EUROPEAN COMMISSION
Competition DG

CASE AT.39230 – RIO TINTO ALCAN

(Only the English text is authentic)

ANTITRUST PROCEDURE

Council Regulation (EC) 1/2003

Article 9 Regulation (EC) 1/2003

Date: 20/12/2012

EUROPEAN
COMMISSION

Brussels, 20.12.2012
C(2012) 9439 final

PUBLIC VERSION

COMMISSION DECISION

of 20.12.2012

addressed to

- Rio Tinto plc
- Rio Tinto International Holdings Limited
- Rio Tinto Alcan Inc
- Rio Tinto France SAS
- Aluminium Pechiney SAS
- Electrification Charpente Levage SASU

relating to a proceeding under Articles 101 and 102 of the Treaty on the Functioning of the European Union and Articles 53 and 54 of the EEA Agreement

in Case COMP/39230 – Rio Tinto Alcan

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TABLE OF CONTENTS

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THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to the Agreement on the European Economic Area,

Having regard to Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty[1], in particular Article 9(1) thereof,

Having regard to the Commission decision of 20 February 2008 to initiate proceedings in this case,

Having expressed concerns in the Statement of Objections of 20 February 2008 and the preliminary assessment of 11 July 2012,

[1] OJ L 1, 4.1.2003, p.1. With effect from 1 December 2009, Articles 81 and 82 of the EC Treaty have become Articles 101 and 102, respectively, of the Treaty on the Functioning of the European Union ("TFEU"). The two sets of provisions are, in substance, identical. For the purposes of this Decision, references to Articles 101 and 102 of the TFEU should be understood as references to Articles 81 and 82, respectively, of the EC Treaty where appropriate. The TFEU also introduced certain changes in terminology, such as the replacement of "Community" by "Union" and "common market" by "internal market". The terminology of the TFEU will be used throughout this Decision.

Having given interested third parties the opportunity to submit their observations pursuant to Article 27(4) of Council Regulation (EC) No 1/2003 on the commitments offered to meet those concerns,

After consulting the Advisory Committee on Restrictive Practices and Dominant Positions,

Having regard to the final report of the Hearing Officer,

Whereas:

1. SUBJECT MATTER

(1) The present Decision is addressed to Rio Tinto plc ("Rio Tinto"), Rio Tinto International Holdings Limited, Rio Tinto Alcan Inc, Rio Tinto France SAS, Aluminium Pechiney SAS ("AP") and Electrification Charpente Levage SASU ("ECL") (collectively, the "Addressees" or "Rio Tinto Alcan") and concerns certain contractual practices of Rio Tinto Alcan relating to the licensing of aluminium reduction (smelting) technology and the supply of pot tending assemblies ("PTAs"), i.e. specialty cranes used in aluminium reduction plants (smelters).

(2) In its preliminary assessment[2] of 11 July 2012, the Commission came to the provisional conclusion that Rio Tinto Alcan's practice of contractually tying the licensing of its AP aluminium smelting technology to the purchase of PTAs exclusively from Rio Tinto's subsidiary ECL raised concerns as to its compatibility with Articles 101 and 102 of the Treaty and Articles 53 and 54 of the EEA Agreement. The preliminary assessment expressed the concern that Rio Tinto Alcan's contractual practice might produce negative effects on innovation and prices and result in anti-competitive foreclosure on the PTA market.

2. THE PARTIES

(3) Rio Tinto is a fully integrated primary aluminium producer, supplying bauxite, alumina and aluminium. Following Rio Tinto's acquisition of Alcan Inc on 1 January 2008, Alcan Inc and Rio Tinto Canada Holdings Inc (a subsidiary of Rio Tinto) merged to become Rio Tinto Alcan Inc, a wholly-owned subsidiary of Rio Tinto International Holdings Limited, itself a direct wholly-owned subsidiary of Rio Tinto plc. [3]

(4) AP is a wholly owned subsidiary of Rio Tinto France SAS, itself a wholly owned subsidiary of Rio Tinto Alcan Inc. AP, which is based in France, has traditionally

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[2] In the preliminary assessment of 11 July 2012, the Commission maintained the findings and the legal and economic assessments set out in the Statement of Objections of 20 February 2008, except where these were not consistent with the revised market definitions of the preliminary assessment or if expressly indicated otherwise. The Statement of Objections was annexed to, and thus forms part of, the preliminary assessment. For the purposes of this Decision, references to the preliminary assessment must be understood as comprising as well, when appropriate, the findings and assessment in the Statement of Objections.

[3] In its decision of 2 October 2007 in Case COMP/M.4827 – Rio Tinto / Alcan, the Commission declared the acquisition of Alcan Inc by Rio Tinto compatible with the internal market and the EEA agreement.

been a leading supplier of technology for the design and operation of aluminium smelters.

(5) ECL, a wholly owned subsidiary of AP, is also based in France and focuses on the manufacturing and supply of mechanical equipment used in the production of primary aluminium and especially of PTAs.

(6) The addressees are regarded as one undertaking within the meaning of Articles 101 and 102 of the Treaty.

(7) Groupe Réel ("Réel") is a French group developing, manufacturing and servicing special mechanical equipment used in various industrial sectors including aluminium, nuclear and defence. It is active in the market for mechanical equipment for aluminium smelters through its fully owned German subsidiary NKM Noell Special Cranes GmbH ("NKM"), which manufactures and sells PTAs.

3. PROCEDURAL STEPS UNDER REGULATION NO 1/2003

(8) On 24 May 2005, the Commission received a complaint from Réel and its subsidiary NKM (collectively, "Réel" or "the complainant"), according to which a substantial part of the market for aluminium smelting (pot) handling equipment was foreclosed to suppliers of such equipment as the result of the practice of AP to contractually tie the licences of its leading aluminium smelting technology to the purchase of pot handling equipment (including specialty cranes) from ECL.

(9) On 20 February 2008 the Commission opened proceedings with a view to adopting a decision under Chapter III of Regulation (EC) No 1/2003 and notified a Statement of Objections to Alcan Inc, Alcan France SAS, AP and ECL. Having heard Rio Tinto Alcan on 14 July 2008 and after carrying out an additional investigation, the Commission adopted, on 11 July 2012, a preliminary assessment as referred to in Article 9(1) of Regulation (EC) No 1/2003, which set out the Commission's competition concerns. These concerns related to the compatibility of the contractual tying of the licensing of aluminium smelting technology to the acquisition of PTAs with Articles 101 and 102 of the Treaty. The preliminary assessment was notified to Rio Tinto, Rio Tinto International Holdings Limited, Rio Tinto Alcan Inc, Rio Tinto France SAS, AP and ECL by letters of 11 July 2012.

(10) On 3 August 2012, Rio Tinto Alcan submitted commitments ("the initial commitment proposal") to the Commission in reaction to the preliminary assessment.

(11) On 10 August 2012 a notice was published in the Official Journal of the European Union pursuant to Article 27(4) of Regulation (EC) No 1/2003, summarising the case and the initial commitment proposal and inviting interested third parties to give their observations on the commitments within one month of publication.

(12) On 17 September 2012 the Commission informed Rio Tinto Alcan of the observations received from interested third parties following the publication of the notice. On 9 November 2012 Rio Tinto Alcan submitted an amended commitment proposal ("the revised commitment proposal").

(13) On 28 November 2012 the Advisory Committee on Restrictive Practices and Dominant Positions was consulted. On 29 November 2012 the Hearing Officer issued his final report.

4. PRELIMINARY ASSESSMENT

4.1. Relevant markets

4.1.1. The tying market: licensing of aluminium smelting technology

4.1.1.1. Product market

(14) The Commission reached the preliminary conclusion that the tying market consists of the market for the licensing of aluminium smelting technology to third parties, excluding smelter capacities using in-house technologies.

The aluminium reduction (smelting) technology transfer package

(15) Aluminium reduction (smelting) technology is transferred pursuant to a licence agreement. The technology licence is acquired as a part of a technology transfer package generally consisting of (*i*) engineering know-how for the construction of a primary aluminium smelter; (*ii*) operational know-how for the adequate operation of the smelter (for AP technologies, the "AP process"); and (*iii*) the right to produce aluminium by using the operational know-how in the smelter. The technology package normally comprises also certain training and support services from the technology provider throughout the process of building and starting up the smelter. Certain support and training services may also be offered throughout the entire operation of a smelter (the "service package").

(16) Technology transfer agreements (the "TTAs") typically provide for the transfer of know-how for the construction of the smelter and guarantee certain performance parameters (most importantly, certain energy consumption at a given production level) in the start-up phase of the smelter that normally occurs several months after the end of construction works. The technology transfer fees are payable in lump sums at different stages of construction and start-up. After the start-up, the fee is paid out and the technology transfer agreement terminates; however, the licensee's right to use AP technology in the production process continues indefinitely.

(17) The provider/licensor of smelting technology is chosen by a customer/licensee following a selection process in which different available technologies (individualised "technology studies") are offered to and which are evaluated on a long-term basis. A technology study is usually based on an existing smelter, as a technology's proven implementation is crucial for the technological risk and "bankability"[4] assessment. A smelting technology's main competitive parameters are its capital costs consisting, in particular, of the licence fee and the smelter

[4] A "bankable" technology will be approved by a bank having previous experience in the primary aluminium business even if the customer who invests in the smelter does not yet have experience of' operations and management of an aluminium smelter.

construction cost, as well as the smelter's operating costs related to factors such as labour, energy, alumina, logistics and consumables. The technology licensor's track record and reputation have a direct impact on the investor's ability to secure financing on the market. The typical investor in a smelter would seek to maximise return on investment and minimise risks and would select a "bankable" technology offering the best net present value of the entire smelter project.

