

ALLEN & OVERY

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German rescue package takes effect

Establishment of an Economy Stabilisation Fund – State guarantees and equity capital of up to EUR 500 billion available

Executive Summary

Today the *Bundesrat* (the second chamber of the German parliament) approved the Economy Stabilisation Fund Act which had been adopted by the *Bundestag* (the first chamber of the German parliament) on 25 March 2020 (*Wirtschaftsstabilisierungsfondsgesetz; WStFG*). It is to be expected that the Act will take effect very shortly.

The WStFG aims at mitigating the economic effects of the corona pandemic for businesses in the real economy, i.e. businesses outside the financial sector. A business wishing to benefit from stabilisation measures must have exceeded at least two of the following three thresholds in two consecutive financial years preceding 1 January 2020: (i) a balance sheet total of more than EUR 43 million, (ii) revenues of more than EUR 50 million, and (iii) an annual average of more than 249 employees (thresholds of the SME definition under EU law). In individual cases, however, smaller businesses that do not reach these thresholds can also benefit from stabilisation measures, provided that they are important for critical infrastructure. A further exception will be available for start-ups under certain conditions.

The stabilization measures introduced by the new Economy Stabilisation Fund (*Wirtschaftsstabilisierungsfonds; WSF* or the **Fund**) include guarantees in the amount of up to EUR 400 billion in aggregate and a term of up to 60 months for debt instruments and liabilities issued or created as soon as the WStFG has taken effect.

In addition, the WSF may acquire shares, silent partnership interests or other equity components in struggling enterprises in order to strengthen their capital base and subscribe for profit participation rights (*Genussrechte*) and notes – provided such recapitalization serves an important interest of the Federal Republic and the intended

purpose cannot be achieved better and more economically by any other measure. To this end, a total of EUR 100 billion will be made available to the WSF.

Stabilisation measures will be available until 31 December 2021. For recapitalisation measures, no time limit is envisaged.

The support to be provided by the WSF is available in addition to the EUR 100 billion of liquidity support that is to be provided via Kreditanstalt für Wiederaufbau. It is linked to certain conditions and requirements that may vary depending on the type of stabilisation measure and the enterprise seeking support. The individual conditions (which may include, for example, the use of the funds received, the remuneration of directors and officers or dividend distributions) will be determined by way of legal regulation.

The Act provides for various exemptions from otherwise applicable requirements under corporate and capital markets law in order to facilitate the implementation of recapitalisation measures. In the case of stock corporations, the majority requirements for capital measures and the exclusion of shareholders' pre-emptive rights are significantly lowered (setting aside any provisions to the contrary in the company's articles of association) and the option is introduced to issue shares at a price below the stock exchange price (but not below par value). In addition, the limitations concerning the amount of authorised capital and contingent capital are revoked in order to give enterprises greater leeway. Resolutions of the general meeting must be entered in the commercial register without undue delay, unless they are obviously void. Actions for avoidance or applications filed for injunction orders do not prevent registration. If and as long as social contacts are required to be minimised by binding official orders due to a pandemic, registration will be deemed effected seven days after filing, unless the registry has previously raised objections against the lawfulness or completeness of the documentation. Furthermore, shareholders that file abusive actions to avoid such resolutions are threatened by the sharp weapon of liability for damages payable to the company. Similar facilitations will be in place for the recapitalisation of companies and partnerships organised in other legal forms.

Securities acquisition and takeover offers made by the Federal Government or the Fund also benefit from a number of facilitations. The minimum acceptance period is only two weeks, and the minimum consideration must only be equal to the lower of (i) the weighted average stock exchange price during the two-week period prior to the date the intention to submit the offer was announced or became publicly known and (ii) the weighted average stock exchange price during the period from 1 to 27 March 2020. If the Federal Government or the Fund obtains or exceeds 30% of the voting rights, the German Federal Financial Supervisory Authority (**BaFin**) must release the government or the Fund from the obligation to submit a mandatory offer. If shareholders and the Federal Government or the Fund act in concert with respect to stabilisation measures, this will not result in an attribution of the respective voting rights. A financing confirmation will not be required. Additional facilitations apply with respect to procedures and documentation.

