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DOJ Announces First-Time Use of Arbitration to Resolve Merger Challenge

Today, the Antitrust Division of the United States Department of Justice (DOJ) [announced](#) that it has agreed with the parties to a proposed acquisition to use binding arbitration “to resolve the dispositive issue” of product market definition in the DOJ’s challenge to that acquisition. The Administrative Dispute Resolution Act of 1996 authorizes the use of arbitration for such purposes, but this is the “first time the Antitrust Division is using this arbitration authority to resolve a matter,” according to the government’s press release. Assistant Attorney General for the Antitrust Division Makan Delrahim indicated that arbitration “is an important tool” and that the Antitrust Division will use it again “in appropriate circumstances.”

The underlying case concerns the DOJ’s effort to block Novelis Inc.’s acquisition of Aleris Corporation. According to the DOJ, the acquisition would result in a competitively problematic four-to-three transaction by “combin[ing] two of only four North American producers of aluminum auto body sheet.” The DOJ’s [complaint](#), also filed today, alleges that Aleris is a “new and disruptive rival” to Novelis, and that “[i]f permitted to proceed, the transaction would concentrate approximately 60 percent of total production capacity and the majority of uncommitted (open) capacity with Novelis.” The complaint alleges that the relevant product market is aluminum auto body sheet, and that “[a]lternative materials, such as steel, . . . are not reasonable substitutes.”

The Administrative Dispute Resolution Act of 1996, 5 U.S.C. § 571 et seq., allows a federal government agency to “use [an alternative] dispute resolution proceeding for the resolution of an issue in controversy that relates to an administrative program, if the parties agree to such proceeding.” The Act provides that “[t]he parties to an arbitration proceeding shall be entitled to participate in the selection of the arbitrator.” “The hearing,” according to the Act, “shall be conducted expeditiously and in an informal manner,” and, while a “brief, informal discussion of the factual and legal basis for the award” must be given, “formal findings of fact or conclusions of law shall not be required.”

In this case, the DOJ indicated in its press release that the arbitration will occur “should certain conditions be triggered,” but did not specify what those conditions are. Nor has the DOJ provided further details about how the arbitration would be structured.

The Antitrust Division’s first-ever agreement to use arbitration to resolve a merger dispute – and the indication that it is willing to do so again in the future – is a significant development, and represents a potential opportunity for companies involved in agency enforcement proceedings to consider. In making

the announcement, the head of the Antitrust Division cited the efficiency and cost-effectiveness of arbitration proceedings. This mechanism also provides the potential opportunity for issues in dispute to be resolved by a subject-matter expert.

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This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

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