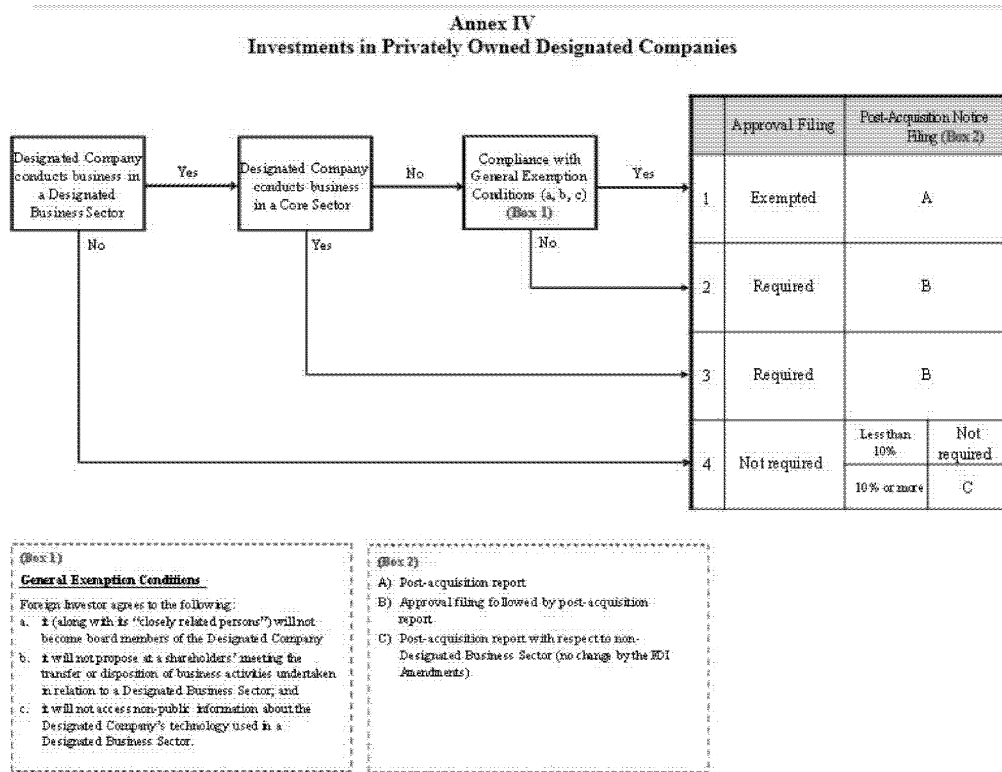

REGULATORS AND M&A: TWO MONTHS INTO THE PANDEMIC

On May 29, 2020, ***The M&A Lawyer*** *spoke with Michael Knight and Michael Gleason, who are partners in the Washington, D.C. office of Jones Day, on the topic of antitrust and how dealings with the federal regulatory agencies have developed over the two months since the COVID-19 crisis began in the U.S.*

The M&A Lawyer*: First, what have the practical aspects been in terms of merger reviews? Have the agencies been able to fully perform their functions, given that most of their officials have been working remotely since mid-March?*

Michael Knight: While a few people at the federal antitrust agencies have been found in their offices on occasion, the vast majority are telecommuting and working remotely, so obviously instead of in-person meetings, we're doing calls and videoconferences a lot more. The FTC has set up an electronic procedure for HSR filings, and they have made it workable—it's the only way they are accepting filings right now. For the most part it's been a pretty smooth process.

Michael Gleason: We've continued to see the FTC and DOJ file cases and settle them, ask for divestitures, and proceed with litigation. That's to say that there's ample evidence that they continue to prosecute cases, that they're moving their investigations forward, and are doing what they've always done.

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Knight: It has been amazing just how well we've been able to function, whether it's engaging with clients or the government agencies, without missing too much of a beat. It would have been much different even 10 years ago.

***MAL**: What has this meant for deal timing—is it taking longer for approvals to get done?*

Knight: For the most part, the review process has been working very well and the agency staffs have been engaged and available. You do have to build in more time with both agencies, in order for them to make decisions that involve their front offices. It's harder for them to coordinate than it used to be. Sometimes things aren't as immediate.

There is an initial statutory review period of 30 days after an HSR filing. If the agencies cannot close their investigation in that period, the staff needs to know whether the parties plan to accept a second request (a large subpoena) or withdraw and refile their filing, giving the agency a second 30 day period. You used to have to tell staff four to five days in advance of that deadline. Now it's typically more like seven to nine days in advance. It's also harder for the agencies to reach all of the third parties whom they typically interview during this time period, and thus it's harder for the agency to accomplish what they need to do within the 30-day timeframe. So, on the margin, this increases the likelihood of receiving a second request—if the agency is on the fence at the end of the period, they may often believe that they need [a second request] because they have to protect the investigation.

Agency leadership has made public statements supporting this. For example, Commissioner Wilson of the FTC tweeted that when the agencies had previously faced government shutdowns [in the 2010s], they had continued to issue second requests, so essentially saying that 'if we can't get our investigations done [in time], we're going to issue a second request.' Other agency leaders have said that 'our standards for getting deals approved are not going to be lessened at all as a result of this crisis. Consumers need the protection of the antitrust laws.'

