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## **DOJ'S ANTITRUST DIVISION ELECTS BINDING ARBITRATION TO RESOLVE MERGER CHALLENGE**

To Our Clients and Friends:

On September 4, 2019, the U.S. Department of Justice's Antitrust Division filed a complaint in the Northern District of Ohio challenging Novelis Inc.'s proposed \$2.6 billion acquisition of Aleris Corporation. In a first, the Antitrust Division has agreed to resolve the matter through binding arbitration under the Administrative Dispute Resolution Act of 1996, 5 U.S.C. § 571 *et seq.* Assistant Attorney General Makan Delrahim remarked that “[t]his new process could prove to be a model for future enforcement actions, where appropriate, to bring greater certainty for merging parties and to preserve taxpayer resources while staying true to the [Antitrust Division’s] enforcement mission.”

It remains to be seen whether this case portends a larger shift in the Antitrust Division’s approach to resolving merger investigations and negotiating remedies, or whether arbitration will be limited to the specific circumstances surrounding Novelis’ acquisition of Aleris. To the extent arbitration becomes a meaningful option for merging parties in future cases, however, the ramifications are significant.

### **Background**

The Antitrust Division and the Federal Trade Commission share responsibility for investigating proposed mergers and acquisitions to determine whether, if consummated, they would violate Section 7 of the Clayton Act, which prohibits transactions whose effect “may be substantially to lessen competition.”<sup>[1]</sup> Parties to transactions that are subject to the Hart-Scott-Rodino Act (or “HSR”) must observe a waiting period before closing, and typically do not close until the Antitrust Division completes its investigation. If, after investigating a proposed transaction, the Antitrust Division concludes it would violate Section 7, it will typically demand a remedy (such as a divestiture of one party’s assets) or, if the parties do not propose a sufficient remedy, challenge the transaction in federal district court.

Novelis announced its proposed acquisition of Aleris on July 26, 2018, and the proposed transaction was subject to HSR. Under the terms of the agreement, Novelis would acquire Aleris’ 13 production facilities across North America, Europe, and Asia.<sup>[2]</sup>

Following an antitrust investigation lasting roughly 14 months, the Antitrust Division filed suit challenging the proposed acquisition.<sup>[3]</sup> The complaint alleged that the transaction would combine two of only four North American producers of aluminum auto body sheet metal, and that the combined company would represent 60 percent of production capacity in this market. The Antitrust Division supported its claims by quoting internal documents where Novelis indicated concern that, absent the transaction, Aleris would be acquired by a new entrant that would “likely ... bid aggressively and negatively impact pricing” in the market.

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In an unusual move, the Antitrust Division simultaneously issued a press release stating that the parties had agreed to arbitrate the central question of product market definition, the outcome of which would determine whether the parties would divest certain assets to cure the alleged competition concern.[4]

In a related court filing, the Division laid out its rationale for pursuing arbitration rather than its usual practice of challenging the merger in federal court or agreeing to a negotiated divestiture. It noted that merger challenges require “weeks-long trials involving the submission of thousands of pages of exhibits, and testimony from a substantial number of fact witnesses, as well as extensive expert testimony.”[5] Citing *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 344–46 (2011), the Antitrust Division explained that arbitration is favored by federal policy and would offer “a speedier and less costly alternative to litigation.”

The filing attached a redacted term sheet explaining that the arbitrator would decide one question: whether aluminum auto body sheet constitutes a relevant product market under the Horizontal Merger Guidelines. The arbitrator would not reach the ultimate question of whether the transaction would substantially lessen competition under section 7 of the Clayton Act.

Significantly, according to the Division, whether or not the parties will need to divest assets hinges on the arbitrator’s determination. If the arbitrator ruled that the relevant product market is broader than aluminum auto body sheet, the Division agreed to withdraw its complaint and the parties could close without any divestiture remedy. If the arbitrator concluded that aluminum auto body sheet is the relevant market, then the parties would be obligated to divest the overlapping business to a buyer acceptable to the Division through a Tunney Act proceeding in which a court would approve the settlement so long as it is in the “public interest.”

