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Corporate/M&A in Times of the Corona Crisis – Current Legal Developments for German Business

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On March 28, 2020, the German Federal legislature's response to the Corona crisis entered into force, introducing a varied array of far-reaching legislative measures to stabilize and support the German economy. In the sphere of corporate law, such statutory implementation measures are, in particular, contained in the Act on the Mitigation of the Consequences of the COVID-19 Pandemic in Civil, Insolvency and Criminal Procedural Law (*Gesetz zur Abmilderung der Folgen der COVID-19-Pandemie im Zivil-, Insolvenz- und Strafverfahrensrecht* – hereinafter the *"**COVID-19 Pandemic Mitigation Act**"*) and the so-called Act on the Introduction of an Economic Stabilization Fund (*Wirtschaftsstabilisierungsfondsgesetz - WStFG*). A selective overview of some of these implementation measures adopted in the corporate law domain is given in Section 1.1 (Corporate Caw "Light" in the Context of State Measures under the WStFG) and 1.2 (Other Corporate Law Modifications pursuant to the COVID-19 Pandemic Mitigation Act).

The Corona crisis also triggers intricate issues related to current and future financial statements: The German Institute of Auditors (*Institut der Wirtschaftsprüfer - IDW*) has dealt with these questions via three separate official communications in March and April 2020 (both in terms of accounting issues under the German HGB-accounting standards and IFRS). A legal overview is given below in Section 2 (Dealing with the Corona Crisis in the Annual Financial Statements for the Business Years 2019 and 2020).

The well-documented concerns regarding increased foreign acquisition activities in sensitive industry sectors during the Corona crisis has seen the EU Commission react a couple of days ago by publishing a Communication providing additional guidance on the foreign investment control mechanisms of the Member States. On April 8, 2020, the German government has resolved a draft of the „*Erstes Gesetz zur Änderung des Außenwirtschaftsgesetzes*" (First Statute on the Amendment of the Foreign Trade and Payments Act). We provide a brief summary of the current German legal situation and the prospective changes under Section 3 (Closing Gaps – COVID-19 and the Modifications of the National Investment Control Regimes).

Last but not least, several anti-trust authorities have issued statements either specifically with regard to merger control issues or, more generally, regarding the application of the competition rules in the current crisis situation, including, *inter alia*, the EU Commission and the German Federal Cartel Office (*Bundeskartellamt - BKartA*). We briefly analyze these latest developments below in Section 4 (Anti-Trust and Merger Control in Times of COVID-19).

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1.1 Corporate Law "Light" in the Context of State Measures under the WStFG

The Act on the Introduction of an Economic Stabilization Fund (*Gesetz zur Errichtung eines Wirtschaftsstabilisierungsfonds* - ***WStFG***), which entered into force on March 28, 2020, provides the statutory framework for the German Federal state's measures aimed at stabilizing the national economy and securing jobs. The measures provided for in this new Act flank the stabilization measures at the Federal level via the support programmes of the *Kreditanstalt für Wiederaufbau* (*KfW*) as well as the additional measures taken at the level of the regional German states (*Bundesländer*).[1]

The decision on the stabilization measures provided for in the WStFG rests with the Federal Finance Ministry (*Bundesministerium für Finanzen*) which decides based on the due exercise of its discretion and after consultation with the Federal Ministry for the Economy and Energy (*Bundesministerium für Wirtschaft und Energie*) following an application of the respective enterprise. Relevant criteria for this discretionary decision are the importance of the applicant enterprise for the German economy, the urgency involved, the potential effects on the job market and on competition, as well as the principles of the most cost-efficient, prudent, economic use of the financial means of the Economic Stabilization Funds (*Wirtschaftsstabilisierungsfonds* - ***WSF***). The applicant enterprises of real economy must, furthermore, meet at least two of the following requirements (i) balance sheet sum of more than € 43 million, (ii) more than € 50 million sales revenues, and (iii) more than 249 employees on average. Any legal entitlement to receive funds under the WStFG is expressly excluded.

In addition to providing guarantees, the WSF may also participate in recapitalization measures. The measures at its disposal include the acquisition of subordinated debt instruments, profit-sharing rights (*Genussrechte*), silent partnerships or convertible bonds and the acquisition of shares. The measures are in principle time-limited until December 31, 2021, but can be extended in the individual case, in particular, if such extension is required to safeguard such a stabilization measure.

