



EUROPEAN COMMISSION
DG Competition

PUBLIC VERSION

Case M.9076 – NOVELIS / ALERIS

(Only the English text is authentic)

**REGULATION (EC) No 139/2004
MERGER PROCEDURE**

Article 8(4) Regulation (EC) 139/2004
Date: 18/02/2021

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EUROPEAN
COMMISSION

Brussels, 18.2.2021
C(2021) 1013 final

COMMISSION DECISION

of 18.2.2021

**ordering measures to restore the situation prior to the concentration pursuant to Article
8(4)(b) of Council Regulation No 139/2004**

(Case M.9076 – NOVELIS / ALERIS)

(Text with EEA relevance)

(Only the English text is authentic)

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COMMISSION DECISION

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(Text with EEA relevance)

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THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union¹,

Having regard to the Agreement on the European Economic Area, and in particular Article 57 thereof,

Having regard to Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings^{2,3}, and in particular Articles 8(2) and 8(4)(b) thereof,

Having given the undertaking concerned the opportunity to make known its views on the objections raised by the Commission,

Having regard to the opinion of the Advisory Committee on Concentrations on 9 February 2021,

Having regard to the final report of the Hearing Officer in this case,

Whereas:

1. INTRODUCTION AND PROCEDURE

1.1. Introduction

- (1) This decision (the ‘Decision’) sets out the European Commission’s (the ‘Commission’) findings that the acquisition of Aleris Corporation (‘Aleris’, USA) by Novelis Inc. (‘Novelis’, USA) has been implemented in contravention of a condition attached to a decision under Article 8(2) of the Merger Regulation and that in the present case such implementation justifies the adoption of measures appropriate to

¹ OJ C 115, 9.8.2008, p. 47.

² OJ L 24, 29.1.2004, p. 1 (‘the Merger Regulation’). With effect from 1 December 2009, the Treaty on the Functioning of the European Union (‘TFEU’) has introduced certain changes, 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.

³ For the purposes of this Decision, although the United Kingdom withdrew from the European Union as of 1 February 2020, according to Article 92 of the Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community (OJ L 29, 31.1.2020, p. 7), the Commission continues to be competent to apply Union law as regards the United Kingdom for administrative procedures which were initiated before the end of the transition period.

restore the situation prevailing prior to the implementation of the concentration as far as possible, pursuant to Article 8(4)(b) of the Merger Regulation.

- (2) Novelis is a global manufacturer of flat-rolled aluminium products and a recycler of aluminium. The company operates manufacturing facilities across North America, South America, Europe and Asia. Novelis' parent company, Hindalco Industries Limited ('Hindalco', India), is a supplier of aluminium and copper. In 2018, Novelis' turnover (excluding Hindalco) was EUR [...]. Following the closing of the acquisition of Aleris on 14 April 2020, Novelis owns Aleris. Prior to its acquisition by Novelis, Aleris was a global manufacturer of flat-rolled aluminium products with production facilities in North America, Europe and Asia. In 2018, Aleris' turnover was EUR [...].
- (3) Liberty House Group Pte. Ltd ('Liberty', UK and Singapore) is a private company group active in the manufacture of steel, aluminium and engineering products, in commodity trading and metal recycling. Liberty operates in more than 30 countries. With regard to aluminium, Liberty operates two smelters (in France and Scotland) as well as die casting, wheel production and pressing facilities, all located within the EEA/UK. Liberty is part of the Gupta Family Group Alliance ('GFG Alliance'), an international group of businesses that are ultimately controlled by the Gupta family - Mr Sanjeev Gupta and Mr Parduman Gupta. GFG Alliance is active in industrial manufacturing, shipping, infrastructure, mining, energy, commodities, banking and real estate.

1.2. Procedure

- (4) By decision of 1 October 2019 (the 'Clearance Decision'), adopted in application of Article 8(2) of the Merger Regulation, the Commission declared the operation by which Novelis intended to acquire sole control of the whole of Aleris (the 'Transaction') compatible with the internal market and with the EEA Agreement, subject to full compliance with the commitments submitted by Novelis and annexed to the Clearance Decision (the 'Commitments').
- (5) Under Section B of the Commitments, Novelis committed to divest or procure the divestiture of (i) Aleris' aluminium automotive body sheets ('Aluminium ABS') business and (ii) other aluminium flat-rolled products ('FRPs') business located in Aleris' plant in Duffel, Belgium, (the 'Divestment Business'), and to find a purchaser and enter into a final binding sale and purchase agreement for the Divestment Business within [...] months from the date of adoption of the Clearance Decision (the 'First Divestiture Period'). The First Divestiture Period was set to expire on [...].
- (6) Under Section B of the Commitments, Novelis further committed to close the sale of the Divestment Business within the period of [...] months from (i) the approval of the purchaser and the terms of sale by the Commission or (ii) the date that all of the approvals, clearances or waiting periods applicable to the Transaction under the HSR Act and the Hart-Scott-Rodino Antitrust Improvements Act of 1976 of the United States and the antimonopoly law of China, have been obtained, expired or terminated; whichever is the later, but ending in all instances at the latest [...] months from the approval of the purchaser and the terms of sale by the Commission (the 'Closing Period').
- (7) On 22 November 2019, Novelis entered into a binding sale and purchase agreement ('SPA') for the sale of the Divestment Business to Liberty. On 26 November 2019, Novelis submitted a reasoned proposal substantiating its claim that Liberty was a suitable purchaser for the Divestment Business (the 'Reasoned Proposal').

- (8) On 7 April 2020, the Commission approved Liberty as a suitable purchaser for the Divestment Business following the criteria set out in Section D of the Commitments, together with the SPA (the ‘Buyer Approval Decision’). Therefore, as the approvals, clearances or waiting periods applicable for the closing of the Transaction under the HSR Act and the Hart-Scott-Rodino Antitrust Improvements Act of 1976 of the United States and the antimonopoly law of China, had been obtained, expired or terminated before that date, the Closing Period was set to expire on [...].
- (9) On 14 April 2020, Novelis implemented its acquisition of Aleris.
- (10) Under paragraph 49 of the Commitments, the Commission could, where appropriate, in response to a reasoned request from Novelis submitted no later than one month before the expiry of the relevant period, showing good cause and accompanied by a report from the monitoring trustee, grant an extension of the time periods foreseen in the Commitments. Paragraph 49 of the Commitments also foresaw that, in exceptional circumstances, Novelis was entitled to request an extension within the last month of any period.
- (11) By letter of 7 June 2020, Novelis requested an extension of one month of the Closing Period until 7 August 2020 (the ‘First Extension Request’). In its First Extension Request, Novelis claimed that extending the Closing Period by one month would facilitate and accelerate the approval of Liberty as buyer of the Divestment Business by the Chinese State Administration for Market Regulation (‘SAMR’), which was a closing condition under the SPA. Novelis also claimed that the extension would facilitate bilateral negotiations between Novelis and Liberty to resolve Liberty’s request for modifications to the SPA.
- (12) On [...], the expiry date of the Closing Period, Novelis and Liberty brought to the Commission’s attention a number of elements, including a draft heads of terms circulated between Novelis and Liberty to renegotiate the SPA.
- (13) By a decision of 7 July 2020 and in accordance with paragraph 49 of the Commitments, the Commission decided to extend the Closing Period until 14 July 2020 (the ‘First Extension’) in order to assess all elements provided by Novelis and Liberty as to their ability to close the divestiture, including the elements referred to in recital (12) above.
- (14) By letter of 14 July 2020, the expiry date of the Closing Period after the First Extension, Novelis requested an extension of the Closing Period until 30 November 2020 (the ‘Second Extension Request’). In its Second Extension Request, Novelis explained that Novelis and Liberty had reached an agreement on 8 July 2020 for the amendment of the SPA and were in the process of converting such agreement into an amended SPA (‘ASPA’). According to Novelis, the ASPA would contain terms designed to maximize the transaction certainty and would be beneficial for the Divestment Business. Novelis claimed that a critical amendment for Liberty to be contained in the ASPA was in respect of the target date for closing on 30 October 2020, or, at Liberty’s discretion, on 30 November 2020.
- (15) By a decision of 14 July 2020 and in accordance with paragraph 49 of the Commitments, the Commission decided to extend the Closing Period until 22 July 2020 (the ‘Second Extension’) in order to assess the compatibility of the Second Extension Request with paragraph 49 of the Commitments taking into account all additional elements provided by Novelis as to its ability to ensure closing of the divestiture in a manner consistent with the Commitments.

