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NEW RISKS RESULTING FROM COVID-19 ANALYZED UNDER SPECTRUM OF GERMAN CRIMINAL, REGULATORY AND CIVIL EXPOSURE

To Our Clients and Friends:

After more than one month of widespread measures to fight the Coronavirus,[1] we can observe the first enforcement actions throughout Europe for alleged misconduct illustrating the wide spectrum of issues facing enforcement agencies. For instance, on April 2, 2020, the Public Prosecutor's Office of Braunschweig announced that it is investigating the COVID-19-related deaths of elderly people in a nursing home in Wolfsburg/Germany under the suspicion of negligent homicide.[2] Sadly, twenty-two people had died as a consequence of the infection with the virus. According to the allegations the hygienic measures taken to protect the inhabitants from contagion were insufficient and a prohibition to allow third party visits to the inhabitants was ordered too late. On the other end of the spectrum, courts in the United Kingdom and the Netherlands have recently sentenced defendants for assault/threatening to custodial sentences because they coughed/threatened to cough at policemen.[3]

These are drastic cases, but they illustrate that with the proceeding of the COVID-19 crisis new exposure arises for business leaders and compliance officers alike.

The changing enforcement and risk landscape is partly a result of the quick adjustment of enforcement agencies to the "new normal" under restrictive measures stipulated through a series of *ad hoc* regulations that dramatically change the way businesses and their employees used to operate a few weeks ago.

1. Sources of liability and exposure

Businesses, whether run by individuals or by companies, have a responsibility to appropriately protect their employees, customers, and business partners from dangers deriving from business operations. The COVID-19 pandemic should remind managers of this fundamental obligation when running the business during the current crisis. Given the dynamic of the situation, this might involve a series of measures to be taken or adjusted *ad hoc*, that in the short or mid-term have potentially substantial impact on the way the business is run or even may have to discontinue the business.

Under German law, liability can be of criminal, regulatory or civil law nature:

- **Individual managers may be held criminally responsible**, if they fail to comply with required safety standards that cause bodily harm of others (e.g. for negligent bodily harm or negligent killing), or be held liable for regulatory/criminal offenses if they fail to comply with official orders and regulations based (e.g. orders under the Infectious Diseases Protection Act, IfSG[4]). They can also be held responsible and fined with a fine of up to €10 million for committing a

regulatory offense if they fail to duly oversee their employees and therefore facilitate or enable that they commit offenses;

- **Companies and partnerships can be held administratively responsible and fined**, if an offense was committed by a representative of the company/partnership, e.g. a board member, or a person having managing responsibilities (*Leitungsperson*) and as a result thereof, (i) duties incumbent on the business have been violated, or (ii) the business has been enriched or (iii) was intended to be enriched. In addition, any economic gain derived from the violation may be subject to disgorgement;
- Finally, **individual managers as well as companies/partnerships represented by them may be held responsible under civil law** for damages if as a result of their business decisions other people, including employees, suffer bodily harm.

2. Attributing criminal responsibility to management for business decisions in situations of crisis

If employees, customers, or business partners become infected with the virus due to poor organizational and safety standards, it is conceivable that managers can be held responsible for not having prevented the infection. This does not only apply to a single executive board member responsible for occupational health and safety. Rather, in the current situation, every board member needs to have these issues in mind.

The German Federal Court of Justice held in a famous judgment^[5] that the entire board can be made criminally responsible for bodily harm, no matter whether the individual board member was internally responsible for health and safety matters. In that particular case, the board members of a company were convicted for dangerously inflicting bodily harm on customers because they unanimously decided to refrain from a recall of a shoe leather spray that was detrimental to health when used.^[6]

The court, by invoking principles of company law, set out the following:

“The principles of general responsibility and general competency of the management attach if for a particular reason, such as in situations of crisis and exception, the enterprise as a whole is concerned. In such a situation, the entire management is called upon to act.”^[7]

When neglected or inadequate safety and health measures can lead to a potentially fatal infection of employees, business partners and customers, as in the current COVID-19 pandemic, it is an exceptional situation that affects the entire company. Therefore, the current crisis triggers the general responsibility of the entire management meaning that business leaders must feel responsible that **adequate organizational measures** be taken to prevent harm to both employees and third parties such as customers, visitors and business partners. It is therefore recommendable to Compliance Officers to put such measures on the agenda of the entire board and make members aware of their duties to inform themselves, to decide on adequate measures and to ascertain their implementation.

3. Holding the business responsible for offences of its business leaders

As set out above, companies and partnerships can be held administratively responsible and fined, if an offense was committed by a representative of the company/partnership, e.g. a board member, or a person having managing responsibilities (*Leitungsperson*) and as a result thereof, (i) duties incumbent on the legal entity have been violated, or (ii) the legal entity has been enriched or (iii) was intended to be enriched.

