U.S. Department of Justice

Antitrust Division

City Center Building
1401 H Street, NW
Washington, DC 20530

March 15, 2004

The Honorable Bob Wise
Governor
State of West Virginia
Office of the Governor
Charleston, West Virginia 25305

Re: *Public Comment on Proposed Final Judgment in United States v. Alcan Ltd., Alcan Aluminum Corp., Pechiney, S.A., and Pechiney Rolled Products, LLC, Civil No. 1:030 CV 02012 (D.D.C., filed Sept. 29, 2003)*

Dear Governor Wise:

This letter responds to your letter of February 13, 2004, which comments on the terms of the proposed Final Judgment ("Judgment") submitted for entry in this case. The United States's Complaint in this case charged that Alcan's acquisition of Pechiney would substantially lessen North American competition in the sale of brazing sheet, a rolled aluminum alloy widely used in fabricating certain critical components of heat exchange systems (*e.g.*, heaters, air conditioners, and radiators) for all types of motor vehicles. The proposed Judgment would resolve those competitive concerns by requiring the defendants to divest Pechiney's "brazing sheet business," a term defined in the Judgment, § II(E), to include, *inter alia,* Pechiney's aluminum rolling mill in Ravenswood, West Virginia, which produces all of the brazing sheet sold by Pechiney in North America.

Your letter raises three major issues related to the proposed divestiture of Pechiney's brazing sheet assets. First, you suggest that the Court should not require the defendants to divest the Ravenswood facility because Alcan's acquisition of Pechiney would not substantially diminish competition in the sale of brazing sheet. Second, you contend that even if the proposed acquisition was anticompetitive, the proposed divestiture is excessive because only a small portion of the Ravenswood facility's production is brazing sheet, the relevant product that precipitated our concerns about the transaction. Third – and what we sense is your primary concern – you point out that the Ravenswood facility has been historically unprofitable, a situation largely attributable to the high costs of pension and retiree health care benefit plans (*i.e.*, "legacy" costs). You note that these legacy costs may not only limit the number of potential purchasers of Ravenswood, but also increase the likelihood that, without a major adjustment in these expenses, any new owner may soon find that the Ravenswood facility is not competitively viable and close it, a development that would adversely affect competition for brazing sheet and the income and livelihoods of Ravenswood's current and retired workers.

The procedures for entering a proposed final judgment in a government antitrust civil case are set forth in the Tunney Act, 15 U.S.C. §§ 16(b)-(h). Before entering a proposed decree, the court must conclude that the relief would be in the "public interest." 15 U.S.C. § 16(e). The public interest determination requires a court to carefully examine the relationship between the relief in the proposed Judgment and the allegations of the government's Complaint. The court must enter the Judgment if it concludes that the relief is "within the *reaches* of the public interest," *United States v. Am. Telephone & Telegraph Co.*, 552 F. Supp. 131, 151 (D.D.C. 1982) (emphasis original; citations omitted), *aff'd sub nom. Maryland v. United States*, 460 U.S. 1001 (1983), even if the remedy is not what the court itself would have fashioned had it stood in the prosecutor's shoes. *United States v. Microsoft*, 56 F.3d 1448, 1460 (D.C. Cir. 1995). *See also United States v. Alcan Aluminum Ltd.*, 605 F. Supp. 619, 622 (W.D. Ky. 1985) (approving consent decree even though the court would have imposed more restrictive terms).

Although public comments on a proposed decree may inform a court's analysis of the proposed relief and its public interest determination, the Tunney Act proceeding is not an open forum for commenters – or the Court – to second-guess the United States's exercise of its broad discretion to file a civil complaint to enforce the nation's antitrust laws. "[T]he Tunney Act cannot be interpreted as an authorization for a district court to assume the role of Attorney General." *United States v. Microsoft Inc.*, 56 F.3d 1448, 1462 (D.C. Cir. 1995). Indeed, 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," "the court is only authorized to review the decree itself," and it has no authority to "effectively redraft the complaint" to inquire into matters that the government might have but did not pursue, *Microsoft Corp.*, 56 F.3d at 1459-60. Nor, for that matter, does the Tunney Act confer upon a court authority to reject a proposed settlement because it provides relief that is "not necessary" or "to which the government might not be strictly entitled," *United States v. Bechtel Corp.,* 648 F.2d 660, 666 (9th Cir. 1981).

