Client Alert – Finance – Germany

The KfW Support, The Economic Stabilisation Fund and The Law to Mitigate the Consequences of COVID-19: Germany's Financial Measures to Support German Companies.

April 2020

The economic shock and disruption caused by the outbreak of the SARS-CoV-2-Virus (COVID-19-pandemic) resulted in unprecedented circumstances for companies and prompted recent emergency rescue measures by both the German Government and the German legislator. In the following, we are highlighting the main financial measures adopted in Germany to support German companies and their business continuity.

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Liquidity Support by the KfW[1]

The German State-owned development bank *Kreditanstalt für Wiederaufbau* (the **"KfW"**) provides an unlimited amount of liquidity support to be available to all companies ranging from the smallest businesses to large DAX-listed multinational corporations. In addition to a commitment to simplify and streamline the application process, there have been improvements in relation to the existing KfW support instruments and a new KfW Special Programme has been introduced to address short-term liquidity problems. Accordingly, following loan schemes are available:

- **ERP Start-Up Loan – Universal** (for newer companies established within the last five years):
    - Assumption of risk (liability waivers) of up to 80 per cent. (previously: 50 per cent.) for the on-lending financing partners (usually the regular banks) for working capital loans up to € 200million;
    - Now also available to large companies with annual sales of up to € 2 billion (previously: € 500 million).

[1] A separate overview of the specifics of each loan programme is contained in the Annex I below.

- **KfW Entrepreneur Loan** (for older companies established for five years or more):
  - Assumption of risk (liability waivers) of up to 80 per cent. (Previously: 50 per cent.) for the on-lending financing partners (usually the regular banks) for working capital loans up to € 200million;
  - Now also available to large companies with annual sales of up to € 2 billion (previously: € 500 million).

- **KfW Loan for Growth** (for companies established for five years or more):
  - Temporary widening of the loan purpose to general corporate finance, including working capital by way of syndicate financing (previously: limited to investments in innovation and digitalisation);
  - Assumption of risk (liability waivers) of up to 70 per cent. (Previously: 50 per cent.) for the on-lending financing partners (usually the regular banks);
  - Now also available to even larger companies with annual sales of up to € 5 billion (previously: € 2 billion);
  - Assumption of risk (liability waivers) of up to 80 per cent. (Previously: 50 per cent.) for the on-lending financing partners (usually the regular banks) for working capital loans with a volume of lending of up to € 200 million;
  - Now also available to large companies with annual sales of up to € 2 billion (previously: € 500 million).

- **KfW Syndicate Loans**: for syndicated loans KfW can act as original lender and thereby have a direct loan participation.

- **Loans with Accelerated Approval Process for Mid-Sized Enterprises**: accelerated lending scheme for SMEs, under which loans may be provided with an accelerated approval process ("*Schnellkredite*") to SMEs which:
  - have more than 10 employees;
  - have been active on the market since at least 1 January 2019;
  - reported a profit for the 2019 financial year or on average over the last three financial years; and
  - did not experience any financial difficulties prior to 31 December 2019.

  Under this scheme, KfW may grant a loan in an amount of up to three times the average monthly revenue generated by the SME in 2019 (capped at €800,000 (for SMEs with more than 50 employees) or €500,000 (for SMEs with up to 50 employees).

The German federal budget guarantees KfW a financial framework of around € 460 billion. If necessary, this framework can be increased promptly by up to € 93 billion. Moreover, we expect that in addition to the funds and guarantees available on the national level more support can be made available through well-established cooperation of KfW with European Investment Fund and European Investment Bank.

Establishment of the Economic Stabilisation Fund (the "WSF Act")[2]

The German Federal Government has set up the Economic Stabilisation Fund (**"WSF"**) to reduce the damage caused to the German real economy by COVID-19. The WSF shall stabilize companies whose existence is of significant importance for the economy in Germany or for the labor market.

- **Guarantees**: The WSF can provide guarantees of up to € 400 billion for debt instruments issued from the date the WSF Act comes into force until 31 December 2021 and for other liabilities of German companies in the real economy in order to eliminate liquidity constraints and to support refinancing on the capital market.

  The term of the guarantees may not exceed 60 months and companies must pay a guarantee fee in line with market conditions.

[2] A separate overview of the specifics of the guarantees granted by the WSF is contained in the Annex I below.

