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Not the Show They Wanted: DOJ Hits Venue Services Group With $3.5 Million HSR Gun-Jumping Penalty

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The US Department of Justice (DOJ) filed **a complaint** and **proposed consent decree** alleging that Legends Hospitality Parent Holdings prematurely acquired beneficial ownership – often referred to as "gun jumping" – in connection with its proposed acquisition of ASM Global. The proposed final judgment requires Legends, a global venue services company providing food and beverage services in stadiums and other venues, to pay a $3.5 million penalty, as well as retain an antitrust compliance officer, implement antitrust training and compliance programs, and submit compliance reports to the DOJ.

The investigation and proposed settlement underscore the US antitrust authorities' commitment to ensuring that acquirers do not obtain beneficial ownership until expiration of the Hart-Scott-Rodino (HSR) Act waiting period. In addition to being the first substantive HSR gun-jumping violation prosecuted since 2017, the enforcement action is notable for several reasons. First, it is another example of a gun-jumping investigation where the agency did not also challenge the underlying transaction. Second, the complaint notes that the parties agreed not to close until after the termination of the gun-jumping investigation, which may mean closing was delayed solely because of the ongoing investigation. The HSR waiting period expired on May 29, 2024, but the parties did not close until August 23, 2024 – an almost three-month delay. Third, the conduct underlying the enforcement action appears to be based primarily on planned changes to operations that would not have occurred until two months after expiration of the HSR Act waiting period.

Overview of applicable laws and penalties

The HSR Act requires merging parties meeting certain conditions to report their transaction to the US Federal Trade Commission (FTC) and DOJ and observe a waiting period (typically at least 30 days) before consummating the transaction. During the HSR waiting period, acquiring firms are prohibited from acquiring beneficial ownership over businesses to be acquired or from consummating proposed transactions, until the waiting period expires. Violators can be subject to civil penalties of up to $51,744 per day (as of 2024) and injunctive relief.

As the complaint notes, "Other antitrust laws also can apply to pre-closing conduct." For example, Section 1 of the Sherman Act prohibits parties from price fixing, bid rigging, customer or market allocation, and other forms of anticompetitive collusion, and Section 5 of the Federal Trade Commission Act prohibits the parties from engaging in "[u]nfair methods of competition."

Legends' conduct and the proposed settlement

According to the complaint, Legends engaged in gun jumping by assuming operational control of ASM prior to the expiration of the HSR waiting period. The complaint alleged that in May 2023 (during negotiation of the transaction), Legends and ASM competed for the management lease of an arena in California to begin July 2024, and Legends won despite ASM being the incumbent. The complaint alleges that, "Legends decided that ASM would continue to operate the California arena." As evidence, the DOJ claimed that:

1. There was an agreement between Legends and ASM signed on December 7, 2023, that ASM would book third-party events for the California arena.
2. "Legends decided that ASM would continue providing venue management services for the California arena instead of transitioning the arena to Legends."

As evidence of the "purpose and intent" of that conduct, the complaint also alleged that:

- While the parties were negotiating the transaction, Legends "sought to discuss competitive bidding strategies with ASM" to determine which company would bid on particular projects.
- For two bids, the parties intended to submit separate bids before entering into negotiations, but "their posture changed" after negotiations began, and they decided to bid together, exchanging competitively sensitive information (CSI) related to preparing one of the bids and exchanging "related information" for the other.

Under the proposed final judgment, Legends agreed to pay a $3.5 million civil penalty and appoint an antitrust compliance officer to provide antitrust compliance training and monitor Legends' compliance with the proposed final judgment. The DOJ alleged that the violations continued for 174 days (from December 7, 2023, the day that Legends and ASM signed the agreement that ASM would provide third-party booking services for the California arena, until the expiration of the waiting period on May 29, 2024). It thus appears that the DOJ penalized Legends approximately $20,115 per day of violation, or about 38% of the statutory maximum.

Finally, the proposal also prohibits Legends from sharing CSI in the course of negotiating future M&A transactions. Legends is prohibited from sharing CSI in connection with competitor collaborations, or from agreeing to collaborate with a competitor on a bid or to refrain from a bid, unless Legends first secures the advice of antitrust counsel, consults with its antitrust compliance officer and obtains advance written permission from its CEO or general counsel. Legends is subject to these restrictions and obligations for seven years.

Legends complaint in context

Legends is the first substantive gun-jumping enforcement action filed by the antitrust agencies since 2017 (during the Trump administration), and is noteworthy both in the limited evidence cited and in the interpretation of what constitutes improper conduct during the pendency of the HSR waiting period.

