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**Subject: State Aid SA.58504 (2020/N) – Germany – COVID-19:  
Bundesregelung für Rekapitalisierungsmaßnahmen und  
nachrangiges Fremdkapital 2020**

Excellency,

## 1. PROCEDURE

- (1) On 14 November 2020<sup>1</sup>, and following pre-notification contacts<sup>2</sup>, Germany notified the below defined scheme for recapitalisation measures and subordinated loans (“*Bundesregelung für Rekapitalisierungsmaßnahmen und nachrangiges Fremdkapital 2020*”; hereinafter “the umbrella scheme” or “the scheme”) under the Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak (“Temporary Framework”).<sup>3</sup> Under the umbrella

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<sup>1</sup> Registered on 16 November 2020

<sup>2</sup> The prenotification contacts started on 28 August 2020 and consisted in exchanges in the form of emails and conference calls to discuss draft submissions of the German authorities, notably working documents, follow-up e-mails, etc. The exchanges took place until 14 November 2020.

<sup>3</sup> Communication from the Commission - Temporary framework for State aid measures to support the economy in the current COVID-19 outbreak, 19 March 2020 (OJ C 91I, 20.3.2020, p. 1), as amended by Communication from the Commission C(2020) 2215 final of 3 April 2020 on the Amendment of the Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak (OJ C 112I, 4.4.2020, p. 1), by Communication from the Commission C(2020) 3156 final of 8 May 2020 on the Amendment of the Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak (OJ C 164, 13.5.2020, p. 3), and by Communication from the Commission C(2020) 4509 final of 29 June 2020 on the Amendment of the Temporary Framework

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scheme, aid can be provided in the Federal Republic of Germany, in the form of subordinated loans, equity instruments, and instruments that have an equity component (“hybrid capital instruments”) (all together referred to as “the measures”).

- (2) Further exchanges in the form of emails took place between the Commission and the German authorities between 17 November and 20 November 2020. Subsequently, Germany amended and supplemented the notification on 18 and 20 November 2020.
- (3) Germany exceptionally agrees to waive its rights deriving from Article 342 of the Treaty on the Functioning of the European Union (“TFEU”), in conjunction with Article 3 of Regulation 1/1958,<sup>4</sup> and to have this Decision adopted and notified in English<sup>5</sup>.

## 2. DESCRIPTION OF THE SCHEME

- (4) Germany considers that the COVID-19 outbreak is causing considerable uncertainty in the real economy and turmoil on the capital markets, both at the national level and at the level of the Länder. The containment measures, introduced by various governments, including the Federal and the Länder governments in Germany, to reduce the spread of the coronavirus, significantly limit or stop entrepreneurial activities, which reduces overall production and demand. As a result, undertakings are exposed to liquidity shortage and the risk of insolvency that could threaten their existence and lead to loss of jobs.
- (5) More specifically the German GDP<sup>6</sup> contracted by 1.9% in the first Quarter 2020 compared to the previous quarter, and by 9.8% in the second Quarter 2020<sup>7</sup>. For the year 2020, the German GDP is forecasted to contract by 5.6%.<sup>8</sup>
- (6) The umbrella scheme aims to help stabilise the real economy and safeguard employment in the German Länder by enabling the granting authorities to grant aid for a limited period of time.
- (7) The umbrella scheme forms part of an overall package which aims to ensure, on the one hand, that sufficient liquidity remains available in the market to counter

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for State aid measures to support the economy in the current COVID-19 outbreak (OJ C 218, 2.7.2020, p. 3) and by Communication from the Commission C(2020) 7127 final of 13 October 2020 on the Fourth Amendment of the Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak and amendment to the Annex to the Communication from the Commission to the Member States on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to short-term export-credit insurance, OJ C 340 I, 13.10.2020, p. 1.

<sup>4</sup> Regulation No 1 determining the languages to be used by the European Economic Community, OJ 17, 6.10.1958, p. 385.

<sup>5</sup> Submission by Germany of 23 October 2020.

<sup>6</sup> After adjustment for price, seasonal and calendar variations.

<sup>7</sup> Data of 30 October 2020, according to the Federal Statistical Office (“*Statistisches Bundesamt*”): <https://www.destatis.de/EN/Themes/Economy/National-Accounts-Domestic-Product/Tables/gdp-bubbles.html;jsessionid=F56640FB8D40D74E53CDE4FC08B97D84.internet8741>

<sup>8</sup> Autumn 2020 Economic Forecast: [https://ec.europa.eu/info/business-economy-euro/economic-performance-and-forecasts/economic-forecasts/autumn-2020-economic-forecast\\_en](https://ec.europa.eu/info/business-economy-euro/economic-performance-and-forecasts/economic-forecasts/autumn-2020-economic-forecast_en)

the liquidity shortage faced by undertakings in Germany because of the COVID-19 outbreak, and on the other hand, that the disruptions caused by the outbreak do not undermine the viability of undertakings. The scheme therefore aims to preserve the continuity of economic activity during and after the outbreak. The resources under the scheme can be used for recapitalisation measures to strengthen the capital structure of undertakings.

- (8) Germany considers the scheme to be compatible with the internal market on the basis of Article 107(3)(b) TFEU, as interpreted by Section 2, and Section 3.11 of the Temporary Framework.

## 2.1. The nature and form of aid

- (9) The umbrella scheme concerns a temporary scheme for subordinated loans as well as equity instruments and hybrid capital instruments. The support is available to all enterprises which meet the criteria described in recitals (23) and (24) .
- (10) Subordinated loans will only be granted in so far as they fall under Section 3.11 of the Temporary Framework. Subordinated loans within the ceilings of point 27bis of the Temporary Framework are excluded from the umbrella scheme<sup>9</sup>.
- (11) The umbrella scheme aims to complement the support measures under the federal Economic Stabilisation Fund scheme already approved by the Commission's decision of 8 July 2020<sup>10</sup> (see recital (35)).

## 2.2. Legal basis

- (12) The legal basis for the umbrella scheme is the Regulation on the temporary granting of recapitalisations and subordinated debt within the Federal Republic of Germany in connection with the COVID-19 outbreak (Federal Regulation for Recapitalisation Measures and Subordinated Debt 2020), ("*Regelung zur vorübergehenden Gewährung von Rekapitalisierungen und nachrangigem Fremdkapital im Geltungsbereich der Bundesrepublik Deutschland im Zusammenhang mit dem Ausbruch von COVID-19* ("*Bundesregelung für Rekapitalisierungsmaßnahmen und nachrangiges Fremdkapital 2020*")<sup>11</sup>, (hereafter "the draft Regulation").

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<sup>9</sup> Subordinated loans within the ceilings of point 27bis of the Temporary Framework may be granted under the Federal framework for subsidised loans 2020 ("*Bundesregelung Beihilfen für niedrigverzinsliche Darlehen 2020*"; approved by Commission decision C(2020)2151 final of 2 April 2020 in case SA.56863(2020/N) – Germany - COVID-19: Federal framework for subsidised loans 2020, OJ C 144, 30.4.2020, p. 1; amendment approved by Commission decision C(2020)2365final of 11 April 2020 in case SA.56974(2020/N) – Germany –Amendment to the approved schemes SA.56790 (2020/N)–Federal Framework "Small amounts of aid 2020" ("*Bundesregelung Kleinbeihilfen 2020*") and SA.56863 (2020/N) Federal Framework for subsidised loans 2020 "*Bundesregelung Darlehen 2020*", OJ C 144, 30.4.2020, p. 1; second amendment approved by Commission decision C(2020)5267 final of 27 July 2020 in case SA.58021(2020/N) – Germany COVID-19: Second amendment of federal frameworks for (a) small amounts of aid and (b) subsidised loans, OJ C 269, 14.8.2020, p. 1.)

<sup>10</sup> Commission decision C(2020) 4747 final of 8 July 2020 in case SA.56814 (2020/N) – Germany - COVID-19 measures of the Wirtschaftsstabilisierungsfonds, OJ C 310, 18.9.2020, p. 1.

<sup>11</sup> In the latest draft version of 12 November 2020 provided by the German authorities on 16 November 2020.

- (13) Germany explained that it is envisaged that the Länder<sup>12</sup> that wish to grant support under the draft Regulation adopt specific implementing legislation on the basis of and fully complying with the draft Regulation.

### **2.3. Administration of the scheme**

- (14) Under the draft Regulation, domestic administrative bodies designate authorities to administer the aid granted under the umbrella scheme. Decisions on granting aid under the umbrella scheme are taken by granting authorities established by domestic administrative bodies.
- (15) Germany does not specify which entities can act as granting authorities or domestic administrative bodies, in order to leave flexibility for the Länder in designing their own institutional setups. However, Germany explained that, in principle, it is possible that there are several granting authorities per Land.
- (16) Undertakings have to apply in writing for support measures under the umbrella scheme. If the granting authority decides on granting the aid, it will conclude an agreement with the beneficiary setting out the specific terms and conditions of the aid and the obligations of the beneficiary.

### **2.4. Budget and duration of the scheme**

- (17) The total budget for the scheme depends on the allocation by individual Länder, which has not yet been fully determined.
- (18) Germany provided the following indicative planned budgets by the Länder, totalling EUR 3.35 billion:
- Baden-Württemberg: EUR 1 000 million (Beteiligungsfonds des Landes Baden-Württemberg);
  - Hamburg: EUR 1 000 million, of which EUR 800 million for recapitalisations (Hamburger Stabilisierungsfonds);
  - Hesse (*Hessen*): EUR 500 million (HessenFonds);
  - North Rhine-Westphalia (*Nordrhein-Westphalen*): EUR 50 million (active, NRW.Bank special fund);
  - Saarland: EUR 40 million (Saarland EK);
  - Saxony (*Sachsen*): EUR 370 million (active, Stabilisierungsfonds);
  - Saxony-Anhalt (*Sachsen-Anhalt*): EUR 350 million (active, Sachsen-Anhalt ZUKUNFT)
  - Schleswig-Holstein: EUR 15 million (active, MBG Härtefallfonds Mittelstand);
  - Thuringia (*Thüringen*): EUR 20 million (Thüringer Zukunftsfonds (TZF)).

The budgets above of the individual Länder are only an estimate. The Länder are responsible for setting the total volume of their respective instruments.

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<sup>12</sup> Germany explained that in order to secure symmetrical treatment from a State aid point of view of the Federation and the Länder, the umbrella scheme should cover besides the Länder also the Federal Government. Therefore, reference in the present Decision to "the Länder" means by implication also the Federal Government.

- (19) Germany provided that the funds that are already active provide other aid measures in compliance with the relevant State aid requirements, which are as follows<sup>13</sup>:
- (a) The Bundesregelung Kleinbeihilfen 2020<sup>14</sup>
  - (b) the de minimis Regulation<sup>15</sup>
  - (c) the Bundesregelung Beihilfen für niedrigverzinsliche Darlehen<sup>16</sup>
- (20) Berlin, Brandenburg, Bremen, Mecklenburg-Vorpommern and Rhineland-Palatinate (*Rheinland-Pfalz*) do not currently plan to grant aid under the umbrella scheme. Lower Saxony (*Niedersachsen*) has not yet decided on establishing a special fund (*Beteiligungskapitalfonds*).
- (21) Germany explained that the umbrella scheme does not include the fund of the Land of Bavaria “BayernFonds”, as COVID-19 measures of the “BayernFonds” have been approved separately<sup>17</sup>. Therefore, this decision does not cover the “BayernFonds”.
- (22) According to the draft Regulation, the measures may be granted until 30 September 2021.

## 2.5. Beneficiaries

- (23) The umbrella scheme aims to stabilise undertakings in the real economy in Germany. The beneficiaries of aid granted under the umbrella scheme will be non-financial undertakings. The specific criteria of eligibility (size limits) will be determined by the individual Länder.
- (24) According to the draft Regulation, the aid can be granted to undertakings whose market exit would have a significant impact on the real economy, technological sovereignty, security of supply, critical infrastructure or the labour market of the respective region or beyond.

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<sup>13</sup> However, the indicative budgets described in recital (18) only refer to the measures that can be granted under the umbrella scheme.