It is expected that the further terms and conditions of the guarantees will soon be determined by a regulation, which will set out:

- the details for determining the type of guarantee and the risks to be assumed;
- the calculation and the crediting of guarantee amounts;
- the calculation of the guarantee fee and other conditions;
- the determination of guarantee caps for individual companies; and
- certain types of guarantees, and other conditions which are required to stabilize the eligible companies during the term of the guarantees.

Where debt instruments and other liabilities are guaranteed by the WSF, certain restrictions on such instruments must be taken into account by the creditor (e.g. no early termination, no enforcement action or set-off, no participation in potential insolvency proceedings).

- **Recapitalisations**: The WSF can participate in the recapitalisation of companies up to a total amount of € 100 billion if and to the extent necessary for the stabilisation of the company. The recapitalisation measures include the acquisition of subordinated debt, hybrid bonds, profit participation rights, silent partnerships, convertible bonds, the acquisition of shares in companies and the assumption of other equity instruments of these companies (in particular increase of the registered share capital and issuance of new shares). A recapitalisation must be carried out under market conditions.

  The WSF will only make a participation if the Federal Government has an important interest in the stabilisation of the enterprise and if stabilisation cannot be achieved by other more economically efficient means.

  The Federal Ministry of Finance and the Federal Ministry of Economics and Energy may agree to issue more detailed provisions on:

  - the consideration and other conditions of the recapitalisation;
  - equity participation caps for individual entities and for certain types of equity instruments;
  - the conditions under which the WSF may resell its equity participations; and
  - other conditions necessary to ensure the stabilisation of the companies in the context of the recapitalisation.

  In some corporate law respects, the new legislation facilitates the implementation of recapitalisation measures. E.g., the agreement on a silent partnership or the issuance of profit participation rights and hybrid instruments (without the right to convert into shares) are admissible without the approval of the general meeting, and the majority requirements for resolving on equity instruments (in particular with exclusion of subscription rights) are lowered.

- **Eligible Companies**: A company has to meet at least two of the following three criteria in the last two financial years prior to 1 January 2020 to become eligible for the guarantee or recapitalisation measures described above:

  - a balance sheet total of more than € 43 million;
  - more than € 50 million in revenues; and
  - more than 249 employees on an annual average.

  However, the Interministerial Economic Stabilisation Fund Committee may, at its sole discretion, also decide on applications from companies, which do not meet the eligibility criteria if the company is active in a sector critical to infrastructure (information technology, telecommunications, cloud computing service providers, telematics, media with broad distribution, sector-specific software) or is of comparable importance for the security or economy.

  Further requirements for stabilisation measures are that the company may have no other financing alternatives, must have a viable business model after overcoming the COVID-19-pandemic and may not satisfy the EU definition of a company in financial distress as of 31 December 2019.

- **Refinancing of KfW**: In response to the COVID-19-pandemic, the WSF can grant loans to KfW of up to € 100 billion to refinance KfW when providing liquidity support to borrowers and/or intermediaries under the new KfW special program provided by the Federal Government. The WSF determines the detailed terms and conditions for granting loans on a case-by-case basis.

Legislative changes to mitigate the consequences of the COVID-19-pandemic with respect to specific contract, corporate, insolvency and criminal law matters (the "COVInsAG")

On 28 March 2020, a bill came into force, which aims to mitigate the consequences of the COVID-19-pandemic with respect to various specific contract, corporate, insolvency and criminal law matters. The legislative changes are foremost intended to facilitate the continuation of businesses that have or will become insolvent as a result of the COVID-19-pandemic or are experiencing economic difficulties. Changes introduced by the COVInsAG include *inter alia*:

- **Suspension of obligation to file for insolvency**: German insolvency law contains rigid obligations for directors to file a company for insolvency without undue delay, but no later than three weeks after the company has become insolvent (i.e. illiquid or balance-sheet insolvent). These obligations to file for insolvency will be suspended until 30 September 2020. This relief, however, does not apply if the insolvency is not a consequence of the COVID-19-pandemic or if there are no prospects of eliminating an existing illiquidity. It will be assumed that an insolvency was caused by the effects of the COVID-19-pandemic and that there are prospects of overcoming an existing illiquidity, if the debtor was not illiquid on 31 December 2019.

- **Relief from liability for managing directors**: The COVInsAG contains certain privileges for loans that are made during the suspension period (even if the respective company is not insolvent). Repayments made prior to 30 September 2023 and security granted for such loans will not be subject to insolvency claw back. The same applies with respect to repayments of shareholder loans and loans that economically have the same effect as shareholder loans (however, not with respect to security granted for such loans).