The relevant minimum threshold for a squeeze-out of minority shareholders is 90% of the share capital. Shareholders of a limited liability company (GmbH) may now also be excluded from the company against compensation.

Legal acts performed in connection with stabilisation measures cannot be contested by actions of avoidance. Shareholder loans granted by the Federal Government or the Fund are not subordinated in insolvency. A successor in title which assumes the rights and obligations in relation to the privileged claim will also benefit from these privileges.

Introduction

During the past days and weeks it was mainly upon the state governments and municipalities to take measures in order to protect the population against the corona pandemic. Now the time has come for the federal legislature to act: a whole array of acts were passed, including amendments to the Infection Protection Act

(*Infektionsschutzgesetz*) and changes in civil, insolvency and criminal procedure law. The debt brake (*Schuldenbremse*) will be eased, and even the German constitution (*Grundgesetz*) is to be amended in order to ensure that parliament remains functional.

An important cornerstone of the programme for mitigating the economic effects of the corona pandemic is the Economy Stabilisation Fund Act, which the *Bundesrat* approved today. The Act will take effect on the day following its promulgation in the Federal Law Gazette (*Bundesgesetzblatt*). This will happen very shortly.

Rescue package for the real economy

The WStFG aims at mitigating the effects of the corona pandemic for businesses in the **real economy** which, were their continued existence at risk, could have a considerable impact on the economy, technological autonomy, security of supply, critical infrastructure or the job market.

Businesses in the real economy are defined as all commercial enterprises which during the last two financial years ending before 1 January 2020 for which financial statements were completed have exceeded at least two of the three following **thresholds**: (i) balance sheet total of more than EUR 43 million, (ii) turnover of more than EUR 50 million and (iii) on annual average, more than 249 employees, with financial sector enterprises (i.e. banks and other enterprises requiring a licence under the German Banking Act (*Kreditwesengesetz*)) being excluded. This means that small and medium-sized enterprises in the sense of the usual definition of this term are generally excluded. But the thresholds actually adopted are much lower than those originally discussed (balance sheet total of EUR 160 million, turnover of EUR 320 million, 2,000 persons employed).

In individual cases, however, smaller businesses that do not reach these thresholds may also benefit from stabilization measures, provided that they are active in one of the sectors listed in Section 55 of the Foreign Trade and Payments Ordinance or are of comparable importance for security or the economy. A further exception will be available for smaller companies (start-ups) which have been valued by private investors in at least one completed financing round since 1 January 2017 with an enterprise value of at least EUR 50 million including the capital raised through this round.

The WStFG as an omnibus act

Article 1 of the WStFG amends the still existing Financial Market Stabilisation Fund Act (*Finanzmarktstabilisierungsfondsgesetz*) of 17 October 2008, BGBl. I p. 1982 – the **FMStFG**). The former sections 1 to 14e FMStFG are combined – with unchanged content – in a newly formed part 1 and continue to govern the Financial Market Stabilisation Fund established in the context of the 2008 financial crisis. A new part 2 is added, containing new sections 15 to 28. The former final provisions, i.e. sections 15 to 17, are renumbered sections 29 to 31 (the former section 18 is repealed). In order to reflect the expansion of its content, the FMStFG is **renamed** "Act on the Establishment of a Financial Market and Economy Stabilisation Fund" (*Gesetz zur Errichtung eines Finanzmarkt- und Wirtschaftsstabilisierungsfonds*; **StFG**).

Article 2 of the WStFG restates the Financial Market Stabilisation Acceleration Act (*Finanzmarktstabilisierungsbeschleunigungsgesetz*; **FMStBG**) in its entirety, adding new provisions for businesses in the real economy to the existing provisions for financial sector businesses. The restated act is renamed "Economy Stabilisation Acceleration Act" (*Wirtschaftsstabilisierungsbeschleunigungsgesetz*; **WStBG**).

Article 1: The new Stabilisation Fund Act

Under section 15 StFG, an Economy Stabilisation Fund similar to the Financial Market Stabilisation Fund launched in the 2008 financial crisis is established in order to assist enterprises in the real economy which,

were their continued existence at risk, would have a considerable impact on the German economy and job market in overcoming liquidity shortages and strengthening their capital base.