<sup>14</sup> approved by Commission decision C(2020) 1953 final of 24 March 2020 in case SA. SA.56790 (2020/N) – DE – Federal Framework "Small amounts of aid 2020" (“Bundesregelung Kleinbeihilfen 2020”), OJ C 112, 3.4.2020, p. 1; amendment approved by Commission decision C(2020)2365final of 11 April 2020 in case SA.56974(2020/N) – Germany –Amendment to the approved schemes SA.56790 (2020/N)–Federal Framework “Small amounts of aid 2020” (“Bundesregelung Kleinbeihilfen 2020”) and SA.56863 (2020/N) Federal Framework for subsidised loans 2020 “Bundesregelung Darlehen 2020”, OJ C 144, 30.4.2020, p. 1

<sup>15</sup> Commission Regulation (EU) No 1407/2013 of 18 December 2013 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to de minimis aid (OJ L 352, 24.12.2013, p.1)

<sup>16</sup> See footnote 9 above.

<sup>17</sup> Approved by Commission decision C/2020/5818 final, of 20 August 2020 in case SA.57447 (2020/N) – Germany – COVID-19 measures of the BayernFonds, OJ C 336, 9. October 2020, p. 1.

- (25) Aid can be provided if it is necessary to stabilise the beneficiary and only if there is an important interest in stabilising the beneficiary. According to the draft Regulation, such a necessity arises when:
- (a) in the absence of the recapitalisation measure, the undertaking would have to cease its activities or would have serious difficulties in maintaining its activities; and
  - (b) the granting of the stabilisation measure is in the common interest.
- (26) The importance of the undertaking for the real economy is an overarching criterion for the individual assessment. The absolute number of jobs in the region affected or beyond, and the importance of the enterprise in the relevant regional labour market will play an important role in the assessment of the individual aid measures. Additional information used will be e.g. the importance of the applicant in the supply chain and the security of supply and critical infrastructure, or the innovation potential of the applicant (e.g. measured by the applicant's expenditure for research and development).
- (27) Furthermore, the draft Regulation requires that the aid is limited to the amount necessary for the stabilisation of the undertaking, i.e. for reestablishing the creditworthiness of the undertaking. Germany explains that the necessary amount will be determined using financial indicators of the business forecasts of the undertaking (see recitals (63) to (68)).
- (28) In any case, the umbrella scheme applies a two-fold test: first, it will establish the amount necessary to stabilise the undertaking (as explained in recital (27)), and subsequently, will estimate the difference between the debt-to-equity ratio on 31 December 2021, as forecasted, to the debt-to-equity ratio on 31 December 2019 in order to ensure that the forecasted debt-to-equity ratio on 31 December 2021 after a recapitalisation would not be lower than the historic debt-to-equity ratio on 31 December 2019. Both limits are absolute. There is a detailed description in section 2.8.2. on the amount of aid.
- (29) Furthermore, aid can be provided only if the objective pursued cannot be achieved as well or better by other means. Aid is not necessary if the company has other financing options available. These options would include non-governmental bodies (for example, from shareholders, or other parties involved in the company, the company's own bank and other credit institutions, funds and associated companies and holdings ("*Beteiligungsgesellschaften*"), or other non-governmental financing or support organizations). Those options would further include offers of promotional banks (such as KfW) or other comparable programmes of the Länder. Moreover, according to the draft Regulation, existing horizontal measures (including existing programmes of promotional banks) to cover liquidity needs have to be insufficient to ensure the undertakings viability, so that aid granted under the umbrella scheme will be "a matter of last resort".<sup>18</sup>

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<sup>18</sup> Germany provided that a similar mechanism to the one used by the *Wirtschaftsstabilisierungsfonds* (WSF) will have to be established by the Länder. One condition for receiving support from the WSF is that no other financing options are available. In practice, this is assessed as follows: As a first step, the applicant must explain specifically for theoretical alternative financing instruments why these are not applicable or sufficient in the specific case. The WSF assesses the explanations for comprehensibility.

- (30) Moreover, according to the draft Regulation, the aid granted must provide a clear, stand-alone prospect of business continuity and viability for the beneficiaries after the end of the COVID-19 outbreak.
- (31) Germany confirmed that aid granted under the umbrella scheme is not to be conditioned on the relocation of any activity of the beneficiary from another country within the European Economic Area (EEA) to Germany.
- (32) Finally, undertakings in difficulty within the meaning of Block Exemption Regulations<sup>19</sup> on 31 December 2019 are excluded from receiving any aid under the umbrella scheme.
- (33) However, according to the draft Regulation, the Länder have the discretion to derogate from the exclusion set out in recital (32) with regard to micro and small enterprises that were already in difficulty on 31 December 2019, provided that these enterprises are not subject, at the moment of granting the aid, to collective insolvency procedure under national law and that they have not received rescue aid or restructuring aid. If these enterprises have received rescue aid, it needs to be confirmed that, at the moment of granting the aid, these enterprises will have reimbursed the rescue loan or terminated the rescue guarantee. If these enterprises have received restructuring aid, it needs to be confirmed that, at the moment of granting of the aid, these enterprises will no longer be subject to a restructuring plan.

## **2.6. Sectoral and geographical scope of the scheme**

- (34) The umbrella scheme is open to all sectors and activities of the economy. The scheme applies to the territory of Germany. Financial undertakings are excluded as eligible beneficiaries.

## **2.7. Complementarity between the umbrella scheme and other schemes at the level of Federation and Länder**

- (35) According to the draft Regulation, the federal Economic Stabilisation Fund (“WSF”) is subsidiary to any programme or fund established by the Länder under the umbrella scheme.
- (36) If aid has already been granted to a beneficiary under the umbrella scheme, it is not entitled to apply for a stabilisation from the WSF, and vice versa. Thus, in

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If the WSF comes to the conclusion that a possible financing option has not been taken into account, the applicant is asked to check this option.

<sup>19</sup> As defined in Article 2(18) of the Commission Regulation (EU) No 651/2014 of 17 June 2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty (OJ L 187 of 26.6.2014, p. 1), in Article 2(14) of Regulation (EU) No 702/2014 of 25 June 2014 declaring certain categories of aid in the agricultural and forestry sectors and in rural areas compatible with the internal market in application of Articles 107 and 108 of the Treaty on the Functioning of the European Union (OJ L 193, 1.7.2014, p. 1), and Article 3(5) of Commission Regulation (EU) 1388/2014 of 16 December 2014 declaring certain categories of aid to undertakings active in the production, processing and marketing of fishery and aquaculture products compatible with the internal market in application of Articles 107 and 108 of the Treaty on the Functioning of the European Union (OJ L 369, 24.12.2014, p. 37).

case of an existing legal commitment for a measure, a parallel measure by the WSF or under the umbrella scheme is excluded.

- (37) If aid has not yet been granted, but the potential beneficiary has applied for aid at the WSF and/or one or more programmes or funds under the umbrella scheme, and the applicant fulfils the eligibility criteria, the Federal Government and/or the Länder will decide which scheme will grant the aid, or whether the aid is granted jointly and is borne proportionately by the involved schemes.
- (38) Germany confirmed that that any aid granted (i) jointly by the WSF and any programme or fund operating under the umbrella scheme, or (ii) jointly by schemes of different Länder, would still constitute a single measure. That single measure would be subject to all Temporary Framework requirements, including the provision on maximum aid, as well as to the legal requirements of either, in case (i), the WSF and the umbrella scheme, or, in case (ii), solely the umbrella scheme.
- (39) To avoid double funding the Federal Government is setting up an information exchange system. The objective of the information exchange between the Federal Government and the Länder is that both levels will be aware of applications by companies that might possibly be addressed to both levels and that a company does not receive double funding.

## **2.8. Basic elements of the scheme**

- (40) Under the umbrella scheme, the granting authorities will provide aid in the form of subordinated loans above the ceilings in point 27bis of the Temporary Framework, equity instruments and hybrid capital instruments (equity instruments and hybrid capital instruments together referred to as “recapitalisations”) in line with the following characteristics and conditions:

### *2.8.1. Types of instruments*

- (41) According to the draft Regulation, recapitalisations can take the following forms:
  - (a) participations in the form of non-voting preferred shares and other non-voting preferred participations in companies other than public limited liability companies (hereafter together “preferred participations”);
  - (b) participations in the form of shares with voting rights (including preferred shares with voting rights) or participations with full voting rights in undertakings other than public limited liability companies (hereafter together “participations with full voting rights”);
  - (c) silent participations and other hybrid capital instruments.
- (42) In the case of recapitalisations using preferred participations, those participations should be issued exclusively to the granting authorities, so that they form a separate class of participations. The same applies to hybrid capital instruments that provide a right to convert debt into equity with voting rights.
- (43) The draft Regulation provides that the use of the instrument of profit participation rights (“*Genussrechte*”) is subject to its notification to the Commission. Thus, it



falls outside the notification of the umbrella scheme and its use is not authorised by the present Decision.

#### 2.8.1.1. Characteristics of preferred participations and preferred shares with voting rights

- (44) Preferred participations and preferred shares with voting rights are part of the share capital of the beneficiary undertaking. They provide the holder with the right to a share of the undertaking.
- (45) Preferred participations and preferred shares with voting rights provide a right in participating in the profits of the undertaking. However, in contrast to ordinary shares, they carry a guaranteed minimum dividend that is calculated as a percentage of the nominal value of the shareholding. If the undertaking cannot service the minimum dividend, the granting authority has a claim on the outstanding dividend. The outstanding dividend has to be paid once the undertaking generates sufficient profits to comply with this obligation. The claim remains with the granting authority even after sale of the participation, if still outstanding.
- (46) Moreover, preferred participations and preferred shares with voting rights may absorb losses under the same conditions as ordinary shares.
- (47) To facilitate the exit of the granting authority, the preferred participations and preferred shares with voting rights may be converted in ordinary shares or participations with voting rights, other than preferred shares with voting rights. This would be in particular the case when the preferred shares are not traded on the stock exchange and there would be limited interest in acquiring them. Moreover, preferred shares purchased at the conditions described in the last sentence of recital (83)(a) will only be converted into ordinary shares to facilitate the exit of the State.

#### 2.8.1.2. Characteristics of hybrid capital instruments

##### *Subordinated convertible bonds*

- (48) Subordinated convertible bonds are accounted as debt both under International Financial Reporting Standards (IFRS) and national accounting standards (as set out in the German commercial code). Their maturity is in case 1 six years (for publicly listed companies) or seven years (for all other companies)<sup>20</sup>, or in case 2 they are perpetual bonds having no maturity (see Annex I of the present Decision).
- (49) The bonds carry a mandatory coupon that is not dependent on the profit of the undertaking and increasing over time. Inability to repay the bonds at maturity will trigger a credit event.
- (50) The bonds may be converted into equity at the discretion of the granting authority. Trigger for the conversion are in principle non-repayment at maturity or

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<sup>20</sup> With the possibility of an extension to a total maturity of ten years under the condition of the provision of a restructuring plan.

non-payment of the coupon during four years in a row. Conversion is not mandatory, to enable the granting authority to secure a senior claim when this would be economically more advantageous. Conversion will be conducted under the conditions described in recital (78).

- (51) The bonds are subordinated to other debt instruments but senior to all equity instruments. They cannot be written down, therefore they do not need to be replenished. Their nominal value has to be repaid and partial repayment before maturity is possible.

*Silent participations (accounted under the German commercial code (“Handelsgesetzbuch”: HGB))*

- (52) Because of their characteristics, those instruments are accounted under HGB as equity but as debt under IFRS<sup>21</sup>. Maturity of the silent participations is limited to six years (for publicly listed companies) or seven years (for all other companies)<sup>22</sup>.
- (53) The silent participations carry a coupon that is dependent on the profit of the undertaking. Coupon payment can be deferred but deferred coupons will carry interest. Once the undertaking generates sufficient profits to service the coupon, the deferred coupons have to be paid. If the instrument is written down, in case of loss absorption, the coupon is still calculated based on the face value of the instrument. Inability to repay the silent participations at maturity will trigger a credit event.
- (54) Germany intends to use silent participations that do not carry conversion rights and silent participations that may be converted into equity at the discretion of the granting authority. Trigger for the conversion are in principle non-repayment at maturity or non-payment of the coupon during four years in a row. Conversion is not mandatory, to enable the granting authority to secure a senior claim when this would be economically more advantageous. Conversion will be conducted under the conditions described in recital (78).
- (55) The silent participations are subordinated to debt instruments and registered capital but senior to capital reserves<sup>23</sup>. They can be written down, and are only junior to registered capital in the order of replenishment<sup>24</sup>. Their nominal value has to be repaid and partial repayment before maturity is possible. However, only after deferred coupons are paid.

