

MINING IN GERMANY – LATEST DEVELOPMENTS

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Following on from “The Mining Industry: An essential part of a renewable future”, this article covers the latest developments in the German mining industry.

THE BROADER CONTEXT

As in other countries around the world before Covid-19 became the all-pervasive news topic, the development of the broader energy and infrastructure sector in Germany was dominated by three topics:

Energy transition – this is the so called “*Energiewende*”, i.e. the transition from conventional energy-based power production to power production based on renewable energy sources;

Climate Change – this includes counter measures such as “e-mobility”, “power-to-X” (also known as P2X, this covers various electricity conversion, energy storage, and reconversion pathways using surplus electric power, typically during periods where fluctuating renewable energy generation exceeds load) and reduction of energy consumption; and last but not least,

Digitisation – including topics such as smart homes and grids and the internet of things.

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These topics are generally discussed and evaluated from different perspectives, primarily those regarding sustainable energy development. It is therefore worth noting that all of them are dependent on the mining industry and – equally importantly– have triggered new developments in the German mining market.

The purpose of this article is, therefore, to elaborate briefly on two of the main developments, namely those regarding (1) loan guarantees issued by the German government under its “untied loan” scheme (*Ungebundene Finanzkredite*, “UFK”) to support mining projects and financings for raw materials with substantial German offtake arrangements and (2) German mining activity. A further element of

Germany’s raw materials strategy is aimed at identifying and securing raw material sources overseas (in particular Africa), though the specific measures taken by the German government to implement this are beyond the scope of this article and will be dealt with in detail in a subsequent article.

BACKGROUND

Digitisation, e-mobility, smart grids and similar developments come with a heightened demand for mineral-based raw materials. Germany as an industrial nation is one of the biggest consumers of raw materials worldwide and this demand will only rise. According to the German raw materials strategy, this is particularly true for certain metals, such as the rare earth elements neodymium and dysprosium (required for generators of wind turbines), copper (required for wind turbine generators and grids) and indium, gallium, selenium, cadmium and tellurium (all of which are required for up-to-date solar panels).

Without having access to a steady, safe and reliable supply of such raw materials, neither the *Energiewende*, digitisation and the counter measures against climate change will be successful. A stable and reliable supply of raw materials is therefore key for Germany.

Since the required minerals are not available as minable resources domestically, at least not in the required amount, Germany will continue to rely on sourcing these raw materials overseas. However, many of the countries which have direct access to these resources are often regarded as politically unstable and lacking the transparent and impartial government and legal systems (e.g. access to independent courts, political influence, bribery avoidance) to encourage substantial international investment in mining these materials. In order to solve this dilemma and to help companies gain access to foreign raw materials, the German state has provided UFK financing since 1961. The UFK scheme aims at securing the lenders to foreign raw material projects against economic and political credit default risks. Since its establishment, it has become an integral part of the German Government's raw materials strategy.

UFK – A BRIEF OVERVIEW

As of 2020, two types of UFK have been available. The project finance UFK is the classic instrument in use since the beginning of the scheme, with a new corporate finance UFK introduced in January 2020. Both types of UFK have a lot in common. However, while a project finance UFK will only be granted for a specific raw materials project, the new corporate finance UFK does not require this project-specific link. This should significantly broaden the scope and availability of the UFK product to more international mining projects. In general, the corporate finance UFK is only available to support offtake arrangements directly with mining companies. For offtake arrangements with pure trading companies however, it will be difficult to receive a corporate finance UFK as the source of the materials would be required to meet certain social and environmental standards, which may be hard to prove for a pure trading company given its role as an intermediary. Nevertheless, whether or not a corporate finance UFK will be granted depends on the specific circumstances and there may be cases where an offtake arrangement with a trading company could, by way of exemption, benefit from a corporate finance UFK.