In order to implement these measures, a number of corporate law provisions applicable to the respective corporate format are temporarily superimposed by the WStFG with a view to facilitating the involvement of the WSF. This concerns, in particular:

- Benefitting companies, as a rule, will have to issue a self-commitment declaration (with the approval of the supervisory board), which contains rules on the due use of funding, the entry into of future liabilities, the remuneration of the company bodies, the dividend policies and other measures and which is also effective vis-à-vis the respective company and its shareholders. Such a self-commitment does not clash with the principle of the management board's independent management capacities and responsibilities even in a stock corporation.
- The exclusion of the subscription rights of existing shareholders for the benefit of the WSF in the context of capital measures has been facilitated.
- New shares can be issued to the WSF with a profit or liquidation preference.
- Irrespective of any contrasting provisions in the articles of association, a capital increase against contribution can be resolved with the majority of the votes cast. The necessary majority to resolve an exclusion of subscription rights is at least 2/3 of the votes cast or of the represented registered share capital (*Grundkapital*); if at least 50% of the registered share capital are represented, the simple majority is also sufficient in such case.

- Prepayments by the WSF on its contribution obligation have discharging effect.
- Further measures were introduced to simplify and accelerate capital decreases, as well as to facilitate the creation of conditional and/or authorized capital (*bedingtes und/oder genehmigtes Kapital*).
- Resolutions regarding capital measures are effective already prior to their registration in the commercial register, provided they are published on the internet webpage of the company.
- The rules on affiliated companies regarding stock corporations are not applicable until December 31, 2021 for the benefit of the WSF, as well as the German Federal Republic and its public corporations and bodies (*öffentlicher Körperschaften*). The rules on the representation of employees in the supervisory board of a company controlled by the WSF are, however, exempt from this exclusion and remain applicable.
- Shareholders who delay or frustrate required recapitalization measures inter alia by their voting behavior or legal remedies may end up being liable to the company for damages.
- Corresponding simplifications for capital measures also apply for benefitting companies in the legal format of partnerships limited by shares (*KGaA*) and European stock corporations (*SE*). In limited liability companies (*GmbH*) capital increases only require a simple majority of votes present; shareholders can be excluded from the company against compensation with a majority of ¾ of the votes present, if this is necessary for the stabilization measure to be successful. The WSF may be accepted as new limited partner of limited partnerships with a limited liability company as general partner (*GmbH & Co. KG*) or other limited partnerships by partner resolution taken by the partners present with simple majority.
- Information duties vis-à-vis the economic committee (*Wirtschaftsausschuss*) or the works council (*Betriebsrat*) are excluded for participation of the WSF.
- Furthermore, for stock corporations the notification duties arising under capital market rules (*wertpapierhandelsrechtliche Mitteilungspflichten*) do not apply, and the obligation to submit a mandatory offer to acquire shares pursuant to the Securities Acquisition and Takeover Act (*Wertpapiererwerbs- und Übernahmegesetz*) is derogated from even if the thresholds are exceeded by the WSF. In tandem, the threshold for the squeeze-out of minority shareholders is lowered to 90% for the benefit of the WSF.
- Further-reaching rules in favor of the WSF concern the large-scale exclusion of the rules on hidden contributions in kind (*verdeckten Sacheinlagen*) and of contestation rights of stabilization measures as well as the subordination of shareholder loans pursuant to the Insolvency Code (*Insolvenzordnung – InsO*). Contractual provisions, which otherwise would give contracting partners a right to terminate the contract on account of a change of control because the WSF joins or exits a business, are deemed to be invalid. The same applies to compensation or severance payments in favor of company organs in the case of a change of control.
- By contract, self-commitment or administrative act, mitigating measures to avoid any distortions of competition can be placed on the beneficiary businesses. The limited applicability of the German Law against Restraints on Competition (*Gesetz gegen Wettbewerbsbeschränkungen - GWB*) to the WSF itself is clarified for completeness sake, notably that only part 4 (Procurement law) and part 5 (Applicability of the GWB to public enterprises) are applicable.