- (16) By letter of 21 July 2020, Novelis requested an extension of the Closing Period until 31 August 2020 (the ‘Third Extension Request’). The Third Extension Request superseded the Second Extension Request.
- (17) Together with the Third Extension Request, Novelis submitted a non-binding heads of terms entered into between Novelis, Aleris and Liberty on 21 July 2020 (‘Heads of Terms’). Those Heads of Terms identified shortly the key items that Novelis and Liberty agreed to subsequently incorporate into a new ASPA, [...]. The Heads of Terms also envisaged closing by 31 August 2020. No final or draft ASPA was provided to the Commission with the Third Extension Request.
- (18) In the Third Extension Request, [detail of correspondence with Novelis].
- (19) By a decision of 22 July 2020 and in accordance with paragraph 49 of the Commitments, the Commission decided to extend the Closing Period until 31 July 2020 (the ‘Third Extension’) in order to assess the compatibility of the Third Extension Request with paragraph 49 of the Commitments, taking into account all additional elements provided by Novelis as to its ability to ensure a closing of the divestiture in a manner consistent with the Commitments.
- (20) On 26 July 2020, Novelis submitted two agreements entered into with Liberty: an Amendment Agreement to the Sale & Purchase Agreement (‘AASPA’) and an Amended and Restated SPA (‘ARSPA’). The AASPA set the following conditions precedent to the effectiveness of the ARSPA: (i) an extension of the deadline for the closing of the SPA pursuant to the Commitments to a date that is no earlier than 31 August 2020; and (ii) the approval of the execution of the AASPA by the Commission. The ARSPA foresaw a closing date no earlier than 31 August 2020.
- (21) By a decision of 31 July 2020 and in accordance with paragraph 49 of the Commitments, the Commission decided to extend the Closing Period until 31 August 2020 (the ‘Fourth Extension’). The Fourth Extension did not affect the Commission’s Buyer Approval Decision and was without prejudice to Novelis’ obligation to close the sale of the Divestment Business in line with the Commitments and the Commission’s Buyer Approval Decision.
- (22) By letter of 28 August 2020, one working day before the expiry of the Closing Period as extended by the Fourth Extension, Novelis requested an extension of the Closing Period until 30 September 2020 (the ‘Fourth Extension Request’). In its Fourth Extension Request, Novelis explained that SAMR’s approval of Liberty as a suitable buyer of the Divestment Business was still pending and that closing the sale of the Divestment Business by 31 August 2020 was thus not possible. Novelis also mentioned that some other closing deliverables were still outstanding, but argued that they could be completed within a few days of obtaining SAMR approval. In addition and together with the Fourth Extension Request, Novelis submitted a Second Amendment Agreement to the Sale & Purchase Agreement (‘Second AASPA’) with changes to the AASPA for closing to take place on 30 September 2020.
- (23) On 31 August 2020, the monitoring trustee⁴ under the Commitments (the ‘Monitoring Trustee’) submitted a reasoned opinion on the Fourth Extension Request (the ‘Reasoned Opinion’). In its Reasoned Opinion, the Monitoring Trustee indicated that there was no certainty that the sale of the Divestment Business to Liberty would close by 30 September 2020 and that there was a risk that such sale would never

⁴ For the purposes of this Decision, the Monitoring Trustee refers to Smith & Williamson LLP consultants appointed by the Commission.

close for the reasons set out in Section 1.5 of this Decision. At a state of play meeting held on 31 August 2020 following the submission of the Reasoned Opinion, and later by a reasoned letter, Novelis was informed that the Commission would not grant the Fourth Extension Request (the ‘Extension Rejection Letter’).

- (24) In the Extension Rejection Letter, the Commission explained that Novelis had failed to inform the Commission in a timely fashion of all outstanding closing deliverables and did not provide certainty that the closing of the sale of the Divestment Business (‘Closing’) to Liberty would take place on 30 September 2020. The Commission considered that the extension of the Closing Period by one month, as requested, would not facilitate the timely Closing and that there was no certainty that it would take place by 30 September 2020 even if the requested extension were to be granted. The Commission found that, despite four extensions of the Closing Period, there was uncertainty as to if and when SAMR would approve Liberty as a suitable buyer for the Divestment Business and if and when Novelis and Liberty would complete the other outstanding closing deliverables.⁵ In such circumstances, granting the Fourth Extension Request would prolong the situation of uncertainty without restoring the competitive conditions in a manner which the Commission considered adequate and necessary as a condition to the Clearance Decision. Moreover, the Commission considered that extending the Closing Period would negatively affect the viability and competitiveness of the Divestment Business by further prolonging the existing uncertainty as to any potential closing of its sale to Liberty, without providing any mechanism within the current process which would ensure its ultimate sale to a third party in case the closing of the sale to Liberty did not occur within the extended deadline.
- (25) On 31 August 2020, the Closing Period as extended by the Fourth Extension expired.
- (26) By decision of 1 September 2020 and in accordance with Article 8(5)(b) of the Merger Regulation, the Commission considered that, by implementing the acquisition of Aleris and not closing the sale of the Divestment Business within the Closing Period, Novelis had implemented the Transaction in contravention of a condition attached to the Clearance Decision. The Commission considered that there was an urgent need to restore or maintain conditions of effective competition in the EEA market for the supply of Aluminium ABS. Therefore, the Commission considered it necessary and appropriate to impose provisional interim measures on Novelis pursuant to Articles 8(5)(b) and 18(2) of the Merger Regulation. Those provisional interim measures reproduced *mutatis mutandis* Novelis’ obligations under the Commitments.
- (27) By letters of 2 and 14 September 2020 to Novelis and Novelis’ counsel, respectively, the Commission confirmed to Novelis that any action that Novelis would take to mitigate the situation resulting from the failure to implement the sale of the Divestment Business to Liberty by the expiry of the Closing Period would be welcomed by the Commission and taken into consideration in determining the further steps it would need to take.
- (28) On 18 September 2020, the Commission adopted a statement of objections (the ‘Statement of Objections’), which was notified to Novelis on the same day. In the Statement of Objections, the Commission set out the preliminary view that by not closing the sale of the Divestment Business to Liberty by the expiry of the Closing

⁵ Extension Rejection Letter, paragraph 43.

Period, Novelis had implemented the Transaction, a concentration which as notified was found to give rise to a significant impediment to effective competition within the meaning of Article 2(3) of the Merger Regulation and Article 57 of the EEA Agreement in relation to the EEA market for the production and supply of Aluminium ABS, in contravention of a condition attached to the Clearance Decision. In addition, pursuant to Article 8(4)(b) of the Merger Regulation, the Commission stated its intention to order the dissolution of the Transaction and other appropriate measures to restore the situation prevailing before its implementation as far as possible. If restoring the situation prevailing before the implementation of the Transaction through its dissolution was not possible, the Commission stated its intention to order the sale of the Divestment Business by a divestiture trustee. Lastly, the Commission stated its intention to order certain measures until the dissolution of the Transaction or the sale of the Divestment Business to a selected buyer and measures to be adopted after closing of the sale of the Divestment Business.

- (29) On 8 September 2020 and 21 September 2020, Novelis was granted access to the Commission's file.
- (30) On 30 September 2020, Novelis informed the Commission that the sale of the Divestment Business to Liberty had closed on that day.
- (31) On 5 October 2020, Novelis identified 32 items from the Commission's file for which they requested non-confidential versions. Novelis was provided with replies of the Commission's review of this request on the same day (addressing 20 items) and on 8 October 2020 (addressing further 12 items). In the course of this review, the Commission signalled that non-confidential versions of the relevant documents relating to 20 items had already been provided to Novelis and further non-confidential versions relating to 12 items were provided on 8 October 2020.
- (32) On 16 October 2020, Novelis submitted its reply to the Statement of Objections (the 'Reply to the Statement of Objections').
- (33) On 20 November 2020, a state of play meeting was held during which the Commission provided Novelis with preliminary feedback following its Reply to the Statement of Objections.
- (34) On 23 November 2020, the Commission sent a letter to Novelis, in which it explained that in light of the closing of the sale of the Divestment Business to Liberty and of the circumstances set forward by Novelis in the Reply to the Statement of Objections, it no longer appeared possible to restore the situation prevailing prior to the implementation of the Transaction through its dissolution (the 'Letter of 23 November'). In the Letter of 23 November, the Commission stated its intention to order only the measures that are still necessary to ensure and maintain the structural effect of the transfer of the Divestment Business and to protect its viability and competitiveness. The Commission also informed Novelis of additional factual elements and items of evidence which had not been expressly mentioned in the Statement of Objections and which, after analysing the Reply to the Statement of Objections, the Commission intended to refer to or rely on in its final decision.
- (35) On 30 November 2020, Novelis requested further access to the file by requesting access to non-confidential versions of all correspondence between the Monitoring Trustee and the Commission. The Commission conducted a review of all correspondence between the Monitoring Trustee and the Commission up to that date and subsequently provided Novelis with non-confidential versions of such correspondence. In particular, the Commission provided Novelis with a total of 358

items, as soon as non-confidential versions of its exchanges with the Monitoring Trustee were available, on 2, 3, 4, 7, 8 and 9 December 2020.

- (36) On 14 December 2020, Novelis submitted its reply to the Letter of 23 November (the ‘Reply to the Letter of 23 November’). As a part of its reply, Novelis requested further access to the Commission’s file. The Commission granted this request on 18 December 2020, offering Novelis the possibility to submit any further comments by 22 December 2020 at 20:00 if it wished to do so.
- (37) On 26 January 2021, the Commission sent a draft Article 8(4) decision to the Advisory Committee with the view of seeking the Advisory Committee’s opinion on it.
- (38) The meeting of the Advisory Committee took place on 9 February 2021.

1.3. [...]

- (39) [Details of private correspondence and negotiation with parties].

1.3.1. [...]

- (40) [Details of private correspondence and negotiation with parties] ⁶.
- (41) [Details of private correspondence and negotiation with parties] ⁷.
- (42) [Details of private correspondence and negotiation with parties] ^{8 9}.
- (43) [Details of private correspondence and negotiation with parties] ¹⁰.

1.3.2. [...]

