

CLIENT ALERT

In Unprecedented Move, DOJ Turns to Binding Arbitration in Merger Challenge

Sep.12.2019

For the first time in its 100-year history, the U.S. Department of Justice Antitrust Division has agreed to binding arbitration to resolve an enforcement action. Invoking its arbitration authority under the Administrative Dispute Resolution Act of 1996 (the “ADR Act”) – which Assistant Attorney General Makan Delrahim described as a law that “many attorneys [have] never heard of” – the Antitrust Division and defendants have agreed to arbitrate the dispositive issue in a merger challenge that the Division recently filed in federal court.

The Antitrust Division’s unexpected, and largely unexplained, decision to depart from its longstanding practice of litigating all enforcement actions in open court has caused quite a stir and raised many questions. Such questions include:

- Why are the facts and issues in this case sufficiently different from prior merger challenges to render it suitable for arbitration?
- How will the arbitration and any post-arbitration proceedings be conducted?
- What criteria will the Antitrust Division apply when determining whether future cases should be arbitrated?
- Will arbitration be the Antitrust Division’s new preferred method of resolving disputes?
- Will the Federal Trade Commission follow the Antitrust Division’s embrace of arbitration?

In this client alert, we explain the context of the recent merger challenge that the Antitrust Division has decided to arbitrate, as well as the statutory and regulatory authority that the Division has invoked for this unprecedented move. In addition, we flag key questions that companies involved in a civil antitrust investigation should consider when assessing whether to agree to arbitrate a possible enforcement action.

The Antitrust Division’s Arbitration Authority: Who Knew?

In 1990, Congress passed the original version of the ADR Act, which required federal government agencies to institute policies and procedures that promote “alternative means of resolving disputes in connection with . . . enforcement actions.” Pub. L. No. 101-552, 104 Stat. 2736. (In 1996, Congress made certain amendments to the ADR Act.) The Antitrust Division implemented the ADR Act by adopting an alternative dispute resolution policy, which “encourage[s] the use of ADR techniques in . . . civil cases where time permits and there is a reasonable likelihood that ADR would shorten the time necessary to resolve a dispute or otherwise improve the outcome for the United States.” 61 Fed. Reg. 36,896 (July 15, 1996). Interestingly, the Antitrust Division recognized that “[b]ecause of the time constraints imposed by the [Hart-Scott-Rodino] Act and the exigencies of the merger review process in general, ADR techniques will likely be difficult to apply during the course of merger investigations.” *Id.*

In adopting this policy, the Antitrust Division identified various factors that investigative teams should consider when deciding whether to utilize alternative dispute resolution procedures, which generally fall into the following four categories: (i) the history of the parties’ settlement discussions and the key issues precluding a consensual resolution; (ii) the types of factual and legal

issues involved; (iii) timing, resource, and practical constraints; and (iv) the parties and counsel's openness to and past experience with alternative dispute resolution procedures. *Id.* at 36,897-98.

The policy also identified a number of factors that could favor or disfavor the use of alternative dispute resolution procedures in a particular case. The factors favoring the use of such procedures include:

- The legal and factual issues create sufficient risk that the Antitrust Division may lose at trial or on appeal.
- The Antitrust Division would have to litigate the case before a potentially hostile or unsympathetic judge or jury.
- The impact achieved through a contested enforcement action would not justify the resources necessary to litigate and try it.

Id. at 36,898.

The factors identified by the policy as potentially disfavoring the use of alternative dispute resolution procedures include (i) the "need for public sanctioning of conduct," and (ii) the likelihood that the issuance of a judicial decision would facilitate an important development in the law or secure the "vindication of rights, enforcement, or compliance." *Id.*

The Antitrust Division Exercises Its Arbitration Authority: A First Time For Everything

On September 4, 2019, the Antitrust Division filed a lawsuit in the Northern District of Ohio challenging Novelis, Inc.'s proposed \$2.6 billion acquisition of Aleris Corporation. The complaint is a typical one, alleging that the transaction would substantially lessen competition in the market for aluminum body sheet – which automobile manufacturers use "to make cars lighter, more fuel-efficient, safer and more durable" – by "combin[ing] two of only four North American producers." According to the complaint, the transaction would give Novelis a 60% market share and allow it to eliminate "an aggressive" and "disruptive rival" whose "expansion into the North American market had an immediate impact on pricing."

But the unusual part of this enforcement action is in the accompanying press release where the Antitrust Division announced that it had agreed with the merging companies to submit the issue of market definition – which both sides agree is the dispositive issue – to binding arbitration. As noted in the press release, this arbitration "would mark the first time the Antitrust Division" uses its arbitration authority to resolve an enforcement action. The Antitrust Division's willingness to enter into binding arbitration represents a significant departure from its standard practice, which is to litigate all aspects of a case in federal district court.

In explaining this unprecedented move, AAG Delrahim stated that "[t]his arbitration would allow the Antitrust Division to resolve the dispositive issue of market definition . . . efficiently and effectively, [thereby] saving taxpayer resources." AAG Delrahim also indicated that the Antitrust Division will continue to look for opportunities to resolve disputed matters outside of litigation: "Alternative dispute resolution is an important tool that the Antitrust Division can and will use, in appropriate circumstances, to maximize its enforcement resources to protect American consumers."

