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Financial Crisis: Roadmap for negotiations with the German authorities

This note merely summarises general legal and economic issues and does not constitute definitive legal advice. It does not necessarily deal with every important topic or every aspect of the topics covered.

As part of the “German rescue package” the financial markets stabilisation fund (now called “SoFFin”) has been established and equipped with funds of up to 480 bn euros. Furthermore, the European Commission declared on 28 October 2008 that the German rescue package is in compliance with European state aid provisions.

Unlike other countries, the German government chose to keep the actual benefit provided by the rescue package optional and not to impose measures without the consent of the financial institutes. In light of the (forced) capitalisation of US, UK and French banks this might create an imbalance if the German banks will not use such recapitalization offers. Even though the first commercial banks have now applied for rescue measures, it is unclear whether the bulk of the German banking industry will follow –concern has been voiced that using the measures would lead to a stigmatization. Also, rumours have spread that the German legislator will soon come up with a way to effectively force German banks to use the so far optional rescue measures, for instance by increasing the minimum core capital requirements. Even under such a scenario, unlike the mandatory models, the German rescue package leaves sufficient room for tailor-made solutions. Therefore, the procedure in Germany can be qualified as a bilateral negotiation process rather than a unilateral, government dictated process.

Since the rescue package leaves the determination of specific details to the SoFFin and an administrative practice is yet to be developed, well organised negotiations are even more important. European state aid law as well as German public law are applicable and an infringement of European law might lead to any agreement being determined as void.

By the applying party preparing and proposing the wording of the agreement there is greater potential for a satisfactory outcome. As the SoFFin has not yet established an administrative practice, there is room for using language and provisions developed by the financial institutions.

Considering the above, we recommend creating an individual roadmap for any negotiations with the SoFFin before entering into the application process. The following topics should be taken into account:

- On the basis of the potential rescue measures (guarantee, recapitalization, assumption of risks): What is the ideal mix?

- Using this as the reference: Where there is room for negotiations and where is the SoFFin limited in concessions (for instance by European state aid provisions)?
- What are the prerequisites of the relevant scheme and how can they be fulfilled? The legal framework partly uses wide-range wording such as “*reasonable compensation*” or “*fair market compensation*”. It will be important to come up with a well prepared interpretation of those terms supporting the application while still respecting the legal constraints set by European law.
- Preparation of exit terms for the SoFFin out of the financial institutions' investment and/or financing, including termination of the restrictions in terms of limited executive compensation, limitation on dividends etc.

For additional guidance please contact:

Wolfgang Richter

T: +49 (0)69 271 33 289

F: +49 (0)69 271 33 161

M: +49 (0)173 59 58 265

wolfgang.richter@dlapiper.com

Ludger Giesberts

T: +49 (0)221 277 277 351

F: +49 (0)221 277 277 80

M: +49 (0)172 2610 724

ludger.giesberts@dlapiper.com

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A list of offices can be found at www.dlapiper.com

Frankfurt switchboard +49 (0)69 271 33 0