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<sup>21</sup> The different accounting treatment according to the national and the international accounting standards results from the different criteria that are used for the characterisation of debt and equity according to these standards. While the accounting of an instrument provides an indication for the treatment of the instrument under the Temporary Framework, it is not a criterion in itself. The categorisation of instruments into equity instruments and hybrid capital instruments is solely based on the characteristics of the instrument.

<sup>22</sup> With the possibility of an extension to a total maturity of ten years under the condition of the provision of a restructuring plan.

<sup>23</sup> Loss absorption of equity instruments will be according to the following waterfall: 1. capital reserves 2. the silent participations 3. registered capital.

<sup>24</sup> Replenishment will be done in the order: 1) registered capital, 2) the silent participations, 3) all other equity components.

*Silent participations (accounted under the International Financial Reporting Standards)*

- (56) Those instruments are accounted under HGB and under IFRS as equity. They are perpetual instruments without a fixed maturity.
- (57) The silent participations carry a coupon that is at full discretion of the undertaking, however subject to covenants. Those covenants include the measures to limit distortion of competition described in recitals (84)(a) to (84)(g). The covenants remain in place until full repayment of the instrument. However, if envisaged in section 3.11.6 of the Temporary Framework, the respective conditions and restrictions can lapse as soon as 75% of the total amount of the recapitalisation have been repaid. Coupon payment can be deferred but deferred coupons will carry interest and payment of all deferred coupons is mandatory before the silent participation is repaid. If the instrument is written down, in case of loss absorption, the coupon is still calculated based on the face value of the instrument.
- (58) The silent participations are subordinated to debt instruments and registered capital but senior to capital reserves<sup>25</sup>. They can be written down, and are only junior to registered capital in the order of replenishment<sup>26</sup>. Their nominal value has to be repaid and partial repayment before maturity is possible, however only after deferred coupons are paid.

*Subordinated loans*

- (59) The subordinated loans are accounted both under IFRS, and national accounting standards as debt. Maturity of the subordinated loans is limited to six years.
- (60) The loans carry a mandatory coupon that is not dependent on the profit of the undertaking and is increasing over time. Inability to repay the loans at maturity will trigger a credit event.
- (61) The loans are not convertible into equity.
- (62) The loans are subordinated to other debt instruments but senior to all equity instruments. They cannot be written down, therefore they do not need to be replenished. Their nominal value has to be repaid and partial repayment before maturity is possible.

*2.8.2. Amount of aid*

- (63) Aid is limited on the one hand to the amount necessary for the stabilisation of the undertaking, i.e. for reestablishing the creditworthiness of the undertaking. The necessary amount will be determined using financial indicators of business forecasts. The decisive factor here is, according to Germany, the dynamic gearing ratio (financial liabilities/Earnings before interest, taxes, depreciation and amortisation (EBITDA)<sup>27</sup>). According to Germany, based on standing practices in

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<sup>25</sup> Loss absorption of equity instruments will be according to the following waterfall: 1. capital reserves 2. the silent participations 3. registered capital.

<sup>26</sup> Replenishment will be done in the order: 1) registered capital, 2) the silent participations, 3) all other equity components.

<sup>27</sup> EBITDA is an indicator of the performance of a company.

debt capital markets for companies with investment grade ratings<sup>28</sup>, this ratio should not exceed 3.0 or 3.5x although this further depends on the type of industry the company is active in and its investor base. Financing requirements that would exceed 3.0 or 3.5x of the EBITDA cannot be funded on the capital market, but should be obtained by other sources. This means that the undertaking should not have higher net indebtedness than 3.0 or 3.5 of its EBITDA by the end of the forecasting period, i.e. by 31 December 2021.

- (64) Thus, Germany considers that the amount of aid is limited to bring the net indebtedness of the undertaking to its forecasted EBITDA multiplied by between 3.0 to 3.5.
- (65) An alternative approach to the financial liabilities/EBITDA ratio, for example when the EBITDA multiplier cannot be calculated due to negative EBITDA figures of the undertaking, is based on the balance sheet structure. If the equity of such an undertaking is partially or completely depleted due to losses during the COVID-19 outbreak, the capability to obtain debt financing at market terms will also require replenishment of the equity basis. Here an equity ratio of at least 15% in the target balance sheet will be the benchmark used by Germany, meaning that the granting authority would recapitalise undertakings up to the target equity ratio of 15%.
- (66) On the other hand, the amount of the recapitalisation is limited to restoring the historic debt-to-equity ratio on 31 December 2019. To determine this, a comparison of the forecasted debt-to-equity ratio with the historic debt-to-equity ratio of the beneficiary prior to the COVID-19 outbreak will be performed. The cut-off date for the forecasts will be 31 December 2021 and the historic basis for the comparison will be 31 December 2019.
- (67) Thus, the German authorities apply a two-fold test: first, the amount necessary to stabilise the undertaking is established; second, the difference between the debt-to-equity ratio on 31 December 2021, as forecasted, to the debt-to-equity ratio on 31 December 2019, is calculated to ensure that in no case the debt-to-equity ratio on 31 December 2021 after a recapitalisation will be lower than the historic debt-to-equity ratio on 31 December 2019. Both limits are absolute limits.
- (68) According to the draft Regulation, all other COVID-19 measures granted or planned will be taken into account in the calculation of the maximum amount of aid<sup>29</sup>.
- (69) Finally, the amount of aid under the umbrella scheme is limited to maximum EUR 250 million per undertaking. Germany will notify individual aid above EUR 250 million to the Commission separately.

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<sup>28</sup> Commonly, to be considered an investment grade, a company has to have a rating of “BBB” or higher.

<sup>29</sup> According to the draft Regulation, this condition will be included in the comparison between the balance sheet structure of 31 December 2019 and the forecast of the prospective capital structure until 31 December 2021.

### 2.8.3. Remuneration

#### 2.8.3.1. Hybrid capital instruments and preferred participations

- (70) According to the draft Regulation, the remuneration takes precedence over the profit-sharing rights of the other shareholders of the beneficiary. The remuneration may take the form, in particular, of preferential profit rights or interest payments.
- (71) The appropriate level of the remuneration will be determined on the basis of criteria commonly used in the market. That determination will factor in the characteristics of the instrument, especially its level of subordination, default risk and all modalities of payment; incentives for exit; and an appropriate benchmark interest rate.
- (72) In general, the minimum remuneration of interest-bearing hybrid capital instruments is calculated as the sum of the base rate (one-year IBOR or equivalent as published by the European Commission), plus a minimum margin as set out in the following table:

#### *Minimum margins (Temporary Framework point 66)*

Type of recipient as defined by the EU	1st year	2nd and 3rd year	4th and 5th year	6th and 7th year	8th year and after
SMEs	225 bps	325 bps	450 bps	600 bps	800 bps
Large enterprises	250 bps	350 bps	500 bps	700 bps	950 bps

- (73) However, the minimum remuneration is adjusted according to the characteristics and the risk profile of the individual instruments:

#### *Minimum remuneration by individual instrument*

Instrument	Remuneration – minimum margins
Subordinated loans	Average of the remuneration provided in points 27bis and 66 of the Temporary Framework: 250/325/325/450/450/550 bps for large undertakings and 200/262.5/262.5/350/350/425 for SMEs
Subordinated convertible bonds	<b>Bonds with fixed maturity:</b> Remuneration as described in recital (72) <b>Perpetual bonds:</b> Remuneration as described in recital (72) plus annually 30 bps
Silent participations (accounted under	<b>Silent participations without conversion</b>

the German commercial code)	<p><b>option:</b></p> <p>Remuneration as described in recital (72) plus the arithmetic average of 50 bps for seven years</p> <p>The additional premium of 50 bps (arithmetic average) can be distributed at the discretion of the State as long as the premium in <math>t \geq</math> the premium in <math>t+1</math></p> <p><b>Silent participations with conversion option:</b></p> <p>Remuneration as described in recital (72) plus the arithmetic average of 40 bps for seven years</p> <p>The additional premium of 40 bps (arithmetic average) can be distributed at the discretion of the State as long as the premium in <math>t \geq</math> the premium in <math>t+1</math></p>
Silent participations (accounted under IFRS)	<p>Either:</p> <p>400/400/500/600/700/800/800/950 bps, or</p> <p>Remuneration as described in recital (72) plus the arithmetic average of 120 bps for 7 years</p> <p>The additional premium of 120 bps (arithmetic average) can be distributed at the discretion of the State as long as the premium in <math>t \geq</math> the premium in <math>t+1</math></p>
Preferred participations	<p>Remuneration as described in recital (72) for preferred shares with voting rights (if not purchased at a discount), and additionally annually 30 bps for preferred shares without voting rights.</p>

(74) The subscription of preferred participations will be done in such a way that those holdings are issued exclusively to the granting authority and thereby constitute a separate class. The entry price is determined in accordance with the conditions described in recitals (75) to (77). The same applies to recapitalisation instruments that include rights of conversion into participations with full voting rights. In the case of preferred participations, the draft Regulation provides for the possibility for an agreement to be reached on a non-increasing rate of remuneration or a lower rate of remuneration in derogation of the table in recital (73), if a substantial discount from the market value is made when setting the entry price. However, the draft Regulation states that such a derogation needs to be notified to the Commission. Therefore, and as such derogation will not be applied unilaterally, it is not part of the scheme approved by the present Decision, with the exception of preferred shares with voting rights, which can be purchased at a 25% discount to the entry price and the remuneration of which may be reduced by 50% (as described in recital (83)(a)).

- (75) In the case of publicly listed companies, the entry price for preferred participations will be closely aligned with the undertaking's market price on the date when the recapitalisation becomes known. Paragraph 31 of the German Securities Acquisition and Takeover Act ("*Wertpapiererwerbs- und Übernahmegesetz*") and paragraph 5 of the Offer Ordinance to the Securities Acquisition and Takeover Act ("*Angebotsverordnung*")<sup>30</sup> apply accordingly, subject to the provision that the average market price of the 15 days preceding the undertaking's first written application regarding a recapitalisation will be applied as the maximum possible entry price paid by the granting authority. In addition, the undertaking's risk profile, the specific characteristics of the selected instrument, special factors affecting share prices, and incentives for exit will also be taken into account when determining the issue price. This may make it necessary to apply an appropriate discount to the share price.
- (76) In the case of publicly listed companies that do not have existing preferred participations traded on the market, and thus the average market price of the 15 days preceding the undertaking's first written application cannot be applied, the entry price will be determined based on the theoretical entry price for ordinary shares, as described in recital (80) with an additional discount of 10%. The discount reflects the difference between the valuation of preferred shares without voting rights and ordinary shares on the German market.<sup>31</sup> Moreover, the value of voting rights also depends on the size of the shareholding. Due to the existence of a blocking minority, the value is much greater for a 25% shareholding than for an 8% shareholding. According to the draft Regulation, preferred shares without voting rights can be used for participations on the subscribed capital up to 20%.
- (77) In other cases, i.e. companies that are not publicly listed, the appropriate entry price will be determined on the basis of expert reports, using recognised methods for the valuation of undertakings. Recapitalisations require the submission of a valuation that either complies with the standard "IDW S1" of the Institute of Auditors ("*Institut der Wirtschaftsprüfer in Deutschland*")<sup>32</sup> or that uses simplified valuation methods (e.g. valuation on the basis of multiples). As described in recital (76), the price will be set at a 10% discount to the result of the expert reports.
- (78) In cases where conversion rights are exercised, a discount of at least 5% is to be taken from the price determined in accordance with the principles described in recitals (80) and (82) below. If two years after conversion, the granting authority still owns equity acquired through conversion, the granting authority receives an additional ownership share of the beneficiary, which shall be at least 10% of the ownership share acquired through conversion, and for which the granting authority does not need to provide any further contribution. As an alternative,

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<sup>30</sup> Paragraph 31 of the Securities Acquisition and Takeover Act sets the conditions for the payment to be made in case of bids aimed at acquiring control. Paragraph 5 of the Offer Ordinance governs the consideration of domestic stock exchange prices.

