EUROPEAN COMMISSION

C(2012) 9263 final

Subject: State aid SA. 35748 (2012/N) – Germany
Prolongation of the German support scheme for banks for H1 2013
(Drittes Finanzmarktstabilisierungsgesetz)

Sir,

I PROCEDURE

(1) By decision of 12 December 2008\(^1\) in case N 625/2008 the Commission raised no objection against the granting of State aid for six months on the basis of the German bank rescue scheme concerning the measures granted to financial institutions under the Financial Market Stabilisation Law (Finanzmarktstabilisierungsgesetz, "FMStG"). The Financial Market Stabilisation Law was in effect until 31 December 2010, prior to which the Commission approved its prolongation on three occasions in its decisions of 22 June 2009 in State aid case N 330/2009\(^2\), of 17 December 2009 in State aid case N 665/2009\(^3\) and of 23 June 2010 in State aid case N 222/2010\(^4\):


Seiner Exzellenz Herrn Dr. Guido WESTERWELLE
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By decision of 5 March 2012 in case SA.34345 (2012/N)\(^5\) the Commission approved a reactivation of the scheme under the 'Second Financial Market Stabilisation Law' (Zweites Finanzmarktstabilisierungsgesetz).

By Decision of 29 June 2012 in State aid case SA.34897\(^6\) the Commission approved a prolongation of the reactivated scheme until 31 December 2012.

On 21 November 2012 Germany notified a request for prolongation of the German support scheme for banks, covering the period from 1 January to 30 June 2013, under the 'Third Financial Market Stabilisation Law' (Drittes Finanzmarktstabilisierungsgesetz) ("the Third FMStG"). To that end, Germany had submitted a pre-notification to the Commission on 12 October 2012, and subsequently provided additional information.

On 29 October 2012 Germany exceptionally agreed to the adoption of the present decision in the English language.

II FACTS

1. Description of the scheme

Legal basis

To stabilise the financial market the Federal Republic of Germany passed the FMStG\(^7\) on 17 October 2008. That legislation was an omnibus act (Artikelgesetz). To finance the measures foreseen under that legislation a Financial Market Stabilisation Fund (Finanzmarktstabilisierungsfonds/ "SoFFin") was established, backed by Germany. Borrowing by SoFFin was to be financed by issuing bonds up to a maximum amount of EUR 100 billion. Further details regarding the administration of SoFFin and the corresponding framework conditions were set out in an accompanying statutory order, the Financial Market Stabilisation Fund Regulation (Finanzmarktstabilisierungsfonds-Verordnung – “FMStFV”), which entered into force on 20 October 2008.

The Third FMStG is an amendment to the FMStG and its subsequent extensions, and covers the period from 1 January 2013 to 31 December 2014. The Third FMStG was adopted against the background of the on-going tensions in the financial markets and in particular in the light of the government debt crisis in several countries which has impaired confidence and led to refinancing problems. The German authorities seek State aid approval for the prolonged scheme until 30 June 2013; if need be, they will notify to the Commission a further extension beyond that date.

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\(^6\) Commission decision in case SA.34897 on the prolongation of the reactivated German rescue scheme for financial institutions. OJ C 220 of 25.7.2012, p. 8.
Operation of the scheme

(8) In continuance of the previous schemes the objective of the Third FMStG is to stabilise the financial market and to counter a possible threat to the financial system in a timely and effective manner, where private solutions for the strengthening of the capital base fail.

(9) The Third FMStG, like its expiring predecessor legislation, permits new applications for stabilisation measures and allows for the following types of measures:

- **Recapitalisation of companies**: Such measures concern participation in companies in the financial sector, in the form of acquisition of shares, silent participations or other instruments constituting equity up to a maximum of EUR 80 billion.

- **Risk assumption**: A joint ceiling totalling EUR 80 billion applies to risk assumption measures and recapitalisation measures. Within that joint ceiling, a total of EUR 80 billion is available for temporary assumption, whether by acquisition or otherwise, of the risk associated with the risk positions acquired by companies in the financial sector before 1 December 2012, including in particular receivables, securities, derivative financial instruments, rights and obligations under loan commitments or warranties and participations, in each case including the related collateral.

- **Guaranteeing of liabilities**: Provision, in return for an appropriate remuneration, of a guarantee up to an amount of EUR 400 billion for newly issued bonds and liabilities of companies in the financial sector.

(10) The terms and conditions of recapitalisations and risk assumptions remain unchanged as compared to the previous versions of the scheme (the reactivation scheme and its first prolongation). A detailed description of the measures can be found in the Commission Decision in State aid case SA.343458 (chapters 4a and c, see also Annex I).