1.2 Other Corporate Law Modifications pursuant to the COVID-19 Pandemic Mitigation Act

The main focus on the corporate law changes was initially put on the relaxation of the requirements for staging general meetings of German stock corporations (*Aktiengesellschaft – AG*), allowing them to proceed in an entirely electronic manner, as well as the possibility of delaying the ordinary general meeting (*ordentliche Hauptversammlung*) beyond the hitherto applicable eight month deadline.[2]

But there is a number of other, temporary provisions of company law which can be relevant for the management of corporate entities:

- Shareholder resolutions of German limited liability companies (*GmbH*) may be adopted in text form or by written vote in the year 2020 even if there is no express enabling clause to do so in the relevant articles of association. It is not necessary that all shareholders consent to such procedure. Text form will not require a personal signature by hand. It is sufficient that the declaration is legible and the name of the person making the declaration is given and that the declaration is embodied on a lasting data medium (e.g. a hard drive, USB stick, but also an e-mail). Such derogation from the holding of presence meetings even without consent of all shareholders, however, does not remove the other formalities for the adoption of resolutions. In particular, whenever resolutions on potentially contentious matters are proposed, the deadline accorded for the submission of written votes should match the regular convocation or resolution announcement periods (*Fristen für die Beschlussankündigung*). Such a waiver of holding a presence meeting also does not derogate any other form requirements applicable to the adoption of shareholder resolutions, which means that changes to the articles of association or measures under the German Conversion Act (*Umwandlungsgesetz - UmwG*) continue to require notarial recordings.
- If proposed measures under the Conversion Act (*UmwG*) require the submission of closing balance sheets (*Schlussbilanz*) as an attachment of the mandatory commercial register filings (for instance the balance sheet of the transferring entity in the case of mergers), under the current law, the balance sheet reference date (*Bilanzstichtag*) used in such filings could not be older than eight months by the time the register filing was submitted to the registry court. This time period has now been extended to twelve months for register filings made in 2020. For example, the register filing of a merger, which is proposed to be submitted on June 1, 2020, would now be permitted to make use of the annual financial statements with reference date as of June 30, 2019 rather than having to prepare an interim balance sheet of a more recent date.
- The management bodies of companies, who benefit from the conditional derogation of the duty to file for insolvency due to COVID-19 for an interim period until, at present, September 30, 2020 despite being in a state of over-indebtedness or illiquidity,[3] may make continued payments in the ordinary course of business during such period despite the existence of over-indebtedness or illiquidity without incurring the personal liability they would otherwise incur. Such payments in a COVID-19-caused technical state of insolvency are deemed by law to be in line with the standards of care of a prudent business person and manager. The reform law lists, by way of examples, payments aimed at maintaining or restarting business operations or designed to implement an operational restructuring concept. However, this new rule places a significant standard of care on the management of companies in financial distress. The necessary assessment notwithstanding whether any measures proposed to be taken is part of the ordinary course of business operations, management will furthermore have to ensure in advance that the company can indeed avail itself of this interim insolvency filing derogation by falling within the scope of the rule. In particular, the state of financial distress must be on account of COVID-19 and there has to be a (reasonable) expectation that such financial distress can be overcome. Management can, however, rely on an (albeit rebuttable) legal presumption that both these requirements apply to the company if the state of over-indebtedness/illiquidity did not already exist as of December 31, 2019.

2. Dealing with the Corona Crisis in the Annual Financial Statements for the Business Years 2019 and 2020

Since the first COVID-19 cases had already been publicized in December 2019 but the cataclysmic consequences for public health and the economy in Germany and Europe only started to be felt in earnest from the end of February 2020, the question whether and if so, how the Corona crisis might also have to be taken into account in the financial statements for the completed fiscal year 2019 quickly became a topic of discussion. Two separate official communications published by the German Institute of German Auditors (*Institut der Wirtschaftsprüfer - IDW*) dated March 4, 2020[4] and dated March 25, 2020[5] provided crucial guidelines. On April 8, 2020, the *IDW* has published a third communication that specifically deals with specific questions asked in response to the two earlier guidelines.[6]

In summary, it can be said that the *IDW* does not view the Corona crisis as a point in time event and, thus, as a value-enhancing event (*wertaufhellend*) under the German HGB-accounting standards or an adjusting event under IFRS but rather as an ongoing process of a certain duration, which therefore is deemed to be value-justifying (*wertbegründend*) under the HGB-rules or a *non-adjusting event* under IFRS. The crisis is, thus, of particular relevance for the reporting in the current fiscal year 2020 and potentially future fiscal years beyond.