- (44) [Details of private correspondence and negotiation with parties] ¹¹.
- (45) [Details of private correspondence and negotiation with parties] ^{12 13 14}.
- (46) [Details of private correspondence and negotiation with parties] ^{15 16}.
- (47) [Details of private correspondence and negotiation with parties] ¹⁷.
- (48) [Details of private correspondence and negotiation with parties] ¹⁸.
- (49) [Details of private correspondence and negotiation with parties] ^{19 20}.

1.4. The Monitoring Trustee’s updates of 26 and 27 August 2020

- (50) On 26 and 27 August 2020, three and two working days before the expiry of the Closing Period after the Fourth Extension respectively, the Monitoring Trustee

⁶ Liberty’s letter to the Commission of 15 April 2020 (ID 4919).

⁷ Monitoring Trustee special report dated 12 June 2020 (ID 4902).

⁸ Monitoring Trustee special report dated 3 June 2020 (ID 4901).

⁹ Monitoring Trustee special report dated 3 June 2020 (ID 4901).

¹⁰ Liberty letter to the Commission dated 24 May 2020 (ID4918) and Liberty reply to RFI 5 dated 25 June 2020 (ID4917).

¹¹ Reply to the Statement of Objections, paragraph 147.

¹² Reply to the Statement of Objections, paragraph 149.

¹³ Reply to the Statement of Objections, paragraph 150.

¹⁴ [...].

¹⁵ [...].

¹⁶ Reply to the Letter of 23 November, Section 6.2.

¹⁷ Reply to the Statement of Objections, paragraph 151.

¹⁸ Reply to the Statement of Objections, paragraph 152.

¹⁹ Reply to the Statement of Objections, paragraph 153.

²⁰ Reply to the Statement of Objections, paragraph 155.

brought to the Commission's attention a number of matters that could delay or jeopardize the timely divestiture of the Divestment Business²¹.

- (51) First, the Monitoring Trustee stated that it had not received copies of the revised transitional services agreements, operative services agreement and ancillary agreements included as annexes to the SPA²², despite Novelis having earlier committed to send those documents by 21 August 2020 at the latest. In light of paragraph 23 of the Commitments, the final binding agreements required the Monitoring Trustee's and the Commission's review before Closing. The Commission had not received copies of the revised agreements either.
- (52) In this regard, Novelis indicated in its reply to the Commission's request for information of 27 August 2020²³ that the changes to these agreements were not material and were in line with the requirements of the Commitments. Moreover, Novelis indicated that the Monitoring Trustee had been informed during weekly calls on the status of these work streams and the proposed changes to the transitional services agreements and ancillary agreements. Furthermore, Novelis stated that it was preferable to get Liberty's and the Divestment Business' final approval of the draft revisions before providing those drafts to the Monitoring Trustee or the Commission. In addition, Novelis committed to provide the Commission and the Monitoring Trustee with the respective redlines, as well as with tables summarizing the key changes to each agreement once finalised.
- (53) As explained in the Monitoring Trustee's update of 27 August 2020, the Monitoring Trustee had reminded Novelis on 4 May 2020 that the Monitoring Trustee and the Commission should review any changes to the transitional services agreements, operative services agreement, and ancillary agreements prior to Closing. Novelis had confirmed on 6 May 2020 that it understood that any changes to those agreements required the Monitoring Trustee's and Commission's review.²⁴ As explained by the Monitoring Trustee, Novelis' minutes of the steering committee dated 6 August 2020²⁵ stated: "[...]". By means of the Monitoring Trustee's update of 27 August 2020, the Monitoring Trustee also provided the Commission with a copy of the correspondence between the Monitoring Trustee and Novelis of 21 August 2020 where Novelis explained that they were still finalising the relevant agreements.
- (54) Second, as per the Monitoring Trustee's report of 26 August 2020, Novelis had just informed the Monitoring Trustee that Liberty might not want [...], whereas it was previously agreed that he would be the replacement of [...], who would remain with Novelis²⁶. The Monitoring Trustee indicated: "[w]e understand from Novelis that Liberty would probably want to amend SPA if they would exclude [...] from the Divested Assets (in which case we will need to provide an opinion on the exclusion of [...] from the Divested Assets)"²⁷. In its reply to the Commission's request for information of 27 August 2020 (RFI 61), Novelis indicated that "Novelis has

²¹ Monitoring Trustee update dated 26 August 2020 (ID4896) and Monitoring Trustee update dated 27 August 2020 (ID4897).

²² Monitoring Trustee update dated 26 August 2020 (ID4896).

²³ Novelis' reply to the Commission's request for information of 27 August 2020, dated 28 August 2020, question 1.f.

²⁴ Monitoring Trustee update dated 27 August 2020 (ID4897).

²⁵ Monitoring Trustee update dated 27 August 2020 (ID4897).

²⁶ Pursuant to Annex 5 to the Schedule of the Commitments [...] is considered key staff. In paragraph 6.3.4. of the Monitoring Trustee Reasoned Opinion dated 1 April 2020, the Monitoring Trustee provided its assessment in relation to [...] replacing [...].

²⁷ Monitoring Trustee update dated 26 August 2020 (ID4896).

informed both the Divestment Business and Liberty that a decision to terminate [...] would require both the consent of Novelis (under the ASPA) as well as the Monitoring Trustee and the Commission under clause 10(c) of the Commitments. As of today, it is not clear to Novelis whether Liberty/the Divestment Business desires to terminate [...]’s employment and, thus, Novelis is in the process of engaging further with Liberty and the Divestment Business to clarify this point, as well as the potential impact on the Divestment Business (which would have to be assessed by the Divestment Business itself)”. Any amendment of the SPA for the exclusion of [...] from the Divestment Business required the Monitoring Trustee’s and the Commission’s review before Closing under the Commitments²⁸. An exclusion of [...] would also impact the carve out agreement, which regards the terms and conditions for the transfer of certain employees of the Divestment Business to Aleris.

- (55) Third, with regard to the cash position of the Divestment Business at day 1 after Closing, the Monitoring Trustee explained in its update dated 26 August 2020 that it had just been informed that the HSM was unwilling to sign off on a statement that was required for Novelis to take cash out of the Divestment Business through dividend and capital reduction.²⁹ It was the Monitoring Trustee’s understanding that, under Belgian law, the HSM and the Divestment Business’s auditors (Ernst & Young) were required to confirm that the Divestment Business would have sufficient cash for the next 12 months before the dividends could be taken out.³⁰ The Monitoring Trustee further explained that: “[w]hereas Novelis is of a view that a cash balance of [...] is sufficient it is the HSM’s view that [...] is required in the current economic climate to be on the safe side”³¹.
- (56) The Monitoring Trustee further added: “As matters stand, it is our understanding that the Transaction may not close until this matter is resolved because Novelis cannot settle the accounts until the HSM signed the statement”³².
- (57) Fourth, with regard to the opening of the CAPEX escrow bank account, it was the Monitoring Trustee’s understanding that, on 26 August 2020, the CAPEX escrow bank account was not set up with [...] yet, although it was required for Closing under paragraph 10(e) of the Commitments. According to the Monitoring Trustee, Novelis explained that Liberty had not provided to Novelis all the relevant information to allow the opening of the bank account.³³

1.5. The Monitoring Trustee’s Reasoned Opinion of 31 August 2020

- (58) The Monitoring Trustee stated in its Reasoned Opinion³⁴ that Closing had been delayed for many months and, given Novelis’ and Liberty’s lack of ability or willingness to move things forward in a timely manner, there was no certainty that Closing could take place. The Monitoring Trustee considered that this was exemplified by the fact that Novelis and Liberty did not provide certain information

²⁸ Paragraph 3 of the Commitments stipulated that before the implementation of the sale of the Divestment Business, the Commission had to approve the purchaser and the terms of the sale. In addition, under Clause 10(c) of the Commitments, where individual members of the Key Personnel exceptionally leave the Divestment Business, Novelis undertook to provide a reasoned proposal to the Commission and the Monitoring Trustee to replace the person or persons concerned.

²⁹ Monitoring Trustee update dated 26 August 2020 (ID4896).

³⁰ Monitoring Trustee update dated 26 August 2020 (ID4896).

³¹ Monitoring Trustee update dated 26 August 2020 (ID4896).

³² Monitoring Trustee update dated 26 August 2020 (ID4896).

³³ Monitoring Trustee update dated 26 August 2020 (ID4896).

³⁴ Monitoring Trustee Reasoned Opinion dated 31 August 2020 (ID4899).

to the Monitoring Trustee in a timely fashion. For instance, the Monitoring Trustee referred to “*Liberty’s delayed and incomplete response to the Trustee dated 23 August 2020*”³⁵.

- (59) The Monitoring Trustee stated in its Reasoned Opinion that Novelis and Liberty had been unable to keep their promises to clear all outstanding items to enable Closing by 31 August 2020. For example, despite promises made by Novelis and Liberty to submit to the Monitoring Trustee the transitional services agreements, operative services agreement, and ancillary agreements, these had still not been received by the Monitoring Trustee on 31 August 2020.³⁶ This is described by the Monitoring Trustee in its Reasoned Opinion as follows³⁷: “[...]”³⁸.
- (60) This, together with a lack of clearance of the outstanding items mentioned in Section 1.4 above, led the Monitoring Trustee to conclude, in its Reasoned Opinion, that there was no sufficient assurance that Closing would take place by 30 September 2020, even if SAMR were to approve Liberty swiftly. The Monitoring Trustee also noted that there was no guarantee that Liberty would not change its position again as to its suitability as it had done previously and/or that Novelis would again not provide the Monitoring Trustee with full disclosure about outstanding items that were required for Closing. The Monitoring Trustee was of the view that compared to 31 July 2020, there was no guarantee that the Transaction would ever close.

