**UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF COLUMBIA**

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| UNITED STATES OF AMERICA,<br><br>*Plaintiff,*<br><br>v.<br><br>ALCAN INC.,<br>ALCAN ALUMINUM CORP.,<br>PECHINEY, S.A., and<br>PECHINEY ROLLED PRODUCTS, LLC,<br><br>*Defendants.* | Case No. 1:030CV02012<br><br>JUDGE: Gladys Kessler<br><br>Deck Type: Antitrust<br><br>Filed: November 14, 2003 |

## COMPETITIVE IMPACT STATEMENT

The United States, pursuant to Section 2(b) of the Antitrust Procedures and Penalties Act ("Tunney Act"), 15 U.S.C. § 16(b)-(h), files this Competitive Impact Statement relating to the proposed Final Judgment submitted for entry in this civil antitrust proceeding.

### I. NATURE AND PURPOSE OF THE PROCEEDING

In early July 2003, Alcan Inc. ("Alcan") publicly announced that it would soon begin a tender offer for shares of Pechiney, S.A. ("Pechiney"), a transaction formally endorsed by Pechiney's board of directors on August 30, 2003. On September 29, 2003, the United States filed a civil antitrust suit alleging that Alcan's proposed acquisition of Pechiney would violate Section 7 of the Clayton Act, 15 U.S.C. § 18. The Complaint alleges that a combination of Alcan and Pechiney would substantially lessen competition in the development, production, and sale of brazing sheet in North America. Pechiney and Alcan are, respectively, the second and fourth largest competitors in the sale of brazing sheet in North America. The acquisition would result in a single firm – Alcan – with a market share of over 40 percent, and the industry's two

largest firms having a combined share of over 80 percent, of North American sales of brazing sheet. The attendant reduction in competition in this highly concentrated market would lead to an increase in brazing sheet prices and a reduction in product quality and innovation to the detriment of North American consumers. Accordingly, the prayer for relief in the Complaint seeks: (1) a judgment that the proposed acquisition would violate Section 7 of the Clayton Act, and (2) a permanent injunction that would prevent Alcan from acquiring control of, or otherwise combining its assets with, Pechiney.

At the same time the Complaint was filed, the United States filed a proposed settlement that would allow Alcan to acquire Pechiney, but require defendants to divest Pechiney's entire North American brazing sheet business in such a way as to preserve competition in North America. The settlement consists of a Hold Separate Stipulation and Order and a proposed Final Judgment. According to the terms of the settlement, defendants must divest Pechiney's brazing sheet business[1] to a person acceptable to the United States, in its sole discretion, within 120 calendar days after Alcan receives preliminary notification from the responsible French stock market regulatory agency, Conseil des Marches Financiers, that the firm's tender offer for shares of Pechiney has been successful, or within five (5) days after notice of entry of the Final Judgment, whichever is later. The United States, in its sole discretion, may extend the time period for this divestiture one or more times, not to exceed a total of 60 days past the initial divestiture deadline. If defendants do not complete the ordered divestiture within the prescribed

[1]Pechiney's brazing sheet business, as defined in Section II(E) of the proposed Final Judgment, includes all tangible and intangible assets of Pechiney's Ravenswood, West Virginia, aluminum rolling mill and the engineering facilities, wherever located, that provide research and development support for any product produced at the Ravenswood plant.

time period, then the United States may nominate, and the Court will appoint, a trustee who will have sole authority to divest Pechiney's brazing sheet assets.

The parties have stipulated that the proposed Final Judgment may be entered by the Court after compliance with the Tunney Act. Entry of the proposed Judgment would terminate this action, except that the Court would retain jurisdiction to construe, modify, or enforce the provisions of the proposed Final Judgment and to punish violations thereof.

## II. DESCRIPTION OF THE EVENTS GIVING RISE TO THE ALLEGED VIOLATIONS OF THE ANTITRUST LAWS

### *A. The Defendants and the Proposed Transaction*

Alcan is a Canadian corporation based in Montreal, Quebec. One of the world's largest fully integrated aluminum producers, Alcan produces primary aluminum ingot and a wide range of rolled aluminum products, including brazing sheet. Its annual revenues exceed $12.5 billion, including over $30 million in North American sales of brazing sheet. This business operation is managed by a domestic subsidiary of Alcan, Alcan Aluminum Corporation.

Pechiney is a French corporation based in Paris, France. Pechiney is also a major fully integrated aluminum producer, with annual revenues exceeding $11.3 billion. Its U.S. subsidiary, Pechiney Rolled Products, LLC, produces a wide variety of rolled aluminum products (including brazing sheet) in an aluminum rolling mill in Ravenswood, West Virginia. Pechiney's total North American sales of brazing sheet exceed $100 million annually.

