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Don't jump the gun: The US Department of Justice issues rare $3.5 million civil penalty for gun jumping

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On August 5, 2024, the U.S. Department of Justice (DOJ) filed a proposed settlement with Legends Hospitality Parent Holdings ("Legends"), a global venue services company, in connection with its proposed acquisition of ASM Global, Inc. ("ASM"), a company focused on venue management.

The DOJ alleged that Legends violated the Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended ("HSR Act"), by failing to operate separately from ASM because Legends had effectively assumed control of ASM prior to the expiration of the waiting period under the HSR Act.

If approved, the settlement will require Legends to pay a $3.5 million penalty, report to an outside compliance monitor, and receive four years of antitrust training and compliance certification.

Although the facts of the DOJ enforcement action with regard to Legends are particularly egregious, the action serves as a useful reminder that companies are at risk if they don't take prohibitions on gun jumping seriously.

The HSR Act and gun jumping

The HSR Act requires companies to notify the DOJ Antitrust Division and the Federal Trade Commission (FTC) (together, the "Agencies") of certain non-exempt transactions that meet minimum reporting thresholds.

The settlement will require Legends to pay a $3.5 million penalty, report to an outside compliance monitor, and receive four years of antitrust training and compliance certification.

If a transaction needs to be reported to the Agencies under the HSR Act, the parties must adhere to a 30-day waiting period prior to closing the transaction.[1] The Agencies can decide whether or not to open an in-depth investigation of the transaction, often called a Second Request, that automatically extends the waiting period.

During this process, the parties cannot close the transaction, must operate separately and independently, and can only share competitively sensitive information with proper safeguards in place. Failure to follow these requirements may constitute illegal gun jumping. The Agencies can seek injunctive relief or civil penalties (currently up to $51,744 per day in violation) against both the buyer and seller.

Legends gun jumping enforcement action

On August 5, 2024, the DOJ brought an action against Legends for gun jumping in violation of the HSR Act. Legends is a global venue services company and was seeking to acquire ASM, another venue services company focused on venue management.

The Legends enforcement action is the second time the Biden administration has sued a company for violating the HSR Act, and the first time the Agencies brought a gun jumping case in seven years.

On November 3, 2023, Legends agreed to purchase ASM for $2.325 billion and submitted an HSR filing on November 6, 2023. The DOJ issued a Second Request on January 8, 2024, to extend its review of the deal. The DOJ closed its review on May 29, 2024. While the DOJ did not challenge the transaction itself, it filed the gun jumping lawsuit months later, on August 5, 2024.[2]

According to the DOJ, while the DOJ's review of the deal was still pending, Legends and ASM engaged in gun jumping. Specifically, the DOJ claims that in May 2023, Legends won the right to manage a city-owned arena in California where ASM was the previous manager. The DOJ alleged that due to the pending acquisition, Legends decided to allow ASM to continue to operate the arena instead and signed an agreement to that effect on December 7, 2023.

Also during the diligence process, Legends allegedly sought to discuss competitive bidding strategies with ASM. It subsequently decided not to compete for a bid opportunity against ASM and decided to change a different Legend's bid to a joint bid with ASM.[3]

The DOJ asserted that the violation started on December 7, 2023 (when Legends signed the agreement with ASM to manage the California arena) and continued until May 29, 2024 (when the HSR waiting period was terminated), which amounts to 175 days total.

Legends agreed to pay a $3.5 million civil penalty to settle the alleged violation, approximately 40% of the maximum civil penalty, among other requirements, which include submitting regular compliance reports to the DOJ, appointing an Antitrust Compliance Officer, and implementing an antitrust training and compliance program.[4]

Aggressive and unpredictable antitrust enforcement under the Biden administration

The Legends enforcement action is the second time the Biden administration has sued a company for violating the HSR Act, and the first time the Agencies brought a gun jumping case in seven years. In April 2023, the FTC sued to stop the integration by Louisiana Children's Medical Center of three New Orleans hospitals it recently acquired; the FTC alleged that they had not reported the transaction as required under the HSR Act.[5]

The Agencies are also bringing cases under novel theories of harm, leading to less predictability in the merger review process and the types of deals that might be subject to prolonged investigations.

The Biden administration has also demonstrated a heightened scrutiny of M&A generally, both through its actions and public statements of key leadership like DOJ Assistant Attorney General Jonathan Kanter and FTC Chair Lina Khan.

Thus far in 2024, parties have publicly abandoned nine transactions due to Agency concerns.[6] In addition, the Agencies have sued to block three additional deals.[7] The number of abandoned transactions is already the highest since 2016, and the combined number of abandoned transactions and transactions that the Agencies have sought to block is also on track to be the highest since 2016.

The Agencies are also bringing cases under novel theories of harm, leading to less predictability in the merger review process and the types of deals that might be subject to prolonged investigations. For example, the current administration has shown a new focus on labor markets and challenged mergers in part due to labor market concerns.[8] Further, the FTC brought a novel theory of harm in Amgen's proposed acquisition of Horizon, where the two parties did not directly compete or have a vertical relationship.[9]

Best practices

The current enforcement environment presents increased compliance risk to parties engaging in transactions. Companies should be vigilant to ensure that they avoid even the appearance of gun jumping.