The WSF is generally supervised by the Federal Finance Agency (*Bundesfinanzagentur*), with (i) decisions on stabilisation measures being taken and (ii) equity stakes in enterprises acquired in the context of stabilisation measures being managed as agreed between the Federal Ministry of Finance (*Bundesfinanzministerium*; **BMF**) and the Federal Ministry for Economic Affairs and Energy (*Bundesministerium für Wirtschaft und Energie*; **BMWi**). It is intended to assign this task to Kreditanstalt für Wiederaufbau (**KfW**) by way of a regulation yet to be passed.

Guarantees

Pursuant to section 21 StFG, the stabilisation measures include the granting of guarantees in an amount of up to EUR 400 billion in aggregate for debt instruments and liabilities issued or created as of the entry into force of the WStFG; the term of such guarantees, debt instruments and liabilities must not exceed 60 months. Further details, such as the type of guarantee, the calculation of the guarantee amount, caps (if any) as well as the consideration to be provided by the enterprises will be stipulated in a regulation yet to be passed. As regards the type of consideration, the rules under European state-aid law must be complied with, if applicable in their less strict version as adopted as a result of the corona pandemic.

Recapitalisation measures

Besides the guarantees, another stabilisation measure available to enterprises in the real economy (section 22 StFG) is a participation of the WSF in the recapitalisation of the affected enterprises, for which a total amount of up to EUR 100 billion is made available. This includes in particular the acquisition of shares, silent partnership interests or other equity components, as well as the subscription of profit participation rights and notes with qualified subordination. An appropriate remuneration must be agreed for the recapitalisation. The details (e.g. consideration, caps, and conditions for disposal) will again be stipulated in a separate regulation yet to be passed. In this regard, too, the explanatory memorandum correctly points out that the implementation of stabilisation measures must be in line with state-aid law.

However, the WSF may acquire an equity stake in an enterprise only if this is in the material interest of the Federal Government and the intended purpose cannot be achieved better and more economically by any other measure. The criteria defining such "material interest" are not set out in the draft bill. It is to be assumed, however, that this will be clarified in the regulation mentioned above. The important thing is that sections 65 to 69 of the Federal Budget Code (*Bundshaushaltsordnung*) are declared to be inapplicable, which "in normal times" limit the Federal Government's ability to acquire equity stakes in enterprises, stipulating further requirements such as appropriate influence or control rights of the audit authorities. All this is likely to be made more flexible under section 22 StFG and the regulation yet to be passed.

The amounts allocated to the WSF, EUR 400 billion for guarantees and EUR 100 billion for recapitalisation measures, are made available in addition to the EUR 100 billion of liquidity support that are available for distribution via the KfW.

Time limits

Stabilisation measures will be possible until 31 December 2021. It will be possible, however, for the WSF to acquire additional equity in an enterprise after 31 December 2021 where this is required in order to maintain the proportion of the WSF's stake in the enterprise in question or in order to secure any stabilisation measures taken.

Application process

Enterprises are not generally entitled to benefit from stabilisation measures. Rather, the BMF will take this decision in its due discretion, acting in consultation with the BMWi. Key decision criteria will be the

importance of the enterprise in question for the German economy, the urgency, the effects on the job market and on competition, and the principle of most effective and economical use of the funds available to the WSF (section 19 (1) StFG).

In practice, it is important that the central point of contact for enterprises will initially be the BMWi (section 18 (1) StFG).

Eligibility for stabilisation measures

Pursuant to section 25 (1) StFG, affected enterprises will not be eligible if there are other financing sources they can draw on. As a result of the stabilisation measures, a clear and independent going concern prognosis must exist for the time after the pandemic has been overcome. Enterprises that apply for a measure under the StFG must not qualify as "distressed enterprises" within the meaning of the EU definition as at 31 December 2019. Moreover, the enterprises in question must guarantee a sound and prudent business policy. The aim of these measures is in particular to help stabilise production chains and secure jobs.