Alcan has launched a tender offer for shares of Pechiney, a transaction now valued at over $4.6 billion. The tender offer, publicly announced in early July and approved in August by Pechiney's board of directors, is expected to be completed in early December 2003. If the tender offer is successful, Alcan's acquisition of Pechiney would combine, respectively, the fourth and

second largest competitors in the sale of brazing sheet in North America, and substantially lessen competition in this already highly concentrated market.

The acquisition would combine Alcan, a low-cost new entrant and pricing maverick, with Pechiney, a large industry incumbent. The deal would eliminate Alcan's incentive to expand its sales quickly by reducing its brazing sheet prices and increase its sales at the expense of larger rivals such as Pechiney, and end the current intense competitive rivalry in developing, producing, and selling brazing sheet in North America. This competition, which promises to intensify in the next few years as Alcan finishes qualifying its brazing sheet for more applications with other North American customers, has already produced significant improvements in brazing sheet quality, durability, and reliability, and highly competitive prices and contractual terms for this material. The transaction would reduce the number of significant competitors in the sale of brazing sheet in North America from four to three, and substantially increase the prospect of future tacit or explicit post-merger coordination between these firms to increase prices of brazing sheet to the detriment of consumers. Other North American competitors in the sale of brazing sheet have neither the production capacity nor competitive incentive, individually or collectively, to discipline a small but significant post-merger unilateral or cooperative price increase in brazing sheet.

*B. The Effects of the Transaction on Competition in the Sale of Brazing Sheet*

1. Relevant market: the sale of brazing sheet in North America.

The Complaint alleges that development, production, and sale of brazing sheet is a relevant product market within the meaning of Section 7 of the Clayton Act. Brazing sheet describes a class of custom-engineered aluminum alloys made of a solid metal core clad on one or both sides with an alloy whose melting temperature is lower than that of the core material.

When heated to the appropriate temperature, the cladding alloy melts and forms a durable, uniform leak-proof bond between the core and any adjoining aluminum surface, effectively welding the two materials together. Brazing sheet is ideally suited, and virtually all of it is used, for fabricating the major components of heat exchange systems for motor vehicles. These heat exchangers include engine cooling systems, such as radiators and oil coolers, and climate control systems, such as heater cores and air conditioning units (*i.e.*, evaporator and condenser cores).

By constructing the basic components of motor vehicle heat exchangers with brazing sheet, a parts maker can avoid the tedious and costly task of welding or soldering individual components, many of which have unusually intricate surfaces that form joints deep within the heat exchange unit. A parts maker can instead loosely assemble brazed components and bake the entire assembly in a brazing oven. The surfaces of the components will melt, converting the assembly into a solid, leak-proof heat exchange unit.

The major components of all heat exchangers used in motor vehicles are made of brazing sheet, a material that enables vehicle makers simultaneously to reduce vehicle cost, size, and weight; improve gas mileage; and extend engine, climate control system, and drive train life. In heat exchange applications, no other material can match the combination of low cost, strength, light weight, durability, formability, and corrosion resistance provided by brazing sheet.

A small but significant and nontransitory increase in prices for brazing sheet would be profitable and sustainable because it would not cause parts makers to begin using significant amounts of other materials to make heat exchangers for motor vehicles. The development,

production, and sale of brazing sheet is a line of commerce and a relevant product market within the meaning of Section 7 of the Clayton Act.[2]

The Complaint alleges that the sale of brazing sheet in North America is a relevant geographic market within the meaning of Section 7 of the Clayton Act. Over ninety percent of brazing sheet sold in North America is produced by firms located in either the United States or Canada. Some customers import brazing sheet into North America from overseas sources. Foreign brazing sheet, however, is significantly more expensive and more prone to unpredictable and costly delivery delays than brazing sheet produced in North America. North American customers are reluctant to rely on it for general production requirements. A small but significant and nontransitory increase in prices of brazing sheet sold in North America would be profitable and sustainable because it would not be undermined by increased customer imports of brazing sheet from overseas sources. North America is a relevant geographic market in which to assess the competitive effects of Alcan's proposed acquisition of Pechiney on sales of brazing sheet.