1.6. The Monitoring Trustee’s update of 4 September 2020

- (61) On 4 September 2020, the Monitoring Trustee informed the Commission in its weekly update that³⁹, following the Commission’s decision to reject the Fourth Extension Request, Novelis and Liberty had resolved a number of outstanding closing issues, namely, the (i) transitional services agreements, operative services agreement and ancillary agreements; (ii) the potential exclusion of [...] from the Divestment Business; (iii) the cash position of the Divestment Business, where Novelis agreed to leave EUR [...] available from day 1 after Closing (as requested by the HSM); and (iv) final changes to the carve out agreement.
- (62) In particular, the Monitoring Trustee indicated that: “[i]t appears to us that given the Commission’s decision [to reject the Fourth Extension Request] Novelis and Liberty have finally expedited their outstanding issues over the last few days, with a willingness to compromise, and Novelis just confirmed to us that the following items have been resolved:
- (1) [...].
 - (2) [...].
 - (3) [...].
 - (4) [...].
 - (5) [...].
 - (6) [...].

³⁵ Monitoring Trustee Reasoned Opinion dated 31 August 2020 (ID4899).

³⁶ Monitoring Trustee Reasoned Opinion dated 31 August 2020 (ID4899).

³⁷ Monitoring Trustee Reasoned Opinion dated 31 August 2020 (ID4899).

³⁸ For accounting reasons Novelis and Liberty required SAMR’s approval of Liberty by 24 August 2020 for a Closing on 31 August 2020.

³⁹ Email from the Monitoring Trustee to the Commission of 4 September 2020 (ID 5127) and Monitoring Trustee Schedule of Issues of 4 September 2020 (ID 5117).

- (7) [...].
 - (8) [...].
 - (9) Liquidity Approach: [...] will be available at Day 1.
 - (10) [...].
 - (63) The Monitoring Trustee also indicated that “[a]s such we understand from Novelis, Liberty and the Divestment Business that as of 4 September 2020 the only key dependency for Closing is SAMR approval”.
- 1.7. Buyer approval process by SAMR**
- (64) On 20 December 2019, SAMR approved the Transaction⁴⁰. The approval of the Transaction by SAMR on 20 December 2019 was conditional upon the divestiture of the Divestment Business to a buyer approved by SAMR⁴¹. [Detail on commercial arrangement].
 - (65) On 2 November 2019, Novelis sent the Commission a memo from its local counsel in China, [...], providing comfort that the buyer approval process in China would not constitute an implementation risk for Closing. In this memo, the local counsel stated: “[memo from local counsel]”. The memo further explained that there were several reasons that would allow Novelis to submit only one proposed buyer, instead of three alternatives as required by Chinese law, including if: “[memo from local counsel]”.
 - (66) On 24 April 2020, the Monitoring Trustee informed the Commission that Alvance/Liberty had sent a letter to the Monitoring Trustee with a copy to SAMR with the aim of, according to the Monitoring Trustee, postponing SAMR’s approval process until Novelis provided the information requested by Liberty in relation to the operational and financial performance of the Divestment Business⁴².
 - (67) In an email sent by the Monitoring Trustee to the Commission on 12 May 2020⁴³, the Monitoring Trustee explained that Novelis “[detail on arrangements between parties]”. The Monitoring Trustee expressed concerns about the divestment process “[detail on arrangements between parties]”⁴⁴.
 - (68) On 3 June 2020⁴⁵, the Monitoring Trustee informed the Commission that during a meeting between SAMR and Liberty on 1 June 2020, Liberty had stated that it no longer considered itself a suitable purchaser [...]. The Monitoring Trustee further informed the Commission that following such meeting SAMR suspended its review of Liberty’s suitability as a buyer of the Divestment Business. The Monitoring Trustee also indicated that “SAMR may re-consider Liberty as a suitable purchaser for the Divestment Business if the commercial dispute would be resolved”.
 - (69) In its monthly report of 19 June 2020⁴⁶, the Monitoring Trustee informed the Commission that “[w]e believe that Liberty has intended for some time to reduce the purchase price and has been misusing SAMR’s approval process for this purpose”.

⁴⁰ Email [...] to the Commission of 6 January 2020 (ID3864).

⁴¹ Email [...] to the Commission of 6 January 2020 (ID3864).

⁴² Email from the Monitoring Trustee to the Commission of 24 April 2020 (ID 5119).

⁴³ Email from the Monitoring Trustee to the Commission of 12 May 2020 (ID 5118).

⁴⁴ Email from the Monitoring Trustee to the Commission of 12 May 2020 (ID 5118).

⁴⁵ Email from the Monitoring Trustee to the Commission of 3 June 2020 (ID 5121).

⁴⁶ Monitoring Trustee Sixth Monthly Report of 19 June 2020 (ID 5114).

- (70) On 30 June 2020, Novelis and SAMR representatives had a conference call. According to the minutes of the call⁴⁷ submitted by Novelis in its reply to the Commission's request for information of 6 July 2020 (RFI 60), a SAMR representative indicated that "[detail on SAMR process].
- (71) On 31 July 2020, Alvanco/Liberty sent a letter to SAMR unequivocally and unconditionally confirming its view that Alvanco/Liberty satisfies the suitable purchaser criteria and asking SAMR to resume its review of Liberty/Alvanco's suitability as a purchaser for the Divestment Business⁴⁸.
- (72) On 7 August 2020⁴⁹, the Monitoring Trustee informed the Commission that Novelis had issued a revised reasoned proposal asking SAMR to approve Liberty as a purchaser for the Divestment Business on 3 August 2020. Following such communication, SAMR resumed its review of Liberty's suitability. For its part, the Monitoring Trustee issued a revised reasoned opinion on Liberty to SAMR on 6 August 2020.
- (73) On 14 August 2020⁵⁰, the Monitoring Trustee informed the Commission that on 13 August 2020, SAMR had requested a meeting with the Monitoring Trustee to discuss certain substantive queries. According to the Monitoring Trustee, "[o]ne of SAMR's considerations appears to relate to the seller's requirement to propose three purchasers under Article 12 of its Regulation for which Novelis has asked SAMR for an exemption. SAMR could reject Novelis' application for an exemption under its legal framework as the criteria for such an exemption are not set out, meaning that such an exemption is at SAMR's discretion".
- (74) Following a meeting between the Monitoring Trustee and SAMR on 19 August 2020, as SAMR considered that it did not have all the information it needed to take a decision on Liberty's suitability, the Monitoring Trustee sent requests for information to Novelis and Liberty. In parallel, questions 4 to 6 of the Commission's request for information to Novelis on 27 August 2020 (RFI 61) aimed at clarifying whether Novelis had considered alternative buyers as required by Chinese law given that SAMR had not yet approved Liberty.
- (75) Novelis confirmed in its reply to question 5 of the Commission's request for information of 27 August 2020 (RFI 61) that it had not considered alternative buyers⁵¹. In particular, Novelis explained that it understood that there was little or no interest from other potential buyers for the Divestment Business (as only Liberty and [company name] products, submitted an offer in the final round and as [detail on commercial negotiation]. Novelis also confirmed that on 20 January 2020, [company name] had sent a written offer to Novelis. In January/February 2020, [company name], had expressed interest to engage in discussions in the event the Liberty transaction failed to close. On 24 June 2020, [detail on commercial negotiation]. It appears that [company name] and [company name] were aware that the Commission and SAMR approvals respectively were not yet obtained at the time of their contacts⁵².

⁴⁷ Novelis' reply to the Commission's request for information of 6 July 2020, Exhibit 8 (ID 4502).

⁴⁸ Letter from Liberty to SAMR of 31 July 2020 (ID 4685).

⁴⁹ Monitoring Trustee Schedule of Issues of 7 August 2020 (ID 5115).

⁵⁰ Monitoring Trustee Schedule of Issues of 14 August 2020 (ID 5116).

⁵¹ Novelis reply to RFI 61 dated 28 August 2020 (ID 4717).

⁵² Novelis reply to RFI 61 dated 28 August 2020 (ID 4717).