Thus, your contention that the divestiture relief in the proposed Judgment is unnecessary because Alcan's acquisition of Pechiney was not anticompetitive is not a basis under the law to reject a proposed Judgment. *See United States v. Archer-Daniels-Midland Co.,* 2003-3 Trade Cas. (CCH) ¶ 74,097 at 96,872 (D.D.C. 2003) ("[C]ourt must accord due respect to the government's prediction as to the effect of the proposed remedies, its perception of the market structure, and its view as to the nature of the case. . . . [T]he court is not to review allegations and issues that were not contained in the government's complaint, . . . nor should it 'base its public interest determination on antitrust concerns in markets other than those alleged in the government's complaint. . . .'") (citations omitted); *United Sates v. Alex Brown & Sons, Inc.,* 169 F.R.D. 532, 541 (S.D.N.Y. 1996) (purpose of Tunney Act is to ascertain whether proposed relief is in public interest, "not to evaluate the strength of the Government's case"). Also, your suggestion that the Court should require the United States to prove the allegations of its antitrust complaint before the Court can assess the appropriateness of the parties' agreed-upon relief is inconsistent with established law. Imposing such a requirement in a Tunney Act proceeding would turn every government antitrust case into a full-blown trial on the merits of the parties'

claims, and seriously undermine the effectiveness of antitrust enforcement by use of consent decrees. *Microsoft Inc.,* 56 F.3d at 1459; *Alex Brown & Sons, Inc.,* 169 F.R.D. at 541.

As to the proposed Judgment submitted in this case, its entry surely would be "within the reaches" of the public interest (*United States v. Bechtel Corp., Inc.,* 648 F.2d 660, 666 (9th Cir.), *cert. denied,* 454 U.S. 1083 (1981)). The Judgment would alleviate the United States's serious competitive concerns regarding the defendants' proposal to combine two of North America's three major producers of brazing sheet by requiring defendants promptly to divest Pechiney's Ravenswood rolling mill, which accounts for all of the brazing sheet developed, produced, and sold by Pechiney in North America. The sale of the Ravenswood facility to a viable purchaser would create a new competitor in brazing sheet, and thus leave competition in the North American brazing sheet market no worse off after Alcan's acquisition of Pechiney than before it. In short, "[g]iving due respect to the Justice Department's perception of the market structure and its view of the nature of its case" (*Microsoft Inc.,* 56 F.3d at 1461), the proposed Judgment "responds fully to the anticompetitive concerns raised by the merger because it would maintain the status quo." *Archer-Daniels-Midland Co.,* 2003-2 Trade Cas. (CCH) at 96,874. As such, "it seems reasonable that entering the proposed Final Judgment will eliminate the threats of easier anticompetitive coordination and diminished competition," which would put the proposed relief "well 'within the reaches of the public interest.'" *Id.* (citations omitted).

The competitive problems created by Alcan's acquisition of Pechiney could not be cured simply by requiring a "partial divestiture" of only those portions of the Ravenswood facility devoted to developing, producing, and selling brazing sheet. As you point out in your comment, at Ravenswood brazing sheet is produced on the same production lines that make many other important rolled aluminum alloy products (*e.g.,* common alloy coil, aerospace sheet). The United States is unaware of any evidence that would support a conclusion that dismantling the Ravenswood facility to sell off a few parts exclusively committed to the production of brazing sheet would produce a viable new firm capable of replacing the competition lost by Alcan's acquisition of Pechiney. The Federal Trade Commission, based on a recent empirical study of its own divestiture efforts, observed: "[D]ivestiture of an ongoing business is more likely to result in a viable operation than divestiture of a more narrowly defined package of assets and provides support for the common sense conclusion that [antitrust enforcement agencies] should prefer the divestiture of an ongoing business." Federal Trade Commission, *A Study of the Commission's Divestiture Process* 12 (1999).[1] Thus, to ensure that the ordered divestiture produces a viable and effective competitor, it makes good economic and business sense for the Judgment to require a sale of the entire Ravenswood facility, even though defendants' combination would have created serious competitive problems in only one major product produced by that plant.