In addition, the BMF is authorised to stipulate in a separate regulation, in consultation with the BMWi, additional requirements that enterprises filing applications must meet (section 25 (3) StFG-E). This includes, for example, the use of the funds raised, the remuneration of directors and officers, dividend distributions, measures to avoid distortion of competition, industry-specific restructuring conditions and undertakings by the management; these requirements may vary depending on the nature of the stabilisation measure and the relevant applicant.

Tax treatment of the WSF

Sections 26 and 27 StFG contain provisions on the tax treatment of the WSF. This will be as follows, in particular based on a reference to the tax provisions of section 14 of the Financial Market Stabilisation Fund Act:

Tax status of the WSF: The WSF is exempt from trade tax and corporate income tax and is not subject to VAT. Investment income generated by the WSF will not be taxed; an exemption notice is not required. Where tax on investment income has been withheld erroneously, the relevant tax return must be amended and the tax wrongfully withheld must be paid to the WSF by the withholding party. The WSF is moreover not obliged to withhold tax on investment income. In addition, conditions are created under German tax law to allow the WSF to benefit from a reduction or refund of withholding tax levied abroad under the applicable double taxation agreements.

Special provisions concerning the application of restrictions of deduction: The forfeiture of loss carryforwards under section 8c of the German Corporate Income Tax Act (*Körperschaftsteuergesetz*) and section 10a of the German Trade Tax Act (*Gewerbesteuer*) is not to apply to the acquisition of equity stakes by the WSF or their later disposal by the WSF (reference to section 14 (3) sentence 1 FMStFG). Where a spin-off within the meaning of section 15 (1) of the German Transformation Tax Act (*Umwandlungssteuergesetz*) must be performed as a necessary preparatory step for stabilisation measures within the meaning of sections 20 and 21 StFG, section 15 (3) of the Transformation Tax Act will not apply, i.e. losses eligible for netting, remaining loss carryforwards, any negative income that has not been offset and any interest carryforward pursuant to section 4h (1) sentence 5 of the German Income Tax Act (*Einkommensteuergesetz*) as well as an EBITDA carryforward pursuant to section 4h (1) sentence 3 of the Income Tax Act will remain with the transferor entity (section 26 (1) StFG).

Real property transfer tax: Legal acts performed in fulfilment of the tasks assigned to the WSF as acquirer as well as acquisitions made by it as beneficiary of expropriation will be exempt from real property transfer tax. Shares or interests acquired by the WSF will not be taken into account in the calculation of the percentage for the purposes of section 1 (2a) of the German Real Property Transfer Tax Act (*Grunderwerbsteuergesetz*) (analogous application of section 14 (4) FMStFG).

Temporal scope of application: The above provisions will apply for the first time to the assessment period corresponding to the year 2020 (section 27 StFG).

Article 2: Economy Stabilisation Acceleration Act

Recapitalisation of stock corporations

Facilitation of capital measures

The WStBG provides for various rules to facilitate capital measures in connection with the recapitalisation of stock corporations. In general:

- **New shares issued** may carry a **preferred dividend right** (*Gewinnvortrag*) and grant a **higher ranking in the distribution of the company's assets**. **Preference shares without voting rights** may also be issued in a form where no subsequent payment is to be made for preferential dividends not paid in previous years (*nicht nachzahlbarer Vortrag*) (section 5 (3) WStBG).
- An issue price equal to the stock exchange price will in any event be adequate. An **issue price lower than the stock exchange price** is permitted. The prohibition of issuance below par value (section 9 of the German Stock Corporation Act (*Aktiengesetz*; **AktG**)) however still applies (section 5 (4) WStBG).
- Payments made by the Fund to the company in advance will be credited, with debt-discharging effect, against any subsequent obligation to make a contribution in the context of a capital measure (section 5 (5) WStBG).
- Where the WSF acquires shares in a company in the context of a capital measure and such shares carry preferred dividend rights or a higher ranking in the distribution of the company's assets, the shares will lose such preference if they are transferred to a third party. The **Fund** itself (!) **may determine that preference shares issued to it will be converted into ordinary voting shares upon transfer to a third party** (section 5 (6) WStBG).