Best practices include:

- Conduct business as usual until closing, which means parties should operate separately, make independent decisions, and compete as they would absent the transaction;
- Do not transfer assets or ownership interests prior to closing;
- Plan for, but do not initiate, integration of any aspect of the businesses, including facilities, data, employees, infrastructure, etc.;
- Do not exercise any influence or control over each other's business decisions;
- Use a clean team to exchange competitively sensitive information necessary for integration planning or diligence;
- Avoid any coordination of sales to customers; and
- Consult with counsel before and throughout the integration planning process.

The Agencies have previously alleged that the following types of conduct are gun jumping violations:

- Sharing competitively sensitive information, such as current and future pricing or cost information;[10]
- Prematurely transferring beneficial ownership of the target or closing the transaction before the expiration of the HSR waiting period;[11]
- Prematurely integrating or consolidating operations;[12]
- Exercising control over the other party's assets or its routine business, management, or operations;[13] and
- Engaging in impermissible joint conduct, such as fixing prices, terms, and conditions.[14]

Most importantly, parties should confer with legal counsel prior to discussing integration, exchanging data, or discussing the transaction with customers, suppliers, or the public, and develop safeguards for integration planning tailored to the transaction at hand.

Notes:

[1] This waiting period can be extended by an additional 30 days if the parties agree to pull and refile.

[2] Amended Complaint, *United States v. Legends Hospitality Parent Holdings, LLC*, No. 1:24-cv-5927 (S.D.N.Y. Aug. 5, 2024).

[3] *Id.*

[4] *Id.*

[5] The Federal District Court in Louisiana ultimately held that the parties did not have to report the transaction since Louisiana Children's Medical Center had received approval from the state under a Certificate of Public Advantage. *Louisiana Children's Med. Ctr. v. Att'y Gen. of United States*, No. CV 23-1305, 2023 WL 6293887, at *12 (E.D. La. Sept. 27, 2023).

[6] These include Amazon's proposed acquisition of iRobot, Choice Hotel's proposed acquisition of Wyndham Hotels, Qualcomm's proposed acquisition of Autotalks, Altus Group's proposed acquisition of Situs Group's commercial real estate valuation business, Fresh Express's proposed acquisition of Dole's packaged salad business, TopBuild's proposed acquisition of SPI, UnitedHealth's proposed acquisition

of Stewardship Health and another undisclosed company, and IAG's proposed acquisition of Air Europa. In addition, the parties have abandoned their proposed acquisitions after a court ruling in IQVIA's proposed acquisition of Propel Media, Novant Health's proposed acquisition of two hospitals from Community Health Systems, and JetBlue's proposed acquisition of Spirit.

[7] These include Kroger's proposed acquisition of Albertsons, Tapestry's proposed acquisition of Capri, and Tempur Sealy's proposed acquisition of Mattress Firm.

[8] Complaint, *Federal Trade Commission v. Tapestry, Inc. and Capri Holdings Limited*, No. 1:24-cv-03109 (S.D.N.Y. Apr. 23, 2024); Complaint, *Federal Trade Commission v. Kroger Company and Albertsons Companies, Inc.*, No. 3:24-cv-00347 (D. Or. Feb. 26, 2024).

[9] The FTC alleged that Amgen could use its market power in certain high-demand drugs to force companies to buy other drugs with lower demand. *See* Complaint, *FTC v. Amgen, Inc. and Horizon Therapeutics PLC*, No. 1:34-cv-03053 (N.D. Ill. May 16, 2023)

[10] *See, e.g.*, *United States v. Flakeboard America Limited et al.*, No. 3:14-cv-4949 (N.D. Cal. Nov. 7, 2014); *United States v. Computer Associates International, Inc. et al.*, No. 1:01CV02062 (D.D.C. Sept. 28, 2001).

[11] *See, e.g.*, *United States v. Duke Energy Corp.*, No. 1:17-cv-00116 (D.D.C. Jan. 18, 2017); *United States v. Flakeboard America Limited et al.*, No. 3:14-cv-4949 (N.D. Cal. Nov. 7, 2014); *United States v. Smithfield Foods, Inc. et al.*, No. 1:10-cv-00120 (D.D.C. Jan. 21, 2010); *United States v. Atlantic Richfield Company and U.F. Genetics*, No. 91-3267 (D.D.C. Dec. 29, 1991).

[12] *See, e.g.*, *United States v. Computer Associates International, Inc. et al.*, No. 1:01CV02062 (D.D.C. Sept. 28, 2001); *United States v. Input/Output, Inc. et al.*, No. 1:99CV00912 (D.D.C. Apr. 12, 1999).

[13] *See, e.g.*, *United States v. Flakeboard America Limited et al.*, No. 3:14-cv-4949 (N.D. Cal. Nov. 7, 2014); *United States v. Smithfield Foods, Inc. et al.*, No. 1:10-cv-00120 (D.D.C. Jan. 21, 2010); *United States v. Qualcomm Inc. et al.*, No. 1:06CV00672 (D.D.C. Apr. 13, 2006); *United States v. Titan Wheel International, Inc.*, No. 1:96CV01040 (D.D.C. May 7, 1996).

[14] *See, e.g.*, *United States v. Gemstar-TV Guide International Inc.*, No. 1:03CV00198 (D.D.C. Feb. 6, 2003).

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