  Under German law, a lender may become liable in damages (and even face criminal liability) if a restructuring loan is insufficient to achieve a turnaround, and instead merely delays the filing for insolvency for that lender's own benefit. The COVInsAG mitigates this risk by stating that any such new loans and any security granted for them will not be regarded as aiding or facilitating a delay in filing for insolvency.

- **Protection from insolvency claw back**: Further to the privileges for restructuring loans, the COVInsAG provides for additional protection from insolvency claw back. Actions taken during the suspension period which assist or enable another party to take security or obtain satisfaction of an obligation are not subject to insolvency claw back in subsequent insolvency proceedings.

  This applies only to security and satisfaction which the other party was able to claim in this manner and at that time. It does not apply if the other party was aware that the debtor's restructuring and financing efforts were not feasible to cure an existing illiquidity.
  These regulations shall apply *mutatis mutandis*:
    - to payments made or services rendered instead of specific performance;
    - to payments made by a third party upon instruction of the debtor;
    - to the provision of security other than the security originally owed, if this other security is not worth more than the security owed;
    - to the shortening of payment due dates; and
    - to the granting of payment reliefs.

Conclusions

Both the German Government and the German legislator have put in place an extensive and differentiated system of financial measures to support German companies.

We encourage our clients to consider the opportunities presented by this set of measures carefully, consulting with us as appropriate.

Separately, German companies which meet the relevant credit rating requirements may also benefit from liquidity assistance via the European Central Bank ("**ECB**") Pandemic Emergency Purchase Programme ("**PEPP**"), pursuant to which the ECB may purchase bonds and commercial paper issued by European private and public sector entities. See our client alert https://www.whitecase.com/publications/alert/european-central-bank-launches-emergency-bond-buying-programme-response for further details.

In addition, White & Case has carried out an analysis of global governmental responses to the COVID-19 crisis. These vary considerably from country to country and are being updated and amended regularly.

We have prepared an in-depth and nuanced analysis for various major jurisdictions and pulled together a global response team.

We encourage our clients to verify with us, as appropriate, if and to what extent their group companies are entitled to receive Government support in these jurisdictions.

For useful information on COVID-19, please consult the Coronavirus section of www.whitecase.com.

Annex I

The KfW loan program and the WSF loans include urgent measures to support the liquidity of companies and ensure business continuity. The applicable measures are described and compared below.

Applicable Measures	**Large corporates**	**SMEs**
Eligible Beneficiary	All entities registered in Germany regardless of shareholder structure	All entities registered in Germany regardless of shareholder structure
ERP Startup Loan – Universal	Beneficiaries: Newer companies established within five years Purpose of Financing: Investments and operating costs Maximum Guaranteed Amount: The maximum loan amount (for working capital loans) of up to € 200 million is limited to: - 25 % of the annual turnover in 2019 or - twice the wage costs of 2019, or - the current financing needs for the next 12 months for large enterprises, or - 50% of your company's total debt for loans over € 25 million. Now also available to large companies with annual sales of up to € 2 billion (previously: € 500 million) Conditions: Higher risk assumption by the KfW: 80% for large companies	Beneficiaries: Newer companies established within five years Purpose of Financing: Investments and operating costs Maximum Guaranteed Amount: The maximum loan amount of (for working capital loans) up to € 200 million is limited to: - 25 % of the annual turnover in 2019 or - twice the wage costs of 2019, or - the current financing needs for the next 18 months for small and medium-sized enterprises, or - 50% of your company's total debt for loans over € 25 million. Conditions: Higher risk assumption by the KfW: 90% for SMEs
KfW-Entrepreneur Loan	Beneficiaries: Large corporations (entities with more than 250 full-time employees) established for five years or more Purpose of the financing: Investments and operating costs Maximum guaranteed amount: Up to € 1 billion, limited to: - 25% of the annual turnover in 2019 or - Twice the wage costs of 2019, or - The current financing needs for the next 12 months, or - 50% of the total debt of the company for loans over € 25 million	Beneficiaries: Small to mid-sized enterprises (entities with 10-249 full-time employees) established with five years or more Purpose of the financing: Investments and operating costs Maximum guaranteed amount: Up to € 1 billion, limited to: - 25% of the annual turnover in 2019 or - Twice the wage costs of 2019, or - The current financing needs for the next 18 months, or - 50% of the total debt of the company for loans over € 25 million