Capital increase against contributions and capital reduction

The holding of a general meeting in the course of a recapitalisation is subject to the **simplified rules** applicable to **convening a general meeting** of the target company in connection with a takeover offer under section 16 (4) of the German Securities Acquisition and Takeover Act (*Wertpapiererwerbs- und Übernahmegesetz*; **WpÜG**) (in particular a shorter convocation period of 14 days). This also applies if the proposed capital increase is to be subscribed, in whole or in part, by persons other than the Fund and if the agenda includes other items in addition to the capital measure (section 7 (1) WStBG).

Resolutions to increase the share capital against contributions that are to be adopted in connection with a recapitalisation require **only a simple majority** of votes cast (regardless of any provisions to the contrary in the company's articles of association) (section 7 (2) WStBG). In this case, a majority of **two thirds** of the votes cast or the share capital represented (compared to three quarters of the share capital represented in any other cases) will be required to exclude **pre-emptive rights** of shareholders; if at least half of the share capital is represented, a simple majority will be sufficient. The **exclusion of pre-emptive rights in order to allow the Fund** to subscribe for the shares is **permitted in any event** and is also appropriate (section 7 (3) WStBG-E).

In addition, the **Fund** may be allowed by resolution of the general meeting to subscribe for **new shares at price lower than the issue price, provided that such new shares were previously offered to the other shareholders pursuant to section 186 AktG**. The WStBG also makes it clear that the fact that the Fund is able to purchase shares at a price lower than the issue price does not give rise to damages (section 7 (4) WStBG).

The same facilitations apply in the event of a **capital reduction**. Furthermore, creditors will not be entitled to demand the provision of **security** under section 225 AktG if the amount of the company's share capital prior to the capital reduction is achieved or exceeded by a capital increase that has been resolved simultaneously with the capital reduction or if the resolution on the capital reduction specifies that the amount of the difference of the share capital prior to the capital reduction less the share capital after the capital reduction must be allocated to the capital reserves.

Authorised capital

The general facilitations described above apply where existing authorised capital is utilised. The resolution of the general meeting to create authorised capital in connection with a recapitalisation measure requires **only a simple majority of votes cast** (regardless of any provisions to the contrary in the company's articles of association). The **limitation of the amount of authorised capital to 50%** of the share capital (as stipulated in section 202 (3) sentence 1 AktG) **does not apply**. The newly created authorised capital will not be counted towards the amount of any other authorised capital (section 7b (1) WStBG). The above description regarding a capital increase against contributions applies accordingly to the exclusion of shareholders' pre-emptive rights by the general meeting and the authorisation of the management board to exclude such pre-emptive rights (section 7 (2) WStBG).

Contingent capital

In connection with a recapitalisation, the capital may also be increased conditionally in order to grant conversion or subscription rights to the Fund as a silent partner. The relevant resolution requires **only a simple majority of votes cast**. The **limitations regarding the amount of contingent capital** (as stipulated in section 192 (3) sentence 1 AktG) **do not apply**. The newly created contingent capital will not be counted towards the amount of any other contingent capital. The exchange of bonds or notes for new shares will not be deemed a contribution in kind. The same applies to convertible bonds issued by a financial sector enterprise against contribution of assets from silent partnerships (section 7a (1) WStBG).

Profit participation rights and subordinated notes

The management board of a stock corporation is authorised for the period up to 31 December 2021 with the approval of the supervisory board to issue profit participation rights and notes with qualified subordination (ranking behind section 39 (1) nos 1 to 5 of the German Insolvency Code (*Insolvenzordnung*; **InsO**)) to **the Fund** (section 8 (1) WStBG). The issuance of such profit participation rights and notes **does not require the consent of the general meeting, and the shareholders' pre-emptive right is excluded**, unless the profit participation rights or notes provide for a right of conversion into shares (section 8 (2) and (3) WStBG). The above also applies if a company issues bonds or notes for which the Financial Market Stabilisation Fund or the Economy Stabilisation Fund assumes a guarantee (section 8 (4) WStBG).

