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DOJ PREVAILS IN UNPRECEDENTED ARBITRATION IN MERGER CHALLENGE, SIGNALING MORE ARBITRATION IN FUTURE MERGER CHALLENGES

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For the first time in history, DOJ's Antitrust Division used binding arbitration to resolve a central dispute in a merger challenge. As part of its lawsuit to block Novelis Inc.'s proposed acquisition of Aleris Corporation, the parties and DOJ agreed to resolve the issue of market definition through binding arbitration. DOJ implemented the relevant order and regulations for Alternative Dispute Resolution ("ADR") in the mid-1990s,[1] but this marks the first time DOJ has used its arbitration authority.

This successful foray means that DOJ leadership is likely to offer arbitration to resolve narrow disputes in future merger investigations. Arbitration may facilitate faster resolution of critical issues without incurring the time and expense of full court litigation. Increased use of arbitration also implicates public policy issues, including deciding what matters will be used to shape precedent.

The Proposed Merger and Challenge

Novelis, a flat-rolled aluminum producer, agreed to acquire Aleris, a relatively new producer of flat-rolled aluminum, in July 2018. More than a year later, DOJ filed a complaint in the Northern District of Ohio seeking to block the acquisition.[2]

The Novelis complaint alleges that the acquisition would combine two of only four North American producers of aluminum auto body sheet ("ABS"), providing the combined entity with 60% of total production capacity and allowing it to raise

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prices, reduce innovation, and provide less favorable terms of service to automakers. Automakers are increasingly using aluminum ABS to develop vehicles that are lighter and more fuel-efficient.

The complaint quotes internal party documents to support DOJ's theories, including that Novelis was worried Aleris could be sold to a "new market entrant in the U.S. with lower pricing discipline" and that an "alternative buyer [was] likely to bid aggressively and negatively impact pricing" in the market.[3]

In announcing the challenge, DOJ promoted the use of arbitration as allowing it to "resolve the dispositive issue of market definition in this case efficiently and effectively, saving taxpayer resources."[4] In 1995, Attorney General Janet Reno ordered the entire DOJ (not just the Antitrust Division) to undertake greater use of ADR "in appropriate cases."[5] In 1996, the Antitrust Division published policy guidance, including on case selection criteria, different ADR techniques such as arbitration and mediation, and factors favoring or disfavoring ADR. This guidance notably provides:

> Because of the time constraints imposed by the [Hart-Scott-Rodino Antitrust Improvements Act of 1976] and the exigencies of the merger review process in general, ADR techniques will likely be difficult to apply during the course of merger investigations. On the other hand, nonmerger investigations often have more timing flexibility.[6]

In *Novelis*, DOJ filed a notice with the court stating that "because this merger challenge would turn on a single dispositive issue [product market definition], the parties have agreed to refer this issue to binding arbitration . . . to lessen the burden on the Court and reduce litigation costs."[7] The notice included a redacted term sheet governing the parties' agreement to arbitrate.[8] According to that document:

- The parties and DOJ "must work in good faith to commence the arbitral hearing" within 120 days of the filing of the answer, assuming DOJ has not accepted a remedy. Arbitration had to be completed within 21 days, and the decision made within 14 days of the hearing.
- If DOJ and the parties could not agree on a

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single arbitrator, a panel of three arbitrators would be selected.

- The arbitral decision was limited to five pages.
- If the arbitrator determined that the relevant market is broader than DOJ alleged, the complaint would be promptly dismissed. If the arbitrator agreed with DOJ, the parties would be forced to divest certain assets and pay DOJ's fees and costs, including expert fees.
- If the arbitrator did not rule for DOJ prior to December 20, 2019, and the arbitration was still pending as of that date (which occurred), the parties could close the transaction subject to holding the potentially divested assets separate from the rest of the business.[9]

The Arbitrator's Decision

In a March 2020 DOJ press release, DOJ announced that it had prevailed in the arbitration and, as a result, Novelis must divest Aleris' aluminum ABS operations in North America.[10] Assistant Attorney General for the Antitrust Division ("AAG") Makan Delrahim stated that DOJ supports increasing use of arbitration "in the right circumstances." In this case, arbitration "proved to be an effective procedure for the streamlined adjudication of a dispositive issue in a merger challenge" and that DOJ "look[s] forward to applying the learning from this case to future matters."[11]

The arbitrator's five-page decision "relied upon the evidentiary record, the 2010 Merger Guidelines, as well as relevant case law and other authorities." He concluded that, while steel and aluminum ABS suppliers may "aggressively compete" at some stages of the automobile manufacturers' design process, the evidence supported the DOJ's product market because steel did not compete with aluminum ABS at later stages where "actual and dynamic pricing occurs."[12] Notably, the arbitrator dismissed both parties' experts' quantitative evidence because "the underlying data used by both economists was not sufficiently verifiable to be definitively relied upon."[13]