Limited or no substitutability between modern and outdated technologies

(18) The two main technological processes used for the production of aluminium are the "Söderberg" and "pre-bake" processes. In a "Söderberg" smelter, the anodes are produced in the smelter pots ("self-bake"). The predominant majority of the existing Söderberg smelters were built in the early 1970s or before. The Söderberg technology was subsequently rendered obsolete or uncompetitive, for the purposes of technology licensing, by the development and commercialisation of technologies having as a feature electrolyte cells functioning with "pre-baked" anodes produced in special anode plants. The development of pre-bake technologies led to an increase in energy and production efficiency of smelter cells, which is directly linked with the increase of the smelter cell amperage, from 180 kA for the earlier technology versions to most recently 400 kA, and which in the future may increase to 500kA and 600kA.

(19) Modern pre-bake smelters (with smelting cells operating with a current range of 200kA or more) are drastically different from Söderberg process-based technologies in their design, input requirements and environmental compliance. Because of these differences, the industrial introduction of pre-bake technologies can be considered as a major innovation in aluminium smelting that rendered Söderberg technologies generally unattractive for licensing. A substantial number of smelters still operate, however, on pre-bake technologies which were developed decades ago (Alcan, Alusuisse, Asv/Norsk Hydro, Alcoa, VAW, Sumitomo, Reynolds, Kaiser, British Aluminium, VAMI, Rio Tinto/Comalco, etc.). As of the late 1990s, these technologies have however been considered outdated and are no longer offered for licensing.

(20) The Commission's preliminary conclusion was that the technologies set out above (i.e. the Söderberg technologies and outdated pre-bake technologies) could not be seen as competing on the technology licensing market with the significantly more innovative AP (pre-bake) technologies and could thus not be included in the same relevant technology market.

Limited or no substitutability between technology licensing and in-house technology development

(21) Aluminium producers operate smelters based on either proprietary smelting technologies (developed "in-house") or technologies licensed from an external provider. The Commission's preliminary assessment is that there is no sufficient substitutability between in-house smelting cell technologies and licensed technologies and they cannot be considered as part of the same relevant technology market.

(22) Major aluminium producers such as Alcoa Inc ("Alcoa"), BHP Billiton, Century Aluminum Company ("Century") and Rio Tinto (before its acquisition of Alcan Inc) no longer develop their proprietary technologies and opted for the purchasing/licensing of technologies that were economically efficient and "bankable" at the relevant time. Since then, these producers' proprietary technologies have been used exclusively in-house and have not been integrated in technology transfer packages for the purposes of licensing.

(23) From a demand-side point of view, switching from a licensed technology to proprietary technology appears practically impossible in the short or mid-term, since this would require significant time and investments in R&D and involve very significant sunk costs resulting, in particular, from the need to achieve economies of scale and scope. Furthermore, even high R&D investments would not necessarily ensure an optimal efficiency of the smelter. Rio Tinto (before its acquisition of Alcan Inc) had indicated that it would be more efficient to invest elsewhere the resources that would otherwise be required for in-house technology R&D in order to bridge the gap between its existing technologies and the AP technologies. Other producers had expressed similar views.

(24) As regards supply-side substitutability, in-house technology owners would not be able to start licensing out without incurring significant additional costs associated with, among other things, the development of a complete engineering package for the implementation of the technology at a new smelter site; the provision of on-going technical support to licensees; the establishment of an active third party licensing business, including insurance[5] and other business costs associated with the development of a complete technology transfer package. Creating a credible technology transfer package is complex and requires significant, long-term investment and efforts. The absence of an established technology transfer package implies that technology owners are unable to market and transfer technologies in the short term.

(25) Currently, Norsk Hydro's "HAL"[6] technology is the only modern technology that is used exclusively in-house, i.e. it is not available on the licensing market as a part of a technology transfer package. […] it seems unlikely that Norsk Hydro would be able to enter the relevant technology market in the near future.

Technologies available for licensing in the relevant technology market

(26) Although smelting technologies have also been licensed earlier, the Commission investigation suggests that a market for licensing of smelting technologies has existed at least since the early 1980s, when the AP18 technology[7] became commercially available.

(27) The technology providers offering modern (pre-bake) technologies for licensing throughout the investigated period in the relevant market have been AP (now owned

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5 Insurance costs are substantial particularly for new technologies with no or a limited record of successful transfers in a given region of the world.

6 […].

7 With a smelter cell amperage of at least 180 kA.

by Rio Tinto Alcan), Dubai Aluminium ("Dubal"), United Company Rusal plc ("Rusal") and the Chinese suppliers North Eastern University Institute ("NEUI"), Shenyang Aluminium and Magnesium Engineering and Research Institute ("SAMI") and Guiyang Aluminium and Magnesium Engineering and Research Institute ("GAMI").

4.1.1.2. Geographic market

(28) Following the investigation in Case No COMP/M.4827 - Rio Tinto / Alcan, the Commission observed that the relevant geographic market for technology licensing might be global, although it could not be excluded that at least the People's Republic of China (hereinafter "China") may be seen as a different geographic market.[8]

(29) The investigation in this case has revealed several factors suggesting that the conditions for competition on the smelting technology market(s) in China are significantly different from those generally prevailing elsewhere in the world:

(a) lack of substitution with foreign technologies,

(b) centralised planning and regulation of the domestic primary aluminium industry;

(c) structural links between the technology providers and aluminium producers;

(d) limited importance of a technology's international "bankability" in the technology selection process for smelters in China; and

(e) comparatively low protection of intellectual property rights.

(30) Alcan Inc, which had a [70-80]% market share outside China, did not license its technology to Chinese aluminium producers[9]. In contrast to capacities in the rest of the world, the (significant) production capacities built in China in the last decade have been exclusively based on Chinese domestic technologies. The fact that Chinese aluminium producers have not licensed technologies from foreign providers suggests as well that competition conditions in China and outside of China are not homogeneous.

(31) On the basis of the above considerations, the Commission's preliminary assessment was that the relevant geographic market for aluminium reduction technology in this case is wider than EEA and is likely to be worldwide excluding China.

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8 See at paragraph 91 of the Commission Decision in Case No COMP/M.4827 - Rio Tinto / Alcan. It should be noted that the Commission investigation in the merger control cases COMP/M.4827 - Rio Tinto/Alcan, COMP/M.3225 - Alcan/Pechiney and COMP/M.1663 - Alcan/Alusuisse did not focus on individual countries outside the EEA, nor on the question of whether the competitive conditions in China and potentially in other countries were sufficiently homogeneous with those in the EEA and the rest of the world.

9 As already concluded in the Commission investigation in Case No COMP/M.4827 - Rio Tinto / Alcan, cf. footnote 8 above.

4.1.2. The tied market: the market for PTAs

4.1.2.1. Product market

(32) PTAs are large handling cranes that perform various operations in modern smelter plants operating with pre-bake technology. PTAs are critical equipment in a smelter: without PTAs, a smelter cannot start-up nor operate. PTAs are distinct from stud pullers and other cranes that are normally used in smelters operating Söderberg technology. The Commission therefore takes the preliminary view that they constitute a distinct product market.

(33) PTAs are produced by four manufacturers: ECL, Réel, Shenyang Cranes ("SMMC") and Zhuzhou Tianqiao ("TQCC"). The two latter producers are located in China. While ECL and Réel have produced PTAs for different smelters worldwide, SMMC and TQCC have supplied almost exclusively the Chinese market.

4.1.2.2. Geographic market

(34) While PTAs are used in aluminium smelters (operating with "pre-bake" anodes) worldwide, PTA customers (namely aluminium producers) as well as the complainant submit that the price and some technical characteristics (notably, functionality) of PTAs sourced for smelters inside and outside China differ substantially. Chinese smelters have predominantly sourced PTAs from domestic manufacturers and the latter have almost exclusively supplied to smelters in China. In contrast, aluminium producers from the rest for the world have stated to be unfamiliar with Chinese PTAs. These findings suggest that the customers' selection criteria for PTAs in China differ from those in the rest of the world. This implies that also the conditions of competition in the market for PTAs in China are distinct from those in the rest of the world. On this basis, the Commission's preliminary assessment is that the geographic dimension of the market for PTAs is worldwide excluding China.

4.2. Position of the parties on the relevant markets / Dominant position of Rio Tinto Alcan in the tying market

(35) The existence of a dominant position derives in general from a combination of several factors which, taken separately, are not necessarily determinative.[10] An important factor is the existence of very large market shares, which are in themselves, save in exceptional circumstances, evidence of the existence of a dominant position.[11] That is the case where a company has consistently held a market share of 50% or above.[12]

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[10] Case 27/76 *United Brands and United Brands Continental v Commission*, [1978] ECR 207, paragraph 66.

[11] Case 85/76 *Hoffmann-La Roche v Commission* [1979] ECR 461, paragraph 41; and Case T-65/98 *Van den Bergh Foods v Commission*, [2003] ECR II-4653, paragraph 154.

[12] Case C-62/86 *Akzo v Commission* [1991] ECR I-3359, paragraph 60; Case T-340/03 *France Télécom SA v Commission* [2007] ECR II-107, paragraph 100; and Case T-336/07 *Telefónica SA v Commission*, judgment of 29 March 2012, not yet published, paragraph 150.

4.2.1. The tying market: licensing of aluminium smelting technology

4.2.1.1. Market structure: large market share of Rio Tinto Alcan on the relevant technology market

(36) In the decision in Case No COMP/M.4827 - Rio Tinto / Alcan, the Commission found that Alcan Inc, with the AP smelting technology, had approximately a [70-80]% market share of all licensed smelter projects implemented from 1995 to 2006 outside China, both relative to the total number of licensed projects as well as to the total capacity added using a licensed technology.[13]

(37) In the case at hand, the Commission has investigated the relevant market structure and also observes that Rio Tinto Alcan's share in the relevant technology market has constantly been substantial and significantly larger than its competitors' market shares.