Based on this assessment of the crisis as an, in principle, value-justifying event, the developments surrounding the corona virus, nevertheless, are to be reflected in the (consolidated) notes to the HGB financial statements 2019 in the individual case if they qualify as a “matter of particular importance” according to § 285 No. 33 or § 314 para. 1 No. 25 HGB. According to the *IDW* that is the case if the effects of COVID-19 are likely to influence the picture conveyed by the financial statements 2019 and, without subsequent supplemental reporting, the developments after the balance sheet date would be judged significantly differently by the addressees of the financial statements. The *IDW* reaches similar conclusions also for the assessment to be made under IFRS.

Further, it should be noted that developments surrounding the coronavirus will in many cases be reflected in the (Group) management reports for the completed fiscal year 2019, at least, in the risk and forecast reporting. According to the *IDW* such an inclusion in the risk report is warranted in principle if the possible further developments lead to negative deviations from the forecasts and goals of the business, such circumstances are a material individual risk and the financial statements would otherwise not provide an accurate picture of the risk position of the group.

It is also possible that the current dramatic changes of the economic parameters result in a situation where management has to revise its expectations of the forecast performance indicators in such a way that an appropriate reflection in or revision of the forecast report in the financial statements 2019 is required.

In the ongoing auditing season for the fiscal year 2019 special focus should, thus, be placed on subsequent, critical developments and close coordination with external advisors is particularly well advised. The European Securities and Market Authority (*ESMA*) has, in this context, appealed to issuers to create transparency with regard to the actual and potential consequences of COVID-19 and include corresponding clarifying assessments in the financial statements for the fiscal year 2019 to the extent they are not yet finalized and established.[7] This is even more critical in cases where the crisis affects a business in such an impactful way that makes it apparent at this stage that it can no longer be assumed that the company will be able to continue its business operations (§ 252 para. 1 No. 2 HGB). It is possible that under certain circumstances the going concern assumption must be retroactively abandoned also for the fiscal year 2019. The IDW states in its communication that in those concrete individual cases where the Corona pandemic no longer allows the company to justify the continuation of its business activities based on a

going concern assumption, „the financial statements must be prepared in accordance with the provisions of IDW RS HFA 17 (e.g. valuation from a liquidation perspective), and the going concern assumption must be abandoned" which applies "even if the reason for the departure did not occur until after the balance sheet date."[8]

3. Closing Gaps – COVID-19 and the Modifications of the National Investment Control Regimes

As a reaction not least to concerns that weakened enterprises might be acquired by investors from abroad, a global trend to tighten the controls on foreign investment in local business is noticeable. For instance, Australia has recently announced that all foreign investments will now be subject to control.[9] The USA had tightened their investment control rules already in February (the so-called 2018 Foreign Investment Risk Review and Modernization Act (*FIRRMA*)) and extended the competencies of the U.S. Committee on Foreign Investment in the United States (*CFIUS*). Now certain investments into the life sciences sector below the regular control thresholds are nevertheless subject to the CFIUS filing requirement.[10]

The EU Commission has also published a communication on March 26, 2020,[11] in which it urged the member states to introduce mechanisms to comprehensively control foreign investment or make full use of such already existing[12] control mechanisms in order to jointly protect strategically important industries against acquisition by foreign investors during the times of crisis. The communication expressly is not limited to the health industry only, but puts special focus on this industry. Already in its earlier communication of March 13, 2020,[13] the Commission had asked the Member states to protect critical installations and technologies. Such communications are not binding, but provide important guidelines for the shaping of the national investment control regimes by the member states – and, thus, relevant clues as to what investors can expect in future.

While Spain, for instance, has already reacted to the Commission's communication with a provisional obligation to obtain an *ex ante* clearance for foreign direct investments into strategic sectors,[14] it otherwise remains to be seen how the other EU member states will position themselves. Certain EU member states had already tightened their investment control regimes before the COVID-19 pandemic struck.[15] But even if it turns out that there might not be a full-scale across the board adaptation of national legislation, a more stringent practical implementation can certainly be expected.