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<td>Also available to large companies with annual sales of up to € 2 billion (previously: € 500 million)

<u>Conditions</u>

1. Duration:
two to five years (for working capital);

2. Credit Support/Covenants:
customary (to be negotiated with local bank);

3. Interest Rate:
2.0– 2.12%

4. Commitment Fee:
0.14% per month on undrawn amounts

Higher risk assumption by the KfW: 80% for large companies</td>
<td><u>Conditions</u>

1. Duration:
two to five years (for working capital);

2. Credit Support/Covenants:
customary (to be negotiated with local bank);

3. Interest Rate:
1.0 – 1.46%

4. Commitment Fee:
0.14% per month on undrawn amounts

Higher risk assumption by the KfW: 90% for SMEs</td>
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<td>KfW Loan for Growth</td>
<td><u>Beneficiaries:</u>
Companies that have been on the market for more than five years

<u>Type of Financing:</u>
Temporary widening of the loan purpose to general corporate finance, including working capital by way of syndicate financing (previously: limited to investments in innovation and digitalisation)

Now also available to even larger companies with annual sales of up to € 5 billion (previously: € 2 billion)

<u>Conditions:</u>
1. Assumption of risk of up to 70% (previously: 50%) for the on-lending financing partners (usually the regular banks)</td>
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<td>Loans with Accelerated Approval Process for Mid-Sized Enterprises</td>
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<td><u>Beneficiaries:</u> Enterprises with more than 10 employees that have been on the market since 01 January 2019 and reported a profit for the 2019 financial year or on average over the last three financial years

<u>Purpose of the Financing:</u>
Investments and operating costs

<u>Maximum Guaranteed Amount:</u>
up to three times the monthly revenue generated by the SME in 2019 (capped at €800,000 (for SMEs with more than 50 employees) or €500,000 (for SMEs with up to 50 employees)</td>
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<td><u>Conditions:</u>
1. Coupon of 3%;
2. Duration: 10 years;
3. No additional credit risk assessment
Indemnity by the KfW that is secured by a guarantee provided by the Federal Republic of Germany</td>
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<td>KfW Syndicate Loans</td>
<td><u>Beneficiaries:</u>
Mid-sized and large corporations (entities with 50-249 and 250 full-time employees, respectively)

<u>Purpose of the financing:</u>
Investments and operating costs

<u>Maximum guaranteed amount:</u>
Minimum of € 25 million limited to:
- 25 % of the annual turnover in 2019 or
- twice the wage costs of 2019, or
- the current financing requirements for the next 12 months.

<u>Conditions</u>
1. Duration:
Up to six years;
2. Risk Participation:
KfW will assume up to 80% of the risk (capped at 50% of the annual total debt) either by
- sub-partcipation or
- as a syndicate partner (each on pari passu basis) or,
- alternatively, the KfW can refinance as syndicate partner;
3. Interest, repayment terms, costs and credit support:
As per the existing syndicate loan</td>
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<td>German Economic Stabilisation Fund</td>
<td colspan="2"><u>Type of guarantee:</u>
Investment of equity capital and thereby taking stakes in distressed companies

<u>Type of financing:</u>
Acquisition of subordinated debt, hybrid bonds, profit participation rights, silent partnerships, convertible bonds, the acquisition of shares in companies and the assumption of other equity instruments of these companies (in particular increase of the registered share capital and issuance of new shares)

The fond is comprised of:
- € 100 billion for capital measures
- € 400 billion for guarantees</td>
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	- An additional € 100 billion to help refinance existing KfW programs Beneficiaries: Enterprises that have experienced financial hardship as a result of the COVID-19 pandemic Conditions (of guarantees): 1. *Duration:* Maximum of 5 years; 2. *Guarantee Fee:* Companies must pay a guarantee fee in line with market conditions; 3. The terms and conditions of the guarantees are still subject to a regulation to be released by the German Federal Ministry of Finance; 4. *Restrictions:* Where debt instruments and other liabilities are guaranteed by the WSF, certain restrictions on such instruments must be taken into account by the creditor (e.g. no early termination, no enforcement action or set-off, and no participation in potential insolvency proceedings) 5. *Prerequisites*: A company is only eligible to apply for guarantees and recapitalisation measures, if it satisfies two of the following three criteria: - a total balance sheet of more than €43 million; - revenues of more than €50 million; and - more than 249 employees on an annual average.

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