(38) For the purposes of its preliminary assessment, the Commission has applied three different, albeit closely related, methods to determine Rio Tinto Alcan's and its competitors' market shares: (*i*) a method based on the total licensing income obtained from royalties; (*ii*) a method based on the share of total installed capacities for each technology family; and (*iii*) a method based on sales of products incorporating the licensed technology on the downstream product market. In each case, the Commission has calculated the technology licensors' market shares in consecutive periods of five years[14].

(39) According to method (*i*), it would appear that Rio Tinto Alcan has obtained a very large share of the estimated royalties fees paid for licensing of smelting technologies, always above [70-80%] and consistently above [80-90%].[15] Conversely, its competitors would account for only a very small share of licence fees, below [10-20%]. The Commission notes in that regard that the licence fees for the Chinese technologies are significantly lower than the AP technology fees. The AP technology package indeed appears to be the most expensive offer (in terms of licence fees) on the technology market.

(40) According to method (*ii*), the Commission, given the importance of the projected capacities of a smelter for the technology selection[16], has estimated the share of the AP technology in the total production capacities installed worldwide excluding

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13 The Commission Decision in Case No COMP/M.4827 - Rio Tinto / Alcan refers to the finding of dominance in Case No COMP/M.3225 - Alcan / Pechiney (II).

14 The Commission considers that the calculation of the market share should take into account developments in the relevant market for at least five years (instead of the one year approach generally applicable in other markets), for several reasons. First, the aluminium industry is developing at a relatively slow pace and a typical smelter would be in operation for several decades. Second, the technology market is a tender market with few licence contracts per year or even no contracts at all. It is, in effect, a bidding market characterised by "lumpy" demand, so that a single project can have a strong impact on the allocation of market shares.

15 According to a preliminary assessment of estimated technology market shares on the basis of licensing income from royalties for newly installed capacities as a result of technology transfers worldwide (excluding China) on a five year moving average between 2000 and 2011.

16 Assuming that the typical investor would select the technology offering the best net present value for the installed capacities in the long term.

China. In terms of both newly installed and total production capacities, it appears that AP technology represents a large share of production capacities, above 50%.[17] There is typically a very significant difference in terms of market shares between AP and its next competitors, the Chinese technology providers.[18]

(41) For the application of method (*iii*), the Commission has taken into account the sales of all producers in the relevant market for primary aluminium. Within this relevant market, the Commission preliminarily considered the production output of all primary aluminium smelters worldwide except (a) the production of smelters operating with manifestly outdated technologies[19] and (b) the production of smelters located in China[20]. On that basis, the preliminary estimates available to the Commission suggest that the market share of the AP technology family in the production of primary aluminium[21] has been above [40-50%][22], while the shares of other modern technologies (Norsk Hydro, Dubal, Rusal and Chinese) have been each in the region of [10-20%] or less.

(42) As a preliminary conclusion, Rio Tinto Alcan's market share has been consistently high or very high (and in any case above 50%) whether calculated on the basis of technologies sales (licence fees) value or on the basis of total installed capacities per technology family. AP's technology maintains as well a large market share (over [40-50%], when excluding outdated technologies) in terms of the production of primary aluminium worldwide excluding China.

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17 According to a preliminary assessment of estimated technology market shares on basis of newly installed and total capacities as a result of technology transfers worldwide (excluding China) on a five year moving average between 1985 and 2011.

18 Around 2006, the distance between Chinese and AP technologies exceptionally decreased, reflecting the fact that the Chinese technology provider GAMI was chosen for the Vedanta project in India, the biggest project ever commissioned in the world so far. However, this had only a temporary effect on the development of the market structure as, two years later, AP's market share increased significantly again leaving the Chinese technologies far behind. Further, AP's market share estimated on the basis of technology fee revenues remained exceptionally high (around [70-80%] – [80-90%]).

19 For the purposes of the preliminary assessment in this Decision, the Commission considers as outdated the technologies of the Söderberg family and, for the period after 2005, also the pre-bake technologies with electrolytic cells operating at less than 190kA power current.

20 In view of the characteristics of the Chinese market for primary aluminium, in particular of China's government policy aimed at discouraging exports through fiscal and other measures, and having regard to the apparent price differences for primary aluminium between the London Metal Exchange (LME) and the Shanghai Metals Exchange (SHFE) as well as taking into account that the quantities of primary aluminium traded between China and the EU have been relatively insignificant, the Commission's preliminary assessment is that China and the EU are not part of the same relevant geographic market for primary aluminium. This preliminary conclusion also reflects the circumstance that the aluminium sector as a whole is subject to centralised planning and regulation in China; in addition, structural links exist in China between the most significant domestic primary aluminium producers (predominantly state-owned) and the aluminium processors.

21 I.e. the share, in the total production on the relevant market, of all smelters operating with AP smelting technology, estimated in accordance with the rules of the Guidelines on the application of Article 81 of the EC Treaty to technology transfer agreements, OJ C 101, 27.04.2004, p. 2 ("Technology Transfer Guidelines"), paragraphs 23, 70.

22 According to a preliminary assessment of technology market shares on the basis of primary aluminium production by modern "pre-bake" smelters (cf footnote 19) between 2006 and 2011.

4.2.1.2. Barriers to entry and expansion

(43) The Commission's preliminary assessment is that the relevant technology market is characterised by significant barriers to entry and expansion and that Rio Tinto Alcan has several substantial competitive advantages, in particular in terms of technological leadership, reputation and "bankability" and economies of scale.

(44) The reputation of a smelting technology is crucial for its successful commercialisation and it appears to be a strong barrier for entry and expansion in the technology market. Reputation is based on a technology's track-record of successful transfers in a given region of the world and it appears indisputable that, in terms of reputation and global coverage, the AP technology is considered the most solid offer. A technology's reputation is key for its "bankability". The Commission investigation suggests that AP has been the most reputable technology that would be likely to be "bankable" anywhere in the world throughout the investigated period.

(45) Economies of scale constitute a significant barrier to technology development, which in this sense includes not only the maintenance of constant levels of production and efficiency but also the continuous improvement of production parameters ("creep") over the life-time of a smelter. The development of a licensable and competitive technology requires even more intensive R&D efforts and larger teams than those required for the operation of a smelter. To recover investment from technology development, large production capacities and a sizeable development team are needed, ideally combined with a large customer base that would allow for recovery of capital expenditures and R&D investments.

4.2.1.3. Limited possibilities for customers to switch technology providers

(46) High switching costs constitute another barrier to entry or expansion. Switching to in-house technology development is complex, costly and time-consuming for aluminium producers. In-house technology development itself is very costly. Indeed, traditional aluminium producers that are currently customers of AP technology used to have their own proprietary technologies but have made a strategic choice to abandon in-house technology development in favour of licensing from AP / Rio Tinto Alcan.

(47) Also, switching from one technology package to another ("ready-for-licensing" and offered on the market) is costly. It would necessarily lead to the loss of valuable synergies, loss of investments in R&D, smelter and equipment improvement ("creep" programs) and know-how and require additional investment in new R&D, learning, training, etc. Therefore, the existing AP licensees can be considered dependent on AP technologies.

4.2.1.4. Lack of countervailing buyer power of customers

(48) The market position of buyers/licensees provides an indication of the extent to which they are likely to constrain the allegedly dominant undertaking. The presence of strong buyers can only serve to counter market power if it is likely that in response to prices being increased above the competitive level, the buyers will pave the way for

effective new entry or lead existing suppliers in the market to significantly expand their output so as to defeat the price increase.[23] A strong buyer can make use of its bargaining power to stimulate competition among suppliers either by threatening to switch orders to another supplier or by threatening to start-up production itself. Conversely, a supplier is normally in a position to exert market power if it faces a large number of dispersed buyers.

(49) In this case, the customers of AP technology are numerous and each of them holds a relatively small portion of the relevant market for the production of primary aluminium. Rio Tinto Alcan is vertically integrated and competes itself with these buyers on the downstream market. Rio Tinto Alcan's share in the relevant downstream market exceeds the market shares of each of its licensees.[24] This market structure, characterised by dispersed and relatively small buyers, who in addition compete with the supplier in the downstream market, leaves little room for countervailing buyer power. In addition, there are no indications that AP's licensees will integrate by expanding upstream via developing their own technology.

(50) Although AP licensees are discontent with the obligation to source their PTAs from ECL, they have been unable to exert enough pressure on Rio Tinto Alcan to change its tying policy. This is a direct indication of the absence of buyer power on the part of the customers in relation to Rio Tinto Alcan.[25]

4.2.1.5. Assessment of competitive constraints from existing technology competitors

(51) In the light of the above, the Commission notes that both current AP licensees and new market entrants would only consider replacing Rio Tinto Alcan as a licensor of aluminium smelting technology if there is a breakthrough, commercially established, alternative technology that would offer a significant reduction in the overall capital costs of the project or significant reduction in the operating costs for production of aluminium. Neither Dubal nor the Chinese technologies , the only new and modern technologies that have been licensed in the period 1995-2011, at this stage appear to offer these advantages.

(52) The Commission has also considered whether there is a realistic commercial prospect for undertakings having or developing modern in-house technologies not yet licensed to enter the market for licensed technology in the near future. In the last decade, two in-house technology owners, Rusal and Norsk Hydro, have continued to invest in their technologies and to construct new smelter plants. However, for an entry to be considered sufficient to exert competitive pressure it should be timely and it has to be of such a magnitude as to be able to deter any attempt of the dominant undertaking to increase price. At this stage, neither Norsk Hydro nor Rusal would appear to constitute a credible imminent threat of entry into the technology licensing market. Norsk Hydro uses its modern HAL technology exclusively in-house […]; Rusal's

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23 See in this respect Case T-228/97, *Irish Sugar plc v Commission* [1999] ECR II-2969, paragraph 101.