For instance, if a company hires employees, it is a duty incumbent to the company that runs the business to protect its employees from dangers arising at the workplace. In contrast, a mere break of a curfew by a manager outside of the business cannot lead to fining the company because observing a curfew is a duty that entirely attaches to the individual.

4. Creating civil liability exposure

In addition, individual managers as well as companies/partnerships represented by them may be held responsible as joint obligors under civil law for damages if as a result of their business decisions other people suffer bodily harm. For instance, if a company were to sell a protective mask that due to its composition is knowingly harmful to the customers making use of it.

Such liability usually arises under sec. 280(1), 241(2), 823(1) and/or (2) of the German Civil Code if an offense that serves to protect individual interests is committed (e.g. negligent bodily harm). In the case of employees, civil liability can also arise on the basis of employment law but will often be excluded due to the provisions of the mandatory accident insurance (sec. 104 Social Code VII).

The amount to be compensated under German civil law does not include punitive damages that is known in other jurisdictions, but is calculated as the difference between the victims hypothetical financial situation had the event causing the damage not occurred and its real financial situation, supplemented by a sum for non-material damage for pain and suffering.

5. Special Recommendations by Public Authorities in re COVID-19

Apart from special requirements for particular businesses that may require specific instructions relating to the operation of the business (e.g. dealing with customers and business partners), as a minimum measure, we would recommend implementing and controlling the effective use and application of the workplace-related recommendations by public authorities.

Adhering to such recommendations would, absent more specific circumstances mandating more stringent measures, allow management to show that it did not act negligently and would further demonstrate compliance with its general obligation set out in Sec. 4 Work Protection Act (ArbSchG) stipulating that work must be organized in such a way that risks to physical and mental health are avoided and minimized.

In this regard, we deem the following recommendations as particularly useful which are targeted at the need of employers:

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- Recommendations by the **Federal Center for Health Education (BzGA)**: <https://www.infektionsschutz.de/fileadmin/infektionsschutz.de/Downloads/Infoblatt-Arbeitgeber-Coronavirus.pdf> (in German; last visited April 20, 2020);
- Recommendations by the **World Health Organization**: https://www.who.int/docs/default-source/coronaviruse/getting-workplace-ready-for-covid-19.pdf?sfvrsn=359a81e7_6 (in English, last visited April 20, 2020);
- The **Robert Koch Institute**^[8] has published specific information with respect to the prevention of infections in nursing homes and hospitals: https://www.rki.de/DE/Content/InfAZ/N/Neuartiges_Coronavirus/nCoV.html (in German, last visited April 20, 2020);
- Lastly, the **Federal Ministry of Health** has put together a website with hotlines, podcasts and useful links for many topics affected by COVID-19: <https://www.bundesgesundheitsministerium.de/coronavirus.html#c17634> (mostly in German, partly in further languages including English, last visited April 20, 2020).

Additional helpful guidance can often be found for members on the websites of the respective industry associations. These are more specific to the specific industry requirements relevant from case to case.

[1] See in this regard, <https://www.gibsondunn.com/covid-19-german-infectious-diseases-protection-act-what-makes-you-stay-at-home/> (last visited April 20, 2020).

[2] <https://www.sueddeutsche.de/gesundheit/gesundheit-wolfsburg-corona-tode-in-seniorenheim-staatsanwaltschaft-ermittelt-dpa.urn-newsml-dpa-com-20090101-200402-99-565664> (in German, last visited April 20, 2020).

[3] <https://www.sueddeutsche.de/panorama/coronavirus-grossbritannien-polizei-1.4866309> (in German, last visited April 20, 2020).

[4] See in this regard, <https://www.gibsondunn.com/covid-19-german-infectious-diseases-protection-act-what-makes-you-stay-at-home/> (last visited April 20, 2020).

[5] See Federal Court of Justice, Judgment of July, 6, 1990, 2 StR 549/89.

[6] The defendants were sentenced to fines and imprisonment (up to 18 months) with probation.

[7] Our translation, the original quote has the following wording: „Doch greift der Grundsatz der Generalverantwortung und Allzuständigkeit der Geschäftsleitung ein, wo - wie etwa in Krisen- und Ausnahmesituationen - aus besonderem Anlaß das Unternehmen als Ganzes betroffen ist; dann ist die Geschäftsführung insgesamt zum Handeln berufen [...]“. Federal Court of Justice, Judgment of July 6, 1990, 2 StR 549/89, para. 51.

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[8] For the role of the Robert Koch Institute, *see* <https://www.gibsondunn.com/covid-19-german-infectious-diseases-protection-act-what-makes-you-stay-at-home/> (last visited April 20, 2020).



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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