Since commencing this lawsuit, the Antitrust Division has filed court papers that summarize the arbitration process that the parties have agreed to follow:

- The case will remain before the district court while the parties complete fact discovery. Subject to the entry of an appropriate protective order and case management order, this discovery process will include the production of the Antitrust Division’s initial disclosures and any third-party documents and data gathered during the Division’s investigation. If a settlement is not reached when fact discovery is completed, the case will then be referred to arbitration.
- 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 conclusion of the arbitral hearing.”
- If the Antitrust Division prevails during the arbitration, it will file a proposed final judgment which requires Novelis to divest certain assets. Pursuant to the Tunney Act, the district court will review the proposed final judgment in order to determine whether entry of the judgment would be in the public interest.
- If the companies prevail in arbitration, the DOJ will voluntarily dismiss the complaint.

In addition, AAG Delrahim recently delivered prepared remarks which sought to explain what he described as the Antitrust Division’s “truly groundbreaking” decision to submit to binding arbitration. In his remarks, AAG Delrahim stated that the arbitral process employed in the Novalis/Aleris merger challenge “could prove to be a model for future enforcement actions” because the increasing complexity and expense of antitrust litigation may require having a specialized and “experienced antitrust decision-maker” rather than a “generalist judge or lay jury.” Such expertise, he said, could lead to “greater efficiency” and “a lower risk of error” while “bring[ing] greater certainty for merging parties” and “preserv[ing] tax payer resources.”

While noting that “[b]oth merger and conduct cases may be ripe for arbitration,” AAG Delrahim observed that “the efficiency analysis could differ between the types of cases” and that “[a]rbitration may be more appropriate for important or dispositive issues rather than entire cases, or for specific issues that lend themselves to resolution by a specialist.” AAG Delrahim also identified “three key questions” – all of which are reflected in the Antitrust Division’s existing alternative dispute resolution policy – that the Division will consider before agreeing to arbitration:

- *What are the efficiency gains relative to the alternatives?* – The Antitrust Division “would be more likely to arbitrate if doing so could save significant time or taxpayer money while ensuring that competition and consumers are protected.”
- *Is the question the arbitrator will be asked to resolve clear and easily can be agreed upon?* – If the answer to this question is no, “then arbitration may not be the best use of [the Antitrust Division’s] or the parties’ resources.”
- *Would arbitration result in a lost opportunity to create valuable legal precedent?* – The answer to this question “will depend on the facts of the particular case,” but important developments in antitrust caselaw and principles could be secured “depending on the transparency of the process and the arbitrator’s decision.”

Important Open Questions

While the Antitrust Division has provided some explanation for its “novel” decision to arbitrate, there still remain several key questions that have yet to be answered:

- Why are the facts and issues in this case sufficiently different from prior merger challenges to render it suitable for arbitration? This case does not represent the first time that the issue of market definition would be dispositive in a

merger challenge. In addition, the Antitrust Division’s alternative dispute resolution policy strongly suggests that merger matters typically should not be referred to arbitration.

- Will the arbitration be open to the public? Arbitration proceedings are typically conducted in private, but the DOJ has a longstanding policy that establishes a “strong presumption” in favor of ensuring that, absent special circumstances (*i.e.*, national security concerns), its enforcement proceedings occur in open forums due to the “vital interest in open judicial proceedings” and the DOJ’s “obligation to the fair administration of justice.” Any effort by the Antitrust Division to conduct entire enforcement actions in private could be met with legal challenges from lawmakers, the press, government oversight organizations, and other members of the public.
- Will the arbitration record be made available to the public and district court as part of the Tunney Act process? The arbitral process set forth by the Antitrust Division in the Novalis/Aleris merger challenge contemplates the entry of a consent decree if the DOJ prevails. Thus, the question remains whether the district court and public would have access to all or parts of the arbitration record as part of the Tunney Act process, where the public has the right to comment on a proposed decree before the court decides whether entry of the judgment would be in the public interest?
- A host of procedural issues such as how will the arbitrator be selected, what rules will apply, and who pays?
- Are there any circumstances (*e.g.*, fraud or arbitrator exceeds scope of authority) that could provide a basis for challenging the arbitrator’s decision in court?
- Most importantly, is this case a one-off or does it represent, as AAG Delrahim seemed to suggest in his remarks, an open door to future use of arbitration in DOJ enforcement actions? Note that the latter could well affect the parties’ incentives to accept a settlement, as they may prefer to take advantage of what appears to be a fast and focused arbitration proceeding on a dispositive issue.

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Given that the Antitrust Division has expressed a willingness to arbitrate civil matters in the future, companies facing a possible enforcement action will need to consider whether the facts and issues make their case suitable for arbitration and, if so, whether proposing or agreeing to a binding arbitration would be a reliable, efficient, and cost-effective manner to receive a final decision.

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