(11) As regards guarantees on liabilities, the remuneration will be calculated in accordance with the formula set out in the 2011 Prolongation Communication, and as described in the Commission Decision in State aid case SA.34345 (see chapter 4b, see also Annex I). The indicative guarantee fees for the period from 1 January to 30 June 2013 can be found in Annex II to this decision and are based on a sample of European banks as of 16 November 2012 determined according to the guidance in the 2011 Prolongation Communication.

2. New elements of the scheme

(12) The terms and conditions of the prolonged scheme remain largely the same as in the previous scheme. However, there are the following significant changes:

(13) As from 1 January 2013, access to the scheme is reserved for banks established in Germany, including subsidiaries of foreign banks, which are subject to the bank levy

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8 See footnote 5.
foreseen in the Restructuring Fund Law\textsuperscript{10}, which has established a Restructuring Fund. The objective of that fund is to stabilise the financial market by means of financing restructuring measures and the orderly winding down of credit institutions. The Restructuring Fund is financed through an obligatory levy on banks. Small banks, with liabilities below EUR 300 million are exempt from paying the bank levy\textsuperscript{11}, but are nonetheless eligible for support under the present scheme.

(14) Other financial institutions, such as insurance companies, are no longer eligible for support. Hence, the Third FMStG aligns the scope of institutions eligible for measures financed by SoFFin with the institutions eligible for restructuring measures that are generally subject to contributions to the Restructuring Fund.

(15) Losses resulting from interventions under the scheme will no longer be financed by the general budget but through recourse to the Restructuring Fund. That fund, which is managed by SoFFin, has been established to support the orderly recovery or resolution of ailing credit institutions. In contrast to SoFFin, which is backed by the federal budget, the Restructuring Fund is financed by the banking industry by way of an obligatory bank levy. If need be, SoFFin can provide bridge financing to the Restructuring Fund.

(16) So far, the systems of SoFFin and of the Restructuring Fund have been operated separately. Whereas measures based on the FMStG were funded solely by the general budget (through SoFFin), the measures of the Restructuring Fund are funded by the contributing institutions (banks and other financial institutions established in Germany). Henceforth, the two systems will be interlocked in a way that the Restructuring Fund, which is financed by a bank levy, will compensate SoFFin for all losses that the latter might incur when implementing support measures. Thereby the banking sector itself will ultimately bear the costs of future stabilising measures (pre-financed by SoFFin).

(17) With regard to the remuneration of guarantees for debt instruments with a maturity longer than three years, the scheme introduces a new "step up" clause. The annual fee for guarantees on debt instruments with a maturity longer than three years will be increased by 10% as compared to the fee applicable to guarantees on comparable debt instruments with shorter maturities. In turn, debt instruments with a maturity longer than three years are no longer limited to one-third of the scheme's overall budget.

(18) Moreover, Germany has adapted the scheme to make it possible to apply the rules for the remuneration of shares to non-share Core Tier 1 instruments in the event that the upcoming Capital Requirements Regulation (CRR) legislation no longer allows fixed remuneration for such instruments (point 4 f of Annex I).

(19) Finally, Germany commits to respect a wide range of behavioural commitments in the rescue phase, i.e. until the support is authorised as restructuring aid, such as an acquisition ban, a price leadership ban, a dividend ban, a coupon ban as well as restrictions on

\textsuperscript{10} Restructuring Fund Law ("Restrukturierungsfondsgesetz") of 9 December 2010 (BGBl. I S. 1900, 1921) and its amendments.

\textsuperscript{11} Calculated according to the provisions of the Restructuring Fund Regulation of 20 July 2011, BGBl. I S. 1406, as amended, which sets out the details for calculating the levy.
remuneration of executives and a quarterly reporting.

(20) The commitments are set out in Annex I to the present decision.

III POSITION OF GERMANY

(21) On 21 November 2012 Germany notified to the Commission a request to prolong the scheme until 30 June 2013.

(22) The German authorities point out that the package of measures is still needed in order to shield the German and European financial markets from possible damage due to the financial market crisis. The high interconnectedness in the Union's financial system has led to a risk of significant contagion, potentially threatening the financial stability of the Union as a whole and adversely impacting the real economy in Europe and beyond. The viability of the German financial system, which makes an important contribution to the functioning of the entire economy and hence to growth and employment in Germany, is exposed to that risk as well. Moreover, the German economy is particularly vulnerable to economic contagion risks which may result from significant investments made in countries severely hit by the crisis. The Third FMStG therefore aims at stabilizing the financial markets by restoring confidence among market players and by curtailing systemic risks for the German banking sector.

(23) A letter from the Deutsche Bundesbank, the German Central Bank, dated 15 November 2012, confirms that the prolongation of the scheme constitutes an appropriate preventive step which will contribute to the stabilization of financial markets. The mere existence of the scheme can reinforce confidence of market participants.