- (76) The Monitoring Trustee mentioned these contacts to the Commission in its Reasoned Opinion⁵³.
- (77) On 23 August 2020⁵⁴, the Monitoring Trustee informed the Commission that, although it had been planning to submit a revised reasoned opinion on Liberty's suitability to acquire the Divestment Business to SAMR by 7 am CET on 24 August 2020, it was not able to do so as Liberty had failed to comply with the Monitoring Trustee's request for information of 19 August 2020 in a timely manner and it did not provide a Chinese version of its reply. In addition, in its reply of 23 August 2020 to the Monitoring Trustee's request for information, Liberty indicated that Closing would not be feasible by 31 August 2020 as SAMR's approval and a number of closing deliverables were still pending. In particular, Liberty mentioned ongoing negotiations with Novelis regarding carve-in and carve-out agreements. In view of this, the Monitoring Trustee indicated that "[g]iven Liberty's stance, it appears to us, that it is highly unlikely that SAMR will approve Liberty [on 24 August 2020] to enable Closing within the Extended Closing Period. It is deeply concerning to us that Novelis had not disclosed the recent interest of [...] and that Liberty failed to cooperate with the Trustee over last few days and dropping a bomb shell now"⁵⁵.
- (78) On 4 September 2020, the Monitoring Trustee informed the Commission that one day earlier Novelis had informed SAMR of its latest correspondence with the Commission where the Commission encouraged Novelis to continue without delay its efforts vis-à-vis SAMR to obtain approval for a sale of the Divestment Business⁵⁶.
- (79) As already explained in section 1.6, on 4 September 2020, the Monitoring Trustee informed the Commission that, given the Commission's decision to reject the Fourth Extension Request, Novelis and Liberty had expedited their outstanding closing issues⁵⁷.
- (80) On 11 September 2020⁵⁸, Novelis informed the Commission that SAMR officials had indicated that they were minded to approve Liberty as a suitable purchaser for the Divestment Business provided that the parties would commit to a Closing on or before 30 September based on the Second AASPA.
- (81) On 14 September 2020⁵⁹, Novelis informed the Commission that, in reply to a request from SAMR of 10 September 2020, Novelis had committed to SAMR to close the sale of the Divestment Business with Liberty by 30 September 2020 and, if such Closing did not occur, then the case would enter into a divestiture trustee sale stage⁶⁰. In addition, Novelis informed the Commission that Liberty had committed to SAMR that, if SAMR approved Liberty as the buyer of the Divestment Business and the sale did not close by 30 September 2020, Liberty would not seek to purchase any divestment businesses in any future conditional approval cases of SAMR⁶¹.

⁵³ Monitoring Trustee Reasoned Opinion dated 31 August 2020 (ID4899).

⁵⁴ Email from the Monitoring Trustee to the Commission of 23 August 2020 (ID 5120).

⁵⁵ Email from the Monitoring Trustee to the Commission of 23 August 2020 (ID 5120).

⁵⁶ Email from the Monitoring Trustee to the Commission of 4 September 2020 (ID 5127).

⁵⁷ Email from the Monitoring Trustee to the Commission of 4 September 2020 (ID 5127).

⁵⁸ Email from [...] to the Commission of 11 September 2020 (ID 4863).

⁵⁹ Email from [...] to the Commission of 14 September 2020 (ID 4863).

⁶⁰ Novelis' letter to SAMR of 13 September 2020 (ID 4868).

⁶¹ Liberty's letter to SAMR of 14 September 2020 (ID 4867).

- (82) On 22 September 2020⁶², Novelis informed the Commission that SAMR had approved Liberty as the buyer of the Divestment Business.

1.8. Approval of the Transaction in the US and divestiture process

- (83) The United States of America ('US'), through the Department of Justice Antitrust Division ('DOJ') filed a civil antitrust complaint with the US District Court for the Northern District of Ohio on 4 September 2019, alleging that the likely effect of the Transaction would be to substantially lessen competition for the development, manufacture, and sale of Aluminium ABS in North America.
- (84) Before the US initiated this lawsuit, the US, Novelis and Aleris agreed that the lawfulness of the Transaction under Section 7 of the Clayton Act (15 U.S.C. § 18) hinged on whether Aluminium ABS constitutes a relevant product market under the applicable antitrust laws.
- (85) In its public Arbitration Term sheet, the US DOJ explained that a possible remedy could resolve the US' competitive concerns.
- (86) Novelis and Aleris failed to resolve the US' competitive concerns by implementing the possible remedy mentioned in the Arbitration Term. The DOJ agreed with Novelis and Aleris to refer this matter to binding arbitration, should the parties be unable to reach a resolution that resolved the US' competitive concerns with the Transaction within a certain period of time. The process then shifted to arbitration.
- (87) The US, Novelis and Aleris agreed that if the US prevailed in arbitration, the US would then file a proposed final judgment requiring Novelis and Aleris to divest Aleris's Lewisport rolling mill in Lewisport, Kentucky, and related assets, which constitute Aleris's entire Aluminium ABS operations in North America ('US Divestiture Assets').
- (88) On 9 March 2020, the US prevailed in arbitration, with the arbitrator determining that Aluminium ABS is a relevant product market under the antitrust laws.
- (89) On 12 May 2020, the US therefore filed a proposed modified hold separate stipulation and order ('Modified Stipulation and Order') and a proposed final judgment (the 'Final Judgment').
- (90) To preserve the US Divestiture Assets pending the outcome of the arbitration, the US District Court for the Northern District of Ohio entered a hold separate stipulation and order on 9 January 2020, requiring Novelis (i) to hold separate, preserve, and maintain the US Divestiture Assets and (ii) to take certain steps to ensure that the US Divestiture Assets were preserved and operated in such a way as to ensure that the US Divestiture Assets continue to be ongoing, economically viable business units.
- (91) The Final Judgment required Novelis and Aleris to divest the US Divestiture Assets within the later of 90 calendar days of the filing of the Modified Stipulation and Order, or 30 days after the regulatory approvals had been received, to an acquirer acceptable to the US, in its sole discretion. Paragraph IV(A) of the Final Judgment provided that the US, in its sole discretion, could grant one or more extensions of the divestiture period, up to a total of 180 days.
- (92) Ultimately, Novelis did not accomplish the divestiture of the US Divestiture Assets within the period prescribed in the Final Judgment, and the US District Court for the

⁶² Email from [...] to the Commission of 22 September 2020 (ID 4972).

Northern District of Ohio appointed a divestiture trustee selected by the US on 18 August 2020 to effect the divestiture without granting any further extension.

2. LEGAL FRAMEWORK

- (93) Under Article 2 of the Merger Regulation, concentrations with a Union dimension pursuant to Article 1 of that Regulation must be appraised by the Commission with a view to establishing whether they are compatible with the internal market.
- (94) Where a concentration raises concerns as to its compatibility with the internal market, the notifying party(ies) can offer to modify the concentration to remedy those concerns. Pursuant to Articles 6(2) and 8(2) of the Merger Regulation, the Commission has the power to declare the concentration, as modified, compatible with the internal market⁶³.
- (95) In particular, pursuant to paragraph (19) of the Remedies Notice, whilst commitments have to be offered by the parties, the Commission will ensure the enforceability of commitments by making the authorisation of the merger subject to compliance with the commitments. A distinction must be made between conditions and obligations. The achievement of the structural change of the market is a condition — for example, that a business is to be divested. The implementing steps which are necessary to achieve this result are generally obligations on the parties, such as the appointment of a trustee with an irrevocable mandate to sell the business to be divested.
- (96) With regard to the types of remedies, pursuant to paragraph (22) of the Remedies Notice, where a proposed concentration threatens to significantly impede effective competition, the most effective way to maintain effective competition, apart from a prohibition, is to create the conditions for the emergence of a new competitive entity or for the strengthening of existing competitors via divestiture by the merging parties. As set out in paragraph (98) of the Remedies Notice, the Commission's experience has shown that short divestiture periods contribute largely to the success of the divestiture as, otherwise, the business to be divested will be exposed to an extended period of uncertainty. The time periods for a divestiture should therefore be as short as feasible.
- (97) As explained by recital (31) of the Merger Regulation, in cases of failure to fulfil a condition attached to a decision declaring a concentration compatible with the internal market, the situation rendering the concentration compatible with the internal market does not materialise and the concentration, as implemented, is therefore not authorised by the Commission. As a result, if the concentration is implemented, it should be treated in the same way as a non-notified concentration implemented without authorisation.
- (98) In addition, paragraph (20) of the Remedies Notice states that when a condition is breached, e.g. a business is not divested in the time-frame foreseen in the commitments or afterwards re-acquired, the compatibility decision is no longer applicable. In such circumstances, the Commission may, first, adopt interim measures appropriate to maintain or restore conditions of effective competition pursuant to Article 8(5)(b) of the Merger Regulation. Second, pursuant to Article

⁶³ See also Merger Regulation, recital (30) and Commission notice on remedies acceptable under Council Regulation (EC) No 139/2004 and under Commission Regulation (EC) No 802/2004, OJ C 267, 22.10.2008, p. 1–27 ('Remedies Notice'), paragraph 5.

8(4)(b) of the Merger Regulation, the Commission may, where it has already found, in a decision taken pursuant to Article 8(2) of the Merger Regulation that, in the absence of the condition, the concentration would be incompatible with the internal market, order the dissolution of the concentration. Where the restoration of the situation prevailing before the implementation of the concentration is not possible through such a dissolution, pursuant to Article 8(4)(b) of the Merger Regulation, the Commission may take any other appropriate measure to achieve such restoration as far as possible.

- (99) The Commission's authority to act when a concentration is implemented in contravention of a condition attached to a decision taken under Article 8(2) of the Merger Regulation reflects the need to ensure the effectiveness of the Union merger control regime. Such authority is paramount to achieving the objectives of the Merger Regulation. By ensuring the possibility to undo concentrations implemented in contravention of a condition attached to their clearance or to adopt other restorative measures, Article 8(4)(b) of the Merger Regulation aims at safeguarding the structure of the market and the competitive process. These powers are in addition to the fines which the Commission may impose on the undertakings concerned pursuant to Article 14(2)(d) of the Merger Regulation.