24 Cf the market shares estimated on a worldwide basis as set out in Commission Decision of 2 October 2007 in Case COMP/M.4827 – Rio Tinto/Alcan, paragraphs 53 *et seq*.

25 [Company …] points out that in circumstances where ECL is specified as the sole supplier of PTAs for a new smelter built with AP technology, [Company …] does not have any bargaining power and ECL faces no price constraints: [Company …], Reply to RFI, September 2009, […].

newly developed, high-current technology (RA-400) is still at the stage of industrial testing and there is no certainty that it will be successfully licensed outside of the Rusal group of undertakings. In any event, Rusal would need to build reputation for its technology outside Russia so as to render it internationally "bankable".

Preliminary conclusion on market power and dominance in the tying market

(53) It appears that Rio Tinto Alcan has very significant market power in the relevant technology market, to a degree that would allow it to behave to an appreciable extent independently of its competitors and customers. The Commission's preliminary assessment is that Rio Tinto Alcan holds a dominant position on the market for the licensing of aluminium smelting technology.

4.2.2. The tied market: the market for PTAs

(54) The market share of ECL in the market for PTAs (worldwide including EEA and excluding China) has been consistently above [50-60%][26].

(55) ECL's competitive position in the PTA market is facilitated by its full vertical integration within Rio Tinto Alcan. The strong market position upstream, combined with the tying strategy, guarantees secured sales to all major aluminium producers who operate with AP technology. Besides, a significant part of ECL's PTA production is used in-house thanks to Rio Tinto Alcan's significant presence in the downstream (primary aluminium) market. On this basis, ECL is able to realise substantial economies of scale and scope.

(56) ECL has maintained significant market shares despite selling PTAs at higher prices than Réel. Customers have perceived ECL PTAs as generally more expensive albeit technically similar in comparison to Réel PTAs.

(57) In particular, the market share of Rio Tinto Alcan may be indicative of substantial market power in the relevant PTA market. However, it is not necessary for the Commission to find dominance on the tied market as a condition for the application of Articles 101 and 102 of the Treaty to an exclusionary contractual tying practice. Therefore, it can be left open, for the purposes of the preliminary assessment, whether Rio Tinto Alcan has been dominant on the PTA market throughout the investigated period or is still dominant at present.

4.3. Practices raising concerns

4.3.1. Abuse of a dominant position pursuant to Article 102 of the Treaty

(58) Article 102 of the Treaty prohibits abuses of a dominant position within the internal market or in a substantial part thereof. It is not in itself illegal for an undertaking to be in a dominant position and such a dominant undertaking is entitled to compete on the merits. However, a dominant undertaking has a special responsibility not to allow its conduct to impair genuine undistorted competition on the common market.

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[26] According to a preliminary assessment of estimated PTA market shares based on PTA project value on a four year moving average worldwide (excluding China) in the period 1999-2010.

(59) In cases of contractual tying, behaviour may be considered to be incompatible with the internal market pursuant to Article 102 of the Treaty where an undertaking is dominant in the tying market and where, in addition, the following conditions are fulfilled: (i) the tying and tied products are distinct products, and (ii) the tying practice is likely to lead to anti-competitive foreclosure.

4.3.1.1. Distinct products

(60) For the purpose of applying Article 102 of the Treaty, two products are distinct where, in the absence of tying, a substantial number of customers would purchase or would have purchased the tying product without also buying the tied product from the same supplier, thereby allowing stand-alone production of both the tying and the tied product.[27]

(61) Rio Tinto Alcan has submitted that the ECL-supplied AP PTAs are an integrated item of the AP process and thus could not be seen as a product distinct from the AP technology. However, the Commission's preliminary conclusion, based on its investigation, points to the contrary.[28] The Commission has obtained evidence that, when given a choice, customers would purchase the tying and the tied products separately.

(62) In particular, AP licensees have stated that they would consider using Réel's PTAs in AP smelters in the absence of the contractual tying, thus confirming that the reason for using AP technology exclusively with ECL PTAs was of a contractual and not a technical nature. Third parties have submitted that there is no significant difference between the PTAs supplied for AP smelters and for other smelters. This indicates that AP technology can operate safely and effectively also with Réel-supplied PTAs. The companies interviewed by the Commission have a significant experience in the construction and operation of AP smelters and there is no apparent reason to doubt their competence. It is publicly known that Alcoa had been able to carry out modifications and significant changes to AP smelting cells[29], apparently without adversely impacting on the smelting process.

(63) Further, Rio Tinto Alcan does not dispute that both ECL and Réel-supplied PTAs perform similar technical functions. Smelter-required PTA functionality is well defined and therefore customers consider both ECL and Réel as capable of meeting the needs of any smelter.

(64) The Commission has also considered the behaviour of undertakings without substantial market power in the tying technology market, i.e., other aluminium

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27 Case T-201/04 *Microsoft v Commission* [2007] ECR II-3601, paragraphs 917, 921 and 922.

28 Generally, the mere fact that two items are functional complements, that is, one of them is useless without the other, does not necessarily imply that they form a single product for the purposes of the analysis under Articles 101 or 102 TFEU.

29 "*Avec les cuves BC-240 conçues au Québec, les gens d'Alcoa continuent d'innover dans la production de l'aluminium" ("With the BC-240 tanks designed in Quebec, Alcoa people continue to innovate in the production of aluminium"),* Alcoa Press-release of 9 March 2012.

smelting technology providers.[30] Other smelting technologies - which Rio Tinto Alcan submits to be part of the same technology market - operate with PTAs from both ECL and Réel. Indeed, Rio Tinto Alcan is the only technology provider on the market mandating the use of PTAs from a specific manufacturer. The commercial practice of the dominant undertaking itself cannot be an indication that this is the normal commercial usage of the products in question.[31] Likewise, in the absence of proof that competing undertakings as a rule tie smelting technology licences to PTAs, the Commission does not consider them a single product.

(65) Therefore, the Commission's preliminary assessment is that aluminium smelting technologies and PTAs constitute distinct products.

4.3.1.2. Anti-competitive foreclosure

(66) Hindering either the degree of competition still existing in the market or the growth of that competition may trigger the application of Article 102 of the Treaty.[32]

(67) Anti-competitive foreclosure refers to a situation where, in particular, effective access of competitors to markets is hampered as a result of the conduct of the dominant undertaking, whereby the latter is likely to be in a position to profitably increase prices, reduce innovation or customers' choice.

(68) In its preliminary assessment of the anti-competitive foreclosure, the Commission in particular considered the following factors:

(a) Rio Tinto Alcan's position in the relevant markets;

(b) the high barriers to entry into the relevant PTA market;

(c) the position and importance of customers in the tied segment of the relevant PTA market[33];

(d) Rio Tinto Alcan's (ECL's) reaction to Réel's entry into the contestable part of the relevant PTA market and pricing strategy;

(e) the portion of tied sales in the relevant PTA market;

(f) the likelihood of Réel's marginalisation and potential exit from the market; and

(g) the likely consequences of Réel's marginalisation and/or exit.

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30 In accordance with the principle set out in Case T-30/89 *Hilti v Commission* [1991] ECR II-1439, paragraph 67; cf also Case C-333/94 P *Tetra Pak II*, paragraph 36 and Case T-83/91 *Tetra Pak II*, paragraph 82.

31 Case T -201/04 *Microsoft v Commission*, paragraphs 939 *et seq*.

32 Case 85/76 *Hoffmann-La Roche*, paragraph 91.

33 Customers will often collaborate with suppliers with a view to testing and calibrating new PTA prototypes in the smelter.

(a) Rio Tinto Alcan's position in the relevant markets

(69) The Commission is of the preliminary view that Rio Tinto Alcan has been dominant in the market for licensing of smelting technology for more than two decades. In addition to that, Rio Tinto Alcan, through its subsidiary ECL, appears to have held a strong position in the relevant market for PTAs.

(b) High barriers to entry into the relevant PTA market

(70) The preliminary results of the Commission's investigation indicate the existence of high barriers to entry into the PTA market: economies of scale and scope and the need for continuous investment into product-specific R&D as well as project-related investment (design and adaptation of PTAs to a specific smelter).

(71) Also, the period of time required for a new entrant to develop a technically competitive PTA and reach the commercialisation stage is relevant. Rio Tinto (before its acquisition of Alcan Inc) submitted that, if Réel were to exit the market, there would be no PTA supplier other than ECL available to customers, because of the time that a new entrant into the market would need for developing a PTA expertise that would be comparable with ECL's or Réel's expertise and because collaboration with Chinese PTA suppliers does not appear to be a suitable alternative for customers.

(72) The Commission's preliminary assessment is that there is currently no actual or potential alternative (at least in the short-term) to Réel- and ECL-manufactured PTAs in the relevant PTA market, due to high barriers to entry.

(c) The position and importance of customers in the tied segment

(73) Rio Tinto Alcan has been able to "tie" customers who have an outstanding reputation in the business and are financially strong and ready to invest in modern equipment. These customers include Alcoa, BHP Billiton, Century Aluminium Company, Hindalco Industries Limited ("Hindalco") and others. Cooperation with, and feedback from, customers (smelter operators) is an important source of innovation in the PTA market. In contrast, Réel remains a niche supplier dependent on only two significant aluminium producers not tied to AP technology: Norsk Hydro and Rusal. Réel's growth potential is limited given that neither Norsk Hydro nor Rusal have plans for PTA procurement in the next years.