(24) In view of the commitments reproduced in Annex I, the German authorities consider the aid scheme to be compatible with the internal market inasmuch as it helps to “remedy a serious disturbance in the economy of a Member State” within the meaning of Article 107(3)(b) of the Treaty on the Functioning of the European Union ("TFEU").

IV ASSESSMENT

1 Existence of aid

(25) Article 107(1) TFEU states that any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market.

(26) As to the State resources, according to settled case-law, all the financial means by which the public sector may actually support undertakings, irrespective of whether or not those means are permanent assets of the public sector, fall under Article 107(1) TFEU, provided that they constantly remain under public control and therefore available to the competent
national authorities. In particular, State resources are generally considered to be involved where funds come from contributions made compulsory by State legislation and are managed and apportioned in accordance with that legislation, even if they are administered by institutions separate from the State\(^{12}\).

(27) In the case at issue, State resources are involved in two ways in the funding of the support measures.

(28) First, the funding of the Restructuring Fund will be obtained through a mandatory levy, determined by law\(^{13}\), imposed on all banks established in Germany. Those resources will be managed by SoFFin, a public-law institution established by Germany with the aim of supporting specific banks. Thereby, the banks receive financial means sourced through the public sector\(^{14}\).

(29) Second, SoFFin will provide bridge financing if the funds available in the Restructuring Fund are not sufficient to implement the required support measures. For any possible losses resulting from future measures financed by SoFFin, recourse will be taken to the Restructuring Fund.

(30) In the light of the above, the Commission considers that the measures taken under the scheme involve State resources that are imputable to the State within the meaning of Article 107(1) TFEU.

(31) The Commission recalls that it has already concluded that the recapitalisation of banks, the risk assumption and the granting of guarantees can constitute aid to the beneficiary bank within the meaning of Article 107(1) TFEU\(^{15}\). In fact, under the scheme any such recapitalisation, guarantee for new liabilities or risk assumption will enable the beneficiary to secure the necessary capital and liquidity on more favourable terms than would otherwise be possible in the light of the prevailing conditions in the financial markets. The advantage is selective since it benefits only beneficiaries under the scheme. Since it confers an economic advantage on beneficiaries and strengthens their position vis-à-vis their competitors in Germany and in other Member States, those measures distort competition and affect trade between Member States.

2 Compatibility

\(a\) Application of Article 107(3)(b)

(32) Germany intends to provide aid in the form of fresh capital and guarantees under a scheme in favour of banks. Given the on-going constraints on the financial markets, the Commission considers it appropriate to examine that measure under Article 107(3)(b) TFEU.


\(^{13}\) § 12 (1) of the Restrukturierungsfordergesetz of 9 Dezember 2010 (BGBl. I S. 1900, 1921) and its amendments.


\(^{15}\) Commission Decision in case SA.34345 (see footnote 5), recitals 61 to 90.
(33) Article 107(3)(b) TFEU empowers the Commission to find that aid is compatible with the internal market if it is intended "to remedy a serious disturbance in the economy of a Member State". The Commission has acknowledged that the global financial crisis can create a serious disturbance in the economy of a Member State and that measures supporting banks are apt to remedy that disturbance. That assessment has been confirmed in the Recapitalisation Communication\textsuperscript{16} and the Restructuring Communication\textsuperscript{17}. The Commission still considers that requirements for State aid to be approved pursuant to Article 107(3)(b) TFEU are fulfilled in view of the reappearance of stress in financial markets. The Commission confirmed that view by adopting the 2010 Prolongation Communication\textsuperscript{18}, which prolonged until 31 December 2011 the application of State aid rules to support measures in favour of banks in the context of the financial crisis. The Commission has since extended the application of those rules beyond 31 December 2011 under the 2011 Prolongation Communication.

(34) In respect of the German economy, that analysis has been confirmed in the Commission's approval of various measures undertaken by the German authorities to combat the financial crisis\textsuperscript{19}. The Commission takes note that the present scheme applies to the whole German banking industry including subsidiaries of banks from other Member States established in Germany.

(35) The Commission considers that the exceptional circumstances at the origin of the notified measures persist and therefore recognizes the need for the prolongation of the scheme. The letter from the Deutsche Bundesbank, the German Central Bank, endorses that necessity (see recital (23)). In particular, the Deutsche Bundesbank states that the high interconnectedness of the distressed financial system in the European Union poses a threat to the viability of the German financial system.

(36) Therefore, the Commission continues to base its assessment of State aid measures in the banking sector on Article 107(3)(b) TFEU.

