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DOJ Wins Groundbreaking Arbitration to Resolve Merger Challenge

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The U.S. Department of Justice Antitrust Division (DOJ) has prevailed in a first-of-its-kind arbitration, resolving its challenge to aluminum producer Novelis Inc.'s $2.6 billion proposed acquisition of rival Aleris Corporation. As a result of the arbitrator's **ruling** in favor of DOJ, Novelis must now divest Aleris's entire aluminum automotive body sheet (ABS) operations in North America in order to complete its acquisition. In addition, defendants must reimburse DOJ for its fees and costs incurred in connection with the arbitration proceedings. This case is particularly noteworthy because it was the first time that DOJ has invoked its authority under the Administrative Dispute Resolution Act of 1996 to arbitrate a merger challenge rather than litigating in federal court.

DOJ filed suit on September 4, 2019, in Ohio federal court to block Novelis' planned purchase of Aleris, due to its concern of increased concentration in the aluminum ABS market if the deal were to go through. At the same time, DOJ announced that it had reached an agreement with the defendants to refer the matter to binding arbitration if the parties could not resolve DOJ's competitive concerns about the transaction within a certain period of time. Following the close of fact discovery, the parties headed to arbitration.

The parties had agreed that the issue of product market definition was dispositive to the outcome of the case, and thus, appropriate for arbitration. DOJ maintained that aluminum auto parts constitute a separate and distinct market from steel auto parts because aluminum makes vehicles lighter, more fuel-efficient and safer compared to those with steel components. According to DOJ's complaint, the deal would have given Novelis 60% of the total production capacity of automotive ABS in North America, as well as the majority of available capacity, which is needed to bid on supply contracts for new vehicle models. Defendants, on the other hand, argued that DOJ's market definition was too narrow and divorced from commercial reality, insisting that fierce competition exists between steel and aluminum suppliers for automaker contracts in North America, and that the merger would not substantially reduce competition in that broader market. Knowing that the case would hinge on the arbitrator's decision regarding the relevant product market, the parties agreed upfront that DOJ would drop its challenge if the arbitrator sided with defendants, and that Novelis would divest all of Aleris's North American aluminum ABS operations, including an Aleris plant in Kentucky, if the arbitrator found in favor of DOJ.

On March 9, 2020, following a ten-day arbitration hearing, the arbitrator, Kevin Arquit, an experienced antitrust lawyer and former Director of the Federal Trade Commission's Bureau of

Competition, ruled for DOJ, triggering the agreed-upon divestiture. The merger parties had already agreed to sell Aleris' aluminum ABS business in Europe as a condition to receiving the approval of the European Commission. After reviewing a substantial volume of evidence, Mr. Arquit found that while there is some inter-relatedness between aluminum and steel ABS, there is sustained and meaningful price competition among only aluminum ABS suppliers at the procurement stage of vehicle production, which is sufficiently separated from competition at the design stage, such that aluminum ABS is a relevant product market.

According to DOJ, arbitration is a way to streamline the merger review process and save taxpayer resources, particularly where, as was the case here, there is a clear dispositive issue, and defendants agree to cover the government's costs if it wins. Assistant Attorney General Makan Delrahim, who heads DOJ's Antitrust Division, noted in a September 9, 2019 *speech* the benefit of presenting important antitrust questions to arbitrators with significant antitrust experience, instead of before generalist judges who may have little or no familiarity in this area. However, AAG Delrahim also explained that the agency needs to consider whether arbitrating issues rather than litigating in court results in a lost opportunity to create valuable legal precedent.

How often the agency will turn to arbitration to resolve future merger challenges, and whether its use will expand beyond disputes about market definition to encompass other elements of antitrust merger analysis (or even non-merger cases), remains to be seen. DOJ clearly views the Novelis-Aleris arbitration as a successful test case, with AAG Delrahim stating that the arbitration authority could be utilized again under the right circumstances.