Registration of resolutions of the general meeting

The registration and thus the taking effect of resolutions regarding capital measures in connection with recapitalisation are significantly accelerated by the WStFG (section 7c (1) WStBG). A relevant **resolution** must be filed for entry in the commercial register and for publication in the Federal Gazette without undue delay. Such resolution will **take effect upon publication on the company's website**, and at the latest upon publication in the German Federal Gazette (*Bundesanzeiger*), also in relation to third parties. **Entry in the commercial register is not a requirement for the effectiveness of the resolution** and the respective capital measure. The **resolution and, as far as required, the implementation of the capital measure must be entered** in the commercial register **without undue delay, unless it is obviously void**. Legal actions or applications filed for the issuance of decisions by way of injunction orders (*einstweiliges Anordnungsverfahren*) do not prevent the registration of resolutions passed by the general meeting or the

implementation of related resolutions that are not required to be registered. If and as long as **social contacts are required to be minimised by binding official orders** due to a **pandemic, registration in the commercial register will be deemed effected** if a **period of seven days has elapsed** from the date of filing of the resolution for entry in the commercial register without the competent registration court having raised any objections regarding the eligibility for registration or the completeness of the documentation (section 7c (2) WStBG). In **proceedings for the release for entry in the register (*Freigabeverfahren*)**, the **company's interest in implementation is deemed to take precedence**.

Abusive shareholders' liability to pay damages

Recapitalisation measures enjoy particular protection under the StFG by the sharp weapon of a **claim for damages the company has in the event of abusive shareholder actions**. Shareholders who delay or frustrate a recapitalisation measure necessary for the company's continued existence, in particular by exercising their voting rights or unreasonably lodging legal remedies in order to obtain unjustified advantages for themselves, will be liable jointly and severally for damages towards the company. In this context, a shareholder will not be able to claim that the exercise of its voting rights was not the cause of the result of the resolution on the grounds that other shareholders also exercised their voting rights in the same manner (section 7 (7) WStBG).

Online general meeting

The draft Act on Mitigating the Effects of the Covid-19 pandemic in civil, insolvency and criminal procedure law (*Gesetz zur Abmilderung der Folgen der COVID-19-Pandemie im Zivil-, Insolvenz- und Strafverfahrensrecht*) simultaneously adopted by the federal cabinet proposes to introduce the option of holding general meetings as online meetings. We will provide detailed information regarding legal issues related to holding general meetings online in a further Client Bulletin.

Recapitalisation of companies and partnerships organised in other legal forms

In addition to the specific provisions for stock corporations, sections 9 *et seq.* WStBG set out specific requirements for stabilisation measures in companies and partnerships organised in other legal forms. The following paragraphs provide an overview of the provisions that are material in this regard:

KGaA and SE

According to section 9 (1) WStBG, the provisions contained in sections 5 to 8 WStBG that have been designed for stock corporations will apply *mutatis mutandis* to partnerships limited by shares (*Kommanditgesellschaften auf Aktien*; **KGaA**) and European Companies (**SE**).

Cooperatives

Pursuant to section 9 (2) WStBG, the Fund may also become a member of cooperatives (*Genossenschaften*). If the purpose of the cooperative is to obtain a capital enhancement from the Fund, any amendments to the articles of association must be filed for registration and entered in the register of cooperatives (*Genossenschaftsregister*) without undue delay.

GmbH

For German limited liability companies (*Gesellschaften mit beschränkter Haftung*; **GmbH**), the provisions of section 9a (1) and (2) WStBG stipulate facilitated procedures for resolutions of the shareholders' meeting on (i) capital increases against contributions, (ii) capital reductions, (iii) the creation of authorised capital, and (iv) the exclusion of shareholders' pre-emptive rights. Regardless of any deviating (and thus irrelevant) provisions in the articles of association, a simple majority of votes present is sufficient for the passing of resolutions. Moreover, resolutions may be passed by way of written procedure, even if the articles do not

provide for this possibility. If resolutions of this kind are passed, they must be filed for registration and entered in the commercial register without undue delay.

In order to prevent individual shareholders from impeding necessary recapitalisation measures, section 9 (3) WStBG facilitates the exclusion of shareholders. Shareholders may be excluded from the company against compensation with a majority of three quarters of votes present if this is required for the success of the stabilisation measure. The compensation must not be lower than the enterprise value determined by an expert opinion. The exclusion will take effect once the resolution is adopted.