This unique process provides the parties with certainty as to when they can close their merger. If the arbitration proceedings are still pending on December 20, 2019, or if the Antitrust Division prevails, then the parties and the Antitrust Division agreed to negotiate a hold separate order. The hold separate order would allow the parties to close their deal pending final court approval of their agreed-upon remedy, so long as they agree to hold the divested assets separate. If the parties prevail, however, then they can close their deal without conditions (i.e., they can close without a hold separate or a remedy). Either way, closing would be allowed no later than December 20.

## **Key Takeaways**

***An Emerging Third Option?*** Up until now, parties to a transaction that the Antitrust Division claimed raised antitrust concerns had two options to resolve the dispute: (1) negotiate a remedy to address competitive concerns raised by the transaction, or (2) litigate against the Antitrust Division in federal court. *Novelis* may signal the Antitrust Division’s willingness to offer a third option that allows the Division and the parties to avoid a trial in federal court by allowing an arbitrator to decide dispositive issues.

However, a broader policy has not yet been announced, and it may turn out that this new arbitration option may be limited to certain cases. AAG Delrahim noted “[t]he division would have to evaluate several factors before agreeing to arbitrate,” including the potential “efficiency gains,” whether the issues

to be resolved in arbitration are “clear and easily can be agreed upon,” and the cost of any “lost opportunity to create valuable legal precedent.”

*Novelis* offers clues as to how these factors might apply in future cases. The Division and the merging parties agreed on the parameters of a divestiture remedy *and* that the need for the remedy turns on the resolution of a discrete question—in this case, the definition of the relevant product market. Matters that present multiple or more complex antitrust issues or where no structural remedy is practically available may not be candidates for arbitration. Of course, mergers being investigated by the Federal Trade Commission would not be subject to this new policy.

***Timing Certainty May Be the Primary Benefit.*** The Division’s filing suggests that arbitration would be “speedier” than litigation, though the *Novelis* arbitration timelines are comparable to the deadlines in case management orders for recent merger trials. Per the filing, the Division and the parties are obligated to work toward commencing the arbitral hearing within 120 days from the filing of an answer, with the hearing to be completed within 21 days, and a final decision within 14 days after the hearing. Assuming no extension to the 21-day deadline to file an answer under Rule 12, the parties would receive an arbitration decision within 176 days, or almost six months. This is roughly equivalent to the length of time typically needed to reach a decision on the merits in a federal merger trial, which averaged roughly 150 days for litigated in recent years. This suggests that the primary benefit of arbitration in this setting may be timing certainty, though limits on appeals of arbitration decisions may present time savings over trial and appellate litigation. Limited appeal rights may further narrow the scenarios in which arbitration will be a suitable option for either the Division or the parties.

***Fewer Confidentiality Concerns for Third Parties.*** The *Novelis* arbitration hearing will be confidential and (presumably) governed by a protective order. In contrast, during a federal court trial, third party customers and competitors of the merging parties often must testify publicly in open court (or at least, must reveal their views to the parties or their counsel under a protective order). In this regard, confidential arbitration appears to eliminate the need to grapple with complex and sensitive confidentiality issues that arise during trial. By the same token, federal court opinions generated by these cases provide valuable insights and precedents for future antitrust cases. To the extent that confidential arbitration becomes more prevalent, there may be fewer such opinions.

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[1] 15 U.S.C. § 18.

[2] *Novelis to Acquire Downstream Aluminum Producer Aleris*, July 26, 2018, available at: <http://investors.novelis.com/2018-07-26-Novelis-to-Acquire-Downstream-Aluminum-Producer-Aleris>.

[3] Complaint, *United States v. Novelis, Inc.*, 1:19-CV-02033, Dkt. 1, (N.D. Ohio Sept. 4, 2019), available at: <https://www.justice.gov/opa/press-release/file/1199441/download>.

[4] *Justice Department Sues to Block Novelis's Acquisition of Aleris*, Press Release, U.S. Department of Justice, Sept. 4, 2019, available at: <https://www.justice.gov/opa/pr/justice-department-sues-block-novelis-acquisition-aleris-1>.

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[5] Plaintiff United States' Explanation of Plan to Refer This Matter to Arbitration, *United States v. Novelis, Inc.*, 1:19-CV-02033, Dkt. 11, (N.D. Ohio Sept. 9, 2019).



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