The drive to attempt to harmonize the investment control regimes in the member states pre-dates the COVID-19 crisis: On October 11, 2020 the Regulation establishing a framework for the screening of foreign direct investments into the Union (EU-Screening-Regulation)[16] will enter into force. It provides, *inter alia*, for a consultation procedure between the Commission and/or member states, on the one hand, and the competent member state, on the other hand, in the context of which the Commission and the member states can suggest mitigation measures or prohibitions for investments which go beyond the initial decision of the competent member state.

With the aim of adapting German law to this EU Regulation, and consequently not purely in direct response to the COVID-19 pandemic and its consequences, the Federal government cabinet on April 8, 2020 launched a draft bill called the First Statute on the Amendment of the Foreign Trade and Payments Act and other Laws (*Erstes Gesetz zur Änderung des Außenwirtschaftsgesetzes (AWG) und anderer Gesetze*),[17], which is based on a ministerial draft bill dated January 30, 2020.[18]

The pre-existing fundamental differentiation in the German foreign direct investment control rules between the so-called cross-sectoral control (§§ 55-59 of the Foreign Trade and Payments Ordinance (*Außenwirtschaftsverordnung - AWV*)) and the so-called sector-specific control (§§ 60-62 AWV) is maintained in principle:

The cross-sectoral control, in principle, covers all acquisition transactions which give an acquirer from outside the Union direct or indirect control over at least 25 per cent of the voting rights in a national enterprise. If the national enterprise conducts its business in a particularly security-relevant sector, as conclusively listed in § 55 para. 1 S. 2 AWV, the control threshold is set at 10 per cent of the voting rights. Acquisitions within the Union are only covered in so far as they are deemed to be a circumvention of the investment control rules. A prohibition of the acquisition currently may only be issued if the public order and security of the Federal Republic of Germany is endangered.[19] The acquirer, furthermore, has the option – e.g. whenever there are uncertainties regarding the applicability and scope of §§ 55 et seq. of the AWV and/or to ensure deal security – of applying for a certificate of non-objection.

The sector-specific control, in contrast, exclusively covers acquisition transactions pursuant to which a foreigner (including foreigners from other EU member states) acquires, directly or indirectly, at least 10 per cent of the voting rights in a national enterprise which produces or develops one of the goods listed conclusively in § 60 AWV. Pursuant to the government draft bill, in the future, not only the production and development of such goods would qualify for a sector-specific control, but also expressly the modification or use of such goods. A prohibition of the acquisition may only be issued if material security interests of the Federal Republic of Germany are endangered.[20]

In addition, the draft bill, in particular, provides for two further key changes: On the one hand, the current concept of endangering in the AWG ("*… if the public order or security of the Federal Republic of Germany is endangered by the acquisition*", § 5 para. 2 AWG, current version) stands to be adapted to the concept of endangering in the EU-Screening-Regulation ("*…if the public order or security of the Federal Republic of Germany or another member state of the European Union … are likely endangered by the acquisition*", § 5 para. 2 AWG in the version in the draft of April 8, 2020). Via the cross-reference to § 4 para. 1 No. 4 AWG (as amended) this would apply accordingly to the public security and order regarding projects and programmes of Union interest within the meaning of Article 8 of the EU-Screening-Regulation. This will consequently result in more future transactions being within the remit of the German foreign direct investment control regime. On the other hand, it is stipulated that the underlying contractual (*schuldrechtliche*) acquisition transactions shall be subject in future to a dissolving condition of a prohibition both within the scope of the cross-sectoral and the sector-specific investment control procedures until such time when the control procedure is completed. The duty to notify the underlying contractual transaction continues to arise from § 55 para. 4 AWV. The implementation of transactions subject to a notification requirement shall in future in all cases only become valid upon completion of the control proceedings. This aims at reducing the risk that irreversible facts are created in the time window until the control procedure is completed by, for instance, implementing the acquisition transaction *de facto* in practice or the irreversible loss of information and technologies. This legal change is flanked by adding specific prohibition scenarios to § 15 para. 4 AWG, like the exercise of voting rights by the acquirer, accepting instructions how to vote, profit payments or the submission of enterprise-specific, investment control relevant information to the acquirer. The relevant Foreign Trade and Payments Ordinance shall be amended accordingly.