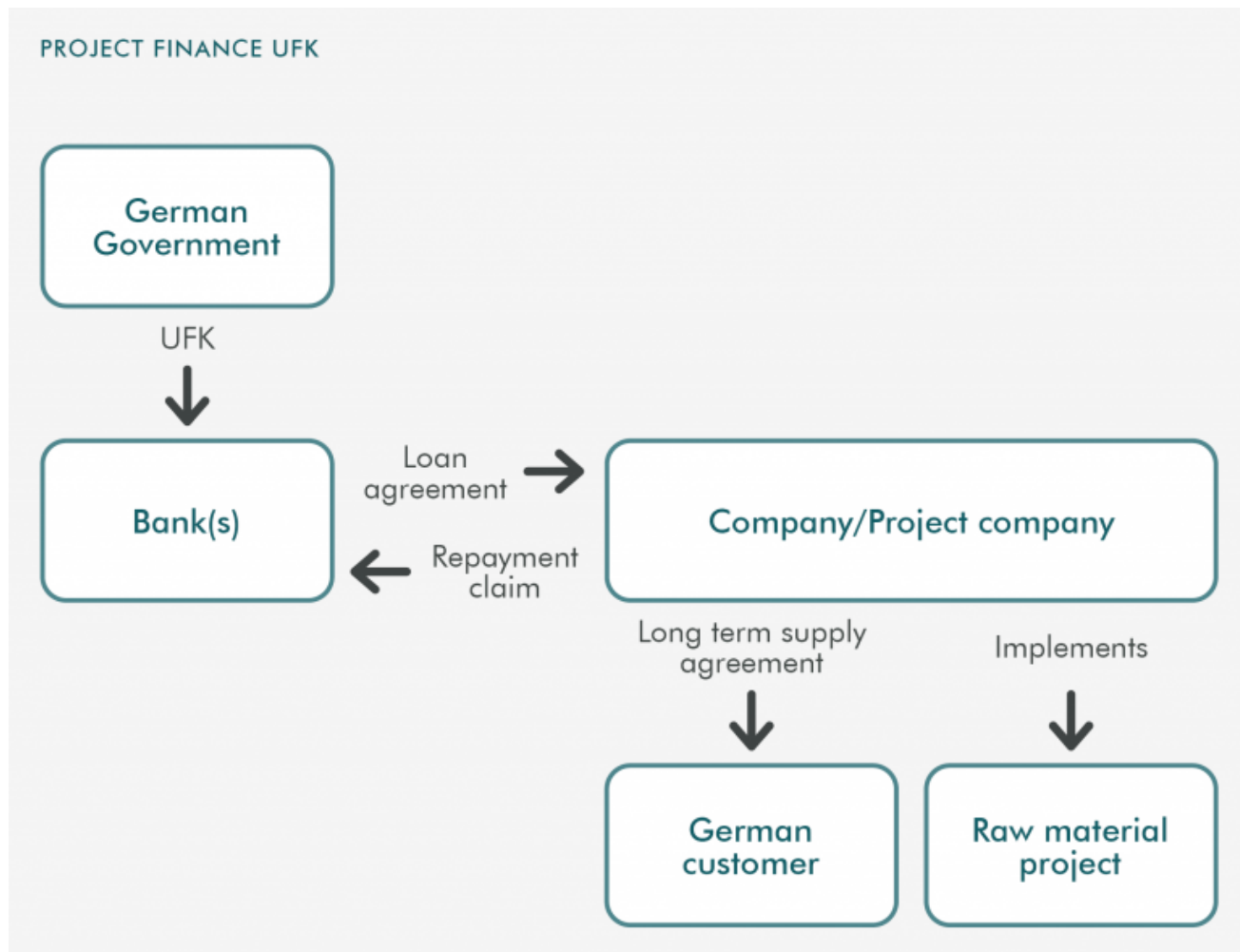
"It is important to note that the UFK products do not require German goods or services be involved and are not part of the German export financing tools."