(d) Rio Tinto Alcan's reaction to Réel's entry into the contestable part of the relevant PTA market and pricing strategy

(74) Rio Tinto Alcan's internal documents show that it has strategically decided to reduce its gross margin from […] to […] for PTA offers to non-tied customers with a view to foreclosing Réel from a sufficient customer base when, as noted in the company's internal documents available to the Commission, *'Noell* [Réel] *ha*[d] *technically caught up'*.

(75) Also, PTA order value data in the file suggest that Rio Tinto Alcan charges on average […] – […] less for PTAs supplied in the non-tied segment of the relevant PTA market as compared to PTAs supplied in the tied segment of the market. It therefore appears that tied customers (i.e. AP licensees) had to pay a higher price for

the tied product than non-tied customers, while the customers did not receive any benefits arising from the tying (which would be the case if the tying were pro-competitive or competitively neutral).

(e) The portion of tied sales in the relevant PTA market

(76) The Commission observes that, in the period 1999 to 2010, a substantial share of the relevant PTA market (in value) was reserved for Rio Tinto Alcan/ECL. This share ranged between [20-30%] and [30-40%]. During this period 1999-2010, Réel could compete only on the remaining part of the market for PTAs while ECL's overall market share (comprising the non-contestable market and a substantial part of the contestable market) remained consistently above [50-60%].

(77) In the light of the particularly high barriers to entry and expansion in the relevant market, it is doubtful that even an equal sharing of the contestable part of the market would be sufficient for Réel to reach the minimum efficient scale required for ensuring continuous innovation (and thus viability and expansion). In particular because significant economies of scale are necessary for competing in the relevant PTA market, the Commission's preliminary assessment is that the scope of foreclosure is substantial and may be sufficient for creating consumer harm.

(f) Réel's marginalisation and potential exit

(78) The marginalisation and likely exit of Réel is suggested by its financial data made available to the Commission: Réel submits that its average PTA turnover would not allow it to break even and the recent financial results of Réel's PTA division seem to confirm that Réel's existing customer base is not sufficient to provide for the division's viability on the market. This should be considered in conjunction with the fact that industry participants have perceived Réel as Rio Tinto Alcan's only credible competitor in PTAs in terms of product quality and innovation.

(g) Likely consequences of Réel's marginalisation and/or exit

(79) Réel's marginalisation and potential exit from the relevant market are likely to have a significant negative effect on customers (aluminium producers). Customers would likely suffer from the reduction of choice and be locked into ECL's product environment, a negative outcome of Rio Tinto Alcan's tying practice that AP-licensees seem to have already been exposed to. This is likely to lead to a price increase of PTAs with a corresponding increase of the customers' capital costs. Further, as submitted by Rio Tinto (before its acquisition of Alcan Inc), a potential exit of Réel would be likely to reduce the innovation incentives in the PTA market,[34] and have, furthermore, negative repercussions on the relevant market for aluminium smelting technology.[35]

(80) During these proceedings, Rio Tinto (before its acquisition of Alcan Inc) set out in detail the likely negative competitive effects resulting from Réel's exit and the Commission finds no convincing reason to disregard Rio Tinto's statement, even

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34 Rio Tinto, Response to RFI, 2007, […].

35 Réel has articulated similar concerns in several submissions, see […].

more so in the light of other aluminium producers' submissions: "*an exit of Réel* […] *from the market would not affect Rio Tinto's strategy as regards technology research and development in the area of reduction technology, but it would carry new risks for Rio Tinto. An exit of Réel would mean that, should Rio Tinto develop a competitive breakthrough reduction technology, Rio Tinto would have to address the risk of there being only one supplier of PTAs. In order to have to restore competitive tension in the supply of PTAs to support such a Rio Tinto technology, Rio Tinto would have to develop its own PTA manufacturing competence (which would not be part of Rio Tinto's core business) or nurture a new PTA supplier. Either mitigation strategy would involve cost, delay and technical risk. Furthermore, if Réel were to exit the market, there would be no other PTA supplier with whom Rio Tinto could enter into a collaboration project* […] *Collaboration with ECL on PTA automation and the other enhancements in place at the Bell Bay smelter would not be acceptable while Alcan continues to mandate sole source supply by ECL of PTAs for use in connection with AP30+ technology. Rio Tinto does not believe it would have any commercial leverage in the negotiation of any such collaboration because of the comparative attractiveness of AP30+ technology*".[36]

(81) This is also in line with [Company …]'s observation that: "*the existence of competition in the PTA sector is important to the marketability of alternative technologies. If Réel exits the market, Alcan would be in an even stronger position to bundle and/or tie PTA technology with its own smelting technology, especially for projects located outside China. Alcan would also be able to shift fees between smelting licensing costs and PTA equipment, which might negatively impact competition*"[37].

(82) [Company…] submits that Réel's market presence provides for "*the competitive market in terms of price as well as the competition between the two companies for innovating and developing new features in their design of PTA's. There are very few suppliers for PTA's and exit of REEL will result in even less alternatives and will effect* [Company …] *in the same way as any monopolistic market* [affects] *users.*"[38]

(83) [Company …] also expressed concerns that, in the absence of Réel, its ability to create a favourable operational environment for its technology would be hampered and, generally, the cost of the aluminium produced would be affected.[39]

Preliminary assessment of anti-competitive foreclosure

(84) In situations of high barriers to entry, as in the relevant PTA market, the Commission is particularly committed to protect the competitive process. In the absence of other (actual or potential) credible competitors to ECL in the relevant market (i.e. in a situation where the viability of ECL's only competitor in the relevant market is

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36 Rio Tinto, Reply to RFI, 2007, […].

37 [Company …], Reply to RFI, September 2009, […].

38 [Company …], Reply to RFI, February 2011, […]. See also *ibid.*, at question 24, stressing the importance of innovation in PTAs.

39 [Company …], Reply to RFI, March 2007, […]. [Company …] concerns regarding innovativeness and cost of smelter projects seem particularly credible in the light of their previous experience with ECL: ECL's PTA offering for [Company …]'s […] smelter proved too expensive; ECL had also refused earlier to supply a PTA adapted to the […] technology: see […].

threatened), the competitiveness (in particular, in innovation) of both the PTA and smelting technology markets seem to depend to a large extent on Réel's ability to survive and expand.

(85) The Commission's preliminary assessment is that the customers' choice of PTA suppliers has been directly and substantially limited by Rio Tinto Alcan's tying practice, with likely negative implications on innovation and, potentially, prices, in the relevant PTA and smelting technology markets. This would amount to anticompetitive foreclosure of the relevant PTA market by Rio Tinto Alcan.

4.3.1.3. Rio Tinto Alcan's efficiency claims

(86) The Commission has examined the claims put forward by Rio Tinto Alcan that its conduct is justified by production-related, operational and reputational efficiencies.

(87) Before considering in more detail the claims made by Rio Tinto Alcan in its defence, it should be emphasised that a tying practice can be justified only if it is established that:

(a) the efficiencies have been, or are likely to be, realised as a result of the tying practice itself -- as opposed to the mere internalisation of the complementarity between the products (in other words, there must be a causal link between the tying as such and the efficiencies)[40];

(b) the conduct is indispensable to the realisation of those efficiencies: there must be no alternatives to the conduct that are less anti-competitive and which are capable of producing the same efficiencies;

(c) the likely efficiencies brought about by the conduct outweigh any likely negative effects on competition and consumer welfare in the affected markets; and

(d) the conduct does not eliminate effective competition, by removing all or most existing sources of actual or potential competition.

(88) The Commission's preliminary assessment is that conditions (*a*) and (*b*) are not satisfied in the present case. Consequently, condition (*c*) is not satisfied. Condition (*d*) is not met either, as Rio Tinto Alcan's tying practice may lead to the likely foreclosure of Réel, so far Rio Tinto Alcan's only credible competitor in the relevant market.

No objective proof of any operational or reputational efficiencies

(89) Most importantly, Rio Tinto Alcan's claims on efficiencies allegedly generated by the tying seem to ignore the fundamental point that any efficiency enhancing tying must be driven by customer preferences for joint consumption. It is not the task of an

[40] When a dominant company sells complementary products it may set lower prices than independent producers: this is due to internalisation of the complementarity between the products, and has nothing to do with the tying. From this point of view, the alleged efficiencies derived from joint development and production of smelting technology and PTAs do not appear to justify the tying.

undertaking in a dominant position to take steps on its own initiative (in particular by contractually tying its products) to eliminate products which, rightly or wrongly, it regards as inferior in quality to its own products.[41] Indeed, as set out at Section 4.3.1.1 above, key AP customers and an Engineering, Procurement, and Construction Management (EPCM) company, [Company …], have clearly stated that PTAs can be sourced from Réel, rather than ECL, without loss of efficiencies.

(90) AP customers are not satisfied with the bundling of the AP technology and ECL PTAs. The Commission is aware that AP customers have expressly requested Rio Tinto Alcan to lift the contractual tie so as to be able to choose the PTA supplier under competitive conditions. The Commission finds no valid reason to question the technical or commercial competence of AP licensees, given that these are aluminium producers with substantial experience in operating AP smelters and with access to expert engineering advice on technology and equipment issues. As set out above, [Company …] has submitted that Réel's and ECL's PTAs are equally good in terms of product characteristics, ability to react to technology used, length of life cycle, operating and maintaining costs. [Company …] has confirmed that Réel is able to meet all its technical needs[42]. [Company …] submits that Réel is "*capable of making a high quality and fit for purpose PTA*"[43]. Moreover, [Company …] recalls that, in a recent bid, ECL and (Réel) NKM made similar offers in respect of capability, robustness and adaptability to the smelting technology; however, "*NKM had a significantly lower total cost of ownership*"[44] (which includes maintenance costs reflecting, inter alia, prices and availability of spare parts).[45] There is no reason to assume that Réel PTAs could not attain a performance similar to ECL PTAs. Rio Tinto Alcan's claim that the contractual tying of the AP technology licences with the purchase of PTAs is necessary for the purpose of capital and/or operational cost savings is not supported by the available evidence.