2. Anticompetitive effects of the acquisition.

The Complaint alleges that in this highly concentrated market for brazing sheet, a combination of Alcan and Pechiney likely would: (i) substantially lessen competition in the development, production, and sale of brazing sheet in North America; (ii) eliminate actual and

[2]Brazing sheet is designed for and sold to motor vehicle parts makers (and others) on an application-specific basis. Thus, it may be possible to delineate relevant markets smaller than the "all brazing sheet" market alleged in the Complaint. A producer of brazing sheet for use in one type of heat exchange component, however, generally has the ability to make and market brazing sheet suitable for use in producing other types of components for heat exchange units. According to the Merger Guidelines, if such production substitutability is "nearly universal" among the firms that make and sell brazing sheet, then it is appropriate, as a matter of convenience, to describe the relevant product market as "all brazing sheet." *See* Horizontal Merger Guidelines, n. 14 (1997 rev.).

potential competition between Alcan's and Pechiney's brazing sheet businesses; and (iii) increase prices and reduce current levels of quality and innovation for brazing sheet in North America.

Specifically, the Complaint alleges that Pechiney and Alcan are, respectively, the second and fourth largest producers of brazing sheet in North America. The combined firm and one other producer command over 80 percent of brazing sheet sales in North America. Two smaller firms also sell brazing sheet in North America. However, these small firms do not have sufficient excess production capacity or capability to attract significant sales away from the larger market incumbents, and thereby effectively constrain a post-merger exercise of market power by those firms.

Alcan's acquisition of Pechiney is likely to diminish competition substantially. First, the remaining competitors would be more likely to successfully engage in tacit or explicit coordinated pricing to the detriment of consumers, because they would not need to worry about the loss of sales to Alcan, currently a small, "hungry," low-cost new entrant. Second, Alcan could unilaterally increase its prices for brazing sheet for which it and Pechiney are the only qualified suppliers.

New entry into the development, production, and sale of brazing sheet in North America is difficult. To produce brazing sheet, a firm must have an aluminum hot rolling mill (which costs at least $80 million and takes at least three years to construct). Even after acquiring an aluminum hot rolling mill, a new firm can begin selling brazing sheet to customers only after it has made an additional substantial investment in developing and mastering alloy-making technology, successfully "qualified" its products with prospective customers by completing a series of time-consuming tests of brazing sheet materials and sample heat exchange components,

and finally, acquired some actual experience producing brazing sheet that meets the exacting specifications of risk-averse parts makers.[3] These so-called "sunk" entry costs[4] are very large relative to the size of the North American market for brazing sheet, and there is a very high risk that a new entrant may not receive any profits from its entry. In these circumstances, it is unlikely that, after a combination of Alcan and Pechiney, new entry into the brazing sheet market in North America would occur so rapidly and be of such magnitude that it would effectively constrain a cooperative or unilateral post-merger exercise of market power by incumbent producers of brazing sheet.

## III. EXPLANATION OF THE PROPOSED FINAL JUDGMENT

The proposed Final Judgment will preserve competition in the sale of brazing sheet in North America. The Judgment requires that defendants sell Pechiney's brazing sheet business to an acquirer acceptable to the United States within 120 calendar days after Alcan has received a preliminary indication from Conseil des Marches Financiers, a French stock market regulatory agency, that Alcan's tender offer for shares of Pechiney has been successful, or within five (5) days after notice of entry of the Final Judgment, whichever is later. The United States may extend this time period for divestiture one or more times, for a total time not to exceed 60 days. Defendants must use their best efforts to divest Pechiney's brazing sheet business as

[3] It took Alcan over two years from when it moved its brazing sheet operations to Oswego, New York, to qualify with enough customers to make a significant sales impact.

[4] The term "sunk costs" as used in this context includes the costs of acquiring tangible and intangible assets that cannot be recovered through the redeployment of these assets outside the relevant market, *i.e.,* costs that were uniquely incurred to enter the production and sale of brazing sheet in North America and cannot be recovered upon exit from that industry.

expeditiously as possible, and until the ordered divestiture takes place, defendants must cooperate with any prospective purchasers.

If Alcan and Pechiney do not accomplish the ordered divestiture within the prescribed time period, the United States will nominate, and the Court will appoint, a trustee to assume sole power and authority to complete the divestiture. Defendants must cooperate fully with the trustee's efforts to divest Pechiney's brazing sheet business to an acquirer acceptable to the United States and periodically report to the United States on their divestiture efforts.