\textit{b) Assessment of the recapitalisation measure}

\textit{Appropriateness}

(37) The objective of the recapitalisation measure is to temporarily reintroduce appropriate measures to establish backstops for the financial system in a timely and efficient manner, where private law solutions for strengthening the capital base fail. The German government accordingly intends to undertake public sector equity participation where necessary. The

\textsuperscript{16} Communication from the Commission – The recapitalisation of financial institutions in the current financial crisis: limitation of aid to the minimum necessary and safeguards against the undue distortions of competition, OJ C 10, 15.1.2009, p. 2.

\textsuperscript{17} Commission Communication on the return to viability and the assessment of the restructuring measures in the financial sector in the current crisis under the State aid rules, OJ C 195, 19.8.2009, p. 9.

\textsuperscript{18} Communication from the Commission on the application, from 1 January 2011, of State aid rules to support measures in favour of bank’s in the context of the financial crisis, OJ C 329, 7.12.2010, p. 7.

Commission observes that applicable prudential requirements have recently been significantly increased by the European regulators. That development has given rise to concerns about the creditworthiness of certain banks. Hence, a backstop mechanism by the Member State is in principle an appropriate means to strengthen the banks and thus to restore market confidence. Moreover, the instruments foreseen under the present measure should also provide the banks with capital of the highest quality and are thus capable of meeting the requirements of the upcoming CRR legislation.

Necessity

(38) With regard to the scope of the measure, the Commission notes positively that Germany has limited the budget available for recapitalisations and that the scheme applies for a limited time, until 30 June 2013. Therefore, the Commission considers the measure as limited to the minimum necessary.

(39) In particular, the Commission regards an appropriate remuneration for the capital provided by the State, which is based as far as possible on the market price, to be the best safeguard for the proportionality of a capital injection measure. The Commission notes that Germany follows the rationale expressed in the 2011 Prolongation Communication when recapitalising in shares. An adequate remuneration is ensured through applying an appropriate discount as indicated in the decision of 5 March 2012.20

Proportionality

(40) The Commission notes that Germany has committed to a number of behavioural safeguards to apply already in the rescue phase, i.e. for the period from the recapitalisation until the Commission adopts a restructuring decision. In particular, Germany submitted the following behavioural commitments: an acquisition ban, a dividend ban, a hybrid coupon ban, and a remuneration cap. Those commitments ensure adequate burden-sharing already in the rescue phase and prevent the beneficiary from using the aid to finance an anti-competitive behaviour or activities, which are not necessary for restoration of its viability. The Commission welcomes the implementation of the restructuring principles already at a preliminary stage, given that the analysis of a restructuring plan often takes considerable time.

(41) Finally, the Commission welcomes that Germany undertakes to submit a restructuring plan for any bank which benefits from a recapitalisation, in line with the rules set out in the 2010 Prolongation Communication. The Commission also welcomes that Germany undertakes that the restructuring plan to be submitted will comply with the principles set out in the Restructuring Communication in order to re-establish the individual bank’s long-term viability without reliance on State support, while containing adequate burden-sharing measures and measures to limit distortions of competition.

(42) As regards the combination of the scheme with other aid measures, the Commission recalls that, as indicated in the Annex to the Restructuring Communication, the restructuring plans to be submitted should contain all State aid received as individual aid or under a scheme

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20 See footnote 5.
during the restructuring period.

(43) Furthermore, based on point 16 of the Restructuring Communication, the Commission recalls that should further aid not initially foreseen in a notified restructuring plan be necessary for the restoration of viability, it cannot be granted under an approved scheme but needs to be subject to individual ex ante notification and any such further aid will be taken into account in the Commission's final decision on that bank.

c) Assessment of the guarantee measure

(44) The objective of the guarantee measure is to provide a safety net for investors in newly issued debt of participating banks in Germany, so that such banks can have sufficient access to liquidity.

Appropriateness

(45) The guarantee measure is a reaction to the on-going constraints on the financial markets in which even banks without intrinsic problems are facing difficulties in gaining access to liquidity. In the previously approved schemes, the Commission has established that such a guarantee scheme can be a suitable means to address those problems. Thus, the Commission considers the guarantee measure appropriate to address possible constraints in refinancing which may cause a potential serious disturbance in Germany's economy.

Necessity

(46) As regards necessity, the Commission notes positively that the guarantee measure is limited to new debt and only applies for a limited time, until 30 June 2013. Therefore, the Commission considers the measure as limited to the minimum necessary.

(47) The distortion of competition is minimised by various safeguards. Above all, the excessive use of guarantees is discouraged by the requirement to pay a market-oriented premium. The German authorities have given a commitment that the minimum level of such remuneration will be determined according to the rules set out in the 2011 Prolongation Communication as indicated above.