Finally, the proposed Judgment addresses your concern that the legacy costs associated with the Ravenswood facility may prevent a potential purchaser from profitably operating the facility. A lynchpin of the proposed decree is its requirement that the Ravenswood facility be

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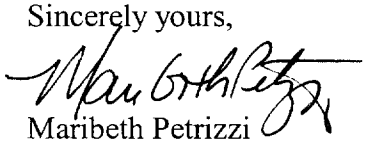
[1]The FTC study is available online at *http://www.ftc.gov/os/1999/08/divestiture.pdf.*

divested to a person who, in the United States's judgment, is able to successfully operate it and provide competition for Alcan (*see* Judgment, § IV(J)). Although the defendants have solicited offers for Pechiney's brazing sheet assets, they have not selected a proposed purchaser. In the event the defendants are unable to find an acceptable purchaser on their own, the proposed decree permits the Department of Justice to nominate, and the Court to appoint, a trustee responsible for conducting an independent search for an acceptable purchaser and selling Pechiney's brazing sheet assets "at such price and on such terms as are then obtainable upon reasonable effort" (Judgment, § V(B)). At this point in the divestiture process, however, it would be inappropriate to conclude that the defendants' – or if necessary, the trustee's – efforts to sell Pechiney's brazing sheet assets will not produce an acceptable, viable purchaser capable of vigorously competing in the development, production, and sale of brazing sheet in North America.[2]

Thank you for bringing your concerns to our attention; we hope this information will help alleviate them. Pursuant to the Antitrust Procedures and Penalties Act, 15 U.S.C. § 16(d), a copy of your comment and this response will be published in the Federal Register and filed with the Court.

Sincerely yours,



Maribeth Petrizzi
Chief
Litigation II Section

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[2]Obviously, an "acceptable purchaser" of Pechiney's brazing sheet business would not be a firm so burdened by its former owners' legacy costs that it is unviable. *See* Judgment, § IV(J): Divestiture terms must not give the defendants "the ability unreasonably to raise the [new firm's] costs, to lower [its] . . . efficiency, or otherwise to interfere in . . . [its] ability . . . to compete effectively."

STATE OF WEST VIRGINIA
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CHARLESTON 25305

BOB WISE
GOVERNOR

February 13, 2004

VIA FAX AND OVERNIGHT COURIER

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Re: United States v. Alcan Aluminum Corp., Pechiney, S.A., and Pechiney Rolled Products, LLC

United States District Court for the District of Columbia, Case No. 1:03CV02012

Dear Ms. Petrizzi:

As Governor of the State of West Virginia, I object to the proposed Final Judgment in *United States v. Alcan Aluminum Corp.* and ask the United States District Court for the District of Columbia to reject the Final Judgment as currently written and to enter a final judgment that will protect the citizens of West Virginia by allowing Alcan to own the plant of Pechiney Rolled Products. The Final Judgment is flawed and the divestiture it requires is unnecessary and contrary to the public interest.

The planned merger of Alcan and Pechiney is global in scope and involves the integration of facilities and operations all over the world. It is ironic and incredible that the Justice Department somehow sees Jackson County, West Virginia, as the only area of certain danger as a result of this merger. It is wholly unacceptable that West Virginia's economy and hundreds of its citizens may suffer because the Justice Department has chosen to bargain away their rights in exchange for an agreed order to hastily and recklessly resolve a theoretical concern. It is disappointing that the Justice Department apparently has opted for the expedience of an agreed order imposing an artificial remedy and has made West Virginia's jobs and economy a bargaining chip in the process.