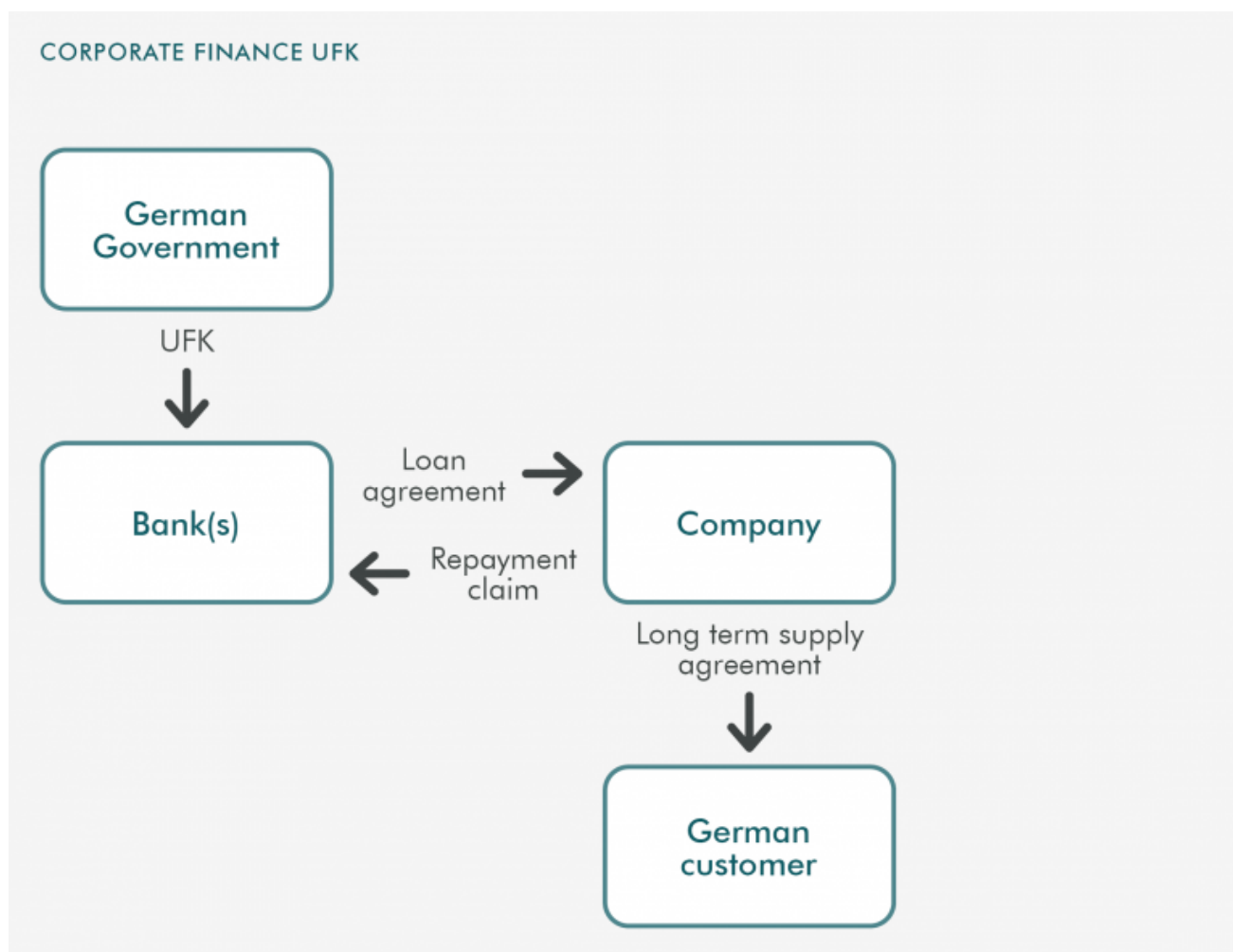
It is important to note that the UFK products do not require German goods or services be involved and are not part of the German export financing tools. Instead, to support the German Government's raw materials strategy, UFK financings require the conclusion of a long-term supply agreement for raw materials with a German customer.

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The government support in a UFK is provided in respect of the lender's right to repayment under the loan agreement for either the project-specific loan (in case of a project finance UFK) or the corporate loan (in case of a corporate UFK). The loan can be paid out and repaid in any currency (not necessarily euros). Interest payments are also covered by the UFK up until the date on which payment becomes due. In case of a project finance UFK, it has long been the case that German involvement at the borrower or borrower shareholder level is not required. Our understanding is that the same should apply in case of a corporate finance UFK; however, this has not yet been confirmed by the German government. In theory, the length of time for which a UFK is available is unlimited. In practice, however, this is usually linked to the term of the raw material supply agreement.