Sections 7e, 7f and 8 WStBG that have been designed for stock corporations will apply *mutatis mutandis* to profit participation rights and subordinated notes.

GmbH & Co. KG

For limited partnerships with a GmbH as general partner (**GmbH & Co. KG**), the admission of the Fund as a limited partner is facilitated and blocking options of individual partners are reduced under section 9b WStBG. A simple majority of partners participating in the vote will be sufficient for related resolutions of partners' meetings.

Silent partnership

Silent partnerships have proven their worth during the financial market crisis of 2008/2009 and are therefore included in section 10 WStBG. According to section 10 (1) and (3) WStBG, such silent participations by the Fund or third parties do not constitute an inter-company agreement (*Unternehmensvertrag*) within the meaning of sections 291 *et seq.* AktG. Consent of the general meeting and registration in the commercial register are therefore not required. The same applies to any subsequent transfer, modification, amendment or termination of such participations.

According to section 10 (2) WStBG, a right of exchange for or subscription of shares is possible, and the shareholders' pre-emptive rights are excluded in the event of conversion. Consent or authorisation is required to be granted by the general meeting with a majority of no less than two thirds of the votes cast or the share capital represented. A simple majority will be sufficient if at least half of the share capital is represented.

In order to facilitate divestiture following successful stabilisation, section 10 (4) WStBG-E provides that an early refund of an asset contribution by the Fund or termination of a silent partnership by mutual consent will not be deemed a refund of contributions within the meaning of section 57 AktG.

Extension to WSF-comparable institutions

In order to avoid distortions and to ensure that federal and state aid run in parallel, section 2 of the WStBG expands the scope of application of the provisions and modifications regulated in the WStBG for corporations and companies of other legal forms which are granted stabilisation measures under sections 6 to 8, 21 and 22 of the StFG. These requirements and modifications apply not only to the WSF, but also to institutions established by other domestic local authorities that are comparable to the WSF and their stabilisation measures. The same amendments have also been adopted in the German Banking Act (Art. 3 WStFG) and the Securities Trading Act (Art. 4 WStFG).

Other facilitations

In addition to the requirements that are specific to individual legal forms, as described above, the WStBG contains various further provisions with respect to selected aspects regarding equity stakes in other entities.

No information or notification requirements

If the Fund acquires an equity stake in an enterprise, such enterprise will not be obliged to inform the economic committee (*Wirtschaftsausschuss*) or, if no such committee exists, the works council of the acquisition of the stake (section 11 WStBG).

If the Fund acquires qualifying holdings in listed companies, there will be no requirement to submit voting rights notifications pursuant to section 43 of the German Securities Trading Act (*Wertpapierhandelsgesetz*) (section 12 WStBG).

If the Fund proposes to acquire a qualifying holding in a (credit) institution, the requirement to notify the German Federal Financial Supervisory Authority (**BaFin**) and Deutsche Bundesbank as stipulated in section 2c of the German Banking Act (*Kreditwesengesetz*) will not apply (section 13 WStBG).

Securities acquisition and takeover offers

If the Fund holds 30% or more of the voting rights of a listed company as the result of a stabilisation measure, BaFin must release the Fund from the obligation to publicly announce the acquisition of control and to submit a mandatory offer (section 14 (1) WStBG).

The provisions of section 30 (2) WpÜG (acting in concert) will not apply if shareholders of the target company (or persons to which voting rights from shares in the target are attributed) are acting in concert with the Fund, the Federal Government or their respective subsidiaries with respect to the target company pursuant to an agreement or in any other manner in connection with stabilisation measures regarding the exercise of voting rights or in any other manner (section 14 (2) WStBG).

The minimum acceptance period in the case of a public takeover offer by the Federal Government or the Fund is reduced from four to two weeks. There will be no additional acceptance period. Neither the convocation of a general meeting by the target company nor the publication of a competing offer will result in an extension of the acceptance period (section 14 (3) no. 1 WStBG).

