No specific regulation on how security right and/or attachment should be effectuated.</p>	<p>Under Lithuanian laws there are no express provisions prohibiting to create a right of pledge or other security right, levy an attachment on CO2 emissions allowances, nor there are special rules allowing for such pledge or attachments.</p> <p>Since under Lithuanian laws CO2 emissions allowances are regarded as disposable property rights, we consider it possible to create a pledge (or levy an attachment) on them. However, Lithuanian laws do not establish a special framework to effectuate pledge or attachment on CO2 allowances. Accordingly, we would suggest that a notarized pledge bond could be issued and registered with the national registry (Hypothec registry) or a possessory pledge could be issued in such cases.</p>

<p>NETHERLANDS</p> <p>De Brauw Blackstone Westbroek</p>	<p>Explicit prohibition to create security right or levy attachment on emission rights.</p>	<p>When the Directive on the EU Emissions Trading Scheme (2003/87/EC) was implemented in the Netherlands, the Dutch legislator explicitly provided that it is not possible to create a right of pledge or other security right (for the benefit of a third party) on EU Allowances and other emission rights (Certified Emission Reductions, Emission Reduction Units and Assigned Amount Units) held on an account in the Dutch national emissions trading registry. It was also provided that no attachment (or seizure or garnishment) can be levied on emission rights in the Dutch registry. These prohibitions are included in article 16.42 of the Dutch Environmental Management Act (<i>Wet Milieubeheer</i>).</p>
<p>NORWAY</p> <p>Wiersholm, Mellbye & Bech</p>	<p>No prohibition to create security right on emission rights. However, such right can in practice not be perfected and therefore a title transfer approach is advisable (which has similar practical effect as a pledge).</p>	<p>There is no Norwegian law prohibition on establishing a pledge in emission rights. However, such right cannot be perfected and we have therefore at previous junctions recommended a title transfer approach. By way of example, Nord Pool has required predelivery of these instruments which – for their purposes – has the same effect as a pledge.</p> <p>In order to establish a functioning security right in emission rights, we would recommend to structure the contracts as financial instruments as defined in Commission Regulation 1278/2006 Article 38 (3) cf Article 39 (d). Such rights would have to be established by means of a financial collateral agreement as regulated (and within the limitations of) Directive Directive 2002/47/EC on Financial Collateral Arrangements.</p>
<p>POLAND</p> <p>Sołtysiński Kawecki & Szlęzak</p>	<p>No prohibition to create security right on emission rights.</p> <p>No specific regulation on how security right should be effectuated, but no legal</p>	<p>Like in Spain and Austria, in the Polish laws regulating national emission trading registry there is no express prohibition to establish a pledge or other security rights on CO2 allowances.</p> <p>Accordingly, the general terms provided for in the Polish Civil Code shall apply.</p>

	<p>limitations identified.</p>	<p>Please note that the Polish Civil Code provides for the possibility to create a pledge over the assignable rights (so called, 'civil pledge'). Thus, one shall assume that those provisions shall be applicable to the CO2 allowances too.</p> <p>Moreover, since under Polish law CO2 allowances are considered as transferable rights, it is also possible to establish over them a pledge in accordance with rules set forth in a separate legal act - Law on Registered Pledges and the Pledge Registry. Such a pledge (so called, 'registered pledge') is then entered into the pledge registry which is maintained by the regional courts (commercial courts).</p> <p>Although Art. 24 (1) of the Registry Regulation, EC 2216/2004 provides for the possibility to include in the national emission trading registry additional information, Polish emission registry does not contain any information regarding the security rights established on CO2 allowances.</p> <p>Summarizing, we do not see any legal limitations to create a civil pledge or a registered pledge on CO2 allowances, however, no special regulations in this regard have been provided in the national laws concerning CO2 issues.</p>
<p>ROMANIA</p> <p>Nestor Nestor Diculescu Kingston Petersen</p>	<p>No prohibition to create security right or levy attachment on emission rights.</p> <p>No specific regulation on how security right and/or attachment should be effectuated.</p>	<p>The Romanian legislation implementing the EU-ETS Directive does not explicitly prohibit either to (i) create a right of pledge or other security right (for the benefit of a third party) on emission rights held on an account in the Romanian National Greenhouse Gas Emissions Registry (the "National Registry"); or to (ii) to levy an attachment (or seizure or garnishment) on emission rights in the National Registry.</p> <p>The means by which a security right on emission rights could be effectuated in Romania depend on the qualification given in Romanian law to the legal regime of emission rights under the EU-ETS, which is yet to</p>