West Virginia does not oppose the acquisition of Pechiney, S. A. by Alcan Aluminum Corporation. However, West Virginia is vitally concerned with that part of the proposed Final Judgment that requires Alcan to divest the plant of Pechiney Rolled Products, located at Ravenswood, West Virginia. If new owners of the plant lack the qualifications necessary for success, the plant will fail and close. That would be a disaster for many people and communities in West Virginia. The economic impact of closure of this facility would be devastating for hundreds of employees and retirees of the Ravenswood facility and the economies of Jackson County and the State as a whole.

This letter of opposition is submitted to the Court and the Justice Department under the terms of the Tunney Act, 15 U.S.C. § 16. Under that Act, the Court must determine whether the proposed Final Judgment is in the public interest, and may consider "effects of alternative remedies actually considered" and "the impact of such judgment upon the public generally."

The Final Judgment puts the public interest in serious jeopardy. If it is not implemented in the public interest, many persons are certain to suffer.

The Ravenswood Plant

The Pechiney Rolled Products plant at Ravenswood employs approximately 960 workers, 700 of whom are hourly workers. It currently has approximately 900 retirees.

The Ravenswood plant is an integrated facility that produces aluminum sheet, aluminum slab, various aluminum specialty products, and brazing sheet. The brazing sheet market is the only one that apparently concerns the Justice Department, but it makes up only a relatively small part of the plant's total output. Pechiney Rolled Products sells about 35 million pounds of brazing sheet per year. Only 28% of the plant's output is brazing sheet. Brazing sheet is a small market, and a small portion of the rolled products sales. Though the plant's larger volume products (principally aluminum plate and sheet) are not the subject of any antitrust concern, the proposed Final Judgment would affect all of the plant's products because the entire plant is to be sold pursuant to its terms.

The plant's dominant product is aluminum plate which is sold as general engineering plate and plate for the aerospace industry. Some aluminum product is produced for transportation manufacturers for railcars, tanker trailers, and wide roofs for freight trailers. The Ravenswood plant also sells rolled aluminum for building products - siding and downspouts. Aerospace customers require product that meets exacting safety standards and they rely on their suppliers for technical support. Pechiney is able to give technical customer support. It has research facilities near Grenoble, France. It has machinery for running trials. It has intellectual property rights, which it will retain after the merger. A buyer of the Ravenswood plant would have to be equally capable of meeting the demands of buyers of these products.

Brazing sheet is not a commodity product. Its production and sale are heavily dependent on technology—for product development and for customer service. There are actually forty different brazing sheet products, some of it "header stock"—the top of the radiator - and "tube stock" - the water carrying tubes that are air-cooled. Competition in the brazing sheet market

is not on price alone, but also on performance, quality, alloy development, product development, service, and long-term relationships.

Defects in the Final Judgment

The Final Judgment is defective because it compels the divestiture of the Ravenswood plant. For reasons discussed in the next section of this comment and objection, Alcan's ownership of the plant would not endanger competition in any market. The fundamental premise of the Final Judgment is erroneous.

The Final Judgment fails to account for the range of products manufactured at Ravenswood. It ignores the products other than brazing sheet. If the search for a successor fails to take the other products into account, there is substantial danger that an ostensible "new owner" found by Alcan under the Final Judgment would lack the necessary experience and technical capability of producing and selling the full range of these products.

The Final Judgment lacks adequate standards for the search for new owners of the Ravenswood plant. It provides no guidance in the event that a qualified buyer with the adequate capital capability is not found by Alcan or the trustee.

Moreover, even if a purchaser is found, it does not have to agree to be bound by the proposed Final Judgment. Consent Final Judgment, ¶¶ II.E and IV.A.

The purchaser must demonstrate only that the acquired assets will be used "as part of a viable, ongoing business, engaged in developing, manufacturing, and *selling brazing sheet* in North America." Consent Final Judgment, ¶ IV.J *This requirement ignores the important fact that brazing sheet is only one of the products (28% of the total production) manufactured at Ravenswood.* In fact, the proposed Final Judgment ignores 72% of the products made by this plant that is to be sold. The plant will not survive unless the purchaser makes a commitment to make and sell *all* of the Ravenswood products.