The arbitrator found that steel producers did not constrain the pricing of aluminum ABS in a way that would support a product market that included both steel and aluminum ABS. The government and merging parties diverged over when and how to analyze the significance of price competition, for example, at the procurement phase only (DOJ position) or at the design and procurement phases (merging parties' position). According to the arbitrator, the parties also "would leave the exercise of looking at pricing discipline to competitive effects analysis," urging a more "holistic view" of the evidence that "focus[es] on the entire equation." However, the arbitrator explained:

> It would be odd if the parties agreed to have the outcome in the Arbitration depend on what stage, in merger analysis, price effects are analyzed, and particularly so because the two stages (market definition and competitive effects) are so closely interrelated that the choice could be serendipitous: "[e]vidence of competitive effects can inform market definition, just as market definition can be informative regarding competitive effects."[14]

This statement highlights a common issue over the intersection of market definition and competitive effects analysis in merger investigations and litigation. The analytical spillover between the two concepts potentially serves as a cautionary tale for companies considering whether to pursue arbitration, and on what basis.

Court Approval and Divestiture

DOJ will next file a proposed final judgment with the court requiring Novelis to divest Aleris' entire aluminum ABS operations in North America to preserve competition in the relevant market. Under the Tunney Act, DOJ must publish the order in the Federal Register, and cause a summary of the contents of the order to be published in a newspaper, allowing 60 days for public comments.[15] The parties may close before completing the divestiture, but they are also awaiting resolution of foreign merger review before they can close.[16]

Potential Benefits of Arbitration

Novelis illustrates how arbitration provides DOJ and merging parties with more control over when and how a case will be resolved. Arbitration gives the parties latitude to define the rules of the game. Typically, a judge in a civil matter has significant discretion over how she manages trials, including when hearings will occur, how long discovery will be, and when to issue a decision. With arbitration, DOJ and merging parties can agree on the schedule they believe makes sense without being limited by a court's other matters.

From a process perspective, arbitration is a win for merging parties. Although in *Novelis*, the arbitration schedule was similar to a typical merger litigation, *i.e.*, four months for pretrial discovery overseen by the court and three weeks for the arbitration hearing, parties in other cases could decide on a more condensed schedule depending on the scope of the issue presented. Additionally, if the parties agree on a narrow question for arbitration, the amount of discovery needed may be greatly reduced as compared to typical merger litigation. This could save both time and resources for all involved (including potential third parties who would otherwise be required to respond to subpoenas). This, in turn, can reduce the cost and length of the arbitration by decreasing the number witnesses and exhibits presented.

Likewise, putting a deadline on when a decision has to be entered (here, within 14 days of the hearing's conclusion) gives companies greater certainty for when the process will resolve. Although federal judges often strive to issue opinions in merger challenges in a timely manner (and often much quicker than decisions issued in the non-merger context), parties have no ability to force a judge to render judgment by a certain date. This is not the case with arbitration. As a service provider hired by the parties to focus on their specific issue, requiring decision by a date certain is an option.

Perhaps the biggest advantage of arbitration over traditional litigation is the ability to choose the arbitrator. Unlike litigation in which judges are randomly assigned, arbitration allows the government and merging parties to agree on the decision maker. The DOJ and merging parties will have to decide on a process to decide on an arbitrator. In *Novelis*, the two sides agreed that, if they could not agree on a single arbitrator, a panel of three arbitrators would be selected. While this system worked in *Novelis*, it is certainly not the only option. Another approach parties could explore is allowing each side to pick one arbitrator and allowing those arbitrators to pick a third to complete the panel. Still another is having one party choose three arbitrators it would be happy with and the other side selecting the one that will ultimately arbitrate the matter. The key point: there is substantial flexibility in how an arbitrator can be selected.

This flexibility is key because the identity of the arbitrator may be just as important as the scope of the question arbitrated. Here, AAG Delrahim commended the arbitrator as "a highly-respected and experienced antitrust lawyer and former Director of the Federal Trade Commission's Bureau of Competition" who also served in private practice.[17] If arbitration becomes a more common tool for resolving antitrust investigations, there will be increasing demand for arbitrators who possess antitrust expertise. Companies will need to vet candidates carefully. An arbitrator who has extensive antitrust experience will likely make the challenge process easier for the parties. An arbitrator who lacks antitrust experience, however, may impede the process and require the parties to expend additional resources to bring the arbitrator up to speed.

DOJ's Future Use of Arbitration

While DOJ supports using ADR to resolve future merger challenges in the "right circumstances," there is limited guidance as to what constitutes such circumstances. AAG Delrahim explained that DOJ would consider three factors when determining whether to use arbitration:

- efficiency gains,
- clarity of the question the arbitrator would resolve, and
- potential lost opportunity to create legal precedent.