Neither the Federal Government nor the Fund are required to submit a financing confirmation by an independent investment firm (section 14 (3) no. 1 WStBG).

In addition, the Federal Government and the Fund are released from the obligation to include information in the offer document regarding the financing of the offer and certain information regarding persons acting jointly within the meaning of section 2 (5) sentence 3 WpÜG (section 14 (3) no. 2 WStBG).

The consideration for the offer must not be lower than the weighted average stock exchange price during the last two weeks prior to the date the intention to submit a takeover offer was announced or became publicly known. This does not apply if this figure is higher than the weighted average stock exchange price during the period from 1 to 27 March 2020, in which case the latter figure will be the applicable minimum amount. The amount of the consideration will not be affected by any prior, parallel or subsequent acquisitions (section 14 (3) no. 3 WStBG).

Squeeze-out

The threshold permitting the Federal Government and the Fund to implement a squeeze-out under takeover law (*übernahmerechtlicher Squeeze-out*) is reduced to 90% (instead of 95%) of the share capital (section 14 (3) no. 1 WStBG).

Similarly, the Fund can initiate a squeeze-out under stock-corporation law (*aktienrechtlicher Squeeze-out*) if it holds 90% (instead of 95%) of the share capital. A bank guarantee as security for the compensation claim

will not be required. The facilitations described above in the context of a recapitalisation of stock corporations also apply with respect to the registration of the transfer resolution in the commercial register. If an action for avoidance of the transfer resolution passed by the general meeting is successful, the Fund must retransfer the shares to the shareholders concurrently with the refund of any compensation that has already been paid (section 14 (4) WStBG).

Miscellaneous

The issuance of new shares in a listed company to the Fund will be made without application for listing and without a prospectus for the admission of securities. A requirement to apply for listing and to publish a prospectus will only be triggered if the shares are transferred to a third party (section 15 WStBG).

The German Act Against Restraints of Competition (*Gesetz gegen Wettbewerbsbeschränkungen*) will largely not apply to the Fund (section 16 WStBG).

Avoidance under the German Insolvency Code or the German Act on the Avoidance of Legal Acts by a Debtor outside Insolvency Proceedings (*Anfechtungsgesetz*) is not permitted where such avoidance would be to the detriment of the Fund, the Federal Government, any body corporates, institutions or pools of assets (*Sondervermögen*) established by them, or any of their related parties or any other enterprises indirectly or directly controlled by them. The same applies to any successors in title which assume the rights and obligations in relation to the privileged claim or security (section 17 (1) and (3) WStBG).

Shareholder loans of the Federal Government or the Fund do not constitute subordinated claims within the meaning of section 39 (1) no. 5 InsO. The same applies to any successors in title which assume the rights and obligations in relation to the privileged claim or security (section 17 (2) and (3) WStBG).

The statutory rules regarding hidden contributions in kind do not apply between the Fund and enterprises in the real economy (section 17 (4) WStBG).

The assumption, restructuring, modification or disposal of an equity stake by the Fund in a *financial sector* enterprise does not give rise to a right of extraordinary termination of a contractual relationship; any contractual provisions to that effect are invalid. Any contractual claims of directors or officers for severance or compensation payments that would be triggered by the acquisition of a stake by the Fund are also invalid (section 18 WStBG). It is questionable whether this rule is in fact intended to exclusively apply to financial sector enterprises or, instead, also to enterprises in the real economy.

The enterprise is obliged at the request of the Fund to take reasonable measures that are expedient for the purpose of retransfer, disposal, transfer or modification of equity stakes acquired by the Fund in connection with a recapitalisation, such as the publication of securities prospectuses. The costs associated with any such measures must be borne by the enterprise; any costs incurred by the Fund must be reimbursed by the enterprise. The enterprise will be liable for the prospectus, and the Fund will not be deemed to be the party on whose initiative the prospectus was issued (*Prospektveranlasser*). If nevertheless claims are asserted against the Fund on the basis of the incorrectness, incompleteness or incomprehensibility of a securities prospectus, the enterprise must indemnify the Fund against any liability. None of the measures described herein constitute a refund of contributions within the meaning of section 57 AktG (section 19 WStBG).