3. IMPLEMENTATION OF THE TRANSACTION IN CONTRAVENTION OF A CONDITION ATTACHED TO THE CLEARANCE DECISION

3.1. Obligations and conditions under the Clearance Decision

- (100) In the Clearance Decision, and in particular in recitals (1018) to (1022), the Commission considered that the Transaction, as notified, would significantly impede effective competition in the internal market within the meaning of Article 2(3) of the Merger Regulation and Article 57 of the EEA Agreement, in relation to the EEA market for the production and supply of Aluminium ABS⁶⁴.
- (101) In particular, the Commission considered that the Transaction would lead to the creation or strengthening of a dominant market position of Novelis on the Aluminium ABS EEA market for the following reasons⁶⁵:
- (1) the Novelis/Aleris merged entity would have a very large market share in terms of sales and capacity ([50-60]% in 2018) in the EEA market for the production and supply of Aluminium ABS;
 - (2) the Novelis/Aleris merged entity's market shares in volume would remain [50-60]%, also in the coming years;
 - (3) the Novelis/Aleris merged entity would only face competition from a limited number of competitors and would have a market and capacity share that is at least [...] as large as that of its next competitor, also in the coming years;
 - (4) competitors to the Novelis/Aleris merged entity have limited spare capacity and the Novelis/Aleris merged entity would be pivotal player in the market; and
 - (5) the Transaction would likely result in higher prices in the relevant market and reduce the Novelis/Aleris merged entity's incentives of adding capacity to the market. In addition, competitors would be unlikely to offset price increases

⁶⁴ See Clearance Decision, recitals (978) and (1018).

⁶⁵ See Clearance Decision, recitals (978) and (1018)-(1020).

resulting from the Transaction and, to the extent that there would be any buyer power, it would be insufficient to offset the effects of the Transaction.

- (102) In addition, the Commission considered that, in any event, the Transaction as notified would give rise to horizontal non-coordinated effects due to the removal of Aleris as an important competitive constraint on Novelis⁶⁶.
- (103) In order to render the Transaction compatible with the internal market in relation to the market for the production and supply of Aluminium ABS in the EEA, Novelis submitted the Commitments.
- (104) As further explained in recitals (5) and (6) above, pursuant to section B of the Commitments, Novelis committed to the sale of the Divestment Business within the Closing Period.
- (105) In addition, under section C of the Commitments, Novelis and Aleris committed to additional obligations ensuring the viability, marketability and competitiveness of the Divestment Business.
- (106) In particular, Novelis and Aleris committed:
 - (1) to preserve or procure the preservation of the economic viability, marketability and competitiveness of the Divestment Business, in accordance with good business practice, and to minimise as far as possible any risk of loss of competitive potential of the Divestment Business until the closing of its sale;
 - (2) to hold-separate obligations, including:
 - (1) From the date of adoption of the Clearance Decision until transfer of the legal title of the Divestment Business, to keep the Divestment Business separate from the business(es) that Aleris and Novelis and their affiliated undertakings are retaining, and to ensure that unless explicitly permitted under the Commitments: (i) management and staff of the business(es) retained by Aleris and Novelis and their affiliated undertakings have no involvement in the Divestment Business; and (ii) all the staff currently employed by the Divestment Business or otherwise necessary to ensure the viability of the Divestment Business have no involvement in any businesses retained by Aleris and Novelis and their affiliated undertakings and do not report to any individual outside the Divestment Business;
 - (2) until transfer of the legal title of the Divestment Business, to assist the monitoring trustee in ensuring that the Divestment Business is managed and as a distinct and saleable entity separate from the business(es) which Aleris and Novelis and their affiliated undertakings are retaining;
 - (3) immediately after the adoption of the Clearance Decision, to appoint a hold separate manager, to manage the Divestment Business independently and in the best interest of the Divestment Business with a view to ensuring its continued economic viability, marketability and competitiveness and its independence from the businesses retained by Aleris and Novelis and their affiliated undertakings;
 - (3) to implement, or procure to implement, from the date of adoption of the Clearance Decision, all necessary measures to ensure that Aleris and Novelis

⁶⁶ See Clearance Decision, recitals (978) and (1021).

and their affiliated undertakings would not, after the adoption of the Clearance Decision, obtain any confidential information relating to the Divestment Business and that any such confidential information obtained by the Parties before the adoption of the Clearance Decision will be eliminated and not be used by Novelis and Aleris and their affiliated undertakings;

- (4) for a period of 10 years after the transfer of the Divestment Business, not to acquire, whether directly or indirectly, the possibility of exercising influence over the whole or part of the Divestment Business;
 - (5) subject to customary limitations, not to solicit, and to procure that affiliated undertakings do not solicit, the personnel necessary to maintain the viability and competitiveness of the Divestment Business and transferred with the Divestment Business for a period of [...] after closing of the sale of the Divestment Business; and
 - (6) for a period of [...] from the date of transfer of the legal title of the Divestment Business, not to solicit, and to procure that affiliated undertakings do not solicit, any customers for the existing purchase orders and volumes which Aleris and Novelis have with the Divestment Business on the date of the adoption of the Clearance Decision.
- (107) The Commission considered that the Commitments were suitable and sufficient to eliminate the significant impediment to effective competition to which the Transaction would give rise as notified and therefore render it compatible with the internal market and the EEA Agreement subject to compliance with the Commitments⁶⁷.
- (108) Therefore, the Commission considered that the Clearance Decision should be made conditional on the full compliance by Novelis with Section B (including the Schedule and Annexes to the Schedule) of the Commitments, whereas all other Sections of the Commitments should constitute obligations within the meaning of Article 8(2) of the Merger Regulation.
- (109) In light of the above, Article 1 of the Clearance Decision declared the Transaction compatible with the internal market and the EEA Agreement. However, pursuant to Article 2 of the Clearance Decision, the declaration of compatibility was subject to compliance with the conditions set out in Section B of Annex 2 of the Clearance Decision. In addition, Article 3 of the Clearance Decision rendered legally binding upon Novelis the obligations set out in the Commitments.
- (110) According to Section B.4 of the Commitments, Novelis should have met two cumulative conditions to comply with the commitment to divest. In particular, one of these two conditions, as set out in section B.4(b) of the Commitments, is that “*the Closing of the sale of the Divestment Business to the Purchaser takes place within the Closing Period*” which, after the Fourth Extension, was set to expire on 31 August 2020.

⁶⁷ See Clearance Decision, recital (1127).

3.2. Novelis' views

3.2.1. *Novelis claims that the Extension Rejection Letter is unlawful*

(111) According to Novelis, the Extension Rejection Letter is unlawful for the following reasons:

- (1) the Extension Rejection Letter failed to state adequate reasons or to properly assess Novelis' Fourth Extension Request under the criteria contained in paragraph 49 of the Commitments⁶⁸;
- (2) the Commission was obliged to grant the Fourth Extension Request because Novelis met the conditions under paragraph 49 of the Commitments;
- (3) Novelis had shown "good cause" to ask for an extension and there were exceptional circumstances justifying making a request for an extension less than a month before the expiration of the Closing Period⁶⁹;
- (4) the Extension Rejection Letter breached the principles of comity and international cooperation by punishing Novelis for observing the mandatory legal requirements of another jurisdiction, and even making Novelis' task of obtaining SAMR approval more difficult⁷⁰;
- (5) the Extension Rejection Letter failed to recognise the Commission's own contribution to the delay of the buyer approval process in China by causing the Monitoring Trustee to delay its Reasoned Opinion to SAMR⁷¹;
- (6) the Extension Rejection Letter breached the principle of proportionality as there were significantly less intrusive measures the Commission could have chosen⁷²;
- (7) the Extension Rejection Letter risked undermining the viability of the Divestment Business⁷³ and contained numerous factual inaccuracies⁷⁴;
- (8) the Extension Rejection Letter wrongly drew adverse inferences from Novelis refusal to amend the Commitments to its detriment⁷⁵;
- (9) the Extension Rejection Letter was adopted in violation of the principle of collegiate responsibility and Novelis' right to be heard⁷⁶.

(112) Novelis further claims that, because the Extension Rejection Letter is unlawful, any Article 8(4) decision the Commission may adopt would also be vitiated by legal errors⁷⁷.

3.2.2. *Novelis claims that it did not implement the Transaction in contravention of a condition attached to the Clearance Decision*

(113) First, Novelis submits that when it implemented its acquisition of Aleris on 14 April 2020, it did so in full compliance with the Commitments attached to the Clearance

⁶⁸ Reply to the Statement of Objections, paragraphs 21 to 27.

⁶⁹ Reply to the Statement of Objections, paragraphs 28 to 36.

⁷⁰ Reply to the Statement of Objections, paragraphs 37 to 40.

⁷¹ Reply to the Statement of Objections, paragraphs 41 to 44.

⁷² Reply to the Statement of Objections, paragraphs 45 to 47.

⁷³ Reply to the Statement of Objections, paragraphs 48 to 52.

⁷⁴ Reply to the Statement of Objections, paragraphs 53 to 56.

⁷⁵ Reply to the Statement of Objections, paragraphs 57 to 59.

⁷⁶ Reply to the Letter of 23 November, paragraphs 10 to 12.

⁷⁷ Reply to the Statement of Objections, paragraph 18.

Decision. According to Novelis, the only relevant moment to assess whether it implemented the Transaction in contravention of a condition attached to the Clearance Decision is the specific point in time where lasting control was transferred to the acquirer, regardless of what happened afterwards⁷⁸.