<sup>31</sup> Information provided by Germany for the WSF scheme (see footnote 4 of the present Decision) shows that the difference in share price between preferred shares without voting rights and ordinary shares in undertakings that have both classes of shares traded is approximately 10-15%.

<sup>32</sup> I.a. the company valuation according to IDW S1 distinguishes two forwardlooking valuation methods (earnings value method, discounted cash flow method).

when shares or other participations are allocated upon exercise of a conversion right, one of the requirements stipulated in recitals (83)(a) to (83)(c) will be fulfilled. Moreover, Germany confirmed that the discount of at least 5% has to be understood as a discount to the Theoretical Ex-Rights Price (TERP).

#### 2.8.3.2. Participations with full voting rights

- (79) Participations with full voting rights are to be acquired by the granting authority particularly in cases where market confidence in the undertaking's continued existence cannot be secured by other means.
- (80) In the case of publicly listed companies, the entry price for participations with full voting rights will be closely aligned with the undertaking's market price on the date when the recapitalisation becomes known. Paragraph 31 of the German Securities Acquisition and Takeover Act and paragraph 5 of the Offer Ordinance to the Securities Acquisition and Takeover Act apply accordingly, subject to the provision that the average market price of the 15 days preceding the undertaking's first written application regarding a recapitalisation will be applied as the maximum possible entry price paid by the granting authority. In addition, the undertaking's risk profile, the specific characteristics of the selected instrument, special factors affecting share prices, and incentives for exit will also be taken into account when determining the issue price. This may make it necessary to apply an appropriate discount to the share price.
- (81) In case of publicly listed companies, that do not have existing preferred shares with voting rights traded on the market, and thus the average market price of the 15 days preceding the undertaking's first written application cannot be applied, the entry price will be determined based on the theoretical entry price for ordinary shares, as described in recital (80).
- (82) In other cases, i.e. companies that are not publicly listed, the appropriate entry price will be determined on the basis of expert reports, using recognised methods for the valuation of undertakings. Either valuation that complies with the standard "IDW S1" of the Institute of Auditors or simplified valuation methods (e.g. valuation on the basis of multiples) can be used for recapitalisations.
- (83) In the case of participations with full voting rights, the recapitalisation will fulfil one of the following requirements:
  - (a) Shares subscribed by the granting authority are issued as a separate class with preferential profit rights as described in recitals (45) and (73). Such shares are referred to in this decision as preferred shares with voting rights. These arrangements will also include a right to claim compensation for lost profits (see recital (45)), and in general the granting authorities will not waive that right. Moreover, the remuneration of preferred shares with voting rights according to the table in recital (72) may be reduced by 50% when the shares are purchased at a 25% discount to the entry price, calculated as described in recitals (80) to (82).
  - (b) A substantial discount to the market value, calculated as described in recitals (80) and (82) is applied when setting the entry price. The substantial discount will be no less than 50%.



- (c) The market value, calculated as described in recitals (80) and (82), is applied when setting the entry price. That entry price is split into two parts: part A is paid for acquiring the ordinary shares and part B is paid to acquire the subscription right of step-up shares (“subscription rights”), to provide an increase in the remuneration as provided in point 61 of the Temporary Framework. Part A will be fixed at a discount in respect of the market price, as calculated as described in recitals (80) and (82); the discount will be at least equivalent to part B<sup>33</sup>. Thus, effectively the step-up shares are purchased for free, and without providing any further funds to the beneficiary at a later stage.<sup>34</sup> The price paid for the subscription right of the step-up shares cannot be higher than the nominal value of the shares to be acquired. If the granting authority has not sold at least 40% of its participation after five years (and after four years for listed companies) after its entry into the participation, subscription rights totalling at least 10% of the nominal value of the shares subscribed by the granting authority mature. The same applies if after seven years (and after six years for listed companies) the granting authority’s participation has not been sold in full. Part B of the entry price counts as an advance payment of the additional step-up shares. In cases where the market value is below the nominal value, a share capital decrease, alone or combined with a share split, will be performed to decrease the nominal value below the market value. Alternatively, the granting authority can decide to acquire preferred shares instead of ordinary shares.

#### 2.8.4. *Governance and prevention of undue distortions of competition*

- (84) Germany provides that the granting authority will require beneficiaries to comply with the following conditions:
- (a) in order to prevent undue distortions of competition beneficiaries must not engage in aggressive commercial expansion financed by State aid or beneficiaries taking excessive risks;
  - (b) beneficiaries of the measures will not advertise them for commercial purposes;
  - (c) until the volume of the measures has been reduced by at least 75%, beneficiaries other than SMEs will not acquire a stake of more than 10% in competitors or other operators in the same line of business, including upstream and downstream operations. In exceptional circumstances, and without prejudice to merger control, such beneficiary undertakings may acquire a stake of more than 10% in operators upstream or downstream in their area of operation if the acquisition is necessary to maintain the viability of the beneficiary. Such acquisitions are contingent on the

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<sup>33</sup> The difference between the discount price and the market price, i.e. the price of the step-up shares for which the Fund receives the subscription rights, is accounted as a “premium”. In case that the step-up is triggered, this premium will be used for the payment of the additional step-up shares.

<sup>34</sup> The arrangement does not interfere with the requirements of Articles 47 and 53 of Directive (EU) 2017/1132 relating to certain aspects of company law, as the “premium”, referred to in footnote 33, will be used for the payment of the additional step-up shares.

Commission's authorisation and cannot be implemented before the approval of the Commission;

- (d) State aid granted under the umbrella scheme will not be used to cross-subsidise economic activities of integrated undertakings that were already in economic difficulties on 31 December 2019. A clear account separation will be put in place in integrated companies to ensure that the measures does not benefit such activities;
  - (e) as long as the beneficiary undertaking is making use of the measures, members of the governing bodies and directors will not be granted any bonuses, other variable remuneration components or similar payments, including any payments from group undertakings. Similarly, special payments in the form of blocks of shares, gratuities or other remuneration in addition to the fixed salary, other remuneration components that are at the discretion of the undertaking or severance payments that are not required by law will not be granted;
  - (f) until the volume of the measures has been reduced by at least 75%, no member of the undertaking's management may receive total remuneration exceeding his/her fixed remuneration on 31 December 2019. In the case of persons who become members of the management at or after the time when the measures is taken, the ceiling is the lowest fixed remuneration of the members of the management with the same level of responsibility on 31 December 2019;
  - (g) for the duration of the measures, no dividends or other profit distributions not owed under contract or law will generally be paid to shareholders other than the granting authorities. Furthermore, the undertaking will not repurchase any shares or other components of its liable capital, or make any other payments not owed under contract or law to shareholders or their affiliated undertakings.
- (85) As regards point 72 of the Temporary Framework, namely that if the beneficiary undertaking has significant market power on at least one of the relevant markets in which it operates, and if the recapitalisation measure exceeds EUR 250 million, the Member State will propose to the Commission additional measures to preserve effective competition in those markets, Germany considers this condition does not apply in the present case. Namely, the umbrella scheme does not cover aid exceeding EUR 250 million and the Länder will have to confirm compliance with point 72 of the Temporary Framework separately when they notify their individual measures above EUR 250 million.
- (86) Restrictions on the beneficiary may be eased in cases where three circumstances are met: i) the regional administrative authority that has established the granting authority has a participation in the beneficiary prior to the recapitalisation and injects new equity under the same conditions as the other partners or shareholders, on a pro rata basis or at a rate of less than their share, ii) the contribution of the private partners or shareholders in such increase is significant and in any case exceeds 30% and iii) the public contribution constitutes State aid in view of special circumstances or the simultaneous granting of other advantages in favour of the recipient. In such cases, it is not necessary to impose specific incentives as regards the State's exit. In particular, the increase in the amount to be reimbursed to the granting authority will not apply and the prohibition from

acquiring shares and paying dividends or other sums or capping on the remuneration of the management will apply for a period of three years from the granting of the support. A prohibition on the distribution of dividends will not apply to shareholdings resulting from the increase in capital and to existing shareholdings provided that the percentage of shareholding held by the shareholders after the increase is below 10%; in other cases, that prohibition will be limited to a period of three years from the date on which the support was granted. In any event, the remuneration of debt or hybrid capital instruments provided by the granting authority will be paid before any dividend.

- (87) Likewise, another exception to the restrictions on the beneficiary is possible. That is the case where the granting authority injects new equity under the same conditions as other investors or shareholders. Where, owing to special circumstances, the acquisition by the State constitutes State aid, and provided that the contribution of the private partners or shareholders in such increase is significant and in any event exceeds 30%, the prohibition on the distribution of dividends will not be absolute. The prohibition will not apply to shareholdings resulting from the capital increase and to existing shareholdings provided that the percentage of those shareholdings after the capital increase is below 10%. In other cases, where the latter percentage is higher than 10%, that prohibition will be limited to a period of three years from the date on which the support was granted. All other conditions laid down in the draft Regulation and section 3.11. of the Temporary Framework will apply.
- (88) Moreover, the following special conditions apply to multinational groups:
- (a) Undertakings that are part of multinational groups are obliged to disclose to the granting authority
    - the legal and beneficial ownership of all parts of their business and
    - their country-by-country reports, if they are required under paragraph 138a (1) of the Fiscal Code (“*Abgabenordnung*”) to prepare such reports.
  - (b) Undertakings that are part of multinational groups will confirm that the granting authority’s resources will not be transferred to non-cooperative jurisdictions as specified in Annex I to the Council conclusions of 18 February 2020.<sup>35</sup> Undertakings whose registered offices are in non-cooperative jurisdictions are not eligible for measures.
- (89) Publicly listed companies may depart from the recommendations of the German Corporate Governance Code only if the granting authority grants permission and if there is an objective reason to do so.
- (90) In addition, the following requirements may be imposed on beneficiary undertakings:
- (a) the undertakings will review their business activities and the economic sustainability of such activities, in order to ensure a sound business policy;

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<sup>35</sup> OJ C 64/8 of 27 February 2020.

- (b) the undertakings will contribute to the performance of the economy, to the stabilisation of production chains and to safeguarding jobs on a sustained basis;
  - (c) the remuneration restrictions described in recital (84)(e) may be imposed on employees in lower levels of management.
- (91) As part of the measures, the granting authority will ensure that the beneficiary undertaking grants the granting authority the following contractual rights:
- (a) an unlimited audit right will be granted to the Federal Court of Auditors (“*Bundesrechnungshof*”) or to the Court of Auditors of the concerned Länder (“*Landesrechnungshof*”);
  - (b) the granting authority will require the beneficiary undertaking that are subject to the audit obligation under Article 316 of the German Commercial Code (“*Handelsgesetzbuch*”) to allow the auditors that audit the annual reports of the beneficiary undertaking to verify that the conditions have been fulfilled and to make a record thereof in the audit report. Beneficiary undertakings that are not subject to the audit obligation will be required to have compliance with the conditions be verified and certified by an auditor, an audit company, a certified accountant, or a tax advisor;
  - (c) the beneficiary undertaking will agree to the individual publication of the measures granted according to the requirements of the Commission.
- (92) The granting authority may require the beneficiary undertaking to submit a declaration of commitment by the management bodies which will include respective conditions. The conditions may be contractually agreed, the legal consequences of an infringement by the beneficiary undertaking may also be regulated by contract. In particular, termination rights, entitlements to compensation and contractual penalties may be stipulated as contractual legal consequences.

