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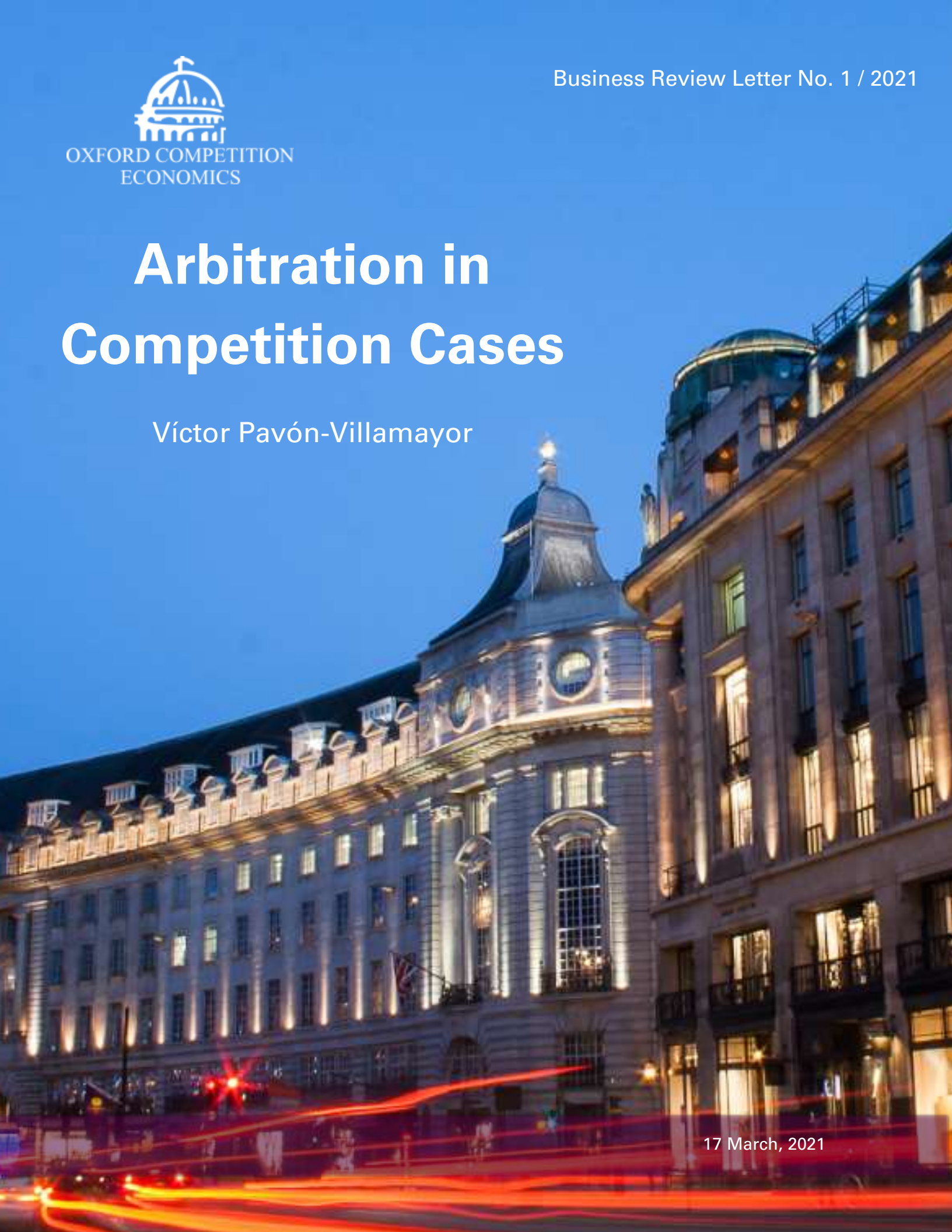
OXFORD COMPETITION ECONOMICS

Arbitration in Competition Cases

Víctor Pavón-Villamayor



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On August 2020, the Antitrust Division of the United States Department of Justice (USDOJ) released its final decision on the merger between two major aluminum producers in North America. This decision was historical since, for the first time in the antitrust history of the United States, arbitration was used to solve, at least partially, a competition matter.