The Final Judgment does not require the purchaser to make its commitments for any length of time. How long the purchaser must operate the plant is not specified. The purchaser need not give assurance for sustained operation.

If the divestiture process were allowed to proceed and if Alcan is unable to find a purchaser acceptable to the Justice Department within the time allowed (120-180 days after the end of the tender offer), a trustee will be appointed to make the sale. Consent Final Judgment, ¶¶ IV.A and V. Any potential purchaser truly capable of operating the plant effectively will surely be located during the time allowed to Alcan. If the sale falls to the hands of a trustee, the likelihood of finding an effective owner of the plant is virtually nil.

The recent owners of the plant have not been able to operate it profitably. Unprofitable plants are often bought by purchasers who intend to sell off assets and go out of business. New owners might also attempt to avoid pension obligations undertaken by Pechiney, its

predecessor owners, or successors. The Final Judgment does not sufficiently guard against these disastrous possibilities.

Final Judgments like the one proposed in this case often fail to result in successful operations after the divestiture.. A 1999 FTC Divestiture Study[1] found that buyers of divested assets often lack the information necessary to carry on the business successfully. They often do not fully know what assets they need to succeed in the business, or whether the assets offered by the sellers are up to the task.[2] Attempts by Alcan to find purchasers experienced in brazing sheet would identify potential buyers that might not be capable of making and selling Ravenswood's other products.

Under these circumstances, particularly in light of the inadequacy of the Final Judgment, the State of West Virginia fears that the urgency in finding a buyer for Ravenswood will lead to a sale to owners who will not keep the plant open. These real dangers make it necessary for the State of West Virginia to register these objections.[3]

The Effect of the Acquisition on Competition

Divestiture of the Ravenswood plant, part of which includes Pechiney's Brazing Sheet Business, is totally unnecessary. Competition in the brazing sheet market is active now and will remain active after the purchase of Pechiney by Alcan. There is sound reason to believe that intense competition would continue in the brazing sheet market if Alcan retained ownership of Pechiney Rolled Products. The Final Judgment and the Justice Department's Competitive Impact Statement ("CIS") fail to analyze the effect of the acquisition on the markets for the products of Pechiney Rolled Products other than brazing sheet.

Competitors in the brazing sheet market are, in order of market share, Alcoa, Pechiney Rolled Products, Alcan and Corus. Alcoa obtained its position as the market leader when it acquired Alumax, which had brazing sheet production facilities at Lancaster, Pennsylvania. Alcoa has been, until now, the world's largest aluminum producer. The combination of Alcan and Pechiney takes that title away from Alcoa. The competition between Alcoa and Alcan around the world has been intense, and the rivalry would continue after this combination is formed,

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[1] FTC, "A Study of the Commission's Divestiture Process" (1999), *available at* www.ftc.gov/os/1999/9908/index.htm#6.

[2] *See* Richard Parker and David Balto, "The Evolving Approach to Merger Remedies," ANTITRUST REPORT, May 2000 (Matthew Bender), 2, 9.

[3] "One particular complication in selling Ravenswood could be the plant's capacity to produce hard alloy plate for the aerospace industry. Operating a plate mill required the support of a research and development team, according to Lloyd O'Carroll of BB&T Capital Markets, and few companies had that capability. In North America, the only company in the market besides Alcoa and Alcan-Pechiney was Houston-based Kaiser Aluminum Corp., O'Carroll said, but Kaiser was struggling to emerge from Chapter 11 bankruptcy protection and was unlikely to have the cash to finance an acquisition unless it succeeded in selling off some of its alumina assets. Anglo-Dutch steel and aluminum producer Corus Group Plc also produces plate but has said it intends to exit the aluminum business." Online American Metal Market, October 1, 2003, http://www.findarticles.com/cf_dls/m3MKT/39-3_111/108450462/p1/article.jhtml.

especially since Alcoa surely will attempt to regain its standing as the world leader in brazing sheet production.