If the trustee is appointed, the defendants will pay all costs and expenses of the trustee. The trustee's commission will be structured so as to provide an incentive for the trustee based on the price obtained and the speed with which the divestiture is completed. After his or her appointment becomes effective, the trustee will file monthly reports with the parties and the Court, setting forth the trustee's efforts to accomplish the divestiture. At the end of six months, if the divestiture has not been accomplished, the trustee and the parties will make recommendations to the Court, which shall enter such orders as appropriate to carry out the purpose of the trust, including extending the trust and the term of the trustee's appointment.

## IV. REMEDIES AVAILABLE TO POTENTIAL PRIVATE LITIGANTS

Section 4 of the Clayton Act (15 U.S.C. § 15) provides that any person who has been injured as a result of conduct prohibited by the antitrust laws may bring suit in federal court to recover three times the damages the person has suffered, as well as costs and reasonable attorneys' fees. Entry of the proposed Final Judgment will neither impair nor assist the bringing of any private antitrust damage action. Under the provisions of Section 5(a) of the Clayton Act (15 U.S.C. § 16(a)), the proposed Final Judgment has no *prima facie* effect in any subsequent private lawsuit that may be brought against defendants.

## V. PROCEDURES AVAILABLE FOR MODIFICATION OF THE PROPOSED FINAL JUDGMENT

The parties have stipulated that the proposed Final Judgment may be entered by the Court after compliance with the provisions of the Tunney Act, provided that the United States has not withdrawn its consent. The Tunney Act conditions entry of the decree upon the Court's determination that the proposed Final Judgment is in the public interest.

The Tunney Act provides a period of at least 60 days preceding the effective date of the proposed Final Judgment within which any person may submit to the United States written comments regarding the proposed Final Judgment. Any person who wishes to comment should do so within 60 days of the date of publication of this Competitive Impact Statement in the Federal Register. The United States will evaluate and respond to the comments. All comments will be given due consideration by the Department of Justice, which remains free to withdraw its consent to the proposed Final Judgment at any time prior to entry. The comments and the response of the United States will be filed with the Court and published in the Federal Register. Written comments should be submitted to:

Maribeth Petrizzi
Chief, Litigation II Section
Antitrust Division
United States Department of Justice
1401 H Street, NW, Suite 3000
Washington, D.C. 20530.

The proposed Final Judgment provides that the Court retains jurisdiction over this action, and the parties may apply to the Court for any order necessary or appropriate for the modification, interpretation, or enforcement of the Judgment.

## VI. ALTERNATIVES TO THE PROPOSED FINAL JUDGMENT

The United States considered, as an alternative to the proposed Final Judgment, a full trial on the merits against defendants Alcan and Pechiney. The United States could have continued the litigation to seek preliminary and permanent injunctions against Alcan's acquisition of Pechiney. The United States is satisfied, however, that the divestiture of the assets as proposed in the Final Judgment will establish, preserve, and ensure competition in the relevant market. To this end, the United States is convinced that the proposed relief, once implemented by the Court, will prevent Alcan's acquisition of Pechiney from having adverse competitive effects.

## VII. STANDARD OF REVIEW UNDER THE TUNNEY ACT FOR THE PROPOSED FINAL JUDGMENT

The Tunney Act requires that proposed consent judgments in antitrust cases brought by the United States be subject to a sixty-day comment period, after which the Court shall determine whether entry of the proposed Final Judgment "is in the public interest." In making that determination, the Court may consider:

> (1) the competitive impact of such judgment, including termination of alleged violations, provisions for enforcement and modification, duration or relief sought, anticipated effects of alternative remedies actually considered, and any other considerations bearing upon the adequacy of such judgment;
>
> (2) the impact of entry of such judgment upon the public generally and individuals alleging specific injury from the violations set forth in the complaint including consideration of the public benefit, if any, to be derived from a determination of the issues at trial.

15 U.S.C. § 16(e). As the United States Court of Appeals for the District of Columbia Circuit held, the Tunney Act permits a court to consider, among other things, the relationship between the remedy secured and the specific allegations set forth in the government's complaint, whether

the decree is sufficiently clear, whether enforcement mechanisms are sufficient, and whether the decree may positively harm third parties. *See United States v. Microsoft*, 56 F.3d 1448, 1458-62 (D.C. Cir. 1995).

In conducting this inquiry, "[t]he court is nowhere compelled to go to trial or to engage in extended proceedings which might have the effect of vitiating the benefits of prompt and less costly settlement through the consent decree process." 119 Cong. Rec. 24,598 (1973) (statement of Senator Tunney).[5] Rather:

> [a]bsent a showing of corrupt failure of the government to discharge its duty, the Court, in making its public interest finding, should . . . carefully consider the explanations of the government in the competitive impact statement and its responses to comments in order to determine whether those explanations are reasonable under the circumstances.