I. USDOJ vs Novelis/Aleris

On July 2018, Novelis and Aleris, two aluminum companies with a strong presence in North America, agreed the full acquisition of Aleris´ assets by Novelis. The acquisition of Aleris by Novelis implied the concentration of roughly 60% of the total US production capacity and almost the totality of the uncommitted (open) capacity in the market.[1] According to the USDOJ, this acquisition would have the following competitive impacts: (a) the lock up of a large share of the available aluminum auto body sheet (ABS) capacity for the foreseeable future, thus having a negative impact on competition and, (b) the elimination of a disruptive competitor (Aleris) that had been eroding Novelis' prices and margins before the proposed transaction.[2] Having these antitrust concerns in mind, on September 2019, the USDOJ decided to file a civil lawsuit against this acquisition.[3]

> ***"This decision was historical since, for the first time in US antitrust history, arbitration was used to solve a competition matter.***

II. Arbitration to Define Relevant Markets

As in most mergers and acquisitions, the anticompetitive effects identified by antitrust authorities critically depend on how the relevant market is defined.

On the one hand, the USDOJ argued that the production of aluminum ABS constituted a relevant product market by itself, given the physical properties of this type of aluminum that reduced substitution with other related

[1] US vs Novelis Inc. and Aleris Corporation (2020). *Competitive Impact Assessment*, Case No.: 1:19-cv-02033-CAB. In addition to Novelis and Aleris, there were only two other competitors in the market.

[2] Aluminum ABS is a product with growing demand given its physical properties that allow reduced-weight and fuel-efficiency for automobile production.

[3] Under Section 7 of the Clayton Act. 15 U.S.C. § 18.

products –steel, in particular. The geographical dimension of the market identified by the USDOJ was North America. According to this market definition, this acquisition would have had anticompetitive effects so that the imposition of remedies would have been necessary.

On the other hand, Novelis/Aleris claimed that the relevant market was much broader. From the perspective of the merging parties, other materials such as steel were also part of the product market so that a broader market definition was technically correct. Provided that this market definition was appropriate, the result of the competitive assessment would have implied that remedies were not necessary.

> ***"the USDOJ agreed to make use of arbitration to resolve the critical point of market definition.***

The relevant aspect of this case is that, under the terms of the *Administrative Dispute Resolution Act of 1996*, the USDOJ agreed to make use of arbitration – between its position and the position of the parties – to resolve the critical point under dispute: the scope of the product market definition.

In particular, the use of arbitration in this case implied that the US competition authority agreed: (a) to appoint an independent expert in competition to define the relevant market under dispute; (b) to fully accept the market definition provided by the expert during the legal proceedings associated with the review of the transaction (binding arbitration) and, (c) to make its decision regarding remedies on the basis of the findings of the expert analyzing the market definition controversy.

The definition of the relevant product market was made during a ten-day arbitration hearing that took place between February and March of 2020.[4]

At the end, the arbitrator found that the correct relevant product market was aluminum ABS in North America, thus supporting the view of the competition authority in this matter. This, in turn, implied that the transaction posed competition risks in the relevant market and, therefore, the implementation of remedies was necessary.[5]

[4] The arbitration decision was published by the USDOJ on March 9, 2020.

[5] The remedy imposed was the divesture of the entire Aleris´s aluminum ABS operations in the region.

III. Conditions for Arbitration in Competition Cases

Given the successful use of arbitration in the Novelis/Aleris transaction, the USDOJ updated its guidance regarding the use of arbitration in competition cases.[6]

In particular, the USDOJ established that arbitration is a useful tool in competition cases in which can be demonstrated that: (a) arbitration will be more efficient to resolve a specific issue at hand and it will decrease taxpayer burdens – in general terms, arbitration can be cheaper than litigation but it is also important to observe that, as part of the arbitration agreement, the parties may agree to reimburse the costs and fees associated with the arbitration incurred by competition authorities, so that the taxpayer burden is minimized; (b) the issue in dispute is extremely clear and easily agreed upon so that it is adequate to be submitted to arbitration; (c) there exists factual or technical complexity associated with the issue on dispute so that reliance on an expert (the arbitrator) seems useful; (d) litigation in courts could result in resolutive delays so that arbitration can be perceived as a useful instrument to shorten the time of the resolution, and finally, (e) in the particular case of mergers and acquisitions, arbitration can be helpful to analyze the range of possible remedies in advance – which benefit both competition authorities and the parties.