4. Anti-Trust and Merger Control in Times of COVID-19

There are several varying consequences of the pandemic on the timelines for merger control proceedings. Some anti-trust authorities have communicated that delays to the customary timeframes are likely,[21] while others have engaged in reviving „fast-track" programs.[22] The European Commission has published on its website that - due to the present situation - it is currently facing difficulties to collect the necessary information from the notifying parties and other third parties like, for example, their customers, competitors and suppliers.[23] In view of the existing procedural deadlines, it will therefore be forced to make generous use of „stop-the-clock" provisions. However, the Commission expressly remains willing and capable of accepting new merger filing applications and processing

them to the best of its abilities if the notifying parties can provide very compelling reasons that militate for a speedy implementation of merger control proceedings in the individual case. The German Federal Cartel Office (*BKartA*) has merely issued a reminder that any currently proposed new merger control notifications should be “re-considered”,[24] but remains in full working mode and has opened additional communication channels to facilitate “remote” work and the submission of documentation. Any parties currently considering mergers and acquisitions which may be subject to filing requirements under one or several merger control regimes would, thus, be well advised under the current circumstances to re-assess the anticipated timeframes and take into account potential time delays and other procedural hurdles in obtaining merger control clearance.[25]

Even in times of crisis, the applicable anti-trust and merger control laws allow for flexible cooperation mechanisms. In a joint statement by the European Competition Network on the COVID-19 crisis,[26] it was already established that the European competition authorities will not actively intervene against cooperation forms which are aimed at securing the access for all consumers to otherwise scarce goods. Further, on April 8, 2020, the European Commission published a “Temporary Framework for assessing antitrust issues related to business cooperation in response to situations of urgency stemming from the current COVID-19 outbreak”.[27] The Commission’s communication is meant to provide antitrust guidance to companies cooperating in response to urgent situations related to the current coronavirus outbreak which includes, in particular, medicines and medical equipment that are used to treat coronavirus patients but also applies to similar supply emergencies resulting from the coronavirus outbreak for essential goods and services outside the health sector. On the other hand, the competition authorities have left no doubt that they will stringently quash any attempts to profiteer from the current emergency situation by way of concerted efforts or the abuse of market power. They have therefore clearly highlighted that the rules on anti-competitive behaviors, and prime amongst them the prohibition of cartels in Art. 101 TFEU/§ 1 German Competition Act (*Gesetz gegen Wettbewerbsbeschränkungen – GWB*), also apply as the guiding principle in these unprecedented times of crisis. Ultimately, this means that it remains incumbent on the enterprises and their legal advisors to assess the admissibility under competition law of any proposed measures in each individual case. Recognizant of the fact that such assessments are difficult enough in “normal times”, let alone in times of a global health pandemic, the European Commission has been engaging with companies and trade associations to help them in assessing the legality of their cooperation plans and putting in place adequate safeguards against longer-term anticompetitive effects, and collected and published additional information and guidelines on its website regarding “Antitrust rules and coronavirus”.[28] The key feature among this information is a specially designated email address which can be used by businesses to obtain informal advice on specific company initiatives. The German *BKartA* has expressly declared its support for this initiative and serves as national point of contact to discuss national concerns and matters in this regard.[29] In addition, the European Commission exceptionally declared its willingness to issue so-called ‘comfort letters’ in cases where there may still be uncertainty about whether such initiatives are compatible with EU competition laws.[30]

Special provisions apply to cooperation among businesses during the coronavirus outbreak to avoid supply shortages of critical hospital medicines and other medical products and services. For this purpose, and in addition to the Temporary Framework outlined above, the European Commission has published “Guidelines on the optimal and rational supply of medicines to avoid shortages during the COVID-19 outbreak” on April 8, 2020. These communications outline the main criteria that will be applied when assessing these possible cooperation projects.[31] In particular, antitrust guidance is provided to companies willing to temporarily cooperate and coordinate their activities in order to increase production in the most effective way and, specifically, to optimize the supply of urgently needed hospital medicines, e.g. by coordinating production, stock management, distribution and logistics. Furthermore, the European Commission has already issued a comfort letter as described above for a cooperation project among pharmaceutical producers that targets the risk of shortage of critical hospital medicines for the treatment of coronavirus patients.

[1] Also see in this context: https://www.gibsondunn.com/european-and-german-programs-counteracting-liquidity-shortfalls-and-relaxations-in-german-insolvency-law/.

[2] See in this context also: https://www.gibsondunn.com/whatever-it-takes-german-parliament-passes-far-reaching-legal-measures-in-response-to-the-covid-19-pandemic/, Section III.

