

Gun-Jumping Charges Remind Dealmakers to Operate Independently Before Closing

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In early August, the U.S. Department of Justice (DOJ) entered a consent decree with Legends Hospitality Parent Holdings, LLC (“Legends”) to resolve gun-jumping allegations that Legends improperly exerted operational control over ASM Global, Inc. (ASM) while its HSR filing for its acquisition of ASM remained pending. Although the DOJ allowed the transaction to close, Legends agreed to pay \$3.5 million and be subject to seven years of DOJ oversight to resolve the allegations. This action by the DOJ provides a reminder to buyers and sellers of the need to continue operating independently after a deal is signed until closing even when the deal does not present significant antitrust concerns.

In November 2023, Legends agreed to purchase another venue management company, ASM, for \$2.3 billion and filed an HSR notification. The HSR notification started a 30-day waiting period preventing the parties from closing the transaction while the DOJ reviewed it, which was extended when the DOJ issued a Second Request seeking additional information concerning the proposed transaction.

Ultimately, the DOJ allowed the waiting period to expire almost eight months later in May 2024, and the parties recently closed the transaction, but not before the DOJ claimed Legends engaged in gun-jumping during the waiting period. “Gun-jumping” is illegal premerger coordination by a buyer and seller such as when the buyer starts exercising operational control over the to-be-acquired business or the parties agree to coordinate competitive activities prior to closing the transaction. Here, the DOJ accused Legends of gun-jumping by:

- after winning a contract to manage a California arena that ASM had previously managed, agreeing to allow ASM to continue managing it in anticipation of their future closing;
- discussing competitive bidding with ASM to avoid competing against each other; and
- halting separate bidding for two customers to instead pursue joint bidding and exchanging sensitive information to facilitate the joint bidding.

To settle the charges, Legends agreed to pay a \$3.5 million civil penalty, appoint an Antitrust Compliance Officer, provide annual antitrust training, file annual written reports to the DOJ, be subject to compliance inspections for seven years, and not engage in the alleged activities with any competitor without consulting with antitrust counsel and the Antitrust Compliance Officer.

TAKEAWAY

This settlement serves as a timely reminder that although gun-jumping complaints are rare, regulators are watching and will “continue to monitor proposed transactions” for gun-jumping concerns” even for transactions that are ultimately approved. Gun-jumping investigations can sidetrack and extend the review of transactions that may not otherwise have significant antitrust concerns. Gun-jumping issues most often come up in the context of integration planning, but even standard transaction provisions can have potential antitrust implications. For example, in a recent, unrelated investigation, regulators noted that the seller had agreed to obtain the buyer’s consent before entering into transactions worth more than a certain amount after signing. That impacted competitive bids prior to close. Similar terms in deals “can in practice provide a buyer with substantial control” over the seller’s ability to compete and other aspects of their ordinary course of business before the HSR waiting period has expired” and gun-jumping concerns are “inherently fact-specific.” Buyers and sellers should carefully consider integration planning and preclosing coordination that could be construed as gun-jumping and involve antitrust counsel to help them evaluate the risk of such measures in the context of the parties and the deal. Winston regularly advises client on gun-jumping issues and how to manage such risks.

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