GERMAN BILL INTRODUCES RESTRICTIONS ON HOSPITAL-OWNED DENTISTRY MEDICAL CARE CENTRES

On 14 March 2019, the German Parliament (*Bundestag*) passed a new bill[1] which implements significant changes to the regulation of medical care centres (*Medizinische Versorgungszentren,* "MVZs") operating in the dentistry sector. The new restrictions are likely to impact investments in dentistry MVZs by limiting the maximum supply capacity a dentistry MVZ structure owned by a hospital can own in individual planning areas.

LOCAL CAPACITY LIMITATIONS FOR HOSPITAL-OWNED DENTISTRY MVZS

The relevant changes introduced by the bill concern the ability of hospitals to establish and grow dentistry MVZs. Under the current legal framework, any authorised hospital can set up MVZs with any kind of medical specialisation. As a consequence, hospitals are often used as platforms for investments into the German healthcare market.

Under the new rules, the ability of hospitals to establish or expand existing dentistry MVZs will be limited and linked to the hospital's total share of capacity to provide dentistry services in its respective planning area (*Planungsbereich*).

This means that an existing MVZ cannot increase its number of employed dentists and a new MVZ cannot be established if the hospital owned more than 10% of the dentistry health care capacity in the relevant area. In oversupplied areas – typically larger affluent cities, which are some of the most attractive markets for dentistry chains – the threshold will be 5%. In undersupplied planning areas, e.g. rural areas, the threshold will be 20% and a newly established MVZ needs to employ at least 5 dentists.

Hospitals may, however, continue to establish and grow dentistry MVZs in other planning areas up until the relevant capacity limit.

During the legislative process, various attempts were made to implement far-reaching restrictions on hospital-owned MVZs which would have affected all MVZs, not just the ones active in the dentistry sector.

Key issues

- The German Parliament passed a new bill implementing restrictions on the ability of authorised hospitals to establish dentistry medical care centres (MVZs).
- For non-dentistry MVZs, no additional limitations apply.
- Hospitals will only be entitled to establish or grow a new dentistry MVZ if, within the concerned planning area, the total capacity to provide dentistry care services of all MVZs operated by this hospital does not exceed 10%. For over- and undersupplied areas, different thresholds apply (5%, 20%).
- The bill will impact the growth potential of existing dentistry MVZ structures. Investors will need to revisit their expansion plans.
- The law provides for grandfathering rules for existing hospital-owned and dialysis service provider-based MVZ.
- Certain dialysis service providers will only be able to establish MVZs in the same area of medical specialization.
- The bill will now be passed to the Federal Council for further review; its entry into force is expected for May 2019.

[1] The "Law for Earlier Doctor's Appointments and Better Medical Care" (*Gesetz für schnellere Termine und bessere Versorgung; TSVG*), which mostly provides for a wide range of healthcare-related measures unrelated to MVZ.

Please see our previous newsletter as of November 2018: https://www.cliffordchance.com/briefings/2018/11/restrictions_on_medicalcarecentresmvzi.html

These attempts to restrict investment into hospital-owned MVZs have not been successful and MVZ structures outside the dentistry sector will not be affected by the new bill (for dialysis see below).

Existing dentistry MVZ structures owned by hospitals are not affected with regard to their existing capacity and will enjoy grandfathering under the new law (i.e., if a dentistry MVZ already owns capacity above the respective thresholds of 5%, 10% or 20%, this excess capacity is not affected). However, their further expansion will be subject to the capacity limitations, i.e. they are barred from acquiring further capacity in the same planning area through the same hospital if and when they reach the applicable limit.

As a consequence of the new bill, buy-and-build strategies of dentistry MVZs will need to be reconsidered. There will still be room for growth, but with a cap for each hospital of 5% of the local capacity in the most attractive markets, further expansion will become more difficult and costly.

Investors affected by the new bill may want to weigh their options with regard to a potential challenge of the constitutionality of the bill. We consider it questionable whether the reasons given in the explanatory note to the bill actually support the implementation of capacity limitations for dentistry MVZs. The note cites concerns about allegedly biased medical treatment decisions at investor-owned MVZs leading to the supply of inappropriate medical services and higher costs as a key motive for the limitations. Given the dubious and thin evidence the note provides on this point and given that one could question whether the limit to the supply capacity of (efficient) MVZ structures is a suitable measure to ensure unbiased medical treatment decisions, it could be worthwhile exploring whether the bill actually meets the proportionality test required by the German constitution.

RESTRICTIONS ON MVZS BASED ON CERTAIN DIALYSIS SERVICE PROVIDERS

In addition to the limitation on hospital-owned dentistry MVZs, providers of certain dialysis services will only be allowed to set up an MVZ operating in the same area of medical specialisation. MVZs established by dialysis service providers existing and authorized at the time of entry into force of the new law will enjoy grandfathering. However, the ability of existing MVZ platforms for further expansion will be restricted. Thus, possible acquisitions of an existing MVZ platform set up by a provider of certain dialysis services would not be (legally) impaired as the structure of the platform itself and, in particular, the existing MVZ, would not be affected by the transaction.

LAST STEPS IN THE LEGISLATIVE PROCESS

After the German Parliament passed the bill, it was submitted to the Federal Council for review. Since the bill does not require the Federal Council's approval, no changes to the content of the bill are to be expected. Most parts of the bill, including the changes regarding MVZs, will enter into force after its publication in the Federal Gazette, which is currently expected in early May 2019.

Commentary

The good news is: The worst ideas for restricting competition in the German healthcare market which have been aired in the legislative process have been rejected. Most MVZs can continue to operate and grow unhindered – driving efficiency, service and quality in the German healthcare market.

But the bill still provides for a rather blatant protection of privately owned small dentistry clinics against competition from larger dentistry chains. Against the general trend of consolidation in the German healthcare market, lobbyists of dentist "mom and pop shops" have been fighting tooth and nail (pun intended) to protect their clients' lucrative market share from competition. And they have partly succeeded.

It is worrying that the explanatory note supporting the bill explicitly takes aim at private equity investors. The note essentially puts all practitioners in investor-owned dentistry MVZs under the general suspicion of applying unnecessary (expensive) medical procedures. This reasoning is a scandal in and of itself.

And the legislative process for this latest amendment to the bill has also been remarkable: after months of public debate the restrictions for dentistry MVZs were sneaked into the bill literally on the day before the bill was passed (by, or rather, through the parties supporting the current German government). The changes were not even properly debated by the Federal Parliament's healthcare committee let alone the wider public. A disgraceful but effective piece of political lobbying.

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