- (114) In this respect, Novelis submits that the interpretation of Articles 8(4)(b) and 8(5)(b) of the Merger Regulation which is given in the Statement of Objections cannot be justified by the existence of an enforcement gap in cases in which the notifying party enters into a binding agreement to divest, but then does not close such a transaction. Novelis further argues that, as a general matter, such situations can be addressed by including a provision in the commitments according to which the divesting party agrees to submit to a sale by a divestiture trustee if the transaction does not close for a prolonged period. According to Novelis, the fact that the Commitments did not contain such a provision may be a design flaw but this was not Novelis' responsibility⁷⁹.
- (115) Second, according to Novelis, even if one were to interpret Article 8(4)(b) of the Merger Regulation as applying to situations in which the implementation of a concentration was in line with the conditions attached to a clearance decision when it occurred, but a later breach of a condition retroactively rendered the clearance decision inapplicable, Novelis has not committed an actionable breach of any condition⁸⁰. Novelis submits that the fact that the sale of the Divestment Business to Liberty was not closed within the Closing Period according to Section B of the Commitments is not the result of a unilateral action by Novelis but the consequence of the Commission's refusal to extend the Closing Period⁸¹.
- (116) Moreover, Novelis submits that a breach of a condition has extremely severe consequences and thus, a breach must be interpreted narrowly and requires a clear-cut, wilful and serious breach of commitments by the addressee⁸². In the present case, according to Novelis, Novelis did not commit an actionable, serious breach of a condition because of the following mitigating factors:
- (1) According to Novelis, the Commission caused the situation in which Novelis is now accused of a pro-forma breach, since the Commission unlawfully rejected Novelis' Fourth Extension Request⁸³.
 - (2) According to Novelis, the delay in complying with the condition attached to the Clearance Decision of closing the sale of the Divestment Business was not caused by Novelis as Novelis pushed for SAMR's approval of Liberty to be issued as soon as possible⁸⁴.
 - (3) According to Novelis, the Commission contributed to the delay of 30 days between the expiry of the Closing Period as extended by the Fourth Extension and the closing of the sale of the Divestment Business by taking 5 and a half

⁷⁸ Reply to the Statement of Objections, paragraphs 65 to 69 and Reply to the Letter of 23 November, paragraph 13.

⁷⁹ Reply to the Statement of Objections, paragraphs 70 and 71.

⁸⁰ Reply to the Statement of Objections, paragraph 72.

⁸¹ Reply to the Statement of Objections, paragraphs 73 and 74 and Reply to the Letter of 23 November, paragraph 14.

⁸² Reply to the Statement of Objections, paragraph 74 and Reply to the Letter of 23 November, paragraph 14.

⁸³ Reply to the Statement of Objections, paragraph 78.

⁸⁴ Reply to the Statement of Objections, paragraph 78.

months to approve Liberty as a buyer, which ultimately led to the Closing Period to fall into the period of the most intense economic impact due to COVID-19⁸⁵.

- (4) According to Novelis, the Commission may have contributed to a delay of SAMR's approval of Liberty as the Monitoring Trustee's report of 31 August 2020 states that the Monitoring Trustee had not yet submitted its third revised reasoned opinion to SAMR on 24 August 2020 as planned "*pending the Commission's decision on Novelis extension request*". Novelis submits that it thus appears that the Monitoring Trustee received an instruction from the Commission to withhold the submission of its opinion to SAMR by almost a week, thereby delaying SAMR's approval of Liberty⁸⁶.
- (5) According to Novelis, refusing to grant an extension of the Closing Period was contrary to the principle of comity and in violation of international best practices for the cooperation of competition authorities in merger control proceedings as cooperation between competition authorities should be designed in a way to accommodate differences in agencies' investigations and prevent inconsistent or conflicting outcomes in the different jurisdictions. According to Novelis, by rejecting Novelis' Fourth Extension Request, the Commission was effectively punishing Novelis for observing the legal requirements in other jurisdictions⁸⁷.
- (6) According to Novelis, Novelis successfully closed the sale of the Divestment Business as intended by the Commitments and the delay of 30 days beyond the Closing Period as extended by the Fourth Extension caused no harm to the Divestment Business⁸⁸.
- (117) Lastly, Novelis submits that even if it is determined that the Transaction was implemented in contravention of a condition attached to the Clearance Decision, that implementation does not extend to the Divestment Business as no change of control occurred with regard to the Divestment Business until 30 September 2020 when the Divestment Business was sold to Liberty. Before that date, Novelis submits that the Divestment Business was held separate from the business owned by Novelis and hence, a decision under Article 8(4) of the Merger Regulation relating to the Divestment Business would lack any legal basis⁸⁹.

3.3. The Commission's assessment

- (118) According to the Commission's assessment, Novelis implemented the Transaction in contravention of a condition attached to the Clearance Decision and the Extension Rejection Letter was lawful, proportionate and appropriate. This assessment is not called into question by the arguments put forward by Novelis in the Reply to the Statement of Objections and the Reply to the Letter of 23 November (Sections 3.3.1 to 3.3.3).

⁸⁵ Reply to the Statement of Objections, paragraph 78 and Reply to the Letter of 23 November, paragraphs 27 to 39.

⁸⁶ Reply to the Statement of Objections, paragraphs 42 to 44 and 78.

⁸⁷ Reply to the Statement of Objections, paragraph 78.

⁸⁸ Reply to the Statement of Objections, paragraph 78.

⁸⁹ Reply to the Statement of Objections, paragraphs 80 to 82.

3.3.1. *Novelis implemented the Transaction in contravention of a condition attached to the Clearance Decision*

- (119) As explained in section 3.1 above, under Section B of the Commitments, Novelis committed to close the sale of the Divestment Business within the Closing Period. In particular, as stated in recital (110) above, according to Section B.4 of the Commitments, Novelis should have met two cumulative conditions to comply with the commitment to divest, one of these conditions being that “*the Closing of the sale of the Divestment Business to the Purchaser takes place within the Closing Period*”.
- (120) As explained in recital (9) above, on 14 April 2020, Novelis implemented its acquisition of Aleris. However, as of 31 August 2020, i.e., at the expiry of the Closing Period as extended by the Fourth Extension, the sale of the Divestment Business to Liberty had not closed.
- (121) As a consequence, Novelis implemented the Transaction, while failing to fulfil a condition attached to the Clearance Decision, which had found that, in the absence of the condition, the Transaction would significantly impede effective competition in the internal market or in a substantial part of it, as a result of the creation or strengthening of a dominant position, as laid down in Article 2(3) of the Merger Regulation. Therefore, the conditions of Article 8(4)(b) of the Merger Regulation are met.
- (122) None of the arguments put forward by Novelis in the Reply to the Statement of Objections call into question that conclusion.
- (123) **First**, the Commission disagrees with Novelis’ view that the only relevant moment to assess whether Novelis implemented the Transaction in contravention of a condition attached to the Clearance Decision is on 14 April 2020, the date when lasting control of Aleris was transferred to Novelis, regardless of what happened afterwards (see Section 3.2.2). Such a view ignores the fact that the Commitments contain conditions to be fulfilled both before the closing of the Transaction (entering into a final binding agreement for the sale of the Divestment Business with a purchaser approved by the Commission within the First Divestiture Period), and after the closing of the Transaction (closing the sale of the Divestment Business within the Closing Period). If Novelis’ argument were accepted, it would render devoid of purpose any conditions to be fulfilled after the closing of a transaction.
- (124) The Commission’s position is consistent with paragraph (20) of the Remedies Notice, which specifically refers to the example of a divestment business that is not divested in the timeframe foreseen in the commitments as an example of a breach of a condition. Moreover, the Commission notes that, by definition, the closing of the sale of a remedy business in an acquisition of sole control over another undertaking may only occur after the closing of the main transaction, as it is only then that the undertaking acquiring control (in this case, Novelis) obtains ownership of the business to be divested.
- (125) Novelis’ argument according to which the interpretation of Article 8(4)(b) of the Merger Regulation which is given in the Statement of Objections cannot be justified by the existence of an enforcement gap in cases in which the notifying party enters into a binding agreement to divest, but then does not close such a transaction (see recital (114)), is unfounded. Contrary to what Novelis claims⁹⁰, such situations could not as a general matter be addressed by including a provision in the commitments

⁹⁰ Reply to the Statement of Objections, paragraph 71.

according to which the divesting party agrees to submit to a sale by a divestiture trustee if the transaction does not close for a prolonged period.