#### 2.8.5. *Exit of the State*

- (93) The following requirements apply:
- (a) The aim is to generally terminate the measures within six years of the measures being granted. If the measures are terminated through sale to a new investor or an existing shareholder, the equity will be sold at market price and in compliance with the principles of transparency and non-discrimination. If the State sells its equity stake at a price below the minimum price laid down in recital (93)(b), the governance rules laid down in section 3.11.6 of the Temporary Framework shall continue to apply at least until four years after the COVID-19 equity injection measure was granted.
  - (b) To the extent legally permissible, a buyback by the beneficiary undertaking itself will be considered as an alternative to a sale on the market. The buyback price will be the higher amount of (i) the nominal investment by the State increased by an annual interest remuneration 200

basis points higher than presented in the table described in recital (72); or  
(ii) the market price at the moment of the buyback.

- (94) If the State is the only existing shareholder, the redemption of COVID-19 recapitalisation may take the following form, notwithstanding point 64 of the Temporary Framework. Provided two years have passed since the granting of COVID-19 recapitalisation:
- (a) the sales process referred to in point 64 of the Temporary Framework is not required, and
  - (b) the open and non-discriminatory consultation referred to in point 64 of the Temporary Framework may be replaced by a valuation of the beneficiary performed by an entity independent from that beneficiary and from the State. If that independent valuation establishes a positive market value, the State is deemed to have exited from the COVID-19 recapitalisation, even if the beneficiary remains State-owned. Nevertheless, if the positive market value is less than the minimum price laid down in point 63 of the Temporary Framework, the governance rules laid down in section 3.11.6 of the Temporary Framework shall continue to apply until four years after the grant of the COVID-19 measure. The Commission may in any case on its own initiative request the submission of the independent valuation and may evaluate it to ensure that it complies with the standard set to ensure transactions that are in line with market conduct.

With regard to the condition in the Temporary Framework that for COVID-19 measures that exceed EUR 250 million, independent valuations need to be submitted to the Commission, Germany considers that, as the umbrella scheme does not provide for individual recapitalisations above EUR 250 million, the condition is not applicable (in the same way, see also recital (85) on the applicability of point 72 of the Temporary Framework).

- (95) If the State is one of several existing shareholders, the redemption of the COVID-19 recapitalisation may take the following form, alternatively to point 64 of the Temporary Framework. Provided two years have passed since the granting of the COVID-19 recapitalisation:
- (a) For the part of the COVID-19 equity that the State would need to retain in order to restore its shareholding to that before the COVID-19 recapitalisation, the possibility described in recital (94) above is applicable. If the State sells a significant fraction of the shares of the beneficiary undertaking to private investors via a competitive process as referred to in point 64 of the Temporary Framework, that process can be considered as an independent valuation for the purposes of the procedure described in recital (94) above.
  - (b) For the rest of the COVID-19 equity, point 64 of the Temporary Framework applies. This includes in particular the need to conduct a competitive process. The State does not have the priority rights mentioned in point 64 of the Temporary Framework as it already exercised that right under application of letter (a) above.

When the redemption of the COVID-19 recapitalisation concerns only a fraction of the COVID-19 equity, letters (a) and (b) above apply to that fraction of the COVID-19 equity.

- (96) Beneficiaries other than SMEs that have received a measure exceeding 25% of their equity at the time when the measure was granted will demonstrate a credible strategy for exiting the measure, unless the granting authority's participation is reduced below the level of 25% of equity within 12 months after the aid was granted. In particular, the strategy will address the undertaking's continued operation and include a plan for the provision of remuneration and repayments.
- (97) Beneficiaries other than SMEs will report to the granting authority on the progress made in implementing the repayment schedule and on compliance with the conditions set out in points 71 to 78 of the Temporary Framework within 12 months of the submission of the schedule, and thereafter periodically every 12 months.
- (98) For the duration of the measure, beneficiaries other than SMEs will, within 12 months from the date of the granting of the aid and thereafter periodically every 12 months, publish information on the use of the aid received. In particular, this should include information on how their use of the aid received supports their activities in line with EU objectives and national obligations linked to the green and digital transformation, including the EU objective of climate neutrality by 2050.
- (99) If, after six years have elapsed since a measure was granted, the total volume of the measure has not been reduced below 15% of the undertaking's equity, a restructuring plan in accordance with the Guidelines on State aid for rescuing and restructuring non-financial undertakings in difficulty<sup>36</sup> will be notified to the European Commission for approval. In the case of SMEs and businesses that are not publicly listed, the notification requirement comes into effect after seven years.
- (100) The measures granted under the umbrella scheme will be terminated no later than ten years after the granting of such measures, unless termination would be unprofitable, would directly endanger public safety and order, technological sovereignty in high-tech areas or the continued operation of the undertaking, or would have significant negative effects on the overall economy.
- (101) Germany confirmed in the notification form that it will report to the Commission annually on the implementation of the repayment schedule and compliance with the conditions in section 3.11.6 of the Temporary Framework.

#### 2.8.6. *Commitments provided by Germany*

- (102) On 20 November 2020, the German authorities submitted the following commitments to the European Commission, which complete and amend the notified umbrella scheme as set out in the legal basis in recital (12):

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<sup>36</sup> Communication from the Commission — Guidelines on State aid for rescuing and restructuring non-financial undertakings in difficulty (OJ C 249, 31.7.2014, p. 1).

- (a) the granting authority will only use the instruments that are described (characteristics, conditions and remuneration), in the Excel table provided in the notification of 14 November 2020 (Annex I of this decision);
- (b) Germany committed not to make use of the provisions under § 4(3) of the draft Regulation and thus, will not acquire shares from existing shareholders in parallel to and as an additional step to a direct recapitalisation measure into the undertaking.

## **2.9. Cumulation**

- (103) The German authorities confirm that aid granted under the scheme may be cumulated with aid under *de minimis* Regulations<sup>37</sup> or the Block Exemption Regulations provided the provisions and cumulation rules of those Regulations are respected.
- (104) The German authorities confirm that aid granted under the scheme may be cumulated with aid granted under other measures approved by the Commission under other sections of the Temporary Framework provided the provisions in those specific sections are respected.

## **2.10. Monitoring and reporting**

- (105) The German authorities confirm that they will respect the monitoring and reporting obligations laid down in section 4 of the Temporary Framework (including the obligation to publish relevant information on each individual aid above applicable thresholds granted under the scheme on the comprehensive State aid website or Commission's IT tool within 3 months from the moment of the recapitalisation<sup>38</sup>).

## **3. ASSESSMENT**

### **3.1. Lawfulness of the scheme**

- (106) By notifying the scheme before putting them into effect, the German authorities have respected their obligations under Article 108(3) TFEU.

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<sup>37</sup> Commission Regulation (EU) No 1407/2013 of 18 December 2013 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to *de minimis* aid (OJ L 352, 24.12.2013, p.1), Commission Regulation (EU) No 1408/2013 of 18 December 2013 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to *de minimis* aid in the agriculture sector (OJ L 352, 24.12.2013 p. 9), Commission Regulation (EU) No 717/2014 of 27 June 2014 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to *de minimis* aid in the fishery and aquaculture sector (OJ L 190, 28.6.2014, p. 45) and Commission Regulation (EU) No 360/2012 of 25 April 2012 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to *de minimis* aid granted to undertakings providing services of general economic interest (OJ L 114 of 26.4.2012, p. 8).

<sup>38</sup> Referring to information required in Annex III to Commission Regulation (EU) No. 651/2014 of 17 June 2014 and Annex III to Commission Regulation (EU) No 702/2014 and Annex III of the Commission Regulation (EU) No 1388/2014 of 16 December 2014.

### **3.2. Existence of State aid**

- (107) For a measure to be categorised as State aid within the meaning of Article 107(1) TFEU, all the conditions set out in that provision must be fulfilled. First, the measure must be imputable to the State and financed through State resources. Second, it must confer an advantage on its recipients. Third, that advantage must be selective in nature. Fourth, the measure must distort or threaten to distort competition and affect trade between Member States.
- (108) The scheme consists in the actions of the granting authorities established by domestic administrative bodies under the draft Regulation. Decisions on granting measures under the draft Regulation are taken by the granting authorities designated by the Federation and Länder (see recitals (14) to (16)). The umbrella scheme is, thus, imputable to the State. The measures granted under the umbrella scheme are financed through State resources, since they are financed by public funds.
- (109) The measures granted under the umbrella scheme confer an advantage on their beneficiaries in the form of subordinated loans, equity instruments, and hybrid capital instruments at preferential terms compared to market terms, so at terms that they would not have otherwise been able to secure on the market (see recitals (25) and (29)). The measures thus relieve those beneficiaries of costs that they would have had to bear under normal market conditions.
- (110) The advantage granted by the measures under the umbrella scheme is selective since it is awarded only to certain undertakings, namely SMEs and large enterprises, that require liquidity as a result of the COVID-19 outbreak and that were not in difficulty on 31 December 2019, and excludes financial institutions (see recitals (23) to (26) and (32)). In addition, the granting authorities have a margin of discretion in the assessment of applications for support measures. In particular, the granting authorities can choose beneficiaries according to the criteria described in recital (24).
- (111) The umbrella scheme is liable to distort competition, since it strengthens the competitive position of its beneficiaries. The umbrella scheme also affects trade between Member States, since those beneficiaries may be active in sectors in which intra-Union trade exists.
- (112) In view of the above, the Commission concludes that the umbrella constitutes State aid within the meaning of Article 107(1) TFEU. The German authorities do not contest that conclusion.

### **3.3. Compatibility**

- (113) Since the umbrella scheme involves State aid within the meaning of Article 107(1) TFEU, it is necessary to consider whether it is compatible with the internal market.
- (114) Pursuant to Article 107(3)(b) TFEU the Commission may declare compatible with the internal market aid “to remedy a serious disturbance in the economy of a Member State”.
- (115) By adopting the Temporary Framework on 19 March 2020, the Commission acknowledged (in section 2) that “the COVID-19 outbreak affects all Member



States and that the containment measures taken by Member States impact undertakings”. The Commission concluded that “State aid is justified and can be declared compatible with the internal market on the basis of Article 107(3)(b) TFEU, for a limited period, to remedy the liquidity shortage faced by undertakings and ensure that the disruptions caused by the COVID-19 outbreak do not undermine their viability, especially of SMEs”.

- (116) The umbrella scheme aims at facilitating the access of undertakings to external finance and restoring their capital at a time when the normal functioning of several markets is severely disturbed by the COVID-19 outbreak and that outbreak is affecting the wider economy and leading to severe disturbances of the real economy of Member States.
- (117) The umbrella scheme is conceived at the level of the Federation and of the Länder to remedy a serious disturbance in the economy. It complements a series of measures conceived at national level by the German authorities. The importance of the umbrella scheme to preserve employment and economic continuity is widely accepted and it can be reasonably anticipated to produce effects across the entire economy. Furthermore, the umbrella scheme has been designed to meet the requirements of a specific category of aid (“Recapitalisation measures”) described in section 3.11 of the Temporary Framework.
- (118) The Commission accordingly considers that the umbrella scheme is necessary, appropriate and proportionate to remedy a serious disturbance in the economy of a Member State and meet all the conditions of the Temporary Framework.
  - (a) According to the draft Regulation, the measures can be granted under the umbrella scheme at the latest by 30 September 2021 (recital (22)). The umbrella scheme therefore complies with point 48 of the Temporary Framework.
  - (b) The measures are only provided to undertakings that would otherwise go out of business or would face serious difficulties to maintain their operations. The granting authorities will conclude an evaluation to assess whether that condition is met (recitals (24) to (28)). The umbrella scheme therefore complies with point 49(a) of the Temporary Framework.
  - (c) The measures will only be provided where there exists a common interest to intervene, as investments are only provided to undertakings whose failure would likely involve social hardship or market failure due to significant loss of employment, the exit of an innovative company, the exit of a systemically important company or the risk of disruption to an important service (recital (24)). As described in recital (26), in order to establish the social hardship or the market failure, the significance of the undertaking (including absolute number of employees, importance of the applicant in the supply chain, or research and development expenditure) will be assessed. The umbrella scheme therefore complies with point 49(b) of the Temporary Framework.
  - (d) The measures are provided to undertakings that are not creditworthy, and thus are not able to find financing on the markets; an assessment concerning the creditworthiness of the undertakings (recitals (28) and

(29)) will be carried out. The umbrella scheme therefore complies with point 49(c) of the Temporary Framework.