(48) In fact, the pricing formula introduced by Germany takes into account the greater differentiation by risk of banks' CDS spreads in recent times, by referring to median CDS spreads over a three-year period ending one month before the granting of guarantees.

Proportionality

(49) As regards proportionality, the annual fee for guarantees on debt instruments with a maturity longer than three years will be increased by 10% as compared to the fee applicable to guarantees on comparable debt instruments with shorter maturities. That step-up clause constitutes a disincentive for benefitting banks to resort to State guarantees for debt instruments with maturities longer than three years. Thus, that clause is contributing to reduce the distortions of competition caused by the measure.
Furthermore, Germany undertakes to submit an individual notification if a restructuring plan has already been submitted by the beneficiary bank that did not foresee the envisaged guarantee. Germany also agrees to submit a viability review if the total outstanding guarantees exceed both a ratio of five per cent of total liabilities and the total amount of EUR 500 million.

On the basis of those considerations, the prerequisites for the compatibility of guarantee schemes that have been established by the Banking Communication and the 2011 Prolongation Communication are met.

d) Assessment of the risk assumption measure

The assessment of the risk assumption measure has not significantly changed compared to the assessment in the decision of 5 March 2012\(^21\). As with the guarantee measure, the objective of the risk assumption measure is to ensure that banks have sufficient access to liquidity, which is an effective way of supporting ailing banks and thus an appropriate means of overcoming the difficulties on financial markets. As the measure is limited in time and based on a market-oriented premium, which has been adjusted in line with the 2011 Prolongation Communication, it can still be considered compatible.

e) Monitoring

Finally, the German authorities reiterated their commitment to comply with the reporting obligations under the 2011 Prolongation Communication and, in addition, to provide quarterly reports on all measures granted under the scheme and a list of all beneficiaries.

f) Conclusion on the compatibility of the aid measure

Therefore, the second prolongation of the Third FMStG remains an appropriate, necessary and proportionate measure to remedy a serious disturbance in the German economy and does not alter the Commission’s previous assessment in the decision of 5 March 2012\(^22\) and the subsequent prolongation decision. In light of the commitments set out in Annex I the notified prolongation complies with the requirements set out above and is compatible with the internal market pursuant to Article 107(3)(b) TFEU.

In line with the Commission’s decisional practice the Third FMStG can therefore be prolonged until 30 June 2013. Any further prolongation will require the Commission’s approval and will have to be based on a review of the developments in financial markets and the scheme’s effectiveness.

The notified prolongation of the Third FMStG is, in light of the commitments set out in

\(^{21}\) See footnote 5.
\(^{22}\) See footnote 5.
Annex I, compatible with the internal market pursuant to Article 107(3)(b) of the Treaty on the Functioning of the European Union, until 30 June 2013.

V CONCLUSION

The Commission has accordingly decided:

- to consider the aid to be compatible with the Treaty on the Functioning of the European Union.

Germany exceptionally accepts that the present decision be adopted in the English language, for reasons of urgency.

If this letter contains confidential information which should not be disclosed to third parties, please inform the Commission within fifteen working days of the date of receipt. If the Commission does not receive a reasoned request by that deadline, you will be deemed to agree to the disclosure to third parties and to the publication of the full text of the letter in the authentic language on the Internet site:

http://ec.europa.eu/competition/elojade/isef/index.cfm

Your request specifying the relevant information should be sent by registered letter or fax to:

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Yours faithfully,
For the Commission

Joaquin ALMUNIA
Vice-President
Annex I
Commitments

In December 2008, Germany notified the Commission of State aid measures (N 625/2008) in the form of a Financial Market Stabilisation Fund Act (Finanzmarktstabilisierungsfondsgesetz - FMStFG) and an accompanying Financial Market Stabilisation Fund Regulation (Finanzmarktstabilisierungsfonds-Verordnung - FMStFV) and, in July 2009, it notified the Commission of additional measures (N 314/2009) in the form of asset relief for structured securities (SPV Model). Since the Second Financial Market Stabilisation Act (Zweites Finanzmarktstabilisierungsgesetzes - 2. FMStG) entered into force, the current range of measures under the Financial Market Stabilisation Fund (Finanzmarktstabilisierungsfonds - SoFFin) may be requested again, subject to rules which in some cases have been amended (Commission approval in State aid Case SA.34345 (2012/N) of 5 March 2012).

With regard to the notification of the package of measures in the Third Financial Market Stabilisation Act, and in the light of the statements made by the Commission in the interim, the German Government makes the following commitments:

1. The German Government commits that the date ‘31 December 2014’ stipulated in Section 13(1) FMStFG will apply only as long as the threat to the stability of the financial market lasts. The Commission's authorisation has for the time being been requested only until 30 June 2013. The German Government will request an extension to that authorisation at least one month before it expires.

