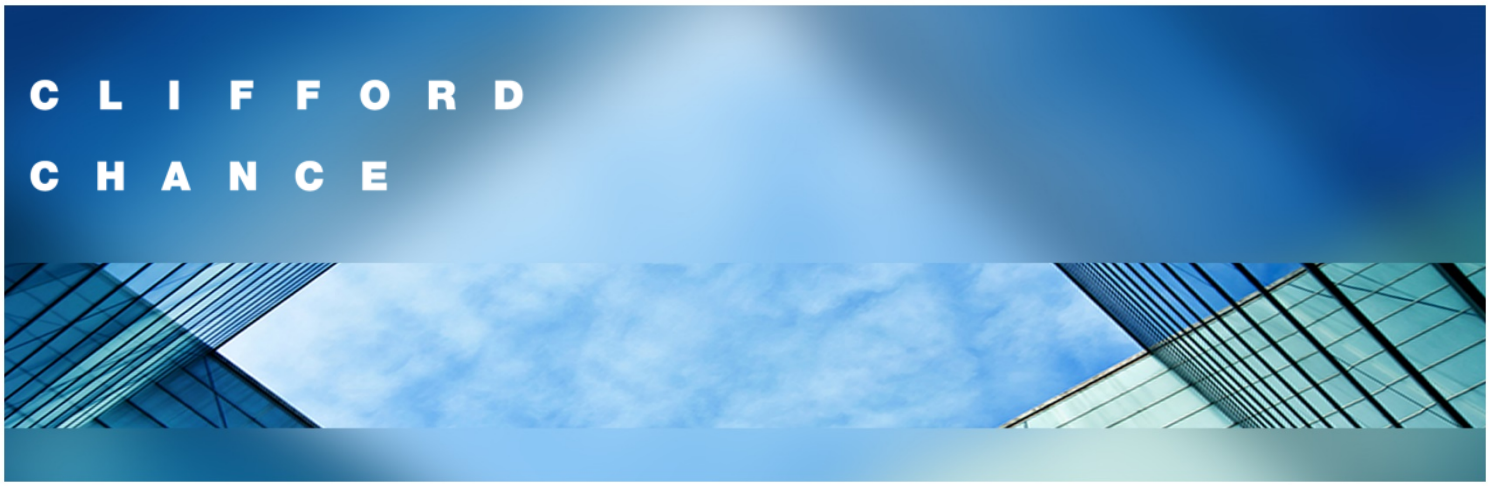

OUT OF THE TOOLBOX AND READY FOR USE: ANTITRUST ARBITRATION

For the first time since the passage of the Administrative Dispute Resolution Act of 1996, the U.S. Department of Justice, Antitrust Division (the "Division") announced that it will use binding arbitration to resolve a dispositive issue regarding market definition. If successfully employed, arbitration and other formalized alternative dispute resolution mechanisms could become a viable way to resolve antitrust matters with the Division moving forward.

Key Takeaways

- Alternative dispute resolution mechanisms are no longer just a theoretical means for resolving merger reviews and antitrust investigations.
- Resolving dispositive issues in merger challenges by arbitration may expedite the pathway to closing a transaction.

BACKGROUND

On September 4, 2019, the Division filed a civil lawsuit in the U.S District Court for the Northern District of Ohio seeking to block Novelis Inc's proposed acquisition of aluminum auto body sheetmaker Aleris Corporation on the grounds that the deal would violate Section 7 of the Clayton Act, which prohibits mergers and acquisitions whose effect may be to substantially lessen competition or to tend to create a monopoly.[1] According to the complaint, the transaction would combine two of only four North American producers of aluminum auto body sheets, which automakers use to produce lighter, safer, and more durable cars. The Division alleged that the proposed acquisition would lock up 60% of the projected total domestic capacity, enabling Novelis to raise prices, reduce innovation, and provide less favorable terms of service to the detriment of automakers and ultimately American consumers.

Upon filing its complaint, the Division issued a press release, announcing that it had agreed with Novelis and Aleris (the "Parties") to refer the matter to binding arbitration to resolve the issue of product market definition. The exercise of defining a relevant product market is essential in assessing the likely competitive effects of any planned merger because it helps courts assess the market power of the merging parties. It is a deeply fact-specific inquiry about which the reviewing authorities and the merging parties regularly disagree. Since the guiding principle of relevant markets analysis is the ability of consumers to switch to a substitute in response to increases in price, a relevant antitrust market includes only those products that are "reasonably interchangeable" by consumers. In general, a party

[1] 15 U.S.C. § 18.

challenging a planned merger seeks to define a product market narrowly (increasing the parties' market share); parties defending a planned merger seek to define a product market broadly (to decrease their market share). This would mark the first time the Division would be using this arbitration authority to resolve a matter.

TERMS OF ARBITRATION

The term sheet filed with the court on September 9, 2019 outlines the terms of the agreement between the parties to resolve the Division's challenge.

The Parties and the Division will enter into arbitration if the currently negotiated remedial measures that the Division is insisting on as conditions for approving the deal are not finalized by the end of the fact discovery stage. The key issue to be resolved by arbitration will be to determine whether aluminum automotive body sheet (ABS) constitutes a relevant product market. The Parties and the Division have agreed to use their best efforts to identify a mutually agreeable single arbitrator. If a single arbitrator cannot be agreed upon, a panel of three neutral arbitrators would be selected—the Division and Parties each selecting one arbitrator from the other's prepared list of five acceptable arbitrators, and working to agree on a third arbitrator.

If the arbitrator determines that the market is broader than aluminum ABS (as the Parties contend), then the Division has agreed to exercise its prosecutorial discretion and promptly dismiss its complaint challenging the deal, clearing the way for the Parties to close the transaction. However, if the arbitrator determines that aluminum ABS is a relevant product market (as the Division contends), then depending on the timing of that decision, the Parties have agreed to make certain divestitures or agree to abide by an undisclosed hold separate agreement before closing the transaction.

The Parties and the Division have also agreed to work in good faith to commence any arbitral hearing within 120 days of the filing of the Parties' answer to the Division's complaint, 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.

ANTITRUST DIVISION POLICY AND MERGER REFORM

In the Division's September 4 press release announcing their challenge to the deal, Assistant Attorney General Makan Delrahim noted that the arbitration would enable the Antitrust Division to resolve the "dispositive issue of market definition in this case efficiently and effectively, saving taxpayer resources." Delrahim also stated that alternative dispute resolution was an "important tool that the Antitrust Division can and will use, in appropriate circumstances, to maximize its enforcement resources to protect American consumers."

These comments carry a familiar theme. About this time last year, Delrahim announced a series of changes designed to reform and expedite the merger review process, citing the importance of protecting American consumers and taxpayers. The Division's agreement to potentially resort to arbitration here may

be the rubber hitting the road on the Division's efforts to streamline the merger review *and* merger challenge processes as well.

The impact of this new approach remains to be seen. The narrow scope of the arbitral tribunal's review, as well as the agreed upon timeline, could result in a more efficient and timely process—a mutual benefit for both the Division and the Parties seeking to close the transaction. That said, there remains some risk that resorting to arbitration—a private, confidential method of dispute-resolution—could embolden the Division to take more aggressive approaches in challenging fact-specific issues like market definition, free from the concerns, ever-present in publicly-filed litigation, that "bad facts make bad law." If the Division loses an aggressive challenge, it can simply move on without precedential effect on market definition that could hamper the agency's pro-enforcement posture.

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