(91) In addition, Rio Tinto Alcan has submitted that the reputation of the AP technology would be damaged if the AP technology-based smelters were to operate with PTAs supplied by producers other than ECL. This claim seems equally unsubstantiated in the light of the submissions from, in particular, [Company …] and [Company …], according to which it would be possible for a specialist to determine whether a smelter failure was due to an error in the PTA, the technology or the pot design.

(92) Separately it should be noted that, even if one were to assume that a pre-integrated PTA can prevent significant operational losses for aluminium producers, the fact remains that in principle customers should be given the liberty to decide for themselves whether to accept the alleged risk of incurring such losses (and benefit from a competitive PTA selection process) or to pay a higher price for ECL's AP PTAs (and forego the opportunity of a competitive PTA selection).

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41 Case T-30/89 *Hilti AG v Commission* [1990] ECR II-163, paragraph 118; Case T-83/91 *Tetra Pak International SA v Commission* [1994] ECR II-755, paragraph 138, C-333/94 P *Tetra Pak International SA v Commission* [1996] ECR I-5951, paragraphs 36 *et seq*.

42 [Company …], Reply to RFI, January 2009, […].

43 [Company …], Reply to RFI, September 2009, […].

44 *Ibid*.

45 *Ibid*.

(93) In any event, any – reputational or operational – efficiency claims appear unconvincing in the light of the example of certain Alcoa AP technology-based smelter pot lines. As stated above, it appears that Alcoa has been able to significantly modify AP smelter cells in-house[46] (without, presumably, negatively affecting their efficiency). In these circumstances, claims of AP- or ECL-specific efficiencies appear unfounded.

Negative effects on consumer welfare are not outweighed

(94) Even if it were to be assumed that the tying is necessary to the realisation of certain efficiencies as claimed by Rio Tinto Alcan, the fact that customers want to have a choice seems to indicate that it brings no overall benefit to consumers. Moreover, the fact that tied customers are paying a higher price for PTAs contradicts the argument that the tying is efficient and beneficial to the said customers. The latter have indeed overwhelmingly failed to recognise any benefits from the tying that might outweigh the additional costs.

4.3.1.4. Preliminary conclusion on abuse of a dominant position pursuant to Article 102 of the Treaty

(95) On the basis of the above considerations, the Commission has concerns as to the compatibility with Article 102 of the Treaty of Rio Tinto Alcan's practice of contractually requiring its AP technology licensees to source PTAs exclusively from ECL.

4.3.2. Agreements prohibited pursuant to Article 101 of the Treaty

(96) Article 101 of the Treaty prohibits as incompatible with the internal market all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market.

(97) It is established Commission practice and settled case law that Articles 101 and 102 of the Treaty can be applied in parallel.[47] In particular, Articles 101(1)(e) and 102(2)(d) of the Treaty have the same wording and pursue the same objective of preventing anti-competitive tying. The Commission considers that a tying agreement is anti-competitive pursuant to Art 101 of the Treaty where: (*i*) there is an agreement or concerted practice [conditioning the provision of one product to the acquisition of

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46 "*Avec les cuves BC-240 conçues au Québec, les gens d'Alcoa continuent d'innover dans la production de l'aluminium*" *("With the BC-240 tanks designed in Quebec, Alcoa people continue to innovate in the production of aluminum")*, Alcoa Press-release of 9 March 2012.

47 Case 85/76 *Hoffmann-La Roche v Commission* [1979] ECR 461, paragraph 116; Joined Cases C-395/96 P and C-396/96 P *Compagnie Maritime Belge Transports, Compagnie Maritime Belge and Dafra-Lines v Commission* [2000] ECR I-1365, paragraph 309 Case T-51/89 *Tetra Pak v Commission* [1990] ECR II-309, paragraphs 21, 22. Cf also AG Léger in Case C-309/99, *Wouters* [2002] ECR I-1582; Cf also Commission Decision 89/113/EC of 21 December 1988 Cases IV/30.979 and 31.394 -- Decca Navigator System — (OJ L 43, 15.02.1998, p. 27) and. Commission Decision 98/531/EC of 11 March 1998 Cases IV/34.073, IV/34.395 and IV /35.436 (1998) -- Van Den Bergh Foods — (OJ L 246, 04.09.1998, p. 1)

another product]; (*ii*) actual or likely anti-competitive effects can be expected with a reasonable degree of probability; *(iii)* the likely negative effects on competition would be appreciable. Appreciable anti-competitive effects are likely to occur when at least one of the parties has or obtains some degree of market power and the agreement contributes to the creation, maintenance or strengthening of that market power or allows the parties to exploit such market power. The degree of market power normally required for a finding of an infringement under Article 101(1) of the Treaty is less than the degree of market power required for a finding of dominance under Article 102 of the Treaty.[48]

4.3.2.1. Agreement

(98) Rio Tinto Alcan has submitted that all AP technology licence agreements in the investigated period have consistently mandated the purchase of ECL PTAs by the licensees.[49] The existence of these agreements has not been disputed by Rio Tinto Alcan or the AP licensees.

4.3.2.2. Effect of restricting competition

(99) An agreement is restrictive by effect where it affects actual or potential[50] competition to such an extent that negative effects on the relevant market on prices, output, innovation or the variety and quality of goods or services can be expected with a reasonable degree of probability.

(100) Contractual tying falls foul of Article 101 of the Treaty in particular where it gives rise to anti-competitive foreclosure in the tied market by way of raising barriers to entry or expansion for rivals.[51] Tying obligations concerning distinct products[52] are likely to result in anti-competitive foreclosure in particular where, without the tying obligations, an important competitive constraint would be exercised by competitors that either are not yet present on the market at the time the obligations are concluded, or that are not in a position to compete for the full supply of customers because the supplier in question is an unavoidable trading partner at least for part of the demand on the market.[53]

(101) The Commission assesses the probability that an agreement has restrictive effects in light of the nature of the products, the market position of the parties, the market position of competitors, the market position of buyers, the existence of potential competitors and the level of entry barriers.[54]

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48 Commission Guidelines on Vertical Restraints (OJ C 2010/130, 19.05.2010, page 1), paragraph 97. Specifically as regards tying in the context of technology licensing see Technology Transfer Guidelines, paragraph 15.

49 Oral submission by […]at the oral hearing. In several submissions during the Commission investigation, Rio Tinto Alcan also provided a list of relevant technology license contracts and copies of some licenses.

50 Case C-7/95 P, *John Deer v Commission* [1998], paragraph 77.

51 Technology Transfer Guidelines, paragraph 193.

52 Cf. at (60) above. The distinct-product test is identical under Articles 101 and 102 TFEU.

53 Guidelines on Vertical Restraints, paragraph 132. See also Guidelines on the application of Article 81(3) of the Treaty (OJ C 101, 27/04/2004), page 97, paragraph 17.

54 Commission Guidelines on the Application of Article 81(3) of the Treaty, paragraph 27.

(102) As set out at Section 4.3.1.1 above, the Commission considers, for the purposes of the preliminary assessment, that aluminium smelting technology and PTAs are distinct products (not necessarily connected by their nature or according to commercial usage).

(103) The Commission's preliminary assessment is that, given Rio Tinto Alcan's substantial market power in both the tying and tied relevant market, Rio Tinto Alcan's tying practice is likely to lead to anti-competitive foreclosure effects in violation of Article 101(1) of the Treaty. This preliminary assessment builds essentially on the same factual elements that the Commission already set out above in expressing its concerns as regards a possible violation of Article 102 of the Treaty. Reference is made in particular to Sections 4.3.1.1 and 4.3.1.2 above.

4.3.2.3. Appreciable restriction of competition

(104) The likely restriction of competition in this case is appreciable in view of Rio Tinto Alcan's significant market power in the tying and the tied relevant markets. Over the time period assessed by the Commission, there seem to have been no smelting technologies available to the customers in the relevant tying market at comparable cost (i.e. with comparable competitive parameters such as operational efficiency, reputation and "bankability") and thus constituting a real alternative to, and imposing a credible competitive constraint on, the AP technology.

4.3.2.4. Application of Article 101(3) of the Treaty

(105) Agreements falling under Article 101(1) of the Treaty which satisfy the conditions of Article 101(3) of the Treaty are not prohibited. Article 101(3) of the Treaty applies in the case of an agreement: (*i*) which contributes to improving the production or distribution of goods or to promoting technical or economic progress; (*ii*) while allowing consumers a fair share of the resulting benefit; (*iii*) which does not impose on the undertakings concerned restrictions that are not indispensable to the attainment of these objectives; (*iv*) nor affords such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

(106) According to Article 2 of Regulation No 1/2003 the burden of proof as regards the conditions of Article 101(3) of the Treaty rests on the undertaking that claims the benefit of that Treaty provision. As the four conditions of Article 101(3) of the Treaty are cumulative, the parties need to demonstrate that each of the conditions is met. Article 101(3) of the Treaty does not apply once it is found that one of the conditions of that provision is not fulfilled.