[3] In this context, also see: https://www.gibsondunn.com/whatever-it-takes-german-parliament-passes-far-reaching-legal-measures-in-response-to-the-covid-19-pandemic/, section II.2.

[4] In German available under: https://www.idw.de/idw/im-fokus/coronavirus/auswirkungen-der-ausbreitung-des-coronavirus-auf-rechnungslegung-und-pruefung--teil-1--fachlicher-hinweis-des-idw-/122498.

[5] In German available under: https://www.idw.de/idw/im-fokus/coronavirus/auswirkungen-der-ausbreitung-des-coronavirus-auf-rechnungslegung-und-pruefung--teil-2--fachlicher-hinweis-des-idw-/122878. A combined English language version of the two German communications can be found under the address: https://www.idw.de/idw/im-fokus/coronavirus/effects-of-the-spread-of-the-corona-virus-on-the-financial-statements-as-of-31-12-2019-and-their-audit/122914.

[6] In German available under: https://www.idw.de/idw/im-fokus/coronavirus/auswirkungen-der-ausbreitung-des-coronavirus-auf-rechnungslegung-und-pruefung--teil-3--fachlicher-hinweis-des-idw-/123092 and again as an English translation: https://www.idw.de/idw/im-fokus/coronavirus/questions-concerning-the-impact-of-the-spread-of-coronavirus-on-the-financial-statements-and-their-audit--part-3-/123132.

[7] https://www.esma.europa.eu/about-esma/covid-19.

[8] Guidelines of the IDW dated March 27, 2020, Page 10/37, https://www.idw.de/blob/122914/8b4b3722606c025e741eb7ac59988ded/down-corona-englische-fassung-teil-1-und-2-data.pdf.

[9] Press release dated March 29, 2020, available under: https://ministers.treasury.gov.au/ministers/josh-frydenberg-2018/media-releases/changes-foreign-investment-framework

[10] Further information on the CFIUS reform see Client Alert „CFIUS Reform: Top Ten Takeaways from the Final FIRRMA Rules“ dated February 19, 2020: https://www.gibsondunn.com/cfius-reform-top-ten-takeaways-from-the-final-firrma-rules/.

[11] Communication from the Commission dated March 25, 2020, Guidance to the Member States concerning foreign direct investment and free movement of capital from third countries, and the protection of Europe’s strategic assets, ahead of the application of Regulation (EU) 2019/452 (FDI Screening Regulation), C(2020) 1981, available under: https://data.consilium.europa.eu/doc/document/ST-7028-2020-INIT/de/pdf (German, without annexes) or https://trade.ec.europa.eu/doclib/docs/2020/march/tradoc_158676.pdf (English, full text).

[12] So far the following 14 member states have established control mechanisms: Austria, Denmark, Finland, France, Germany, Hungary, Italy, Latvia, Lithuania, Netherlands, Poland, Portugal, Rumania, Spain; in addition, corresponding rules also exist in Great Britain.

[13] Communication from the Commission to the European Parliament, the European

Council, the Council, the European Central Bank, the European Investment Bank and the Eurogroup: Coordinated economic response to the COVID-19 Outbreak; available under https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52020DC0112.

[14] Real Decreto 8/2020 dated March 18, 2020, available under: https://www.boe.es/boe/dias/2020/03/18/pdfs/BOE-A-2020-3824.pdf (in Spanish).

[15] Germany and others notwithstanding, France had already tightened its foreign investment control legislation at the beginning of last year and extended the list of sectors subject to control, see press release of January 3, 2019, available under: https://www.gouvernement.fr/en/strengthening-control-of-foreign-investments-in-sensitive-companies.

[16] Regulation (EU) 2019/452 of the European Parliament and of the Council of March 19, 2019 establishing a framework for the screening of foreign direct investments into the Union, available under: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32019R0452&from=EN.

[17] The draft law's text can be found under https://www.juris.de/jportal/portal/page/homerl.psml?nid=jnachr-JUNA200401047&cmsuri=%2Fjuris%2Fde%2Fnachrichten%2Fzeigenachricht.jsp.

[18] Referentenentwurf Bundesministerium für Wirtschaft und Energie, Erstes Gesetz zur Änderung des Außenwirtschaftsgesetzes dated January 30, 2020, available under https://www.bmwi.de/Redaktion/DE/Downloads/E/erstes-gesetz-zur-aenderung-des-aussenwirtschaftsgesetzes.pdf?__blob=publicationFile&v=6.

