

EUR 600 Billions for Stabilisation and Recapitalisation Measures to be granted by the German Government to German Enterprises under the German Economic Stabilisation Fund Act (WStFG) – our Expertise

In the course of the "Corona crisis", many affected companies urgently need governmental support / state aid in order to be able to mitigate acute liquidity issues in a timely manner and to strengthen their equity ratio. On March 25, 2020, the German Parliament (Bundestag) therefore passed the Act on the Establishment of an Economic Stabilisation Fund (Gesetz zur Errichtung eines Wirtschaftsstabilisierungsfonds, WStFG), and was approved by the Federal Council of Germany (Bundesrat) shortly thereafter. The WStFG is to enter into force immediately after its publication in the Federal Law Gazette (Bundesgesetzblatt).¹

Individual states of Germany (e.g. Bavaria - see the cabinet decision of the Bavarian government of 24 March 2020)² are planning similar measures.

The existing programmes of the Kreditanstalt für Wiederaufbau (KfW) and their additional programmes launched in response to the Corona crisis continue to exist ([Link](#) to our overview)

I. Overview

Based on the financial market stabilisation fund, the WStFG provides for the establishment of an economic stabilisation fund (Wirtschaftsstabilisierungsfonds, WSF), a special fund of the Federal Government of Germany with no legal capacity (nichtrechtsfähiges Sondervermögen des Bundes) to support the real economy (as opposed to the financial economy only – like the special fund SoFFin established in reaction to the financial crisis in 2008/2009). In accordance with section 20 (7) FMStG in conjunction with section 5 FMStG, the assets of the WSF are separated from the remaining assets of the Federal Government of Germany, its rights and liabilities, i.e. the WSF is not liable for the other liabilities of the Federal Government; however, the Federal Government is liable for the liabilities of the WSF.

The WSF will initially have a total volume of around EUR 600 Billion. Drawing on the proven regulations and instruments of the Financial Market Stabilisation Act (Finanzmarktstabilisierungsgesetz, FMStG) and the Financial Market Stabilisation Acceleration Act (Finanzmarktstabilisierungsbeschleunigungsgesetz, FMStBG) from the years of the financial market crisis (2008/2009), the WStFG largely consists of amendments and additions to these two laws.

¹ This summary is based on the draft version published by the Federal Ministry of Finance (*Bundesministerium für Finanzen*) on 23 March 2020.

² https://www.bayern.de/bericht-aus-der-kabinettsitzung-vom-24-maerz-2020/?fbclid=IwAR32ru6E4iC_Kmk08plwmJQPWwhPjN2TdARzdyE8jeySl2DcpHEApYgz258.



Central instruments of the WSF to stabilize companies of the (so called) real economy are

- A total volume of EUR 400 billion for the granting of guarantees to alleviate liquidity bottlenecks of companies and to support them in refinancing on the capital market
- A total volume of EUR 100 billion for direct recapitalisation and strengthening of the (economic) equity base of companies (especially for the acquisition of shares or silent partnerships and for the subscription of profit participation rights or subordinated bonds)
- A total volume of a further EUR 100 Billion to refinance the KfW for the implementation of the special programmes assigned to it.

The planned measures must comply with state aid requirements of EU law and therefore require the approval of the European Commission.

The legislator recognised that measures to recapitalise and strengthen the equity base of companies (e.g. via silent partnerships, subordinated bonds or by subscribing to shares in the context of a capital increase) can only be implemented sufficiently promptly and in a transaction-safe manner, if certain provisions of company law are modified. However, these modifications are limited in time and their applicability is limited to stabilisation measures of the WSF.

II. Eligible enterprises

Only enterprises of the (so called) real economy (i.e. no enterprises in the financial sector, no credit institutions and no bridging institutions) which have achieved at least two of the following three criteria in the last two financial years completed before 1 January 2020 are eligible to apply for support measures under the WStFG (section 16 (2) FMStG, new version):

- a balance sheet total of more than EUR 43 million,
- more than EUR 50 million sales revenues,
- more than 249 employees on an annual average.

In individual cases, smaller enterprises may also be taken into account if they operate in one of the sectors listed in section 55 of the Foreign Trade and Payments Regulation (Außenwirtschaftsverordnung, AWV) (sections 21 (1) sentence 2, 22 (2) sentence 3 FMStG as amended), which mainly concerns enterprises that are important for critical infrastructures.

III. Basic criteria and conditions for the granting of stabilisation measures

The WSF is set up for the purpose of stabilising enterprises of the real economy whose existence would be threatened if they were to have a significant impact on the economy, technological sovereignty, security of supply, critical infrastructures or the labour market (section 16 (1) FMStG as amended). The ministries involved (i.e. the German Federal Ministry of Economics and Energy and the German Federal Ministry of Finance) are to decide on applications from companies in the real economy for the granting of stabilisation measures by mutual agreement and according to their best judgment, taking into account

- the importance of the enterprise for the German economy,
- of urgency,
- the impact on the labour market and competition, and
- the principle of the most economical and economic use of WSF funds.

