

COVID-19/CORONAVIRUS – GERMANY PLANS TO ESTABLISH ECONOMIC STABILISATION FUND

To further mitigate the impact of the Covid19-pandemic the German parliament (Bundestag and Bundesrat) has adopted a law on the establishing of an Economic Stabilisation Fund (*Wirtschaftsstabilisierungsfonds* – "**Fund**") enabling government stabilisation measures for affected German companies. The Fund complements other support measures, such as the expanded KfW-programmes (see our separate [briefing](#)).

THE STABILISATION FUND

The Fund is established under the Economic Stabilisation Fund Act (*Wirtschaftsstabilisierungsfondsgesetz* – "**WStFG**"), similar to the Financial Market Stabilisation Fund ("**SoFFin**") created during the global financial crisis in 2008. Although the Fund has no legal personality, it can participate in legal transactions. The Fund will be managed by the German Federal Debt Agency, *Finanzagentur GmbH*, and will be subject to the supervision of the German Federal Ministry of Finance (*Bundesministerium der Finanzen* – "**BMF**").

The Fund aims to stabilise non-financial undertakings by overcoming liquidity bottlenecks and by establishing the framework conditions to strengthen their capital base. For this purpose, the underlying law basically provides for two stabilisation measures: granting of state guarantees and recapitalisation measures.

ELIGIBLE APPLICANTS FOR STABILISATION MEASURES

Only non-financial companies regardless of their legal form are, in principle, eligible to apply for stabilisation measures under the WStFG provided that a threat to their continued existence would lead to considerable consequences for the economy, technological sovereignty, supply security, critical infrastructures or the labour market in Germany. Companies must have fulfilled at least two of the following three criteria during the last two financial years prior to 1 January 2020 in order to be eligible for stabilisation measures:

- balance sheet total exceeding an amount of EUR 43 million,
- annual turnover exceeding an amount of EUR 50 million,
- more than 249 employees on an annual average.

Key issues

- The Economic Stabilisation Fund is proposed by the Federal German Government to stabilise non-financial undertakings by overcoming liquidity shortages and strengthening their capital base.
- The Fund may grant guarantees for refinancings on the capital market.
- The Fund is also authorised to acquire direct participations in companies.
- The implementation of stabilisation measures by the Fund must comply with the EU state aid law requirements.
- Further provisions regarding these stabilisation measures will be set out in an ordinance to be adopted by the German Federal Ministry of Finance.

Companies that do not meet these requirements can still be eligible for stabilisation measures provided that they operate in one of the critical sectors referred to in section 55 German Foreign Trade and Payments Ordinance (*Außenwirtschaftsverordnung*), such as energy, water or telecommunication, or are of a comparable importance for the security or the economy of the Federal Republic of Germany.

STABILISATION MEASURES

Under the WStFG, the Fund may grant guarantees for debt instruments and participate in recapitalisation measures. Applications for these measures must be submitted to the Federal Ministry for Economic Affairs and Energy (*Bundesministerium für Wirtschaft und Energie* – "**BMWi**"). The BMF, by mutual agreement with the BMWi, is the competent authority for decisions on these measures at its due discretion. Companies do not have a legally binding claim to stabilisation measures. When exercising its discretion, the BMF must take into consideration the following factors:

- the company's importance for the German economy,
- the urgency of stabilisation measures,
- the impact on the labour market and competition, and
- the principle of using the resources of the Fund as economically as possible.

Besides establishing the Fund, the WStFG also includes specific tax provisions which have already applied to the SoFFin.

General conditions for stabilisation measures

Companies applying for stabilisation measures must meet several prerequisites:

- No other means of financing must be available for the relevant company.
- Stabilisation measures must lead to a clear perspective for an independent continuation after overcoming of the Covid-19 pandemic.
- The company must not have been in economic difficulties on 31 December 2019.
- Companies must guarantee a sound and prudent business policy, especially to contribute to stabilisation of production chains and securing of jobs. To ensure companies complying with this, conditions can be agreed on. Those conditions vary individually depending on the kind of measure (e.g. in the case of guarantees it could be a fair market return or in case of recapitalisation measures it could be limitations on the distribution of dividends and the remuneration of members of the executive boards).

In addition, the BMF in cooperation with the BMWi is authorised to issue an ordinance providing for further detailed requirements to be met by applying companies, *inter alia*, with respect to the use of funds raised, the remuneration of the governing bodies, payment of dividends, or measures to avoid distortion of competition. Beneficiary companies can be obliged to comply with these requirements by contract, self-commitment, or administrative act. A previous ordinance issued in 2012 with regard to the Financial Markets Stabilisation Fund (*Finanzmarktstabilisierungsfondsverordnung* – "**FMStFV**") *inter alia* authorised the authorities to oblige applicants for stabilisation measures "to review their remuneration systems and the remuneration systems of the

companies they control for their incentive effect and appropriateness", "to limit the remuneration of their directors and officers to an appropriate level" or "not to pay dividends or other profit distributions not owed by contract or by law to shareholders other than the Fund during the duration of the stabilisation measure".

Moreover, the implementation of stabilisation measures by the Fund must comply with the EU state aid law requirements. Therefore, stabilisation measures will need to be notified to the European Commission on a case-by-case basis. It can nevertheless be expected that the German Federal Government will proceed a framework notification of the planned measures and, if necessary, notify significant individual stabilisation measures separately.