AAG Delrahim added that DOJ also would consider the identity of the arbitrator, how costs would be allocated, and the arbitration process, which would be agreed by DOJ and the parties "likely before filing suit."[18]

DOJ stated arbitration might be appropriate if there is agreement between DOJ and companies on a clear question for the arbitrator. Identifying and reaching agreement on this point may prove challenging in many cases, including on the discrete issue of market definition when, as in this case, there may be aspects of the separate—and non-arbitrable—competitive effects analysis that potentially support the companies' arguments. This is especially so given that DOJ anticipates these agreements on the scope of arbitration occurring prior to filing suit.

Finally, it is possible that arbitration could hinder the development of antitrust precedent. Mindful of public policy concerns, DOJ has warned that it will not pursue arbitration if it means a lost opportunity to create valuable legal precedent.[19] DOJ may not want to use arbitration in cases that involve high-profile industries or companies, or that implicate important policy considerations. In these situations, the government is more likely to pursue litigation that creates valuable legal precedent over arbitration, where the outcome and reasons for it will be less transparent and determinative of future cases. Still, DOJ may selectively offer or agree to arbitration in challenging matters where it faces difficult facts. By sidelining these matters, DOJ could skew court precedent—strategically or unintentionally—in its favor, ultimately leading to more pro-enforcement case law.

ENDNOTES:

[1]*See* Administrative Dispute Resolution Act of 1996, 5 U.S.C.A. § 571 et seq.; 61 Fed. Reg. 36,896 (July 15, 1996) (Antitrust Division's implementing regulations).

[2]Complaint, *United States v. Novelis, Inc. et al.*, No. 19 Civ. 2033 (N.D. Ohio Sept. 4, 2019), *available at* https://www.justice.gov/atr/case-doc

ument/file/1199461/download.

[3]*Id.* at 7.

[4]Press Release, U.S. Dep't of Justice, Justice Department Sues to Block Novelis's Acquisition of Aleris (Sept. 4, 2019), https://www.justice.gov/opa/pr/justice-department-sues-block-noveliss-acquisition-aleris-1.

[5]U.S. Dep't of Justice, Policy on the Use of Alternative Dispute Resolution and Case Identification Criteria for Alternative Dispute Resolution, 136 Fed. Reg. 36,895 (July 15, 1996).

[6]*Id.* at 36,896.

[7]Plaintiff United States' Explanation of Plan to Refer this Matter to Arbitration, *United States v. Novelis, Inc. et al.*, No. 19 Civ. 2033 (N.D. Ohio Sept. 9, 2019), *available at* https://www.justice.gov/atr/case-document/file/1200821/download.

[8]Term Sheet, *United States v. Novelis, Inc. et al.*, No. 19 Civ. 2033 (N.D. Ohio Sept. 9, 2019), *available at* https://www.justice.gov/atr/case-document/file/1200806/download.

[9]*Id.*

[10]Press Release, U.S. Dep't of Justice, Justice Department Wins Historic Arbitration of a Merger Dispute (Mar. 9, 2020), https://www.justice.gov/opa/pr/justice-department-wins-historic-arbitration-merger-dispute.

[11]*Id.*

[12]Arbitration Decision, *United States v. Novelis, Inc. et al.*, No. 19 Civ. 2033 (N.D. Ohio Sept. 9, 2019), *available at* https://www.justice.gov/atr/case-document/file/1257031/download.

[13]*Id.*

[14]*Id.* (citing U.S. Dep't of Justice & Fed. Trade Comm'n, Horizontal Merger Guidelines (2010)).

[15]Antitrust Procedures and Penalties Act of 1974, 15 U.S.C. § 16(b)-(h) (the "Tunney Act").

[16]Press Release, U.S. Dep't of Justice, Justice Department Wins Historic Arbitration of a Merger Dispute (Mar. 9, 2020), https://www.justice.gov/opa/pr/justice-department-wins-historic-arbitration-merger-dispute.

[17]*Id.*

[18]Makan Delrahim, Ass't Att'y Gen., Antitrust Div., U.S. Dep't of Justice, Assistant Attorney General Makan Delrahim Delivers Remarks at the 7th Bill Kovacic Antitrust Salon (Sept. 9, 2019), *available at* https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-remarks-7th-bill-kovacic-antitrust.

[19]*Id.*

THE BLENDING OF PRIVATE EQUITY AND ACTIVISM

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A trend is emerging in the world of alternative investments that is defying decades of tradition. There is a noticeable blending of activism and private equity, intrinsically separate investment strategies that once occupied two distinct arenas, into a hybrid space in which private equity firms are making minority investments and hedge funds are acquiring whole companies. While certain activist investors such as Paul Singer and Carl Icahn have long been selectively acquisitive due to their size, other activist investors are also starting to employ private equity-like strategies. For their part, some private equity firms have recently taken up their own form of activist investing.

Differences Between Activists and Private Equity

Activist investors and private equity firms share a common goal: to acquire an ownership stake in a company they consider to be undervalued, effect certain changes at the company designed to boost value, and then realize a return on their original