> ***"the USDOJ established that arbitration is a useful tool in competition cases.***

The USDOJ also recognized two factors that may represent drawbacks in the process of using arbitration in competition cases. The first is that arbitration may result in a lost opportunity to create a legal precedent. The second is that, in some cases, a judicial resolution is necessary given the public interest dimension of the issue at hand.

IV. Discussion

In general, there are two perspectives regarding the use of arbitration in competition cases. The first view seems to be based on a dogma, more than economic rationality. This view supports the idea that, since

[6] USDOJ (2020) *Updated Guidance Regarding the Use of Arbitration and Case Selecion Criteria*, November 12, 2020.

competition is a matter of *public interest*, then competition matters can only be analyzed and resolved by competition authorities. The second perspective is more open-minded, since it recognizes that there are instances in which the public interest embedded in competition matters requires the direct (and only) intervention of competition authorities but, at the same time, it also recognizes that there can be other instances in which arbitration — understood as the *private enforcement* of competition rules — represents a useful and complementary instrument for the optimal enforcement of competition policy in markets and industries.

This second approach highlights the benefits of using arbitration in competition cases in terms of reducing enforcement costs, reducing resolution times and, most importantly, increasing the quality of final decisions – an arbitrator not only increases the chances of speeding up the resolution of a case but also provides, at the same time, the technical expertise (economic and legal) required to solve it.

> ***"As of today, in Latin America, the use of arbitration in competition matters is mixed.***

The value of arbitration in competition cases goes beyond the above benefits. It has been discussed elsewhere that is possible to construct real case scenarios in which markets are affected and distorted by anticompetitive effects even in cases in which there is a reasonable public enforcement of competition policy but arbitration of competition issues is excluded.[7]

The use of arbitration by the USDOJ in the Novelis/Aleris case is important because it shows a world-class competition authority explicitly recognizing the value of arbitration in competition matters. As arbitration becomes more relevant in US antitrust enforcement, it should not be a surprise that other authorities around the world will follow suit.

As of today, in Latin America, the use of arbitration in competition matters is mixed, with countries like Colombia leading the trend and countries like Mexico lagging behind.

Looking forward it would be a good practice that countries in which arbitration is still not

[7] Pavón Villamayor, Víctor (2019) "*Arbitraje de la Competencia Económica en México*", Oxford Competition Economics Business Review Letter, No. 2/2019, March 25, 2019.

used in competition cases follow the following path to encourage its use:

- To reform any laws or norms that restrict, partially or totally, the use of arbitration in competition cases;
- To mandate national competition authorities to design and to release guidelines regarding the circumstances under which arbitration can be used in competition cases, just as the Antitrust Division of the USDOJ has already done — in the case of Mexico, the release of these *Guidelines for the Use of Arbitration in Competition Cases* should be done by the Federal Commission for Economic Competition (COFECE) and the Federal Institute for Telecommunications (IFT). Arbitration should not be compulsory, but it should be a tool that competition authorities can use under a case-by-case basis.
- Once the relevant guidelines are issued, competition authorities should take the lead by using arbitration in specific cases under its review, so that authorities can test the efficacy of its guidelines and, if necessary, amend them.

It is natural to expect that the reach and use of arbitration in competition cases will be different depending on the jurisdiction in which is implemented. These differences in the scope and the use of arbitration in competition cases are fine. What is not fine is to keep neglecting the utility and benefits of arbitration as a means of enforcing competition law in a more comprehensive and efficient way in markets and industries as a whole.

Dr. VÍCTOR PAVÓN-VILLAMAYOR

Economist (Ph.D., Oxford) Executive President, *Oxford Competition Economics Research Group S.A. de C.V.* & Vice-President of the Competition Commission of the *International Chamber of Commerce*, Mexico.

Contact:

+ 52 55 5499 9606 vpavon@oxford-economics.org

+ 52 55 5131 8120 @pavonvillamayor