[19] It can be expected that the concept of endangering in the AWV will be modified in accordance with the First Statute on the Amendment of the Foreign Trade and Payments Act and other Laws to match the concept of endangering in the EU-Screening Regulation.

[20] It can be expected that the concept of endangering in the AWV will be modified in accordance with the First Statute on the Amendment of the Foreign Trade and Payments Act and other Laws to match the concept of endangering in the EU-Screening Regulation.

[21] France: Autorité de la concurrence, „Adaptation of the time limits and procedures of the Autorité de la concurrence in times of health emergency", press release of March 27, 2020, available in English under https://www.autoritedelaconcurrence.fr/en/press-release/adaptation-time-limits-and-procedures-autorite-de-la-concurrence-times-health; Denmark: Konkurrence- og Forbrugerstyrelsen, „Time limits for merger control are suspended for 14 days", press release of March 18, 2020, available in English under https://www.en.kfst.dk/nyheder/kfst/english/news/2020/20200318-time-limits-for-merger-control-are-suspended-for-14-days/.

[22] U.S. Federal Trade Commission, „Resuming early termination of HSR reviews", blog post of March 27, 2020, available in English under https://www.ftc.gov/news-events/blogs/competition-matters/2020/03/resuming-early-termination-hsr-reviews.

[23] Notice of the EU Commission dated March 7, 2020, „Special Measures due to Coronavirus / COVID-19: Update of 7th April 2020", available in English under https://ec.europa.eu/competition/mergers/covid_19.html.

[24] Bundeskartellamt, „Kommunikation mit dem Bundeskartellamt (Corona–Maßnahmen)", Notice of March 17, 2020, available under https://www.bundeskartellamt.de/SharedDocs/Meldung/DE/AktuelleMeldungen/2020/17_03_2020_Kommunikation_Bundeskartellamt.html.

[25] In this regard also refer to our Client Alert, „U.S. Federal Trade Commission and DG COMP Implement Changes to U.S. and EU Merger Filing Procedures in Response to

COVID-19“, March 16, 2020, available in English under https://www.gibsondunn.com/us-ftc-and-dg-comp-implement-changes-to-us-and-eu-merger-filing-procedures-in-response-to-covid-19/.

[26] European Competition Network, „Antitrust: Joint statement by the European Competition Network (ECN) on application of competition law during the Corona crisis“, Statement of March 23, 2020, available in English under https://ec.europa.eu/competition/ecn/202003_joint-statement_ecn_corona-crisis.pdf

[27] Communication from the Commission dated April 8, 2020, “Temporary Framework for assessing antitrust issues related to business cooperation in response to situations of urgency stemming from the current COVID-19 outbreak”, C(2020) 3200, available in English under: https://ec.europa.eu/info/sites/info/files/framework_communication_antitrust_issues_related_to_cooperation_between_competitors_in_covid-19.pdf.

[28] https://ec.europa.eu/competition/antitrust/coronavirus.html.

[29] Bundeskartellamt „EU-Kommission informiert zu Wettbewerbsregeln in der Coronavirus-Krise“, Notice dated March 31, 2020, available in English under https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/AktuelleMeldungen/2020/01_04_2020_EU_Commission_competition_rules_coronavirus.html?nn=4136442.

[30] See Communication from the Commission dated April 8, 2020, “Temporary Framework for assessing antitrust issues related to business cooperation in response to situations of urgency stemming from the current COVID-19 outbreak”, C(2020) 3200, available in English under: https://ec.europa.eu/info/sites/info/files/framework_communication_antitrust_issues_related_to_cooperation_between_competitors_in_covid-19.pdf.

[31] Communication from the Commission dated April 8, 2020, “Guidelines on the optimal and rational supply of medicines to avoid shortages during the COVID-19 outbreak”, C(2020) 2272, available in English under: https://ec.europa.eu/info/sites/info/files/communication-commission-guidelines-optimal-rational-supply-medicines-avoid.pdf.

Gibson Dunn’s lawyers are available to assist with any questions you may have regarding developments related to the COVID-19 outbreak. For additional information, please contact your usual contacts or any member of the Firm’s Coronavirus (COVID-19) Response Team or the following authors in Germany:

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