- (e) Undertakings already in difficulty on 31 December 2019 are excluded from benefitting from the umbrella scheme (recital (32)). It may be decided by the Länder that aid can be granted to micro or small enterprises (within the meaning of Annex I of the General Block Exemption Regulation) that were already in difficulty on 31 December 2019 provided that they are not subject to collective insolvency procedure under national law, and that they have not received rescue aid or restructuring aid (see recital (33)). That derogation is in line with point 49(d)bis of the Temporary Framework. The umbrella scheme therefore complies with point 49(d) of the Temporary Framework.
- (f) The measures are provided only following a written request for such instruments by the beneficiary (recital (16)). The umbrella scheme therefore complies with point 50 of the Temporary Framework.
- (g) A separate notification will be made for individual aid above the threshold of EUR 250 million (recital (69)). The umbrella scheme therefore complies with point 51 of the Temporary Framework.
- (h) The aid will not exceed the minimum needed to ensure the viability of the beneficiary, and not go beyond restoring the capital structure of the beneficiary to the one predating the COVID-19 outbreak. As Germany committed, the cap for recapitalisation will be set at the differential between the capital structure of the beneficiary on 31 December 2019 and at the end of the forecasting period, i.e. 31 December 2021 (recitals (63) to (67)). In assessing the proportionality of the aid, State aid received or planned in the context of the COVID-19 outbreak will be taken into account (recital (68)). The umbrella scheme therefore complies with point 54 of the Temporary Framework.
- (i) A capital injection by the granting authority will be conducted at maximum at a price that does not exceed the average share price of the beneficiary over the 15 days preceding the request for the capital injection, or an estimation of its market value by an independent expert if the beneficiary is not publicly listed (recitals (75) to (77), (80) and (81)). The entry price may be reduced by a discount for the purpose of the step-up tools (recitals (83)(b) and (83)(c)).

Concerning the entry price for preferred shares without voting rights, as described in recital (76), the Commission notes Germany's commitment not to purchase more than a 20% stake in individual undertakings by the use of preferred shares without voting rights (see Annex I). Moreover, information provided by Germany for the WSF scheme<sup>39</sup> shows that the difference in share price between preferred shares without voting rights and ordinary shares in undertakings that have both classes of shares traded is approximately 10-15%. Given that (i) Germany has limited the use of

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<sup>39</sup> See footnote 4.

this instrument to a maximum 20% stake, (ii) the fact that, in addition to the proposed 10% discount, the annual minimum dividend of preferred shares without voting rights will have an additional top-up of 30bps compared to preferred shares with voting rights (see the table in recital (73)), and (iii) dividends to ordinary shares cannot be paid until the preferred shares have been repaid<sup>40</sup>, the Commission considers the discount of 10% compared to the entry price for ordinary shares to be sufficient and proportionate as estimation for the value of the voting rights.

Therefore, the umbrella scheme complies with point 60 of the Temporary Framework.

- (j) The umbrella scheme includes step-up mechanisms or alternative mechanisms to step-up mechanisms in the form of (i) a significant discount to the market price when entering into the capital of a beneficiary (recital (83)(b)), or (ii) additional shares (via the exercise of subscription rights) corresponding to an increase of 10% in remuneration if the State has not sold a minimum percentage of its shareholding (recital (83)(c)) and (iii) in case of preferred shareholdings and preferred shares with voting rights a step-up in form of an increasing minimum dividend (recitals (83)(a)).

Concerning (i), the Commission notes that the discount will be at minimum 50% of the market price. Point 62 of the Temporary Framework allows the Commission to accept mechanisms, other than the mechanism described in point 61 of the Temporary Framework, provided that they overall lead to a similar outcome with regard to the incentive effects on the exit of the State and a similar overall impact on the State's remuneration. The discount proposed by Germany has a larger dilution effect on the existing shareholders than the mechanism in point 61 of the Temporary Framework. Moreover, the State would potentially receive a higher stake in the beneficiary and thus a higher potential remuneration.

The Commission notes that under the proposed ex ante discount, in terms of remuneration the State is having an ex ante benefit. The step up mechanism from point 61 of the Temporary Framework does not necessarily lead to such higher remuneration for the State in case of exit. Therefore, in terms of remuneration of the State the proposed mechanism is adequate. In terms of incentives to minimise State participation, the beneficiaries would be incentivised to minimise the amount of aid and exhaust all other possibilities instead of resorting to State recapitalisation measures since an ex ante discount of 50% is a significant penalty for existing shareholders.

Concerning (iii), i.e. step-up for referred participations and preferred shares with full voting rights. The Commission notes that these instruments have characteristics similar to ordinary participations (e.g. the holder of the instrument receives a share of the undertaking, the instrument can absorb losses, the instrument can fully participate in profits, the instrument is not senior to ordinary participations, see recitals

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<sup>40</sup> Due to the prohibition of dividend payments.

(44) to (46)). Thus, the Commission considers that these instruments have to be regarded as being equity instruments. Therefore, the remuneration of these instruments has to comply with point 61 of the Temporary Framework, or alternatively point 62 of the Temporary Framework.

The Commission observes that, as committed by Germany, (a) preferred participations will carry a minimum remuneration according to the table described in recital (72) plus annually an additional 30bps, and (b) preferred shares with voting rights will carry minimum remuneration according to the table described in recital (72) (see table in recital (73)).<sup>41</sup> The Commission notes that this alternative mechanism is in line with point 62 of the Temporary Framework since it leads to a similar outcome with regard to the incentive effects on the exit of the State and a similar overall impact on the State's remuneration as point 61 of the Temporary Framework (step up). While, in the years of the step-up in point 61 of the Temporary Framework (year five and seven after the COVID-19 recapitalisation for not publicly listed companies, and year four and six for listed companies), the effect of the remuneration put forward by Germany would be lower than under the step-up mechanism in point 61 of the Temporary Framework, the overall economic effect of the alternative remuneration is advantageous when compared to the effect of the mechanism in point 61 of the Temporary Framework.<sup>42</sup> Since also the remuneration increases significantly over time, it also provides sufficient exit incentives. In addition, the Commission notes the beneficiaries have sufficient incentives to ensure timely payment of the minimum remuneration since until that remuneration is not paid the governance conditions (see recital (84)) would apply for the company (even in cases where the preferred shares are sold to 3<sup>rd</sup> parties (a possibility envisaged in recital (45))).

Therefore, the umbrella scheme complies with points 61 and 62 of the Temporary Framework.

- (k) The capital injection can be bought back by the beneficiary at any time, while taking into account an appropriate remuneration (recital (93)(b)). Furthermore, the granting authority may sell at any time its equity participation at market prices to purchasers other than the beneficiary, following an open and non-discriminatory consultation (recital (93)(a)). In that regard, Germany confirmed to follow the conditions set out in points 63 and 64 of the Temporary Framework (recitals (93)(b)). Therefore, the umbrella scheme complies with points 63 and 64 of the Temporary Framework.

The granting authorities may derogate from point 64 of the Temporary Framework within the limits set by points 64bis and 64ter of the Temporary Framework (see recitals (94) and (95)). The derogation is in

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<sup>41</sup> The minimum remuneration for preferred shares with voting rights is lower, because of the intrinsic value of the voting right.

<sup>42</sup> The calculation was performed under the assumption of profits at a constant level. As the preferred participations and the preferred shares with voting rights have a cumulative dividend, i.e. also a claim on a dividend in years when the undertaking does not generate sufficient profits to service the dividend claim of the instrument, the economically advantageous effect could increase in loss making years.

line with points 64bis and 64ter of the Temporary Framework. Therefore, the umbrella scheme complies with points 64bis and ter of the Temporary Framework.

The Commission notes that with regard to the condition in the Temporary Framework that for COVID-19 recapitalisation measures that exceed EUR 250 million, independent valuations need to be submitted to the Commission, the umbrella scheme does not provide for individual recapitalisations above EUR 250 million (see also recital (69)). This condition does not need to be met for recapitalisations up to EUR 250 million, therefore does not negatively impact compliance with point 64 of the Temporary Framework.

- (l) The Commission notes that the conditions of the hybrid capital instruments notified by Germany embed various risk characteristics. As shown by the description of the characteristics and conditions of the hybrid capital instruments in recitals (48) to (58), the characteristics range from limited risk (e.g. the maturity is limited, the coupon payments are mandatory with limited exceptions, the granting authorities have a conversion option in case of certain predetermined events), to risk characteristics close to the risk characteristics of equity instruments (e.g. no maturity, loss absorption of the instrument, coupon payment at the discretion of the issuer). The Commission considers that it is therefore appropriate to require additional extra margins above the minimum rates reflected in the table included in point 66 of the Temporary Framework, with the exception of the least risky instrument (i.e. subordinated convertible bond with fixed maturity) for which the margins notified by Germany comply with the minimum remuneration of that table (recital (73)).

The Commission considers that the buy-back price provided in point 63 second sentence (i) of the Temporary Framework can be used as a benchmark for the appropriate remuneration of instruments with the risk characteristics of equity instruments. In this regard, the Commission notes that the instrument with the highest risk characteristics (i.e. silent participation under IFRS)<sup>43</sup> has still a lower risk than ordinary equity instruments (e.g. payment of coupons while at the discretion of the issuer still subject to covenants that still apply until full repayment even if the granting authority sells its claims, and payable at the end of the term, interest on non-paid coupon, repayment of nominal value). The Commission considers that the additional extra margins proposed by Germany (recital (73)) appropriately reflect the risk characteristics of the instruments and thus comply with point 65 of the Temporary Framework.

Subordinated loans will have a remuneration below the minimum remuneration provided in point 66 of the Temporary Framework. The Commission notes, in that regard, that the minimum remuneration in point 66 of the Temporary Framework applies to hybrid capital instruments, i.e.

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<sup>43</sup> Silent participations under IFRS are the hybrid capital instrument that is closest to ordinary equity. As described in recitals (53) to (55), these instruments are for example accounted as equity, are loss absorbing, have a dividend that is at the discretion of the beneficiary and are not tradable.

instruments that have an equity component and thus an increased risk compared to pure debt instruments. Therefore, remuneration of subordinated loans below the minimum provided in point 66 of the Temporary Framework is justified by the lower risk and the fact that the subordination of the loans will only have an impact on the State in a gone concern scenario. The Commission considers that in accordance with point 59 of the Temporary Framework, taking into account the characteristics of the subordinated loans that the granting authority may provide, the remuneration, as described in recital (73), is appropriate.

Germany will use only the instruments with the characteristics, conditions, and remuneration as described in recitals (48) to (58), and (73), and Annex I.

Therefore, the umbrella scheme complies with the remuneration provisions included in points 65 and 66 of the Temporary Framework.

- (m) The conversion options for convertible hybrid capital instruments are to be conducted at 5% or more below the TERP at the time of the conversion (recital (78)). Therefore, the umbrella scheme complies with point 67 of the Temporary Framework.
- (n) After conversion of a convertible hybrid capital instrument into equity, a step-up mechanism increases the remuneration of the granting authority by applying one of the step-up mechanisms described in recitals (78) and (83)(a) to (83)(c) to incentivise beneficiaries to buy back the equity (recital (78)). Therefore, the umbrella scheme complies with point 68 of the Temporary Framework.
- (o) In order to prevent undue distortions of competition beneficiaries must not engage in aggressive commercial expansion financed by State aid or beneficiaries taking excessive risks (see recital (84)(a)). Therefore, the umbrella scheme complies with point 71 of the Temporary Framework.
- (p) For beneficiaries of recapitalisation measures above EUR 250 million that have significant market power on at least one of the relevant markets in which they operate, measures to preserve effective competition in those markets will be proposed by Germany to the Commission as part of the notification of individual recapitalisation measures above EUR 250 million. The proposals may cover structural or behavioural commitments foreseen in Commission Notice on remedies acceptable under the Council Regulation (EC) No 139/2004 and under Commission Regulation (EC) No 802/2004 (recital (85)). The Commission notes that, the umbrella scheme does not cover recapitalisation measures above EUR 250 million (see also recital (69)). Aid above EUR 250 million will not be provided under the umbrella scheme, therefore, point 72 of the Temporary Framework is not applicable.
- (q) Beneficiaries are not allowed to advertise the investment by the granting authority for commercial purposes (recital (84)(b)). Therefore, the umbrella scheme complies with point 73 of the Temporary Framework.
- (r) As long as 75% of the investment of the granting authority is not redeemed, the beneficiaries other than SMEs are not allowed to acquire a more than 10% stake in competitors or operators in the same line of

business. In exceptional circumstances, and without prejudice to merger control, beneficiaries may acquire a more than 10% stake in operators upstream or downstream in their area of operation, only if the acquisition is necessary to maintain the beneficiary's viability and upon Commission's prior approval (recital (84)(c)). Therefore, the umbrella scheme complies with points 74 and 75 of the Temporary Framework.