2. Starting on 15 April 2013, the German Government commits that it will send quarterly reports to the Commission on the individual financial support measures in each respective quarter. The report will also give details on the issuing of non-guaranteed bonds by institutions which received guarantees under Section 6 FMStFG, and compare them with the costs of guaranteed and non-guaranteed bonds issued by German credit institutions, provided that this data is publicly available.

3. With reference to Section 2 FMStFV, the German Government commits that the minimum guarantee fees for State guarantees will be calculated in accordance with the rules in Communication C(2011) 8744 of 1 December 2011 (point 1 of Section 2(2) FMStFV), and that an additional fee will be charged to cover the risks of guarantees for debt denominated in a foreign currency, unless the foreign exchange risk for SoFFin is covered by the beneficiary. Moreover, the German Government commits that, for each individual institution, the fee for guarantees with a maturity of more than three years will be at least ten per cent higher than the fee for guarantees with a maturity of three years. The German Government will grant guarantees on debt with a maturity of less than three months only with the prior approval of the Commission. Guarantees to credit institutions will be granted only for non-subordinated debt. In addition, the German Government will inform the Commission within three months after the granting of a guarantee of the guarantee procedure and the agreed fee. Irrespective of this and as part of the notification procedure, the German Government has provided a list of possible minimum guarantee fees as an annex, that is, the minimum fees expected for German credit institutions.
using the CDS spread in accordance with the provisions of the Commission Communication.

4.

a) With reference to Section 3 FMStFV, the German Government commits that SoFFin will only acquire shares which have not already been acquired by existing shareholders or placed on the market. For shares, SoFFin will call for the highest possible discount on the average price (after adjustment for the dilution effect of the capital increase) of listed liquid shares with the same rights in the five days before the announcement of the capital increase or the start of the subscription period. The basis for calculating the discount is a discount on the theoretical ex-rights price (TERP); the discount required on the TERP is based on normal market practice. If the new shares have different rights from the previous shares, those differences should be properly taken into account in determining the required discount. In particular, a higher discount is normally required for shares without voting rights; the difference in discounts should be based on the identifiable difference between ordinary shares and non-voting shares of comparable companies.

b) Generally accepted valuation methods should be used to calculate the value of a company for unlisted companies or for share classes with different rights, for example, on the basis of the price-earnings ratio and the book value-market value ratio for a group of comparable companies. Preferential cash rights should also be taken into account for at their risk-adjusted present value. The discount should be calculated as described in the previous paragraph.

In all cases, the higher the capital contribution is in relation to the bank’s core tier one capital, the higher the discount to be applied for the provision of tier one capital.

c) With regard to justified recapitalisation measures after the entry into force of the Second Financial Market Stabilisation Act, it will be ensured that any conversion into shares of capital instruments held by SoFFin will be carried out at arm's length. In particular, if a conversion takes place under a capital measure where third parties also acquire shares, the subscription price for SoFFin must not be higher than the subscription price for other shareholders. If a conversion does not involve third parties acquiring shares, the discount must be set pursuant to paragraph 1 to the extent permissible under the German Stock Corporation Law.

d) SoFFin will require market-oriented remuneration also for all other capital instruments. For equity instruments with pre-set remuneration, the market-oriented remuneration will be guided by the Commission Communication of 5 December 2008 and the ECB Recommendations of 20 November 2008, i.e. it will amount to between 7 % and 9.3 % on average, depending on the risk profile of the financial institution and the type of capital instrument; it will amount to at least 10 % on average for financial institutions with a particularly bad risk profile for that sector, depending on the type of hybrid capital instrument. If the remuneration is set at a lower level, corresponding compensation must be given in the form of other secure remuneration components or, if they are not secure, the compensation must be appropriate to the risk. It is possible to deviate from the minimum remuneration if SoFFin provides the capital contribution together with
significant private-investor involvement (at least 30%) on the same terms. Public undertakings within the meaning of the Transparency Directive (Commission Directive 2006/111/EC) do not count as private-sector companies within the meaning of this paragraph.

e) The German Government will establish an alternative coupon satisfaction mechanism (ACSM) – whereby coupons will be paid out in the form of shares instead of cash – for hybrid capital instruments with profit-based remuneration, provided that those instruments continue to be classed as tier one or additional (tier two) capital after the entry into force of the Capital Requirements Regulation (CRR). If there are any doubts, the German Government will take into account a written interpretation from the European Banking Authority and the Directorate-General for Internal Market and Services of the Commission on the recognition of a capital instrument as tier one or tier two instrument, respectively; regardless of this, the German Government will clarify that issue with the competent authorities as soon as possible. The value of coupons paid out as shares instead of cash through an ACSM must be calculated in accordance with standard practice; in particular, that value of coupons should be calculated on the basis of the value of the company or, if the shares are liquid, by taking into account the average share price in the five trading days before the pay-out.