No applicability of the Technology Transfer Block Exemption Regulation[55]

(107) It should be noted from the outset that, outside the area of hardcore restrictions, Article 101 of the Treaty is unlikely to be infringed where four or more independently controlled technologies are available in addition to the technology controlled by the parties to the agreement which may be substitutable for the licensed

[55] Commission Regulation (EC) No 772/2004 of 27 April 2004 on the application of Article 81(3) of the Treaty to categories of technology transfer agreements, OJ L 123, 27.04.2004, pages 11-17.

technology at a comparable cost to the user.[56] However, the preliminary results of the Commission investigation do not confirm the existence of four additional independently controlled aluminium smelting technologies in the relevant market that may be substitutable for the licensed technology at a comparable cost to the user (licensee). Apart from the (leading) AP technology, only two or three independently controlled modern pre-bake technologies appear to have been available for licensing on the tying market.[57]

(108) Smelting technology licences concern the transfer of know-how and therefore could benefit from the exemption from Article 101(1) of the Treaty provided for under the Technology Transfer Block Exemption Regulation. However, Rio Tinto Alcan's share in the relevant technology market, as calculated under the methods provided for by the Technology Transfer Guidelines (licence fee income and value of sales in the downstream (primary aluminium) markets)[58] has consistently exceeded 30% and thus been above the thresholds set out in Article 3(3) of the Technology Transfer Block Exemption Regulation.

(109) The block exemption provided for in the Technology Transfer Block Exemption Regulation is therefore not applicable in the present case.

Assessment outside the block exemption for technology transfer agreements

(110) The Commission's preliminary assessment under Article 101(3) of the Treaty of the potential efficiency gains from the tying follows the analysis at Section 4.3.1.3 above. Given the clear feedback from AP licensees and [Company …], imposing ECL as the sole supplier of PTAs does not appear necessary for ensuring any essential (i.e., indispensable from the customers' point of view) quality or safety standards or the technically satisfactory way of exploitation of the AP technology. Furthermore, AP customers do not recognise that the AP technology can be exploited significantly more efficiently with ECL-supplied PTAs as opposed to, in particular, Réel-supplied PTAs. Therefore, the Commission takes the preliminary view that at least some of the cumulative conditions of Article 101(3) of the Treaty presented above (cf. at paragraph (105) above) would not be fulfilled in this case.

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56 Technology Transfer Guidelines (see footnote 58 below), paragraph 131.

57 In particular, Norsk Hydro's HAL technology has not been available for licensing. Dubal's technology is available on the licensing market. Rusal's technology could be seen as licensable but, given that it has not yet been commercialised outside the Rusal group in Russia, doubts remain about whether customers/licensees in the relevant market have realistically seen it as substitutable for the AP technology on comparable terms (in particular, in terms of "bankability") in the investigated time period. Lastly, the Commission takes the preliminary view that the three known Chinese technologies (SAMI, GAMI and NEUI) are not independently controlled from each other, notably as it is questionable that these providers would compete with each other for projects outside China.

58 Commission Guidelines of 27 April 2004 on the application of Article 81 of the EC Treaty to technology transfer agreements, OJ C 101, 27.04.2004, pages 2-41, paragraphs 22, 70 et seq.

4.3.2.5. Preliminary conclusion on agreements prohibited pursuant to Article 101 of the Treaty

(111) In the light of the above, the Commission has concerns as to the compatibility with Article 101 of the Treaty of Rio Tinto Alcan's practice of contractually requiring the AP technology licensees to purchase ECL-supplied PTAs.

4.4. Effect on trade between Member States

(112) ECL is based in France and Réel and NKM Noell are based in France and Germany. The relevant smelting technology market as well as the relevant PTA market comprises the EEA. As Rio Tinto Alcan's practices are likely to have repercussions on the competition between ECL and Réel in the relevant PTA market as well as the customers/licensees on the market for aluminium smelting technology, trade between Member States and/or Contracting Parties would potentially be affected within the meaning of Articles 101 and 102 of the Treaty.

5. PROPOSED COMMITMENTS

(113) On 3 August 2012, Rio Tinto Alcan offered commitments pursuant to Article 9 of Regulation (EC) 1/2003, to meet the Commission's competition concerns as set out in the preliminary assessment. The key elements of the initial commitment proposal were as follows:

(1) Rio Tinto Alcan proposed to remove from its future technology licences the tying clauses requiring licensees of its aluminium smelting technology to purchase PTAs from ECL, and to replace them with an obligation to purchase such cranes from "pre-qualified suppliers". Rio Tinto Alcan proposed, in that regard, to introduce a non-discriminatory pre-qualification process for suppliers of PTAs, to be undertaken by an independent expert with relevant industrial expertise (the "Monitoring Expert"). AP licensees would be able to select a third party PTA supplier which had been and remained pre-qualified for the relevant AP Aluminium Smelter Technology Family, as defined in the text of the commitments, prior to signature of the corresponding TTA.

(2) To that effect, Rio Tinto Alcan offered to provide competing PTA suppliers with the necessary specifications and technical information so as to enable them to make competing bids for the supply of cranes, while ensuring the technically satisfactory exploitation of the AP technology (notably the operation of the electrolyte pots and other equipment interacting with the cranes).

(3) The proposed commitments would extend to all currently commercialised AP technologies (namely the AP-18 and AP-30/AP-40 technology families) and their future developments, operating at currents below 450kA.

(4) Smelters in which Rio Tinto Alcan (or the group of companies to which Rio Tinto Alcan belongs) has an ownership interest of 15% or more were not included in the proposal (material ownership interest clause).

(5) Rio Tinto Alcan proposed that the commitments would apply for a period of five years to all future licensed smelters in the relevant geographic market as preliminarily defined by the Commission (i.e. worldwide excluding China).

(6) The proposal to set up a monitoring mechanism, based on the appointment of a Monitoring Expert, to whom a number of monitoring and reporting obligations would be attributed.

6. COMMISSION NOTICE PURSUANT TO ARTICLE 27(4) OF REGULATION (EC) NO 1/2003

(114) In response to the publication, on 10 August 2012, of a notice pursuant to Article 27(4) of Regulation (EC) No 1/2003, the Commission received submissions from the complainant and five other interested third parties (namely aluminium producers, including several AP licensees).

(115) The respondents generally acknowledged that remedies removing the contractual tying of AP aluminium smelter technology with ECL's PTAs were in principle suitable to address the competition concerns expressed by the Commission. However, respondents also expressed criticism of the Initial Commitment Proposal and suggested a number of modifications to it.

(116) Regarding the scope of the proposed commitments, some respondents, first, expressed doubts as to whether all future developments of the AP-18 and AP-30/AP-40 technology families would ultimately be included in the commitments, in view notably of the reference in the initial commitment proposal to a maximum amperage threshold of 450 kA. It was submitted, in that regard, that the amperage threshold should not be decisive in determining which smelter projects fall under the commitments. A few respondents asked for the inclusion not only of the currently commercialised AP technology families and their future developments, but also of future AP technology families. Second, several respondents requested that the commitments cover as well existing smelters and/or TTAs concluded before the entry into force of the commitments. One respondent was particularly concerned by the possible exclusion from the scope of the Commitments of situations where an AP licensee wants to modify or retrofit an existing smelter, to expand a greenfield or brownfield site, or to purchase new or replacement PTAs. Third, respondents generally criticised the exclusion of joint venture smelter projects in which Rio Tinto Alcan has a 15% or more ownership interest (the material ownership clause), notably in so far as this exclusion may apply to projects where Rio Tinto Alcan does not have the authority, under the relevant shareholders' agreement or the company's by-laws, to either decide on the supplier of PTAs or to block such a decision. This exclusion, it has also been alleged, risks giving Rio Tinto Alcan the possibility of circumventing the effective application of the commitments. Fourth, a few respondents suggested that the commitments should be of unlimited duration or at least extend beyond the proposed five years period.

(117) Respondents raised as well a number of criticisms regarding the pre-qualification process for alternative suppliers of PTAs. First, a few respondents expressed concerns that the said process could effectively result in the communication to Rio Tinto Alcan of confidential information pertaining to the smelter owner or the PTA

supplier. Second, some respondents criticised the pre-qualification process as unnecessary, costly and cumbersome and warned of the risk that Rio Tinto Alcan could introduce requirements contrary to standard industry practice or, more generally, delay or negatively affect the effective implementation of the commitments. Third, several respondents claimed that the requirement that the PTA supplier has to be pre-qualified already at the time of signature of the TTA was unduly restrictive as, typically, at that stage the smelter planning is not sufficiently advanced and the licensee is not in a position to procure PTAs, such procurement not taking place until months or even years later. Fourth, one respondent requested a clarification of the procedure to declare that a qualified supplier has ceased to be in compliance with the AP specifications.

7. REVISED COMMITMENTS

(118) Rio Tinto Alcan has been given access to the non-confidential versions of the third party comments on the initial commitment proposal. On 9 November 2012, Rio Tinto submitted a revised commitment proposal which contained several modifications and clarifications to the initial commitment proposal, aimed at addressing the main issues raised during the market test.

(119) In the revised commitment proposal, Rio Tinto Alcan first clarified that all future developments of the AP-18 and AP-30/AP-40 technology families will be covered by the commitments, removing any condition directly linked to a maximum amperage threshold.

(120) Second, Rio Tinto Alcan has clarified that TTAs are covered by the remedies whether they relate to a brownfield or a greenfield smelter site. In that regard, Rio Tinto has explicitly included within the scope of the remedies future expansions of existing smelters. In particular, tenders for PTAs associated with the retrofitting or upgrading of an existing smelter or pot line will be covered. Similarly, where a licensee is party to an existing TTA which includes an option for an additional aluminium smelter (or pot line) based on AP technology, both the potential smelter under the unexercised option and the corresponding PTAs are also covered by the commitments.

(121) Third, regarding the Material Ownership clause[59], Rio Tinto Alcan has submitted that a strategic investment of 15% or more in a smelter project would always substantially (probably several times) exceed in value the sales from an order for a line of PTAs and that it would be irrational for Rio Tinto Alcan to invest in smelter projects merely with a view to circumvent the effectiveness of the commitments. However, Rio Tinto Alcan, in view of the results of the market test, has raised the relevant equity threshold from 15% to 25% in the revised commitment proposal.

(122) Rio Tinto Alcan has also made a number of improvements and submitted clarifications regarding the pre-qualification procedure set out in the commitments, in order to address concerns expressed by respondents to the market test.