- (s) Beneficiaries are prohibited from using the received aid to cross-subsidise other economic activities of integrated undertakings that were already in economic difficulties on 31 December 2019. A clear separation of accounts will be put in place to ensure this (recital (84)(d)). The umbrella scheme, therefore, complies with point 76 of the Temporary Framework.
- (t) As long as the granting authority's equity resulting from the recapitalisation has not been fully redeemed, beneficiaries cannot make dividend payments or non-mandatory coupon payments, or buy back shares, other than in relation to the granting authority (recital (84)(g)). The umbrella scheme therefore complies with point 77 of the Temporary Framework.
- (u) As long as at least 75% of the investment of the granting authority has not been redeemed, the cap on the remuneration of management indicated in point 78 of the Temporary Framework is applied (recital (84)(f)). Moreover, as long as the investment is not fully redeemed, members of the governing bodies and directors will not be granted any bonuses, other variable remuneration components or similar payments, including any payments from group undertakings. Similarly, special payments in the form of blocks of shares, gratuities or other remuneration in addition to the fixed salary, other remuneration components that are at the discretion of the undertaking or severance payments that are not required by law will not be granted (recital (84)(e)). The umbrella scheme therefore complies with point 78 of the Temporary Framework.
- (v) Restrictions related to the governance of the beneficiaries referred to in recitals (84)(c) and (84)(f), as well as the obligation to increase the amount to be reimbursed to the granting authority in accordance with point 61 and 62 of the Temporary Framework, are lifted in circumstances corresponding to those described in points 78bis and 78ter of the Temporary Framework (recitals (85) and (87)). Therefore, the umbrella scheme comply with points 78bis and 78ter of the Temporary Framework.
- (w) Large enterprises that have received recapitalisation from the granting authority of more than 25% of their equity have to demonstrate a credible exit strategy for the participation of the granting authority within 12 months after receiving the investment (recital (96)). The umbrella scheme therefore complies with points 79 to 81 of the Temporary Framework.
- (x) Beneficiaries of the recapitalisation will have to report to the granting authority on the progress in the implementation of the repayment schedule as well as the compliance with the obligations described in recital (84) within 12 months of the repayment schedule's presentation, and thereafter periodically every 12 months (recital (97)). The umbrella scheme therefore complies with point 82 of the Temporary Framework.

- (y) As long as the recapitalisation by the granting authority has not been fully redeemed, beneficiaries of the recapitalisation, other than SMEs, shall, within 12 months from the date of the granting of the aid and thereafter periodically every 12 months, publish information on the use of the aid received. In particular, this should include information on how their use of the aid received supports their activities in line with EU objectives and national obligations linked to the green and digital transformation, including the EU objective of climate neutrality by 2050 (recital (98)). The umbrella scheme therefore complies with point 83 of the Temporary Framework.
  - (z) Germany confirmed that it will provide annual reporting to the European Commission regarding the granting authority's activities, the implementation of the repayment schedules and compliance with the obligations described in recital (84) (recital (101)). Where a beneficiary received a recapitalisation above EUR 250 million, the report shall include information on compliance with the conditions set in point 54 of the Temporary Framework. The umbrella scheme therefore complies with point 84 of the Temporary Framework.
  - (aa) A restructuring plan of the beneficiary in accordance with the conditions of the Rescue and Restructuring Guidelines will be notified if six years, or seven years in case of SMEs and businesses that are not publicly listed, after recapitalisation under the Measure the granting authority's intervention has not been reduced below 15% of the beneficiary's equity (recital (99)). The umbrella scheme therefore complies with point 85 of the Temporary Framework.
- (119) The German authorities confirm that the monitoring and reporting rules laid down in section 4 of the Temporary Framework will be respected (recital (105)). The German authorities further confirm that the aid under the umbrella scheme may only be cumulated with other aid approved under the Temporary Framework, provided the specific provisions in the sections of the Temporary Framework are respected and the cumulation rules of the relevant block exemption Regulations are respected (recitals (103) and (104)).
- (120) The Commission therefore considers that the umbrella scheme (with the commitment described in section 2.8.6. and explained in Annex 1 to this decision) is necessary, appropriate and proportionate to remedy a serious disturbance in the economy of a Member State pursuant to Article 107(3)(b) TFEU since it meets all the relevant conditions of the Temporary Framework.

#### **4. CONCLUSION**

The Commission has accordingly decided not to raise objections to the umbrella scheme on the grounds that it is compatible with the internal market pursuant to Article 107(3)(b) of the Treaty on the Functioning of the European Union.

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>.

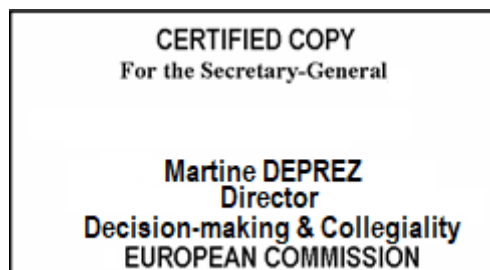
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State Aid Greffe  
B-1049 Brussels  
[Stateaidgreffe@ec.europa.eu](mailto:Stateaidgreffe@ec.europa.eu)

Yours faithfully,

For the Commission

Margrethe VESTAGER  
Executive Vice-President



**ANNEX I: CHARACTERISTICS, CONDITIONS, AND REMUNERATION OF INSTRUMENTS USED UNDER THE UMBRELLA SCHEME<sup>44</sup>**

**Subordinated loans and hybrid capital instruments**

<b>Instrument</b>	Subordinated Loan (Volume above the limits of section 3.3 of the Temporary Framework)	Subordinated Convertible Bond	Silent Participation (HGB) with conversion	Silent Participation (HGB) without conversion	Silent participation (IFRS)
<b>IFRS and national classification</b>					
Is the instrument considered as debt or equity under IFRS?	debt	debt	debt	debt	equity
Is the instrument considered as debt or equity under national accounting standards?	debt	debt	equity	equity	equity
<b>Coupon</b>					

<sup>44</sup> Based on the Excel table in version provided by Germany on 16 November 2020

Is there a step up for coupons?	yes	yes	yes	yes	yes
Are the levels of coupons in compliance with the min set out in the TF?	yes, with TF No 66	yes, with TF No 66	yes, with TF No 66	yes, with TF No 66	yes, with TF No 66
What is the level of coupons?	average of TF 27bis and TF 66: 250/325/325/450/450/50 bp for Large Enterprises and 200/262.5/262.5/350/350/425 for SME	Case 1: maturity fixed, up to 7 years (6 years for listed undertakings), extension possible up to 10 years TF 66 Case 2: maturity perpetual TF 66 + 30 bp flat (for Large Enterprises and SME)	TF 66 + arithmetic average of 40 bp (for Large Enterprises and SME) for 7 years premium above TF 66 can be distributed at discretion of the State as long as premium in $t \geq$ premium in $t+1$ .	TF 66 + arithmetic average of 50 bp (for Large Enterprises and SME) for 7 years premium above TF 66 can be distributed at discretion of the State as long as premium in $t \geq$ premium in $t+1$ .	total remuneration 400/400/500/600/700/800/800/950/ Bp (for Large Enterprises and SME). Alternative: TF 66 + arithmetic average of 120 bp (for Large Enterprises and SME) for 7 years premium above TF 66 can be distributed at discretion of the State as long as premium in $t \geq$ premium in $t+1$ .
Is the payment of coupons mandatory?	yes	yes	no, dependent on profitability (sufficient profit)	no, dependent on profitability (sufficient profit)	payment of the coupon is legally at the discretion of the company, but subject to covenants, e.g. ban of dividend payments

If coupons are not mandatory, is the payment dependant on profitability or completely discretionary?	n/a	n/a	dependent on profitability	dependent on profitability	completely discretionary, but mandatory at the end of term
If coupon not paid in year X, are the coupons deferred?	n/a	n/a	yes, dependent on profitability	yes, dependent on profitability	yes
If coupons are deferred, are they capitalised?	n/a	n/a	no	no	no
Is there interest on deferred coupons? If so, at what level?	n/a	n/a	yes, as if capitalized	yes, as if capitalized	yes, as if capitalized
In case of write downs of the instrument, are coupons calculated on the face value of the instrument (i.e. including the written down part)?	n/a	n/a	yes	yes	yes
Please explain who is entitled to a claim attached to the instrument and will	n/a	n/a	depends on the circumstances of the individual case	depends on the circumstances of the individual case	depends on the circumstances of the individual case

receive payment in case the instrument is sold (e.g. in case where there are deferred coupons.)					
If the instrument is recognised as equity under local GAAP or IFRS, can you please explain how the instrument's remuneration will be taxed (as a dividend or as interest payment)	n/a	n/a	depends on the circumstances of the individual case	depends on the circumstances of the individual case	depends on the circumstances of the individual case
<b>Maturity (fixed, perpetuity)</b>					
Is the maturity fixed duration or perpetual?	fixed, up to 6 years (TF No 25)	fixed, up to 7 years (6 years for listed undertakings), extension possible up to 10 years	fixed, up to 7 years (6 years for listed undertakings), extension possible up to 10 years	fixed, up to 7 years (6 years for listed undertakings), extension possible up to 10 years	perpetual
If fixed duration, what happens at exit if the instrument is not repaid (conversion or credit event)?	credit event	credit event	credit event	credit event	n/a