f) If a recapitalisation is planned to be made by a non-share Core Tier 1 instrument and if conditions d) and e) are not fulfilled or probably not fulfillable against the background of the upcoming CRR-legislation, then the German authorities will assume the instruments only with the highest possible reasonable discount to its market value (according to number a). If a market value does not exist, the value of the instrument will be determined in the same way as in b), taking into account the different rights attached to the shares.

5. Under point 5 of Section 5(2) FMStFV, a company which has been supported by a recapitalisation measure must first buy back the shares or a third party must acquire them before it can distribute dividends to its shareholders again. The German Government can – having regard to the provision in number 10, para. 2 (no dividend payouts until the Commission approves a restructuring plan) – refrain from a dividend ban if there are sufficient incentives for the repayment of a State capital injection. The following are sufficient incentives for hybrid capital instruments:

a) A remuneration structure in which, in addition to risk-based and market-oriented pricing within the meaning of point 4 above, step-up clauses in respect of the amount to be repaid or of dividends OR a higher nominal interest rate OR a higher dividend-linked additional remuneration have been agreed upon. In any case, the total expected annual return over a period of five years should be increased by 0.5 percentage points per year, with unsecure remuneration components being evaluated conservatively and in line with the risk.

b) A temporary ban on dividends enables the annual increase of 0.5 percentage points mentioned in (a) to be reduced by 0.1 percentage points for each year of the ban, up to a maximum of 0.5 percentage points.

c) Limiting the distribution of dividends to 20% of the annual net profit for the duration of
the stabilisation measure enables the annual increase of 0.5 percentage points mentioned in (a) to be reduced by 0.2 percentage points.

d) Combinations of some of the elements from (a), (b) and (c), provided that the resulting exit incentive is just as strong.

If recapitalisation is in the form of shares, limiting the upside potential through an exit incentive (e.g. a dividend ban for ordinary shares or the issuing of equity warrants to existing shareholders) will require either a higher discount or a preferential dividend in case of issuing a different class of shares.

6. The German Government has also given a commitment that beneficiary companies will have to fulfil further appropriate conditions with respect to their business activities in order to avoid distortions of competition due to the stabilisation measure, in particular through a ban on advertising to the public that refers to the stabilisation measure, and a ban on aggressive pricing and aggressive expansion of the companies’ business in respect of shareholdings or loans that would not be possible without the stabilisation measure. In that connection the German Government would point out that the effects on competition will already have to be taken into consideration when deciding on an application for stabilisation measures (the first sentence of Section 4(1) FMStFG).

7. With reference to Sections 2 and 4 FMStFV, the German Government has given a commitment that the guarantee provision and the risk assumption will be directed only at solvent financial sector companies, which in principle presupposes that beneficiary companies are sufficiently capitalised. This means that only credit institutions with a Tier 1 ratio of at least 7% can avail themselves of a guarantee provision or risk assumption – even allowing for a recapitalisation pursuant to Section 3 FMStFV. If the institution does not have a Tier 1 ratio of 7% at the time the measures are approved, a guarantee provision or an assumption of risk is possible only if the owners provide a credible commitment that a Tier 1 ratio of 7% will be achieved within three months of the measures being approved, and take all necessary steps to that end. The German Government will ensure that advantage may be taken of guarantees and risk assumption initially only until the agreed deadline for achieving the above-mentioned Tier 1 ratio, and that suitable measures will be taken if the owners do not fulfil their obligation. In particular, a restructuring plan will be submitted within six months in the event of the owners not fulfilling their obligation. This commitment also applies to financial sector companies which are not credit institutions. With reference to Section 3 FMStFV, the German Government has given a commitment that as a rule only companies which undertake to bring their capital base into line with the above-mentioned requirements will be eligible for recapitalisation. Beneficiary credit institutions will also have to ensure as part of the review of their commercial policy under the first point of Section 5(2) FMStFV, that they do not fall short of the requirements regarding minimum regulatory capital plus 2 percentage points that apply in each case. This will be regularly reviewed as part of the reporting obligations.

8. In so far as the company that has already been granted a guarantee framework is granted another, the German Government is to submit to the Commission within three months of the new guarantee being granted a viability review that complies with the Restructuring Communication if, at the time the most recent guarantee is granted, the new and existing guarantees amount to at least 5% of the company's total liabilities and at least EUR 500 million.
9. The German Government is to ensure that a restructuring or liquidation plan will be presented for the company benefiting from the stabilisation measure within six months of demands being made on the Fund through a guarantee.