Purchasers of brazing sheet from the Ravenswood plant and other similar facilities are Tier 1 suppliers to the automotive industry. These are large, sophisticated buyers that are capable of negotiating favorable prices. Furthermore, they must qualify to supply the automobile manufacturers, and they in turn require qualification by those who supply them with materials like brazing sheet. Each Tier 1 supplier chooses suppliers of brazing sheet from whom it will demand qualification. This means that each brazing sheet producer does not compete with all other brazing sheet sellers in seeking the business of a Tier 1 supplier, but at the most one or two of the other sellers. Purchasers want to maintain at least two reliable sources. These circumstances significantly reduce the impact of market share as a factor for analysis of the anti-competitive effects of the proposed merger.

The Justice Department asserts in its CIS that Alcan is a new "maverick" that is using low prices to gain market share in the brazing sheet market. If Alcan owned the Pechiney Rolling Products plant, the Justice Department believes it would gain that market share without price concessions. This would lead it to abandon its low-price strategy, hurting purchasers who now enjoy the benefits of Alcan's low prices. That analysis by the Justice Department is highly questionable. First, as a practical matter, Alcan is unlikely to use a low price strategy any longer than necessary to gain the market share it wants. Once it gains the market share it seeks, the low price strategy will end and purchasers will not have any price benefit. Second, Alcan shares the brazing sheet market with its arch-rival Alcoa, the major seller in the market. Alcan could not raise prices above Alcoa's price, and vice versa. There is price discipline in the market with these two sellers vying with one another. Alcan's low prices are a short-term strategy. It is not worth the risks posed by the consent decree to require divestiture just to get this short term advantage. Indeed, allowing Alcan to retain the Ravenswood facility may very well create a pro-competitive effect in that Alcoa will have to find ways to regain its "world leader" title. Third, the buyers of brazing sheet are large, sophisticated purchasers who are capable of negotiating prices.

In spite of the Justice Department's concerns, Alcan would be the best owner of the Ravenswood plant. Among the reasons for this conclusion are these:

1. The divestiture is not necessary because competition in the brazing sheet market without the divestiture would continue to be intense.
2. Alcan, being aggressive in its competition with Alcoa, would maximize the potential of the Ravenswood plant better than any other owner. Contrary to the Justice Department's view that Alcan would not compete aggressively as owner of the Ravenswood plant, industry commentators believe that Alcan "could speed up the 'fixing' of Pechiney's Ravenswood facility now under way."[4]
3. Finding a buyer capable of maximizing the potential of the Ravenswood plant would be very difficult, if not impossible, especially in light of the previous lack of profitability of that plant and its legacy costs.

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[4] Online Metal Center News, August 2003.
http://metalcenternews.com/2003/august/mcn0803Merger.htm (viewed 10/6/03)

4. Alcan has the experience and facilities to make and sell all of the products of the Ravenswood plant, not just the brazing sheet upon which the Final Judgment focuses.

Conclusion

West Virginia proposes that the Final Judgment be modified to permit Alcan to retain ownership of the Pechiney Brazing Sheet Business and the other operations of Pechiney Rolled Products at Ravenswood. In the alternative, West Virginia proposes that no buyer be accepted for the Ravenswood plant that has fewer capabilities that those of Alcan, and that if the buyer fails to keep the plant in operation, the plant should revert to Alcan.

The current economic climate demands that the State of West Virginia expend every effort to ensure that no jobs are lost as the result of the Alcan/Pechiney transaction. The proposed Final Order, however, severely threatens our economy and places at severe risk the jobs of hundreds of Ravenswood plant employees and the future welfare of hundreds of its retirees. The State of West Virginia cannot stand idly by and allow its economy and citizens to be jeopardized. The public interest requires that Alcan retain ownership of the plant, or, in the alternative, that the highest priority in this divestiture be given to finding a buyer that is at least as capable as Alcan to operate the plant. If such a buyer cannot be found, Alcan should be permitted to own and operate the plant.

Very truly yours,

Bob Wise

Governor Bob Wise

STATE OF WEST VIRGINIA
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BOB WISE
GOVERNOR

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Please deliver this and the following 6 **page(s) to:**

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