There have been important changes to timing on the "back end" of agency reviews. The agencies have made it clear that they're often going to need extra time. By statute, the agencies have 30 days (in most cases) after the merging parties comply with a second request to close their investigation, file litigation to block the transaction, or seek a remedy. If you get a second request, in exchange for modifying the burden [on merging companies], parties often enter into a timing agreement, which is an agreement between the merging parties and the agency not to close, and which provides the agency more time to complete its review. The DOJ and FTC both have added 30 days to the post-compliance period in their standard timing agreements. Merging parties need to take this change into account when negotiating the termination date in their transaction agreement.

***Gleason**:* When you're negotiating a deal, you have to think about all the potentially related agencies that you may have to deal with. You might have a foreign direct investment filing (*e.g.*, CFIUS) or with certain merger control filings outside the U.S. need to produce certified copies of documents such as the articles of incorporation from a state agency. These can be real logistical challenges at times right now but can be overcome.

MAL: Are the same types of delays happening in terms of divestitures?

Knight: One thing worth mentioning with regard to divestitures: in transactions where divestitures are required, the agencies are stepping up their reviews of divestiture buyers. It is not entirely related to COVID, but they are trying to assess whether the potential buyer of the asset will not just be able to compete effectively, but be able to survive any downturns, including those related to COVID.

MAL: Are some deals involving distressed companies being sold more aggressively as a "necessity" given that the seller is considered a failing firm, and are the agencies more open to that argument?

Knight: We have seen some deals where the parties have told the agencies that what they said about the deteriorating condition of the seller last year is more true than ever because of COVID. But it's been more on the level of emphasis—I've yet to see anyone make that argument directly: that because of COVID, this seller is now a failing firm.

And the agencies have expressed some skepticism, noting that just because we're in a pandemic, parties shouldn't expect to get a free ride, even if the target is compromised financially. The same standards are going apply as usual. The FTC in particular can be very skeptical as to "failing firm" claims. You're going to have to prove there is no other option for these assets in the market and that they can't be rehabilitated.

MAL: How has the overall US M&A market been recently? Have there been signs of movement after the "limbo" of the early pandemic weeks?

Knight: For a while, M&A activity outside of distressed companies seemed somewhat suspended. However, more companies now appear to be starting to think more about the future. There have also been some deals that looked good at the end of last year but no longer look as good to the parties now. There have been recent public examples of parties deciding to terminate transactions in the face of agency opposition. Although it is hard to predict what would have happened, might those parties have extended the outside date or gone further in litigation without the crisis? At the margin, you might continue to see parties rethink their strategies: "do we want to extend our outside date in this transaction?" Some sellers may also be thinking they can't afford to wait, given everything that they're going through. Maybe it's best to break free of the deal and get back to saving their business.

For a while in mid-March, the FTC suspended granting early terminations of the HSR period. When we look at early terminations early on [in the pandemic] in early April, there were still 18-19 clearances being granted per week. Now it's gone down to the single digits. The decline likely reflects the overall decline in M&A volume—one FTC commissioner recently said that filings were down nearly 60%. There appear to be many fewer deals for this time of year, normally.

Gleason: My sense is that HSR filings are something of a lagging indicator, in that it takes a while just to get to a filing—first you've got to negotiate, you've got to come to terms before you file. So we might actually be at the trough of HSR filings, as it now reflects the general lack of new deals at the beginning of the pandemic.

MAL: Has it been as delayed, regulatory wise,

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on the international front? Are there even greater lags in dealing with European competition regimes, for example?

Knight: From talking with my colleagues in Europe, there appears to be a somewhat similar situation in the EU. Some of the national regimes have suspended their filing deadlines and some have come back on line. The EU had discouraged parties from pushing transactions forward too quickly. But by and large, the system continues to work.

We've actually seen the least disruptions in China. China has made it a point that they remain open and are keeping matters on schedule, particularly for transactions that involve industries considered important relative to the pandemic—healthcare, food supply, and so on. They will give expedited review to any transactions in those fields.

CORPORATE M&A IN TIMES OF THE CORONA CRISIS: SPECIFIC CONSEQUENCES OF THE PANDEMIC FOR THE GERMAN TRANSACTION BUSINESS

By Lutz Englisch, Birgit Friedl, Marcus Geiss, Sonja Ruttmann and Dennis Seifarth

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The Impact of Insolvency Law on the M&A Transaction Business

The cross-sectoral economic effects of the Corona crisis are likely to lead to an increased number of transactions in the medium term where the seller or the target companies, but in certain cases also the purchaser, are operating under distress or the threat of impending insolvency. This trend should apply irrespective of the German Act on the Temporary Suspension of the Insolvency Filing Obligation and Liability Limitation of Corporate Body in cases of Insolvency caused by the COVID-19 Pandemic[1] ("COVInsAG") that recently entered into force.[2]

This kind of crisis scenario makes the initial planning and structuring of M&A transactions, as well as the later implementation thereof, particularly challenging for the parties: both sides are forced to make an informed risk assessment on a potential insolvency of their contract partner and/or the target involved and then settle on a structure that best prevents or mitigates such risk. The possible privileges accorded by the COVInsAG, if applicable, will be of particular interest to the parties. If the seller is in distress, the purchaser should, for instance, evaluate up front whether it might be preferable in terms of legal certainty to acquire the target in the framework of a "pre-packaged deal" in subsequent insolvency proceedings. To the extent, however, that either the seller and/or its main creditors do not consent to this approach, the purchaser is only left with the choice of either not proceeding with the desired transaction or trying to mitigate the risks of a later seller insolvency to the largest extent possible.

If German insolvency law is applicable to one of the contract parties, either due to the fact that