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Skadden Discusses DOJ and the Arbitration Option for Merger Review

By *Karen Hoffman Lent, Kenneth Schwartz and Heather Cicchese* October 22, 2019

Comment    

After letting the option go unused for more than 20 years, the Antitrust Division of the Department of Justice recently announced it would use arbitration to settle its challenge of the proposed merger of two aluminum producers. In a press release last month, the Division acknowledged that this is the first time its history that it has used arbitration rather than litigation as a means to resolve an antitrust challenge. The emergence of arbitration as an alternative to litigation raises questions about its proper mechanisms and its potential impact on the merger review process.

Novelis-Aleris Agreement and Rationale

On Sept. 4, the DOJ challenged Novelis's proposed \$2.6 billion purchase of Aleris, citing concerns that the combination of two of the four North American producers of aluminum for automobile bodies would result in higher prices. In the same press release, the Antitrust Division stated that it had agreed with the defendants to refer the matter to binding arbitration. While the DOJ has had the power to invoke arbitration since the passage of the Administrative Dispute Resolution Act of 1996, this marks the first time the Division has done so.

During remarks at the 7th Bill Kovacic Antitrust Salon the following week, Assistant Attorney General Makan Delrahim commented on the challenges faced by generalist judges when handling antitrust proceedings and spoke about the benefits of arbitration as an alternative. Arbitration provides a means to have specialty decision-makers, either with economics training or other prior experience, preside over complex economics issues and thus, Delrahim argued, provides for greater accuracy and efficiency, benefiting both defendants and the public. He noted arbitration would likely be used to decide important or dispositive issues without the expense of a trial, rather than to resolve entire litigations. Such is the case in the Novelis-Aleris arbitration, which will be focused on the discrete question of the relevant product market. Novelis and Aleris argue that they compete with suppliers of steel for automotive parts as well as suppliers of aluminum, whereas the DOJ argues that there is a distinct market for aluminum parts because it makes vehicles lighter and safer compared to those made with steel parts.

The DOJ announced its challenge of the transaction on the same day that a federal district court finally cleared the CVS-Aetna merger after a lengthy review. The DOJ had filed suit on Oct. 10, 2018 to enjoin CVS Health's nearly \$70 billion proposed acquisition of health insurer Aetna, and at the same time filed a proposed settlement. Merger settlements are subject to judicial review under the Tunney Act, which requires the district judge's agreement that the proposed settlement is in the public interest. Historically, this has been a fairly fast process. But in the CVS-Aetna merger, the federal district judge spent nearly a year questioning whether the settlement did enough to protect competition and consumers in health-care markets, including, for the first time in a court review of a government merger settlement, convening hearings to consider live testimony from the deal's critics. While the DOJ ultimately got the result it sought, commentators have speculated that the Antitrust Division may be looking for ways to avoid such costly and time-consuming processes in the future by streamlining disputed merger questions through arbitration. See Pallavi Guniganti, *DOJ Embraces Arbitration After Long CVS/Aetna Review*, *Global Competition Review* (Sept. 20, 2019). Deputy Assistant Attorney General for the Antitrust Division Barry Nigro acknowledged that the judge's handling of the CVS-Aetna deal required the DOJ to "effectively litigate in a mini-trial a case we didn't bring," costing time and taxpayer money. See Matthew Perlman, *CVS-Aetna Deal Clouds Merger Reviews, DOJ Deputy Says*, *Law360* (Sept. 10, 2019).

According to the publicly filed Explanation of Plan to Refer This Matter to Arbitration (the Plan), the parties will "work in good faith to commence the arbitral hearing within 120 days of the filing of Defendants' answer, with the arbitral hearing being completed in no more than 21 days, and the arbitrator being asked to issue a

decision within 14 days of the arbitral hearing.” From the filing of the complaint to decision, the process will take almost six months, though the Defendants’ answer deadline has already been extended another 21 days to October 16th. Though the Plan notes the parties agreed to arbitration “in order to lessen the burden on the Court and reduce litigation costs to the merging parties and to the United States,” this timeline is roughly equivalent to the typical timing in a merger litigation in federal court. For example, in 2016, the average time from filing the complaint to the judge’s decision was seven months. More recently, in the AT&T-Time Warner merger litigation, the complaint was filed in November 2017 and a decision was announced in June 2018, consistent with the seven-month average. Based on this data, it is unclear how significant the efficiency gains will be of opting for arbitration over litigation, particularly since the arbitration plan contemplates the parties having “discovery rights no less favorable than it would have in any other district court litigation.”

Outstanding Questions

To date, the DOJ has not offered specifics on how it intends to employ arbitration more generally. Arbitration has been used in merger review in the past as a potential remedy, including in the AT&T-Time Warner merger. Time Warner offered to engage in baseball style arbitration at rival distributor’s request as an attempt to mitigate the DOJ’s concerns that the merger would give Time Warner increased leverage during negotiations. The offer mirrored a remedy adopted in the Comcast-NBC Universal merger settlement in 2009. Both arbitration agreements involved (1) final offer arbitration, (2) standstill provisions preventing content blackouts, (3) fair market value as the standard, and (4) similar discovery procedures and timelines. The DOJ had experimented intermittently with arbitration provisions prior to Comcast-NBC, though the five consent decrees that included arbitration provisions contained little detail or consistency on the governing terms. See Daniel H. Margolis & Kenneth M. Vorrasi, “Arbitration in US Antitrust Enforcement,” *EU & US Antitrust Arbitration: A Handbook for Practitioners* (2011). Accordingly, the use of arbitration as a merger remedy offers little insight into the DOJ’s general practice or preferences for arbitration, even on issues such as arbitrator selection or the scope of discovery. Key questions about the how arbitration will work in lieu of trial include:

1. What arbitration procedures will be followed? According to the Plan, the case will remain before the district court while the parties complete fact discovery. If a settlement is not reached by the conclusion of fact discovery, the case will be referred to arbitration. If the companies prevail at arbitration, the DOJ will voluntarily dismiss the complaint, and if the Division prevails, it will file a proposed final judgment with the district court for Tunney Act review. Each party will pay its own costs and fees, though Novelis has agreed to reimburse the United States for attorney fees and expenses incurred in connection with the arbitration should the DOJ prevail.

The Plan also states that the parties and the DOJ will use their “best efforts” to identify a mutually agreeable arbitrator. If they cannot agree, a panel of three arbitrators will be chosen through a process in which each side prepares a list of five and then selects one from the opposing party’s list. The third arbitrator will either be agreed on by the parties or selected by the arbitrators already chosen. The Plan does not include any specifications about who should be considered as an arbitrator, though given the DOJ’s rationale, both sides will presumably put forth arbitrators experienced in antitrust litigation and/or economics. Commentators have speculated whether the Division will feel obligated to name arbitrators widely viewed as fair and impartial, whereas the merging parties will likely name “Chicago-school true believers with a consistent track record of supporting all mergers about which any reasonable observer could disagree.” See Stephen Calkins, *Binding Arbitration of Merger Challenges: First Do No Harm*, American Antitrust Institute (Sept. 18, 2019). This suggests the challenge will be resolved by far more skeptical decision-makers than had the DOJ litigated in court, though it remains to be seen whether the parties have agreed, off the record, to a certain understanding about which arbitrators will be chosen.

2. Will the arbitrator be required to publicly provide a reasoned decision? Like most arbitration proceedings, all hearings in the Novelis-Aleris arbitration are to be kept confidential. The Plan does state that the arbitrator “shall include in its Award a brief statement of its reasoning, not to exceed five pages.” It does not specify if this statement will be available to the public or if it will be part of the district court’s review of the settlement should the DOJ prevail. A lack of published opinion may deprive future litigants of potentially useful precedent and other market participants of relevant insight into the appropriate market definition. In addition, if the Division prevails, the public has a right to comment on the proposed consent decree as part of the Tunney Act process. The public’s ability to fully weigh in on the merger remedy may be undermined if the decision and underlying record are not available. Even if the five-page decision is released, this will likely provide a much more cursory analysis than typically is included in a judicial opinion.

3. In what circumstances, if any, can the arbitrator’s decision be challenged in court? The parties have agreed to binding arbitration, with the DOJ forfeiting its right to bring an action in court should the arbitrator find in the companies’ favor on the market definition question. Under the American Arbitration Association rules, which the parties have agreed generally govern, there is no right to an appeal unless the parties have provided for one. The current public filings do not indicate that the parties have agreed to allow appeals. Accordingly, should Novelis and Aleris prevail, the appropriate product market will not be subject to appellate review, running the risk that an arbitrator error will go uncorrected. If the Division prevails, it is unclear whether the district court judge reviewing the settlement will have access to the discovery materials or arbitration record and, if so, whether he or she would have the ability to review the market definition question as part of the Tunney Act review.

4. Should parties anticipate arbitration becoming the new norm? The parties and the DOJ must agree to enter into an arbitration agreement in order to by-pass a trial. Delrahim highlighted three important questions that the Division will consider before agreeing to arbitration: (1) what are the efficiency gains relative to the alternatives; (2) is the question the arbitration will be asked to resolve clear and can it easily be agreed upon; and (3) would arbitration result in a lost opportunity to create valuable legal precedent.

As discussed above, whether conditions one and three are satisfied in the Novelis-Aleris case is not clear cut. Regarding the second condition, the merger does present a clear question for arbitration: whether aluminum automotive body sheet constitutes a relevant product market. While this is not the first time that the issue of market definition would be dispositive in a merger challenge, the facts and issues in this case may make it sufficiently different from prior merger challenges so as to be suitable for arbitration. Novelis and the DOJ have already agreed on the parameters of the divestiture remedy should the arbitrator decide in the Division's favor. They have also agreed that the relevant product market is the "single dispositive issue" on which the appropriateness of the remedy turns. In many transactions, parties cannot reach a resolution on the proposed remedy or whether one issue is dispositive. Moreover, many transactions may not be candidates for arbitration because they raise multiple complex antitrust issues or do not have a structural remedy practically available. In practice, then, the arbitration option may be available in much more limited circumstances than the Division's broad questions suggest.

Whether arbitration continues to gain steam will be important for parties, and counsel, to track. Increased use of arbitration may affect companies' incentives to accept a settlement, since it may be advantageous to have specialized arbitrators deciding key issues like market definition. Companies may also need to consider whether to contemplate arbitration agreements when drawing up transaction contracts. Finally, Delrahim commented that both merger and conduct cases may be ripe for arbitration, meaning the answers to these questions may impact parties even outside the merger review process.

This post comes to us from Skadden, Arps, Slate, Meagher & Flom. It is based on the firm's memorandum "DOJ Invokes Arbitration Option For Merger Review," dated October 8, 2019, and available [here](#).

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