In order for stabilisation measures to be granted to them, enterprises must also fulfil the following conditions (section 25 (1) and (2) FMStG, new version):

- The enterprise in question must not have access to other sources of financing.
- The stabilisation measures must provide a clear independent continuation perspective after the pandemic has been overcome.
- Enterprises applying for a measure under this Act must not have met the EU definition of 'firms in difficulty' by 31 December 2019.³
- In addition, they must guarantee a sound and prudent business policy.
- In particular, they are intended to contribute to the stabilisation of production chains and to securing jobs.

VI. Guarantees

Up to a total volume of EUR 400 Billion, the WSF is authorised to grant guarantees for liabilities and debt instruments held by enterprises of the real economy, but only for such new debt instruments or liabilities issued or created from the entry into force of the WStFG and until 31 December 2021 (section 21 (1) FMStG, new version). The maturities of the guarantees and the liabilities covered by them must not exceed 60 months. A consideration in line with the market has to be charged for granting such guarantees. Further details re the granting of such guarantees by the WSF can be regulated by a statutory instrument (among other things, the type of guarantee and the risks which can be covered by it, the calculation and offsetting of guarantee amounts, the consideration and other conditions of the guarantee, upper limits for the granting of guarantees for liabilities of individual enterprises as well as for certain types of guarantees and other conditions which are necessary to ensure the purpose of stabilisation). The provisions of section 6 (1a) to (3) FMStG apply accordingly to guarantees of the WSF.

V. Recapitalisation measures

The WSF is authorised to carry out recapitalisation measures up to a total volume of EUR 100 billion. These include the acquisition of subordinated debt instruments, hybrid bonds, profit participation rights, dormant holdings, convertible bonds, the acquisition of shares in companies and the assumption of other components of the equity of these companies if this is necessary for the stabilization of the company (section 22 (1) FMStG as amended). They have to be carried out at market conditions.

³ Cf. the criteria set out in point 20 of the Guidelines on State aid for rescuing and restructuring non-financial companies in difficulty (Official Journal of the EU C 249/1 of 31 July 2014) and in Article 2(18) of Commission Regulation (EU) No 651/2014 of 17 June 2014 declaring certain categories of aid compatible with the common market in application of Articles 107 and 108 of the Treaty on the Functioning of the European Union (Official Journal of the EU L 187/1 of 26.06.2014).



VI. Other requirements for beneficiary enterprises

- The legislative decree may lay down more detailed rules on the other requirements to be met by the recipient enterprises, including
- the use of the funds raised,
- the raising of further loans,
- the remuneration of their organs,
- the distribution of dividends,
- the period during which these requirements must be met,
- measures to avoid distortion of competition,
- a commitment to comply with the above requirements, to be made and published by the representative body with the approval of the supervisory body,
- sector-specific restructuring requirements,
- other conditions that are appropriate to ensure the stabilisation purpose.

The requirements may differ according to the type and addressees of the stabilisation measure and may be determined on the basis of the WStFG and the statutory instrument issued for this purpose by contract, voluntary commitment or administrative act. The statutory instrument should also be able to regulate the legal consequences of non-compliance with the aforementioned requirements.

VII. Competent ministries

The administration of the WSF (with the exception of decisions on stabilisation measures under section 20 (1) FMStG, new version and the performance of the tasks under section 20 (3) FMStG, new version) is the responsibility of the Finance Agency (Finanzagentur), which is subject to the legal and technical supervision (Rechts- und Fachaufsicht) of the Federal Ministry of Finance (Bundesfinanzministerium, BMF) in this respect (section 18 (2) sentence 3 FMStG, new version).

With regard to decisions on stabilisation measures, technical supervision is exercised by the Federal Ministry of Finance in agreement with the Federal Ministry of Economics and Energy (Bundesministerium für Wirtschaft und Energie, BMWi) (section 18 (2) sentence 4 FMStG as amended), i.e. both ministries decide on the granting of stabilisation measures in agreement (section 20 (1) FMStG as amended).

The BMWi is the sole competent authority for receiving applications and for negotiations with companies on stabilisation measures applied for (section 20 (4) FMStG as amended). However, this can also (partly) be transferred to the KfW by statutory order.

The BMF is responsible for managing the equity interests acquired under stabilisation measures and for the safekeeping and administration of the other instruments acquired under recapitalisation measures under section 22 FMStG, new version (section 20 (3) FMStG, new version).

VIII. Modifications of German company law applicable to stabilisation measures under the WStFG

For enterprises in the legal form of a German stock corporation, the WStFG provides for special privileges under German stock corporation law for a faster and more transaction-secure implementation of stabilisation measures (cf. sections 5 - 8 of the Economic Stabilisation Acceleration Act, (Wirtschaftsstabilisierungsbeschleunigungsgesetz, WStFBG⁴), which also apply analogously to European companies or partnerships limited by shares pursuant to section 9 WStFBG. These are, among others,:

- New shares in the company can be issued to the WSF with a preferential right to profits or a priority in the distribution of the company's assets (section 5 (3) WStFBG); however, if these shares are transferred to a third party, they lose their preferential right to profits or their liquidation preference (section 5 (6) WStFBG).
- The issue price of new shares may also be lower than the stock exchange price, provided that the issue price does not fall below the nominal value or the pro rata amount attributable to a no-par value share (facilitation of, among other things, the exclusion of subscription rights, section 5 (4) WStFBG).
- Advance payments by the WSF on guarantees as well as other prior payments made by the WSF into the company may (in the corresponding amount) exempt the Fund from its obligation to make contributions for subscribed shares (sections 5 (5) and 7 (4) WStFBG).
- The facilitations for holding a (virtual) Annual General Meeting provided for under the Act on Measures in Company, Association, Cooperative and Home Ownership Law to Combat the Effects of Infections with the SARS CoV-2 Virus (Gesetz über Maßnahmen im Gesellschafts-, Vereins-, Genossenschafts- und Wohnungseigentumsrecht zur Bekämpfung der Auswirkungen der Infektionen mit dem SARS-CoV-2-Virus, GMCoV) shall apply accordingly (section 6 (1) WStFBG).
- Privileges for Annual General Meeting resolutions on the implementation of capital increases against contributions and the creation of authorised capital with regard to majority requirements and individual conditions of effectiveness, including the exclusion of subscription rights (section 7 WStFBG).
- Conditional capital increases in connection with recapitalisation measures may also be resolved to grant conversion or subscription rights to WSF as a silent partner (section 7a (1) WStFBG).
- Facilitations are provided for the issue of profit participation rights and bonds (with a qualified subordination) to the WSF with the exclusion of shareholders' subscription rights and for the entry into silent partnerships by the WSF.
- The privileges applicable to stabilisation measures may in principle also be applicable if the new shares or participation rights are subscribed by third parties (sections 7e (2), 8 (4) WStFBG).
- When the WSF acquires shares, there are no information obligations vis-à-vis the Economic Committee or Works Council, nor are there any notification obligations pursuant to section 43 of the German Securities Trading Act (Wertpapierhandelsgesetz, WpHG) for holders of major holdings (sections 11 and 12 WStFBG).

⁴ According to Article 2 of the WStFG, the FMStBG is to be renamed the Economic Stabilisation Acceleration Act, for which the abbreviation **WStFBG** is used below.



- If the WSF acquires shareholdings within the scope of recapitalisation measures, it may invoke far-reaching exceptions to the main provisions of the German Securities Acquisition and Takeover Act (Wertpapiererwerbs- und Übernahmegesetz, WpÜG) (section 14 WStFBG); above all, the WSF does not have to make a mandatory offer to the other shareholders even in the event of an acquisition of control. In addition, the provisions on acting in concert or the minimum price regulations do not apply in the case of stabilisation measures.
- The provisions of stock corporation law concerning affiliated companies do not apply to the Federal Government and the WSF, among others, until 31 December 2021.
- Admission of new shares subscribed to by the WSF under stock exchange law only has to take place when the shares are transferred to a third party.
- Relief also applies to the squeeze-out of minority shareholders by the Federal Government or the WSF
- Other special features. Further restrictions exist with regard to the provisions on shareholder loans and economically comparable claims and the principles of hidden contribution in kind, which are not applicable to legal transactions between the WSF and companies.

Some of the privileges under German company law also apply to stabilisation measures for companies of other legal forms, including the GmbH, the GmbH & Co KG and silent partnerships.

IX. Our expertise in the implementation of recapitalisation measures

Corporate law and capital market law: Stabilisation measures are complex transactions that must be tailored to the needs of the respective company. Even though the WStFG already provides for far-reaching privileges for the requirements of corporate law and capital market law, it does by no means avoid all the pitfalls that typically arise in such (time-)critical transactions. Our in-depth transaction experience provides you with the necessary guidance.

EU state aid law: The provisions of EU state aid law do not, in principle, prevent public authorities from holding shares in companies. On the basis of the *private investor test / pari passu criteria*, it must be ensured that no illegal aid is granted through capital contributions by the state. If state aid cannot be ruled out, we ensure that the measures could be approved as compatible with EU state aid law. We have already provided comprehensive advice on this in the course of the "financial crisis" and since then.

Financing law: If a company wants to benefit from the state guarantees and warranties, coordination with the borrower's other creditors will be the key to success. In addition, the eligibility for application, the group structure (especially in the case of private equity portfolio companies) and the interplay with existing financial ratios also play a decisive role. Defining the interfaces to existing financiers and making them contribute to the obligatory own contribution requires know-how and negotiating skills.

Tax law: We know how important it is to structure state support measures from a tax perspective in such a way that their restructuring contribution does not lead to avoidable tax damage for the beneficiary companies in the event of a claim.

Budget Law / Corporate Governance Code of the Federal Government: Even if the provisions of sections 65 - 69 of the Federal Budget Code (*Bundeshaushaltsordnung*, **BHO**) do not apply to the federal government's holdings in companies by means of recapitalisation measures under the WStFG (section 22 (2) FMStFG as amended), the other provisions of federal budget law or the relevant provisions of the state budget regulations must be complied with (e.g. for performance audits within the meaning of section 7 (2) BHO).

We will be happy to answer any questions you may have on the subject of public sector investments in companies.

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