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[59] Cf. at paragraph (113)(4) above.

(123) First, Rio Tinto Alcan has included safeguards for the protection of IP-related or commercially sensitive information of third parties. Rio Tinto Alcan will not have access to confidential information from any third party without the disclosing party's prior approval. Moreover, under no circumstances will ECL have any access to confidential information from a third party PTA supplier. Also, the revised commitment proposal explicitly indicates that site visits will only be carried out, for the purposes of pre-qualification, with the agreement of the relevant third party.

(124) Second, the revised commitment proposal no longer requires that the PTA supplier must already be pre-qualified at the moment of the signature of the TTA for the smelting technology. For TTAs concluded after the entry into force of the commitments, the licensee may use a PTA supplier that has been pre-qualified after the signature of the said TTA but before the launch of the tender for the PTAs.

(125) Third, Rio Tinto Alcan has clarified the procedure for declaring that a qualified supplier has ceased to be in compliance with the AP specifications.

(126) Fourth, the revised commitment proposal introduces, at different stages, a requirement to act in accordance with relevant industry practice. Industry practice is defined as an established procedure in the aluminium industry, as it may evolve from time to time, that is generally considered as common and reasonable.

(127) Fifth, some of the deadlines set out in the initial commitment proposal have been shortened (e.g., the period for the entry into effect of the remedies or the deadline for Rio Tinto Alcan to propose new candidates for the position of Monitoring Expert if those initially proposed are rejected by the Commission).

(128) Sixth, the revised commitment proposal strengthens the role of the Monitoring Expert and, more generally, the mechanisms for the monitoring of the correct implementation of the commitments. It is now explicitly stated that the Monitoring Expert will act on behalf of the Commission to ensure Rio Tinto Alcan's compliance with its obligations under the commitments, and that the Commission may give orders or instructions to the Monitoring Expert in order to ensure compliance with the commitments. Rio Tinto Alcan, in turn, is not entitled to give instructions to the Monitoring Expert to the extent that such instructions would interfere with the Monitoring Expert's ability to comply with its duties and obligations. Furthermore, the Monitoring Expert must inform the Commission, before adopting a negative pre-qualification decision, a pre-qualification decision including mitigation measures or a decision declaring that a recommended PTA supplier no longer complies with the applicable specifications, of its intended decision and the reasons for such a decision. Finally, Rio Tinto Alcan must inform the Monitoring Expert without delay of any TTAs or intended TTAs which it considers as falling outside the scope of the commitments; the Monitoring Expert will inform the Commission accordingly without delay.

8. PROPORTIONALITY OF THE COMMITMENTS

8.1. Principles

(129) The principle of proportionality requires that the measures adopted by institutions of the Union must be suitable and not exceed what is appropriate and necessary for attaining the objective pursued.[60]

(130) In the context of Article 9 of Regulation No 1/2003, application of the principle of proportionality is confined to verifying, first, that the commitments in question address the concerns expressed by the Commission in its preliminary assessment and, second, that the undertakings concerned have not offered less onerous commitments that also address those concerns adequately.[61] When carrying out that assessment, the Commission must take into consideration the interests of third parties.[62] Finally, it has to be ensured that the commitments offered and made binding do not manifestly go beyond what was necessary to address the concerns identified by the Commission in its preliminary assessment.[63]

8.2. Application in the present case

(131) The Commission considers that, further to the modifications and clarifications introduced in the Revised Commitment Proposal, the commitments offered by Rio Tinto Alcan address the competition concerns identified by the Commission in its preliminary assessment and they are proportionate to those concerns. These concerns relate to the contractual practices of Rio Tinto Alcan of tying the licences of its AP aluminium technology to the purchase of PTAs exclusively supplied by its subsidiary ECL.

(132) The Commission considers that the scope of the proposed commitments is appropriate and sufficient to address these concerns. The commitments cover all families of AP smelting technologies currently commercialised (the very successful AP-18 and AP-30/AP-40 families) as well as their future developments. While the commitments do not include future AP technology families, currently being developed and not yet commercialised, the Commission considers that this exclusion is not likely to affect significantly the viability of alternative suppliers of PTAs. Those technology families are not expected to be commercialised on a large scale during the next years (not only because they do not appear to be mature enough yet, but also due to their technical characteristics, notably their very high energy consumption). Furthermore, while the commitments will apply to future TTAs, they will also cover future expansions of existing smelters, in particular tenders for PTAs associated with the retrofitting or upgrading of an existing smelter or pot line.

(133) Furthermore, the geographic scope of the commitments coincides with that of the relevant markets (both for the "tied" and the "tying" products), as preliminarily

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60 See for instance, Case T-260/94 *Air Inter v. Commission* [1997] ECR II-997, paragraph 144 and Case T-65/98 *Van den Bergh Foods v. Commission* [2003] ECR II-4653, paragraph 201.

61 Case C-441/07 P *Commission v Alrosa*, [2010] ECR I-5949, paragraph 41.

62 *Ibid.*

63 Case C-441/07 P *Commission v Alrosa*, [2010] ECR I-5949, paragraph 120.

defined in the present decision, and it is therefore adequate. As to the duration of the commitments, the proposed five year period seems sufficient to enable alternative suppliers of PTAs to build up the necessary reputation on the market, particularly with regard to the AP smelting technology. The duration of the commitments seems in line also with the current development cycle of modern smelting technologies. Furthermore, in so far as the commitments will cover projects for which a request for a technology tender is made within five years, even if the tenders and orders for the PTA (as it is always the case) are not carried out until later on, the practical effects of the commitments will be felt beyond this time horizon.

(134) The Commission also considers that the exclusion, under the material ownership interest clause, of smelters owned by Rio Tinto Alcan or where the latter is a strategic industrial shareholder is in principle justified. The proposed 25% ownership interest threshold is fixed at a sufficiently high level (notably in view of the investments necessary in these markets) as to prevent Rio Tinto Alcan from artificially circumventing the commitments by the mere acquisition of small shareholdings in the relevant smelter projects. In practice, this threshold ensures that only projects where Rio Tinto Alcan is likely to have a significant degree of influence are excluded, without making the implementation of the commitments unnecessarily and disproportionately complex. For the avoidance of doubt, it shall also be observed that, above this 25% ownership interest threshold, the commitments do not preclude smelter companies from organising competitive tenders for PTAs, when the relevant contracts allow indeed such possibility.

(135) With regard to the pre-qualification process and other procedural steps, the commitments, further to the improvements and clarifications introduced by Rio Tinto Alcan in the revised commitment proposal, seem adequate to ensure an objective and non-discriminatory pre-qualification of alternative PTA suppliers and may reasonably be expected to be based on, and conducted according to, industry practice. In particular, these improvements and clarifications address the main procedural issues raised during the market test, as described above. The commitments also set out a monitoring mechanism aimed at ensuring the respect of their effective implementation.

(136) As the initial commitment proposal did not adequately address the Commission's concerns, in the revised commitment proposal Rio Tinto Alcan has offered commitments which address these concerns. Rio Tinto Alcan has not offered less onerous commitments that also address those concerns adequately. Moreover, the revised commitment proposal does not manifestly go beyond what is necessary to address the concerns identified by the Commission in its preliminary assessment.

(137) The Commission has taken into consideration the interests of third parties, including those of the interested third parties that responded to the notice published on 10 August 2012 pursuant to Article 27(4) of Regulation (EC) No 1/2003.

(138) This decision makes binding the commitments offered on 9 November 2012 by Rio Tinto Alcan.

9. CONCLUSION

(139) By adopting a decision pursuant to Article 9(1) of Regulation (EC) No 1/2003, the Commission makes the commitments proposed by the undertakings concerned binding upon them. Recital 13 of the Preamble to Regulation (EC) No 1/2003 states that such a decision should not conclude whether or not there has been or still is an infringement. The Commission's assessment of whether the commitments offered are sufficient to meet its concerns is based on its preliminary assessment, representing the preliminary view of the Commission based on its investigation and analysis, and the observations received from third parties following the publication of a notice pursuant to Article 27(4) of Regulation (EC) No 1/2003.

(140) In the light of the revised commitment proposal, the Commission considers that there are no longer grounds for action on its part and, without prejudice to Article 9(2) of Regulation (EC) No 1/2003, the proceedings in this case should therefore be brought to an end.

(141) The Commission retains full discretion to investigate and to open proceedings under Articles 101 or 102 of the Treaty and Articles 53 or 54 of the EEA Agreement as regards practices that are not the subject matter of this Decision.

HAS ADOPTED THIS DECISION:

Article 1

The commitments as listed in the Annex shall be binding on the addressees until 20 January 2018.

Article 2

It is hereby concluded that there are no longer grounds for action by the Commission, and the proceedings in this case should therefore be brought to an end.

Article 3

This Decision is addressed to:

Rio Tinto plc, 2, Eastbourne Terrace, London W2 6LG, UK;

Rio Tinto International Holdings Limited, 2, Eastbourne Terrace, London W2 6LG, UK;

Rio Tinto Alcan Inc, 1188, Sherbrooke Street West, Montréal Québec H3A 3G2, CANADA;

Rio Tinto France SAS, La Défense 2, 17, place des Reflets, F- 92400 Courbevoie, FRANCE;

Aluminium Pechiney SAS, 725, Rue Aristide Bergès, 38341 Voreppe, FRANCE; and

Electrification Charpente Levage SASU, 100, rue Chalant, 59790 – Ronchin, FRANCE.

Done at Brussels, 20.12.2012

For the Commission

Vice-President
Joaquín ALMUNIA
Vice-President

CERTIFIED COPY
For the Secretary - General

Jordi AYET PUIGARNAU
Director of the Registry

ANNEX

THE COMMITMENTS