

ECONOMIC STABILITY FUND FOR THE GERMAN ECONOMY: EXECUTIVE SUMMARY

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Germany's federal legislature has decided to establish an Economic Stabilisation Fund (Wirtschaftsstabilisierungsfonds – "WSF") to mitigate the economic impact of the coronavirus pandemic. The €600bn WSF is aimed only at firms in the real economy and is not available to the financial sector.

"The legal basis of the WSF is the Economic Stabilisation Fund Act ("WStFG"), which is itself largely modelled on an act which was used to address the 2008 financial crisis."

LEGAL FRAMEWORK

The legal basis of the WSF is the Economic Stabilisation Fund Act (*Wirtschaftsstabilisierungsfondsgesetz* – "WStFG"), which is itself largely modelled on the Financial Market Stabilisation Fund Act enacted to address the 2008 financial crisis. The WStFG consists of the Stabilisation Fund Act (*Stabilisierungsfondsgesetz* – "StFG") and the Economic Stabilisation Acceleration Act (*Wirtschaftsstabilisierungsbeschleunigungsgesetz* – "WStBG"). The Federal Ministry of Finance (*Bundesministerium der Finanzen* – "BMF"), together with the Federal Ministry of Economics and Energy (*Bundesministerium für Wirtschaft und Energie* – "BMWi"), may specify the requirements and legal consequences of the WSF

measures in more detail by means of a statutory regulation ("Framework Regulation").

STABILISATION MEASURES

Requirements of Stabilisation Measures

The BMWi decides on stabilisation measures together with the BMF on application. An inter-ministerial committee ("WSF Committee") decides on fundamental questions and matters of particular importance.

Companies must in principle have fulfilled two of the following three criteria in the last two financial years prior to 1 January 2020:

- a balance sheet total exceeding €43m;
- annual turnover exceeding €50m; or

- more than 249 employees (annual average).

However, the WSF Committee can also decide on applications from companies that do not meet the above-mentioned requirements but either operate in a sector according to Sec. 55 of the German Foreign Trade Regulation (*Außenwirtschaftsverordnung* – AWV) or have been valued at a minimum of €50m in a financing round since 1 January 2017 (this last criteria being aimed primarily at start-ups).

In addition, the StFG lays down further requirements for the use of stabilisation measures, with a company:

- not having any other form of financing;
- having a continuity forecast (*Fortführungsprognose*) as a result of the measure;
- not being qualified as an “undertaking in difficulty” (cf. no. 20 of Communication from the Commission 2014/C 249/01) by 31 December 2019; and
- having a sound and prudent business policy.

Further provisions on requirements and conditions for companies can be laid down by the Framework Regulation.

In addition, the following criteria shall be taken into account when deciding on stabilisation measures:

- the company’s importance to the German economy;
- the urgency of a company’s need for support;
- the impact on the labour market and competition; and
- the principle of efficiency (*Wirtschaftlichkeitsgrundsatz*).

These stabilisation measures must also be compatible with EU state aid law (Art. 107, 108 TFEU), and are to be reviewed by the EU Commission.

The Individual Stabilisation Measures

The following stabilisation measures are provided for in the StFG:

- Provision of guarantees to secure external debt financing in exchange for appropriate remuneration (€400bn in total);
- Acquisition of subordinated debt, hybrid bonds, profit participation rights, silent participations, convertible bonds and shares in companies (“recapitalisation”) in exchange for appropriate remuneration (€100bn in total); and
- Granting of loans to refinance special KfW programmes.



NOTICE PERIODS FOR GENERAL MEETINGS DECIDING ON RECAPITALISATION ARE REDUCED TO 14 DAYS.

IMPACT ON COMPANY LAW

AG, KGaA and SE

For stock corporations (AG), partnerships limited by shares (KGaA) and European companies (SE), the adoption of shareholder resolutions regarding stabilisation measures are facilitated (restricting minority rights) by:

- Notice periods for general meetings deciding on recapitalisation being reduced to 14 days, even if other items are also on the agenda. Voting proxies cannot be restricted;
- Resolutions on a capital increase being able to be adopted with a simple majority. Deviating provisions of articles of association are irrelevant;
- Majority requirements for resolutions on the exclusion of subscription rights being reduced to two-thirds. If half of the share capital is represented, the exclusion of subscription rights can be resolved by a simple majority. The exclusion of subscription rights is always considered permissible and appropriate. The same applies for the issue of the new shares at the stock exchange price;
- Resolutions of general meetings on the measures described above becoming effective upon publication of a resolution on a company's website or upon publication in the Federal Gazette (*Bundesanzeiger*) (no ban on registration (*Registersperre*)); and
- Squeeze-outs under stock corporation law now possible if the WSF holds 90% of the shares.

The participation of the WSF is facilitated by a number of other measures. For example, authorised capital (*genehmigtes Kapital*) can be created in unlimited amounts and the WSF can make an advance payment (especially before the capital increase resolution).

The management board may issue profit participation rights and subordinated bonds to the WSF (or to third parties if the WSF provides a guarantee for this) without the approval of the general meeting, as long as no right to conversion into shares is provided for.

GmbH

Measures under corporate law are also simplified in limited liability companies (GmbH): for capital increases, capital reductions or the creation of authorised capital (incl. exclusion of subscription rights), only a simple majority is now required in shareholders' meetings. Here too, resolutions become effective as soon as they are published on a company's website.

In addition, for the first time, a squeeze-out against compensation is possible. This requires a shareholder resolution with a three-quarters majority.

Management may also issue profit participation rights and subordinated bonds without the approval of the shareholders' meeting.

(GmbH & Co.) KG

The decision on whether to accept the WSF as a limited partner of a (GmbH & Co.) KG requires only a simple majority in a partners' meeting. Conflicting provisions in partnership agreements and other shareholder agreements are irrelevant.

Silent Participation

Participation by the WSF (or third parties) in recapitalisations does not constitute an inter-company agreement within the meaning of Secs. 291, 292 of the German Stock Corporation Act (Aktiengesetz – AktG), nor does it require approval via the general meeting as long as the silent partner is not granted subscription or conversion rights to shares.

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IMPACT ON OTHER AREAS OF LAW

The company law simplifications described above are flanked by numerous other amendments to German law. These mainly include simplifications to insolvency laws (e.g. restriction of the right of challenge), the suspension of German merger controls regarding the acquisition of shareholdings by the WSF, modified capital market regulations (especially regarding notification requirements) and the exclusion of change-of-control clauses if the WSF acquires a controlling majority or resells it.

SUMMARY

The WStFG provides important ways out of liquidity problems both for "big players" and for SMEs of all legal forms which get into difficulties due to the current lockdown. The measures are accompanied by a far-reaching suppression of minority rights under company law.

Jan Winzen, a former Managing Associate in our Frankfurt office, also contributed to this article.

Disclaimer

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