



COVID-19

Draft law establishing an economic stabilisation fund

On 23 March 2020, the German Federal Cabinet adopted and published a draft **law on the establishment of an economic stabilisation fund** (*Economic Stabilisation Fund Act - WStFG*). The draft law supplements other financial support measures intended to mitigate the impact of the COVID-19 pandemic, in particular the special programmes of the German promotional bank (KfW) approved by the Commission on 22 March 2020 and available as of 23 March 2020.

The following is an overview of the essential aspects of the draft as relevant for market participants.

As the final version of the law may differ from the draft, further developments should be carefully monitored. In addition, as the draft emphasizes, the Commission must approve the measure before it can be implemented.

OVERVIEW OF THE ESSENTIAL ASPECTS FROM A COMPANY'S PERSPECTIVE

The draft (**WStFG-E**) concerns two areas:

- The establishment of an economic stabilisation fund (**WSF**), including rules on stabilisation measures and their conditions, on the administration of the WSF and its financing, as well as
- Temporary amendments to German corporate law with a view to allowing the WSF to implement stabilisation measures quickly.

The draft envisages amending the Financial Market Stabilisation Act (**FMStG**) to establish the WSF and renaming it the "Act for the Establishment of a Stabilisation Fund" (**StFG**). The amendments under corporate law will be implemented in the separate Financial Market Stabilisation Acceleration Act (**FMStBG**), which will be renamed "Economic Stabilisation Acceleration Act" (**WStBG**). Accordingly, we will use the abbreviations "StFG-E" and "WStBG-E" in the following for the provisions to be newly inserted as a result of the draft.

MAIN ASPECTS OF THE WSF AND OF POSSIBLE STABILISATION MEASURES

For companies considering funding by the WSF, the following aspects of the draft are particularly significant:

- The WSF shall have a **total volume of around EUR 600bn**. Of this amount, EUR 400bn are available for guarantees and EUR 100bn for recapitalization measures. In addition, the WSF can take out further loans of an amount of up to EUR 100bn to refinance special programmes of the KfW.
- The WSF is intended **to stabilise companies of the real economy** by overcoming liquidity shortfalls and by creating framework conditions for strengthening the capital base of companies the failure of which **would have a significant impact on the economy, technological sovereignty, security of supply, critical infrastructures or the labour market**.
- The WSF is only available to **companies of the real economy**. Companies of the financial sector, mainly CRR credit institutions and CRR investment firms, cannot apply for funding.
- Potential WSF **stabilisation measures** for companies of the real economy include:
 - **Guarantees** for debt instruments issued and liabilities established between the date of the entry into force of the WStFG and 31 December 2021, as well as
 - **Recapitalisation measures** through the acquisition of subordinated debt, hybrid bonds, profit participation rights, silent partnerships, convertible bonds, the acquisition of shares in companies and the acquisition of other equitylike instruments.
- Stabilisation measures are only granted on **application**, which must be submitted via the Federal Ministry of Economics (**BMWi**). The BMWi is also responsible for negotiating stabilisation measures with companies of the real economy and preparing applications. Pursuant to the draft, the Federal Ministry of Finance, in agreement with the



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BMWi, may in certain cases entrust **KfW** with receiving and processing applications.

- To be eligible for any of the stabilisation instruments, companies of the real economy need to have met at least two of the following three criteria in the last two financial years before 1 January 2020 that are already closed from a balance sheet perspective:

- balance sheet total of more than EUR 43m;
- revenues of more than EUR 50m;
- more than 249 employees on the annual average.

If companies do not meet the above criteria but are active in one of the sectors listed in section 55 of the German Foreign Trade Regulation (AWV) (i.e. in particular operators of critical infrastructure) or are of comparable importance for the security or the economy (other systemically important companies), funding is nevertheless possible (opening clause).

- **Companies do not have a legal claim to benefits of the WSF.** Decisions on stabilisation measures are made at the discretion of the WSF, taking into account in particular the importance of the company for the German economy, the urgency, the effects on the labour market and competition and in accordance with the principle that the WSF's funds need to be used as efficiently and economically as possible.
- To receive funding, companies must also meet the following conditions:
 - **Other financing options** must not be available.
 - As a result of the stabilisation measures, there must be a **clear and independent perspective for the company to continue to operate** after the COVID-19 pandemic has been overcome.
 - In principle, the **liquidity and capital requirements must result from the COVID-19 pandemic**, i.e. companies must not have met the EU definition of “undertaking in difficulty” as of 31 December 2019. “Undertakings in difficulty” are companies that will almost certainly be forced to cease operations in the short or medium term if the state does not intervene.
 - Companies must **guarantee a solid and prudent business policy**.
 - Finally, they should **contribute to the stabilisation of production chains and to securing jobs**.
- Funded companies must expect **restrictions**, particularly in the case of recapitalisations, especially with regard to the **use of funds, the remuneration of their board members and the distribution of dividends**.
- The implementation of stabilisation measures by the WSF will be possible **for a limited period only, i.e. until the end of 2021**.

AMENDMENTS TO THE CORPORATE LAW

The accompanying corporate law provisions, which are found above all in the WStBG-E, are recognisably aimed at the objective of implementing the stabilisation measures in the companies as flexibly and, above all, as quickly as possible. They relate in particular to the following points:

- **Facilitation of capital measures** (especially capital increases), including regulations on
 - The facilitation of invitation provisions;
 - A reduction in the majority requirements and exclusions from the right to appeal;
 - A faster liquidity flow through prepayments;
 - Special arrangements for rights attached to shares and reconversion options into ordinary shares;
 - Facilitated possibilities for a capital reduction;
 - The facilitated creation of authorized capital; and
 - Obligation to pay damages for permanently disturbing shareholder;
- **Facilitating the establishment of silent partnerships** with the WSF (or third parties) as silent partner;
- **Acceleration of the effectiveness of resolutions passed by the general meetings**;
- **Facilitation of the issuance of participation rights and bonds** to the WSF;
- Accompanying **modifications of existing regulations for share acquisitions** (e.g. exclusion of information, notification and disclosure obligations under the German Works Constitution Act (BetrVG), German Banking Act (KWG) and German Securities Trading Act (WpHG); facilitation of takeovers under the German Securities Takeover Act (WpÜG); no requirement for stock exchange listing);
- Various **adjustments to the law applicable to German limited liability companies (GmbH)**, including the possibility of exclusion of shareholders against cash compensation.



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