

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 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 allow-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 costs⁴ 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 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 attorney's 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, DC 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 competition 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

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.