Simplified, the structures involving UFKs look as follows:





UFK REQUIREMENTS

In order to be eligible to receiving a UFK, certain requirements have to be met:

Application

In order to receive a UFK, an application is required by a German bank or the German branch of an international bank. Under specific circumstances, international banks may also apply for an UFK. Such banks have to prove, inter alia, that they are regularly involved in the financing of companies providing long-term supply of raw materials to German companies and that there are no doubts in with regard to the execution of the UFK.

Eligibility for Funding (Long Term Supply Contract)

Projects that increase the security of Germany's raw materials supply are considered eligible for funding. The prerequisite for this is that, on the basis of long-term supply contracts with domestic customers, raw materials of general economic interest are brought to Germany. In order to meet this requirement, the foreign borrower has to conclude a long-term supply contract relating to specific raw materials with a German customer. However, the mere existence of such a contract is not always sufficient to become eligible for funding. The decisive point is whether, by granting an UFK, additional deliveries of raw materials to Germany can be secured. Based on this, structures which involve the conclusion of a new long-term supply agreement will in general be eligible for funding (if the other requirements are met). The same holds true for structures where a supply contract already exists but where the amount of raw materials supplied is increased. In cases where just the term of an existing supply agreement is extended, a case-by-case check applies.

Positive general risk assessment

The German government will only hand out UFKs in cases with a positive general risk assessment. Taking into account the credit worthiness of the borrower, as well as the political and economic risks, a reasonable justified expectation has to exist that the loan (including interest) can be repaid in accordance with its terms.

Environmental, social and human rights standards

Project Finance and Corporate Finance UFKs are only available if the applicant can prove that it meets internationally recognised standards in relation to environmental, social and human rights. In case of a Project Finance UFK the relevant checks will be conducted at project level. In case of corporate finance UFKs the applicant must have environmental and social management systems in place. In addition, a risk-oriented check will be conducted on the source of the supply under the long-term supply agreement.

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Project Structure (UFK Project finance)

In case of a Project Finance UFK, the project structure is also relevant. Only projects which can prove a fully developed technical and commercial concept will be eligible for funding. Furthermore, the term of the loan should mirror the commercial nature of the project.

APPLICATION PROCEDURE

The application procedure is generally the same for both types of UFKs. In the early stages of a specific financing project, each participant in a financing (borrower, lender, sponsor) can submit an informal question to the German Government (represented by Euler Hermes AG as agent) in order to evaluate whether the project is generally eligible for funding. This does not require any particular form and is free of charge. If the answer is positive a formal application procedure can be started by the financing bank. The application will need to be accompanied by documentation and information regarding the borrower, the project, the loan agreement and the long-term supply agreement.

DEVELOPMENTS TO STRENGTHEN GERMAN MINING ACTIVITIES

In addition to the significant widening of the scope for UFK financings for imports of raw materials, the new German strategy on raw materials is also aimed at re-developing and strengthening domestic mining activities.

Against the backdrop of closing lignite and hard coal mines as envisaged by the German draft Act to Reduce and End Coal-Fired Power Generation (*Entwurf eines Gesetzes zur Reduzierung und zur Beendigung der Kohleverstromung*), this development might seem more than a bit odd. However, the German Government has explicitly stated that domestic mining is a cornerstone of its raw materials strategy. This new strategy therefore, contains several measures aimed at securing broader acceptance of domestic mining projects by the general public.

Indeed, these measures are desperately required as most infrastructure projects in Germany are facing a “not in my backyard” reaction public and, as a result, permitting and subsequent court procedures can take as long as ten years before a final court decision is reached (although the average timing from application to receipt of the required permits is between 1-2 years). The German Government is therefore trying to accelerate these procedures, in particular by only allowing claims to be made if the underlying reasons were presented at an early stage of the permitting procedure.