*United States v. Mid-America Dairymen, Inc.*, 1977-1 Trade Cas. (CCH) ¶ 61,508, at 71,980 (W.D. Mo. May 17, 1977).

Accordingly, with respect to the adequacy of the relief secured by the decree, a court may not "engage in an unrestricted evaluation of what relief would best serve the public." *United States v. BNS, Inc.*, 858 F.2d 456, 462 (9th Cir. 1988) (citing *United States v. Bechtel Corp.*, 648 F.2d 660, 666 (9th Cir. 1981)); *see also Microsoft*, 56 F.3d at 1460-62. Case law requires that:

> [t]he balancing of competing social and political interests affected by a proposed antitrust consent decree must be left, in the first instance, to the discretion of the

[5] *See United States v. Gillette Co.*, 406 F. Supp. 713, 715-16 (D. Mass. 1975) (recognizing it was not the court's duty to settle; rather, the court must only answer "whether the settlement achieved [was] within the reaches of the public interest"). A "public interest" determination can be made properly on the basis of the Competitive Impact Statement and Response to Comments filed pursuant to the Tunney Act. Although the Tunney Act authorizes the use of additional procedures, 15 U.S.C. § 16(f), those procedures are discretionary. A court need not invoke any of them unless it believes that the comments have raised significant issues and that further proceedings would aid the court in resolving those issues. *See* H.R. Rep. No. 93-1463, 93rd Cong., 2d Sess. 8-9 (1974), *reprinted* in 1974 U.S.C.C.N. 6535, 6538.

> Attorney General. The court's role in protecting the public interest is one of insuring that the government has not breached its duty to the public in consenting to the decree. The court is required to determine not whether a particular decree is the one that will best serve society, but whether the settlement is "*within the reaches of the public interest*." More elaborate requirements might undermine the effectiveness of antitrust enforcement by consent decree.

*Bechtel*, 648 F.2d at 666 (emphasis added) (citations omitted).[6]

The proposed Final Judgment, therefore, should not be reviewed under a standard of whether it is certain to eliminate every anticompetitive effect of a particular practice or whether it mandates certainty of free competition in the future. Court approval of a final judgment requires a standard more flexible and less strict than the standard required for a finding of liability. "[A] proposed decree must be approved even if it falls short of the remedy the court would impose on its own, as long as it falls within the range of acceptability or is 'within the reaches of public interest.'" *United States v. Am. Telephone & Telegraph Co.*, 552 F. Supp. 131, 151 (D.D.C. 1982) (citations omitted) (quoting *Gillette*, 406 F. Supp. at 716), *aff'd sub nom. Maryland v. United States*, 460 U.S. 1001 (1983); *see also United States v. Alcan Aluminum Ltd.*, 605 F. Supp. 619, 622 (W.D. Ky. 1985) (approving the consent decree even though the court would have imposed a greater remedy).

Moreover, the Court's role under the Tunney Act is limited to reviewing the remedy in relationship to the violations that the United States has alleged in its Complaint, and does not authorize the Court to "construct [its] own hypothetical case and then evaluate the decree against

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[6] *Cf. BNS*, 858 F.2d at 463 (holding that the court's "ultimate authority under the [Tunney Act] is limited to approving or disapproving the consent decree"); *Gillette*, 406 F. Supp. at 716 (noting that, in this way, the court is constrained to "look at the overall picture not hypercritically, nor with a microscope, but with an artist's reducing glass"). *See generally Microsoft*, 56 F.3d at 1461 (discussing whether "the remedies [obtained in the decree are] so inconsonant with the allegations charged as to fall outside of the 'reaches of the public interest'").

that case." *Microsoft*, 56 F.3d at 1459. Because the "court's authority to review the decree depends entirely on the government's exercising its prosecutorial discretion by bringing a case in the first place," it follows that "the court is only authorized to review the decree itself," and not to "effectively redraft the complaint" to inquire into other matters that the United States might have but did not pursue. *Id*. at 1459-60.

VIII. DETERMINATIVE DOCUMENTS

There are no determinative materials or documents within the meaning of the Tunney Act that were considered by the United States in formulating the proposed Final Judgment.

Dated: November 13, 2003.

Respectfully submitted,

/s/

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## CERTIFICATE OF SERVICE

I, Anthony E. Harris, hereby certify that on November 14, 2003, I caused the foregoing Competitive Impact Statement to be served on defendants by sending a facsimile and by mailing a copy first-class, postage prepaid, to duly authorized legal representatives of those parties, as follows:

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