		<p>be settled by law, in the legal doctrine or by the courts of law.</p> <p>In this regard, the Government Decision No. 780/2006 regarding the establishment of a greenhouse gas emission trading scheme (“GD 780/2006”), which is the main legal act transposing the EU-ETS Directive into Romanian law, only provides that an allowance represents a title that confers the right to emit one tonne of carbon dioxide equivalent during a determined period, thus it does not qualify the allowances. Moreover, due to the relatively new legal framework in this field, there is no court practice addressing this issue.</p> <p>Considering the above, as well as the general principles of Romanian civil law, it may be argued that allowances may be assimilated as assets, in which case they would be deemed, as a rule, generically identified movable assets.</p> <p>However, in February 2010, the Romanian National Securities Commission (“NCS”) attempted to qualify the allowances as securities through the Ruling No. 10/2010 (“Ruling 10/2010”). Nevertheless, a claim for the annulment of this ruling was filed with the Romanian court and such issued a decision for the suspension of the ruling until the completion of the trial. Thus, at this moment in time, the legal regime of allowances is not governed by the special requirements set by the Romanian capital market legislation.</p> <p>In lack of specific express derogatory legal provisions, irrespectively if allowances are qualified as assets or as securities, security rights may be created over allowances through security agreements. In case the allowances are qualified as securities, security may be also created in accordance with the capital market rules governing the trading of the respective securities (e.g., by making them unavailable or by</p>
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		<p>endorsement - in Romanian: "andosare"). In order to ensure that such security rights become fully opposable and enforceable against third parties, they need to be registered with the Romanian Electronic Archive for Interests in Movable Property (in case the allowances are deemed assets) or they need to fulfil the publicity requirements set out by the capital market legislation (in case the allowances are deemed securities).</p> <p>Similarly to the above, seizures (in Romanian: "sechestre") and attachments (in Romanian: "poprire") may be effected in accordance with the general rules of the Romanian Civil Procedure Code or those set out in the legislation on the establishment of securities over movable assets. The latter also provides, amongst others, the possibility for the creditor to take peaceful possession of the secured assets / securities and to sell/appropriate them by using reasonable commercial methods.</p> <p>Romanian legislation governing the greenhouse gas emissions trading scheme does not provide for the possibility to record security rights and/or attachment rights into the National Registry. In its practice, the National Registry administrator (i.e., the National Environmental Protection Agency) has yet to issue documents or information regarding the status of an operator' allowances to third parties (e.g., if such allowances are free of encumbrances, or if they exist or not in the operator's account at a certain moment in time).</p> <p>From a practical perspective, limitations on the actual movement of allowances may be imposed by having the allowances transferred from the security debtor operator's account with the National Registry in another account controlled by the beneficiary of the security rights (which equals to a dispossession). Another alternative would be to have the</p>
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		<p>debtor appoint creditor's representatives in the positions of security debtor operator's primary, secondary, additional or external authorized representatives for the security debtor operator's account in the National Registry. Such appointment would have to observe the conditions provided in the Commission Regulation No. 2216/2004 for a standardized and secured system of registries pursuant to the ETS Directive, as amended by the Commission Regulation No. 920/2010 (which is directly applicable in Romania), and in the Romanian Ministry of Environment Order No. 1474/2007 on the approval of the National Regulation on the management and operation of the National Registry. However, this latter alternative would be subject to certain limitations, both legal (e.g., the operator's possibility to revoke the mandate given to these representatives) and/or deriving from the authority's past and current practice (e.g., the refusal of the National Registry's administrator to enter into contractual arrangements undertaking not to make changes into the operator's account and/or not to perform operations in the account unless certain conditions are met).</p>
<p>SPAIN Uría Menéndez</p>	<p>No prohibition to create security right on emission rights.</p> <p>No specific regulation on how security right should be effectuated.</p>	<p>There is no express prohibition to pledge or create a charge over CO2 allowances in Spain. However, it is also true that the Spanish Registry Regulations do not contemplate such a pledge nor facilitate the mechanics for the recording of pledge rights in the Spanish Registry (which operates under the name "Renade"). We checked this a couple of years ago with Renade and at the time they did not have any precedents either.</p> <p>However, CO2 allowances are treated as assets for accounting purposes and are transferable rights, although such a transfer needs to be recorded at Renade. In the past, we have suggested a couple of solutions to clients who were looking into this, although to be honest they finally did not go ahead with taking security over CO2 allowances. One of the solutions was executing a deed of pledge but documenting</p>