As described above, the *Legends* complaint focused on three types of conduct. First, the DOJ alleged that Legends contracted with ASM for ASM to provide a subset of services for a California arena that Legends had won in competition with ASM, and then "decided" that ASM would continue to provide venue services to the California arena, which appeared to form the basis of the actual violation. The DOJ alleged that, "[a]bsent the [a]cquisition, Legends was planning to provide those services itself to the arena." Of note, however, is that ASM's existing contract with the arena did not expire until July 31, 2024, more than two months after the expiration of the HSR waiting period. There are no allegations that Legends directed or required ASM to make any changes to its operations or provision of services to the arena that would take effect prior to expiration of the HSR waiting period. Further, the DOJ's assertion that, "Legends **decided** that ASM would continue providing venue management services," (emphasis added) includes no allegations that Legends actually **instructed** ASM to provide the services, or that ASM actually took any action to provide such services prior to expiration of the HSR waiting period. Indeed, this allegation on its face appears consistent with planning for integrated operations following closing, which has long been accepted as permissible during the HSR waiting period.

The second set of allegations, which the DOJ contends, "[inform the] purpose and intent of Legends' pre-closing conduct," focus on internal Legends documents and communications that it **intended** to discuss CSI with ASM or coordinate bidding for an opportunity in North Carolina, but there is no evidence that it actually had those conversations.

Third, the DOJ alleged that for two additional opportunities, the parties intended to pursue separate bids but then "changed their

posture" after starting negotiations to instead jointly bid for two opportunities and exchanged CSI as part of one of those joint bids. Notably – and perhaps why it is not included as part of the core allegations of a violation – one of those opportunities occurred while the parties were in negotiations and long before signing or submission of the HSR filing. Moreover, there were no allegations that the CSI exchanged was beyond that which was appropriate for preparing a joint bid or that joint bids in the industry, or even among the parties, were unusual.

Antitrust compliance when negotiating with competitors

The antitrust laws recognize that parties must be free to engage in some level of due diligence to negotiate transactions and engage in integration planning post-signing to enable successful integration after clearing the HSR waiting period. But as the *Legends* case illustrates, when negotiating a potential transaction – particularly with counterparties that may be competitors – parties must ensure that pre-close information exchange or integration planning does not cross the line into illegal control or gun jumping. Parties pursuing M&A or other collaborations should engage with antitrust counsel early in the process to develop a compliance plan allowing them to pursue necessary information sharing and integration planning without crossing that line. A good compliance plan will cover, at minimum, the following:

1. Due diligence protections

While there can be legitimate reasons for a buyer to review a seller's CSI in the course of negotiations, overbroad access exceeding legitimate need may be interpreted as facilitating illegal coordination or gun jumping. Consider methods to reduce those risks. For example, a clean team of internal or external individuals that do not have responsibility for competitive operations can facilitate exchange while minimizing risks.

2. Integration planning

Parties can and should develop post-close integration plans to enable the combined firm to effectively compete on "day one." However, such efforts should be limited to "planning" and should not cross over to "implementation." If integration planning concerns conduct that will only occur post-closing and has no effect on current operations, parties should document those intentions.

3. 'Business as usual'

Until the HSR waiting period has expired or terminated, parties to a transaction should remain separate. For example, if the parties are competitors, then each party should continue to independently compete vigorously for opportunities. And all negotiations with vendors, suppliers or customers must remain separate, with each party exercising its independent business judgment. Balancing these requirements with interim operating covenants designed to legitimately protect the buyer against material changes in the seller's business, which could undermine the benefit of the bargain, can be complicated – and counsel should be consulted if the parties anticipate an extended regulatory review.

4. Use caution for any joint activities with the other party

Even if the parties regularly collaborate, the parties should exercise caution after negotiations start and ensure that any such collaboration is justifiable.

Key Contacts

Richard G.S. Lee Washington, DC	rglee@cooley.com +1 202 842 7881
Sharon Connaughton Washington, DC	sconnaughton@cooley.com +1 202 728 7007
Megan Browdie Washington, DC	mbrowdie@cooley.com +1 202 728 7104
David Burns Washington, DC	dburns@cooley.com +1 202 728 7147
Kathy O'Neill Washington, DC	koneill@cooley.com +1 202 776 2294
Howard Morse Washington, DC	hmorse@cooley.com +1 202 842 7852