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Despite these obvious obstacles the German mining industry has seen a (mild) renaissance, often supported by international investors, including in relation to the mining of tin, cobalt silver and tungsten in Thuringia and Saxony, all of which are raw materials in high demand for digitalisation and e-mobility projects.

In general, mining projects require different permits and licences under the Federal Mining Act (*Bundesberggesetz*, “BBergG”) and supplementary mining regulations, which set out a specific regime for public minable resources, that can be exploited only with the permission of the competent authority (*bergfreie Bodenschätze*). The competent regional mining authorities allow access to resources by issuing mining licences and – before any mining activities can actually be carried out – operating plans. The holder of a mining permit or licence has the exclusive right to explore

and/or produce and to acquire the respective minable resources in the permit/licence area, so that the permit/licence holder enjoys priority over any other potential third-party applicant.

Under mining law, a mining project may need the following permits:

- i) A prospecting permit (*Aufsuchungserlaubnis*), which grants the permit holder the exclusive right for the exploration of a specified underground area for purposes of mining specific minerals, but not the exploitation itself or any mining activities (this is only allowed under exploitation licences and operating plan approvals);
- ii) An exploitation license (*Gewinnungsbewilligung*) (or mining property (*Bergwerkseigentum*)), which only generally allows the extraction of minerals for exploitation purposes but does not permit any specific mining activities without an operating plan. Accordingly, the exploitation licence must be in place as a basis for mining activities, but for the actual mining works an operating plan must be approved by the mining authority; and

iii) An operating plan approval, which forms the final legal requirement to begin actual mining activities. In other words, the prospecting permit and exploitation license decide on the “if” of a prospecting and exploitation plan, whereas the operating plan approvals decide upon the “how”. There are several kinds of operating plan approvals available depending on the type and specifics of the actual mining project.

iv) Environmental Impact Assessment

For projects that require an environmental impact assessment under section 57c BBergG in connection with the Regulation on the Environmental Impact Assessment of Mining Projects (*Verordnung über die Umweltverträglichkeitsprüfung bergbaulicher Vorhaben, “UVP-V Bergbau”*), approval of a framework operating plan is mandatory (section 52 paragraph 2a BBergG). According to sections 57a and b BBergG, the mining authority will decide on the approval in a formal plan approval procedure (*Planfeststellungsverfahren*). A formal plan approval procedure includes a comprehensive environmental impact assessment and participation of other authorities and of the public. The formal plan approval contains all permits which would otherwise be required separately (“one-stop shop”, *Konzentrationswirkung*, section 57a paragraph 1 sentence 1 and section 57b paragraph 3 BBergG). Projects that require an environmental impact assessment are listed in section 1 UVP-V Bergbau. Even if a project is not listed in section 1 UVP-V Bergbau it may still require an environmental impact assessment in accordance with the rules of the Act on Environmental Impact Assessment (*Umweltverträglichkeitsprüfungsgesetz, “UVPG”*). The performance of a required environmental impact assessment is an integral part of the permitting procedure for the (framework) operating plan. It is not a separate permitting procedure but will in general prolong the permitting procedure for the operating plan. The applicant (project developer) has to submit to the competent authority all documents which are relevant for a decision on the environmental impacts of the project at the beginning of the permitting procedure. Based on these documents and the statements submitted by other public authorities and the public within the public participation period, the mining authority evaluates the project’s potential impacts on the environment and on this basis decides on the approval for the project.

v) Other Permits

Apart from these permits, additional ones (in particular under the Federal Water Act (*Wasserhaushaltsgesetz, “WHG”*)) may be required depending on the specifics of each project.

OUTLOOK

It is clear that mining and the availability of minerals play a decisive role in Germany’s energy transition and digitalisation objectives. Access to overseas raw materials has become significantly easier with the widening of the scope of the UFK product to corporate (rather than project-specific only) loans. In addition, it will be ever more important to re-establish an environment for successful domestic mining projects. The recent changes to the Germany’s raw materials strategy are a clear and necessary step in the right direction in that regard.

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