		<p>the transfer of possession of the allowances as a sale and purchase or repo in trust (as a "fiducia") to the lenders. Another would be to use a "pledge without transfer of possession" ("prenda sin desplazamiento"), a security interest that was expanded in 2007 to comprise credit rights and other economic rights, whereby the pledge would be recorded in a different Registry (a registry of movable assets); the borrower may then not dispose of the allowances, but the allowances themselves would not be blocked in the Renade registry.</p> <p>So all in all, a pledge of CO2 allowances we believe it is legally possible, but the mechanics for perfecting and implementing such a pledge are difficult in the absence of specific registry provisions.</p>
<p>SWEDEN Hammariskiöld & Co</p>	<p>No prohibition to create security right on emission rights, but as this cannot be recorded in the national emissions trading registry, it would have to assume the form of a transfer.</p> <p>Explicit provision that allows attachment on emission rights, which can be recorded in national emissions trading registry.</p>	<p>There is no explicit prohibition against the creation of a pledge or other security arrangement on emission rights held on an account in the Swedish emission trading registry. However, a pledge cannot be recorded in the Swedish registry. For registration purposes, a pledge would have to assume the form of a transfer in order to be recorded in the registry (as a transfer).</p> <p>Swedish law does, however, explicitly provide that attachments on emission rights held on an account in the Swedish emission trading registry are possible. Following notification to the Swedish Registry (<i>Statens energimyndighet</i>), an entry of the attachment is made in the account of the holder of the emission rights.</p>
<p>SWITZERLAND GHR</p>	<p>No prohibition to create security right or levy attachment on emission rights.</p> <p>No specific regulation on how security right and/or attachment should be effectuated. These cannot be recorded</p>	<p>Neither a pledge nor an attachment on carbon emission rights are explicitly forbidden in Switzerland. However, it is also a fact that the law does not expressly provide the possibility to pledge carbon emission rights or to levy an attachment on them. According to the information obtained from the Federal Office for the Environment (FOEN), there is no existing technical procedure that allows for the recording of an attachment or a pledge in the national emission rights registry. As</p>

	<p>in the national emissions trading registry.</p>	<p>the registration of a pledge or an attachment in the registry is a precondition for the validity and enforcement of such pledge or attachment, if there is no such registration, the owner of the emission rights in question may still transfer the pledged or attached emission rights to any third party, who may acquire them in good faith.</p> <p>As a result, the solution would be to perform an assignment for security. However, in that case, the assignee is registered as the new owner of the emission rights in the national emission rights registry. This again enables him to transfer such rights to any third party without any limitation (überschüssende Rechtsmacht).</p>
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