10. Companies supported by a recapitalisation measure (Section 3 FMStFV) are to submit to the Commission a restructuring plan that complies with the Restructuring Communication six months after the recapitalisation if the company does not undertake to buy back the shares within six months.

The German Government is to ensure, so long as there is no legal obligation, that no investors other than the SoFFin receive dividends or coupon payments on hybrid capital, in any case until the restructuring plan is approved. Even dividend payouts to the SoFFin are not permitted in so far as this would trigger coupon payments on hybrid instruments that would otherwise not be made.

The German Government will also ensure, at least until a restructuring plan is approved, that no acquisitions of companies or business operations are agreed without the Commission's approval if the purchase price exceeds 0.01% of the balance-sheet total at the time of the recapitalisation. Purchases below that threshold must not exceed 0.025% of the balance sheet total. That ban on acquisitions does not apply to purchases in the context of a bank's normal business, particularly acquisitions of shares from debtors of non-performing loans. The Commission must agree to any purchases of shares for the purposes of liquidation.

11. The German Government will make an individual notification if it grants an additional stabilisation measure to a company whose restructuring plan has already been approved by the Commission.

12. The German Government would point out that the upper limit for the recapitalisation of a company, subject to a decision by the steering committee in individual cases, is EUR 10 billion (point 3 of Section 3(2) FMStFV).

13. With reference to Section 4 FMStFV, the German Government also commits itself to ensuring that, no later than thirty-six months after the risk assumption, a redemption that includes compensation in respect of the value at acquisition is effected, or that a remuneration corresponding to the risk is secured and notified to the Commission. A restructuring plan is to be submitted within six months also in cases where risk assumptions exceed both the upper limit laid down in point 6 of Section 4(2) FMStFV and 2% of the institution’s risk-weighted assets.

14. With reference to Section 4 FMStFV the German Government has also provided a commitment that an “appropriate remuneration” will be paid to the Fund for the liquidity made available, being at least a premium corresponding to the twelve-month Euribor rate plus a guarantee fee corresponding to the rules governing guarantees for (covered) bonds (see No 3), provided that a redemption obligation with compensation in respect of the value at acquisition has been agreed. In all other cases of a risk being assumed, the remuneration will be decided on a case-by-case basis to be established in the context of an individual notification, and will be subject to the Commission's approval. The income from the risk positions assumed is to flow into the Fund, but will count towards the remuneration. A commitment has also been given that the duration of the risk assumption will not exceed that of the risk positions and that, should it prove
impossible to effect redemption or compensatory payments for losses of market value upon expiry of the agreed term, a restructuring plan will be presented within six months in so far as no such plan has yet been presented.

15. With reference to Section 4 FMStFG (Decisions on Stability Measures), the German Government has given a commitment that the Federal Ministry of Finance or the Financial Market Stabilisation Institution is to take a decision according to its best judgment and in the light of the importance for financial market stability of the company covered by the stabilisation measure, the urgency of the situation, the effects on competition and the principle of the most effective and most economical use possible of the Fund’s resources. The importance of the financial sector company for financial market stability within the area of validity of the Act will be assessed in particular in the light of its balance sheet total, the level of deposits, the part it plays in the nation’s payments system, and its general importance for maintaining confidence in the stability of the financial market. Nevertheless, smaller financial institutions may also benefit from stabilisation measures in the interests of financial market stability, whereby covert discrimination against individual financial institutions must be averted, regardless of whether or not it concerns a subsidiary of a financial institution with its headquarters in a Member State of the European Union. The German Government would point out that under point 5 of Section 2(2) or Section 4(1) FMStFV, guarantees or risk assumptions can be effected for or by special purpose vehicles, in so far as they have assumed only or mainly risk positions from financial sector companies within the meaning of Section 2(1) FMStFG.

16. With reference to Section 5 FMStFV (Conditions for Stabilisation Measures) the German Government has given a commitment that it will take into consideration the relevant conditions required by the Commission that apply at the time the decision on granting stabilisation measures is taken (point 5 of Section 4(1) FMStFG). The German Government also refers to the fundamental requirement to restrict the remuneration of board members and executives to an appropriate level that is laid down in points 3 and 4 of Section 5(2) FMStFV.

17. The German Government will provide individual notification of measures under Sections 6a and 8a FMStFG (SPV model and wind-up institution) and will submit a restructuring plan in view of the commitment provided in No 10.

18. Germany has given a commitment that it will not implement any of the measures provided for in the rescue package before the Commission grants its approval in Case SA.35748.

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Annex II

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