Guarantees

Under section 21 WStFG, guarantees for up to EUR 400 billion for debt instruments can be granted to overcome liquidity shortages and support refinancing on the capital market. The term of these guarantees is limited to a maximum of 60 months.

A consideration in line with market conditions must be charged for the provision of guarantees. The BMF is authorised to issue an ordinance setting out further provisions regarding

- the nature of the guarantees and the risks they may cover,
- the calculation and set-off of guarantee amounts,
- the consideration and other conditions of the guarantees,
- limits on guarantees for liabilities of individual undertakings and for certain types of guarantees, and
- other conditions ensuring the purpose of the stabilisation measures.

The guarantee refers to "debt instruments issued and other liabilities created until 31 December 2021". However, such instruments and liabilities need to serve the purpose to procure liquidity and to support the refinancing on the capital market.

Recapitalisation

The Fund may participate in the recapitalisation of companies. Recapitalisation measures include the acquisition of subordinated debt, hybrid bonds, profit participation rights, silent partnerships, convertible bonds, the acquisition of shares in companies and the assumption of other components of the equity of these companies if these measures are necessary for the stabilisation of the respective company. For the purpose of these recapitalisation measures, the BMF is authorised to borrow up to EUR 100 billion. Recapitalisation measures are required to be carried out under market conditions.

The Fund shall only participate in companies if there is a significant interest in the stabilisation of the company and if this purpose cannot be achieved better and more economically by other means. If the Fund decides to do so, it is the BMF's obligation to manage the equity interests acquired. This does, however, neither constitute a nationalisation nor an expropriation – the Fund rather only exercises its ownership rights following the company's voluntary application.

Again, the BMF is authorised to issue an ordinance setting out further provisions regarding

- the consideration and other conditions of the recapitalisation,
- limits on participation in equity components of individual entities and certain types of equity components,
- the conditions under which the Fund may resell its shares or other participations, and
- other conditions ensuring the purpose of the stabilisation measures.

Moreover, the Fund is authorised to grant loans to the German promotional bank *Kreditanstalt für Wiederaufbau*, "**KfW**" to recapitalise KfW's special programs established to support companies affected by the crisis. The conditions will be decided on individually.

ADDITIONAL CHANGES TO COMPANY AND TAKEOVER LAW

The WStFG also proposes an Economic Stabilisation Acceleration Act (*Wirtschaftsstabilisierungsbeschleunigungsgesetz* – "**WStFBG**") which is again based on a law created during the financial crisis. As in this law of 2008, the WStFBG underpins the measures of the WStFG by providing for temporary modifications of, and relief from, mandatory corporate and takeover law requirements, in particular to facilitate the implementation of the contemplated measures. Accordingly, the WStFBG ensures that the management can comply with a given self-commitment (*Verpflichtungserklärung*) in connection with stabilisation measures without being held liable for violating its fiduciary duties towards the company. Such modifications only apply to capital measures and transactions in connection with stabilisation measures of the Fund.

In order to meet the need for urgency, amongst others, the WStFBG provides for

- limitations of minority shareholder rights such as simplification of decisions by simple majority,
- possibility to exempt the Fund from the necessity to launch a mandatory takeover offer, and simplified features for a takeover offer launched by the Fund,
- no acting in concert should shareholders cooperate with the Fund to ensure a recapitalisation,
- simplified features for a squeeze-out initiated by the Fund,
- virtual general meetings and decisions by way of casting votes in writing,
- modifications of provisions on capital increases and capital reductions and the issuance of new shares, such as issuing of shares to the Fund without the requirement of an admission of new shares according to the German stock exchange law and validity of the capital increase irrespective of the registration of the capital increase in the commercial register,
- authorisation of the management board to issue bonds and profit participation rights with a qualified subordination and exclusion of shareholder subscription rights to the Fund with approval by the supervisory board,

- simplified possibility of the Fund to provide capital contributions as a silent partner,
- inapplicability of certain provisions of the German competition law such as the provisions on market control and anticompetitive agreements,
- exclusion of termination rights and claims for compensations or damages based on stabilisation measures of the Fund, and
- exemptions from notification requirements, challenge in insolvency provisions and provisions on shareholder loans.

The WStFBG also includes provisions on termination or modification of recapitalisation measures which amongst others allow the Fund to demand reasonable measures from the company for the purposes of repayment such as stock market listing. It is also ensured that the company bears all costs and responsibility in connection with any offers of participations or financial instruments such as responsibility for accuracy and completeness of securities prospectus.

OUTLOOK

It can be expected that further conditions with respect to the aforementioned stabilisation measures will be set out in at least one ordinance to be issued by the BMF.

Moreover, the WStFG has been modified during the short legislative process in order to enable also stabilisation measures taken by the federal states which are similar to the Fund and its competencies. To ensure a level playing field all over Germany, comparable rights and privileges will apply to such bodies.

Several measures taken by the Fund will require a prior notification to and approval by the European Commission. However, given the Commission's Coronavirus State Aid Framework a quick decision can be expected (see our separate [briefing](#) on the Framework).

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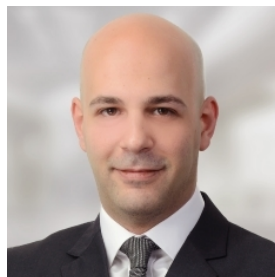
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