Does the issuer have a termination right?	yes	yes	yes	yes	yes
If maturity can be extended, is this decided by the State or the beneficiary?	n/a	state, precondition is restructuring plan acc. TF No 85, see section 8 para. 4	state, precondition is restructuring plan acc. TF No 85, see section 8 para. 4	state, precondition is restructuring plan acc. TF No 85, see section 8 para. 4	n/a
If maturity is extended, will the remuneration mechanism remain the same? If not, please specify the changes.	n/a	depends on the restructuring plan approved by the Commission, see section 8 para. 4 and 5	depends on the restructuring plan approved by the Commission, see section 8 para. 4 and 5	depends on the restructuring plan approved by the Commission, see section 8 para. 4 and 5	n/a
<b>Conversion</b>					
Are the instruments convertible to equity?	no	Yes	yes	no	no
If so, what are the triggers for conversion? Are they mandatory or discretionary?	n/a	trigger: non-repayment at maturity or non-payment of the coupon four years in a row, potentially other triggers at discretion of the state, e.g. for protection against hostile takeover from 3rd country Triggers at discretion of the state	trigger: non-repayment at maturity, or non-payment of the coupon four years in a row, potentially other triggers at discretion of the state, e.g. for protection against hostile takeover from 3rd country Triggers at discretion of the state	n/a	n/a

		to protect senior claims	to protect senior claims		
If discretionary, is the option to convert on the issuer or the buyer?	n/a	buyer	buyer	n/a	n/a
If so, does conversion take place at [5 ] percent or more below TERP (Theoretical Ex-Rights Price) at the time of the conversion (67).	n/a	the TERP concept does not fit here, there are no subscription rights for shareholders; but can be agreed individually - commitment to a discount below TERP in all cases	the TERP concept does not fit here, there are no subscription rights for shareholders; but can be agreed individually - commitment to a discount below TERP in all cases	n/a	n/a
Once converted into equity, do the requirements for remuneration of equity apply (step ups)?	n/a	yes, see section 3 para. 8 in conjunction with section 4 para. 7	yes, see section 3 para. 8 in conjunction with section 4 para. 7	n/a	n/a
<b>Seniority/ranking</b>					
<b>i) on going concern</b>					
Are the instruments fully senior to ordinary equity?	yes	yes	loss participation is in the following order: 1. capital reserves 2. the instrument 3. registered	loss participation is in the following order: 1. capital reserves 2. the instrument 3. registered	yes

			capital	capital	
If not, do they absorb losses together with ordinary equity? At which terms?	n/a	n/a	see above	see above	n/a
Are the instruments senior to some other categories of subordinated instruments?	no	no	no	no	no
If not, do they absorb losses together with some other categories of subordinate instruments? at which terms?	no	pari passu	pari passu with private silent participations	pari passu with private silent participations	pari passu with private silent participations
<b>ii) gone concern</b>					
Are the instruments fully senior to ordinary equity?	yes	yes	yes, instrument senior to registered capital and junior to capital reserves (retained earnings)	yes, instrument senior to registered capital and junior to capital reserves (retained earnings)	yes
If not, do they absorb losses together with ordinary equity? On	n/a	n/a	n/a	n/a	n/a



which terms?					
Are the instruments senior to some other categories of subordinated instruments?	yes (silent participations)	no	no	no	no
If not, do they absorb losses together with some other categories of subordinate instruments? On which terms?	n/a	pari passu	pari passu	pari passu	pari passu with private silent participations
<b>Replenishment of instrument</b>					
If there have been write downs of the instrument, will the instrument be replenished? If so, with priority?	convertible bond prior to conversion and subordinated loans are not written down and thus cannot be replenished	convertible bond prior to conversion and subordinated loans are not written down and thus cannot be replenished	yes, replenishment priority: 1. registered capital, 2. the instrument 3. all other equity components	yes, replenishment priority: 1. registered capital, 2. the instrument 3. all other equity components	yes, replenishment priority: 1. registered capital, 2. the instrument 3. all other equity components
<b>Repayment</b>					
Is a partial repayment of the instrument possible before	yes	yes	yes	yes	yes

maturity?					
Is partial repayment of the instrument possible even if there are deferred coupons for the non repaid part?	n/a	n/a	no	no	no
Is partial repayment possible if the instrument has not yet been fully replenished after being written down?	no	no	no	no	no
<b>Exit</b>					
Does the nominal (face) value of the instrument need to be redeemed?	yes	yes	yes	yes	yes
Can the State resell the instruments to 3rd parties? If so, are there any conditions for such sale to take place (e.g. min duration, min	yes	yes	yes	yes	yes

price)?					
If available for an individual aid measure, please describe a planned exit strategy for the State in view of a payment schedule of the remuneration and of the redemption of the State investment.	n/a	n/a	n/a	n/a	n/a
<b>Voting right</b>					
Does the instrument provide voting rights?	no	no	no	no	no
<b>Private participation</b>					
Is there also private participation in the scheme?	no	no	no	no	no
Are private investors participating pari passu ?	n/a	n/a	n/a	n/a	n/a

### Preferred participations and participations with full voting rights

<b>Instrument</b>	Preferred Shares (with voting rights)	Preferred Shares (without voting rights)	Preferred shares (with voting rights with a discount of 25%)
<b>IFRS and national classification</b>			
Is the instrument considered as debt or equity under IFRS?	equity	equity	equity
Is the instrument considered as debt or equity under national accounting standards?	equity	equity	equity
<b>Coupon</b>			
Is there a step up for coupons?	yes	yes	yes
Are the levels of coupons in compliance with the min set out in the TF?	yes, with TF No 66	yes, with TF No 66	no; TF no 66 with a discount of 50 %
What is the level of coupons?	TF 66	TF 66 + 30 bp flat (for Large Enterprises and SME). Justification: risks similiar to the silent participation (GGAAP). Preferred shares are not a hybrid	TF 66 with a discount of 50 %

		instrument, but an equity instrument. Remuneration serves therefore as alternative under no 62 TF to the step-up under no 61 TF. This remuneration is significantly higher than the economic value of the dilution effect caused by the step up under no 61 TF.	
Is the payment of coupons mandatory?	no, dependent on profitability (sufficient profit)	no, dependent on profitability (sufficient profit)	no, dependent on profitability (sufficient profit)
if coupons are not mandatory, is the payment dependant on profitability or completely discretionary?	dependent on profitability	dependent on profitability	dependent on profitability
if coupon not paid in year X, are the coupons deferred?	yes, dependent on profitability	yes, dependent on profitability	yes, dependent on profitability
If coupons are deferred, are they capitalised?	depends on concrete agreement	depends on concrete agreement	depends on concrete agreement
Is there interest on deferred coupons? If so, at what level?	no	no	no
in case of write downs of the instrument, are coupons calculated on the face value of the instrument (i.e. including the	yes	yes	yes

written down part)?			
<b>Maturity (fixed, perpetuity)</b>			
Is the maturity fixed duration or perpetual?	perpetual	perpetual	perpetual
If fixed duration, what happens at exit if the instrument is not repaid (conversion or credit event)?	n/a	n/a	n/a
If maturity can be extended, is this decided by the State or the beneficiary?	n/a	n/a	n/a
<b>Conversion</b>			
Are the instruments convertible to equity?	it is from the beginning equity, but conversion into ordinary shares is possible	it is from the beginning equity, but conversion into ordinary shares is possible	it is from the beginning equity, but conversion into ordinary shares is possible; mandatory requirement for selling the shares to investors
If so, what are the triggers for conversion? Are they mandatory or discretionary?	planned only as preparation for exit	planned only as preparation for exit	planned only as preparation for exit (mandatory requirement)
If discretionary, is the option to convert on the issuer or the	Buyer	buyer	buyer

buyer?			
If so, does conversion take place at [5 ] percent or more below TERP (Theoretical Ex-Rights Price) at the time of the conversion (67).	Yes, see section 3 para. 8	Yes, see section 3 para. 8	the TERP concept does not fit here, there are no subscription rights for shareholders; but can be agreed individually - commitment to a discount below TERP in all cases
Once converted into equity, do the requirements for remuneration of equity apply (step ups)?	no because the conversion serves for exit-puposes	no because the conversion serves for exit-puposes	no because the conversion serves for exit-puposes
<b>Seniority/ranking</b>			
<b>i) on going concern</b>			
Are the instruments fully senior to ordinary equity?	ordinary equity	ordinary equity	ordinary equity
If not, do they absorb losses together with ordinary equity? At which terms?	n/a	n/a	n/a
Are the instruments senior to some other categories of subordinated instruments?	no	no	no
If not, do they absorb losses together with some other	loss absorption works the same way as if it were ordinary shares	loss absorption works the same way as if it were ordinary shares	loss absorption works the same way as if it were ordinary shares

categories of subordinate instruments? at which terms?			
<b>ii) gone concern</b>			
Are the instruments fully senior to ordinary equity?	no	no	no
If not, do they absorb losses together with ordinary equity? On which terms?	yes	yes	yes
Are the instruments senior to some other categories of subordinated instruments?	no	no	no
If not, do they absorb losses together with some other categories of subordinate instruments? On which terms?			
Are dividends of the preferred shares cumulative? Is the level of dividends increasing annually?			
<b>Replenishment of instrument</b>			
If there have been write downs of the instrument, will the instrument be replenished? If so, with priority?			



<b>Repayment</b>			
Is a partial repayment of the instrument possible before maturity?	no	no	no
Is partial repayment of the instrument possible even if there are deferred coupons for the non repaid part?	no	no	no
<b>Exit</b>			
Does the nominal (face) value of the instrument need to be redeemed?	no, but there is the option of buying back the shares by the company	no, but there is the option of buying back the shares by the company	no, but there is the option of buying back the shares by the company
Can the State resell the instruments to 3rd parties? If so, are there any conditions for such sale to take place (e.g. min duration, min price)?	yes	yes	yes
If available for an individual aid measure, please describe a planned exit strategy for the State in view of a payment schedule of the remuneration and of the redemption of the State investment.	n/a	n/a	n/a

<b>Voting right</b>			
Does the instrument provide voting rights?	yes	no	no
<b>Private participation</b>			
Is there also private participation in the scheme?	Under conditions set out in section 10 (in accordance with TF No 78bis and 78ter)	Under conditions set out in section 10 (in accordance with TF No 78bis and 78ter)	Under conditions set out in section 10 (in accordance with TF No 78bis and 78ter)
Are private investors participating pari passu ?	Under conditions set out in section 10 (in accordance with TF No 78bis and 78ter)	Under conditions set out in section 10 (in accordance with TF No 78bis and 78ter)	Under conditions set out in section 10 (in accordance with TF No 78bis and 78ter)

### Equity instruments

Equity Instrument	ordinary shares	preferred shares with voting rights	preferred shares without voting rights	preferred shares with voting rights with a discount of 25%
<b>Ordinary equity</b>				
Is the entry price below the average share price over the 15 days preceding the request? (para 60 TF)	does not exceed the average share price over the 15 days preceding the request, discount is possible, especially with regard to the riskprofile	does not exceed the average share price over the 15 days preceding the request, discount is possible, especially with regard to the riskprofile	does not exceed the average share price over the 15 days preceding the request, discount is possible, especially with regard to the riskprofile	does not exceed the average share price over the 15 days preceding the request, discount is possible, especially with regard to the riskprofile

	(inter alia the rating) of the beneficiary, see section 4 para. 4	(inter alia the rating) of the beneficiary, see section 4 para. 4	(inter alia the rating) of the beneficiary, see section 4 para. 4 minus a discount of 10 % of the average share price over the 15 days preceding the request.	(inter alia the rating) of the beneficiary, see section 4 para. 4 minus a discount of 25 %.
Is there a step up mechanism of 10% increase in the remuneration of the State after 4 years and after 6 years? (61)	yes, see section 4 para. 10	no, see next line	no, see next line	no, see next line
Does the MS/company propose an alternative step up mechanism? If so what is it? (62)	yes, discount of 50% (see section 4 para. 9)	step-up remuneration under no 66 TF (see section 4 para. 8)	step-up remuneration under no 66 TF (see section 4 para. 8) plus 30 bps flat (for Large Enterprises and SME)	step-up remuneration under no 66 TF with a discount of 50% (see section 4 para. 8)
At what rates can be the beneficiary buy back shares?	Rates in accordance with No 63 TF (see section 8 para. 2 sentence 5)	Rates in accordance with No 63 TF (see section 8 para. 2 sentence 5)	Rates in accordance with No 63 TF (see section 8 para. 2 sentence 5)	Rates in accordance with No 63 TF (see section 8 para. 2 sentence 5)
How does the State sell its participation in the market? (tender, stock market)? (64)	tender or stock market (case by case), see section 8 para. 2 sentence 3 and 4	tender or stock market (case by case), see section 8 para. 2 sentence 3 and 4	tender or stock market (case by case), see section 8 para. 2 sentence 3 and 4	tender or stock market (case by case), see section 8 para. 2 sentence 3 and 4
Does the State sell at	yes, sell at market price;	yes, sell at market price;	yes, sell at market price;	yes, sell at market price;

market price? Do existing shareholders have priority rights? (64)	no priority rights; see section 8 para. 2 sentence 3 and 4	no priority rights; see section 8 para. 2 sentence 3 and 4; typically conversion of the preferred shares to ordinary shares before selling the shares to investors	no priority rights; see section 8 para. 2 sentence 3 and 4; typically conversion of the preferred shares to ordinary shares before selling the shares to investors	no priority rights; see section 8 para. 2 sentence 3 and 4; typically conversion of the preferred shares to ordinary shares before selling the shares to investors
conversion to ordinary shares before selling the shares to investors	no	optional	optional	mandatory
upper limit for the participation in the share capital	none	none	20 percent of the share capital of the company	none