- (126) This is because even if commitments were to contain such a provision, this would not address a situation in which closing of the sale of the divestment business with the approved buyer does not take place, and in which no other suitable buyer is interested in buying the divestment business. If Novelis' interpretation according to which an implementation of a concentration in contravention of a condition can only be assessed at the point in time that lasting control was transferred to the acquirer, was followed, there would indeed be an enforcement gap, since there would be no possibility to remedy the situation in a case in which no other suitable buyer can be found, even if commitments contained a clause as suggested by Novelis.
- (127) In this respect, the Commission points out that, if no suitable buyer can be found either in the first divestiture period or the trustee divestiture period, the parties are not allowed to implement the concentration. However, if closing of the sale of the divestment business does not take place after the concentration has been implemented, as in the present case, this situation needs to be addressed.
- (128) Moreover, the Commission disagrees with Novelis' view that the fact that the Commitments did not contain a provision according to which Novelis agreed to submit to a sale by a divestiture trustee if the remedy sale did not close for a prolonged period of time is a "*design flaw*" that is not Novelis' responsibility (see recital (114)).
- (129) As explained in paragraph (6) of the Remedies Notice, it is for the parties to the concentration to put forward commitments and the Commission's role is "*to assess whether the proposed remedies, once implemented, would eliminate competition concerns identified*" (paragraph (7) of the Remedies Notice). As Novelis offered a commitment that would eliminate the competition concerns identified and set that in motion with the SPA, the Commission was entitled to assume that the timetable in the SPA would be met. As with other commercial elements of the divestment, Novelis bears the transaction risk that is inherent to any transaction the validity of which is conditional on a divestment within a deadline.
- (130) Moreover, there is no design gap in the legal framework for enforcement. If the sale of the Divestment Business has not closed within the Closing Period, the clearance decision becomes inapplicable, as explained in §20 of the Remedies Notice. Once a clearance decision has become inapplicable, and the other conditions of Article 8(4)(b) of the Merger Regulation are met, the Commission may require the dissolution of the transaction or take other measures to restore the situation prior the implementation of the Transaction as far as possible.
- (131) **Second**, the Commission disagrees with Novelis' argument that a breach of a condition must be interpreted narrowly and requires a clear-cut, wilful and serious breach of commitments by the addressee because of the consequences it entails, and that in the present case Novelis did not commit an actionable, serious breach of a condition (see recital (116)).
- (132) In the first place, Novelis did commit a clear-cut and serious breach. A failure to comply with a deadline is inherently a clear-cut breach. Not divesting a remedy business within the closing period is by its very nature very serious because such a divestment is what makes the main transaction compatible with the internal market. As to the wilfulness of the breach, for the reasons set out paragraphs (138) and (139) below, the Commission disagrees with Novelis' view that the Commission caused

the situation Novelis found itself in, by unlawfully rejecting Novelis' Fourth Extension Request.

- (133) In the second place, and in any event, the legal standard that Novelis proposes is not correct. The Merger Regulation sets out an objective test. Indeed, the Merger Regulation does not refer to the breach of a condition attached to a clearance decision having to be “serious” or “intentional”.
- (134) Hence, intention does not need to be established. In this regard, even the imposition of a fine according to Article 14(2)(b) of the Merger Regulation does not imply a wilful (i.e. intentional) breach of a condition – a “negligent” breach is sufficient for the imposition of a fine. The application of Article 8(4) of the Merger Regulation does not even require negligence. The fact that a transaction is implemented in contravention of a condition attached to a decision which has found that, in the absence of the condition in question, there would be a significant impediment to effective competition, means that the impediment has to be addressed. This cannot be dependent on the question of intention or negligence of the addressee of the decision. The consequences of the breach of a condition in these circumstances are meant to restore the situation prevailing prior to the implementation of the concentration and not to punish the addressee. Unlike for the imposition of fines, the question of intention or negligence is therefore irrelevant.
- (135) Furthermore, Article 8(4)(b) of the Merger Regulation does not mention that a breach must be “serious”. According to Article 8(4)(b) of the Merger Regulation, just the fact that the concentration has been implemented in contravention of a condition attached to a decision which has found that, in the absence of the condition, there would be a significant impediment to effective competition, is sufficient for the conditions of Article 8(4)(b) to be met.
- (136) **Third**, the Commission also disagrees with Novelis' claim that, even if it is determined that the Transaction was implemented in contravention of a condition attached to the Clearance Decision, that implementation does not extend to the Divestment Business as no change of control occurred with regard to the Divestment Business until 30 September 2020 when the Divestment Business was sold to Liberty. Before that date, Novelis submits that the Divestment Business was held separate from the business owned by Novelis and hence, a decision under Article 8(4) of the Merger Regulation relating to the Divestment Business would lack any legal basis⁹¹.
- (137) However, the condition attached to the Clearance Decision was not merely to hold separate the Divestment Business, but to divest it by the expiry of the Closing Period. Moreover, by implementing the Transaction, Novelis at the very least acquired ownership over the whole of Aleris' business, including the Divestment Business. The question of whether Novelis acquired control over the Divestment Business is thus not relevant.
- (138) **Finally**, the Commission also disagrees with Novelis' view that the Commission caused the situation Novelis found itself in, by unlawfully rejecting Novelis' Fourth Extension Request (see recital (116)(1)).
- (139) In that regard, the cause of the situation is Novelis' choice to implement the Transaction combined with its breach of the Commitments. The breach results from Novelis' failure to close the sale of the Divestment Business within the Closing

⁹¹ Reply to the Statement of Objections, paragraphs 80 to 82.

Period, as extended by the Fourth Extension, the duration of which Novelis had undertaken to respect, through the Commitments it gave, the rigour of which were mitigated by the Commission granting four extensions totalling close to an extra eight weeks.

- (140) Indeed, in the Commitments, Novelis committed to close the sale of the Divestment Business within the Closing Period (as extended). The Closing Period expires automatically on the last day of such period and compliance with the duty to have closed the sale of the Divestment Business is assessed on that day. Thus, the absence of an extension is not the cause of the breach of the condition. The breach of the condition solely results from the failure to close the sale of the Divestment Business. If the absence of Closing within the Closing Period could be treated as a consequence of the refusal to extend the deadline, the existence of a deadline for Closing would become devoid of purpose, as in such case the Commission would be always obliged to grant the extension.
- (141) Moreover, as set out in Section 3.3.2 below, the Extension Rejection Letter lawfully rejected Novelis' Fourth Extension Request.

3.3.2. *The Extension Rejection Letter is lawful, proportionate and appropriate*

- (142) For the reasons set out in the previous section, the objective failure of Novelis to close the sale of the Divestment Business within the Closing Period, as extended by the Fourth Extension, enables the Commission to adopt the necessary measures under Article 8(4) of the Merger Regulation, irrespective of the duration of such Closing Period or the reasons for the failure to close within such Closing Period.
- (143) As regards Novelis' arguments directed at contesting the legality of the Commission's Extension Rejection Letter, the Commission recalls from the outset that measures of the EU institutions are in principle presumed to be lawful and accordingly produce legal effects until such time as they are withdrawn, annulled in an action for annulment, or declared invalid following a reference for a preliminary ruling or a plea of illegality.⁹² In that regard, Novelis has filed an application for annulment of the Commission's Extension Rejection Letter on 11 November 2020 (Case T-680/20), which is currently pending (the "Annulment Proceedings"), and it will therefore be for the Court of Justice to decide on the legality of this act. Pending the Court's judgment, the Extension Rejection Letter remains valid.
- (144) However, without prejudice to its arguments in the Annulment Proceedings, the Commission will briefly address Novelis' arguments relating to the legality of the Commission's Extension Rejection Letter to the extent that Novelis itself gives significant prominence to these arguments in the Reply to the Statement of Objections.
- (145) The relevant rules are set out in paragraph 49 of the Commitments: "The Commission may extend the time periods foreseen in the Commitments in response to a request from Novelis or, in appropriate cases, on its own initiative. Where Novelis requests an extension of a time period, it shall submit a reasoned request to the Commission no later than 1 month before the expiry of that period, showing good cause. This request shall be accompanied by a report from the Monitoring Trustee, who shall, at the same time send a non-confidential copy of the report to Novelis. Only in exceptional circumstances shall Novelis be entitled to request an extension within the last month of any period".

⁹² Case C-362/14, *Schrems*, EU:C:2015:650, §52 and the case-law cited.

- (146) As set out in paragraph (98) of the Remedies Notice, the Commission's experience has shown that short divestiture periods contribute largely to the success of a divestiture as, otherwise, the business to be divested will be exposed to an extended period of uncertainty. The period should therefore be as short as feasible, and the parties are expected to cooperate in good faith to achieve the divestiture with the buyer approved by the Commission.
- (147) Contrary to Novelis' claims, Novelis failed to show good cause for an extension in its Fourth Extension Request. But, even if Novelis had shown good cause, *quod non*, it would not have had any automatic right to an extension (3.3.2.1). Furthermore, the Extension Rejection Letter states adequate reasons and properly assesses Novelis' Fourth Extension Request (3.3.2.2). Finally, the Commission did not act disproportionately in rejecting the Fourth Extension Request (3.3.2.3).
- 3.3.2.1. Novelis did not show good cause for an extension in its Fourth Extension Request and would in any event not have had an automatic right to an extension
- (148) It was for Novelis to substantiate its Fourth Extension Request to show good cause justifying the granting of a fifth extension but, for the reasons explained in this section, Novelis failed to do so.
- (149) In the particular context of this case, for Novelis to show good cause for its Fourth Extension Request it would have had to show that it had no responsibility for any delay in closing the sale of the Divestment Business and that it was sufficiently certain that granting the requested extension to the Closing Period would have resulted in Novelis effectively closing the sale of the Divestment Business within the extended Closing Period.
- (150) However, the arguments put forward by Novelis in support of its Fourth Extension Request did not show good cause. In particular, Novelis failed to provide any degree of certainty that Closing would take place on or by 30 September 2020 if the requested extension were granted. As the Monitoring Trustee stated in its Reasoned Opinion dated 31 August 2020, after considering all the elements of Novelis' Fourth Extension Request, "*there is in our view, as matters stand, no certainty that Closing will take place by 30 September 2020 and a perceived risk that the Transaction will never Close*"⁹³. An important source of input available to the Commission (i.e. the opinion of the Monitoring Trustee) thus suggested that another extension of the Closing Period would not have ensured that Closing would take place within the month of September, or even at all.
- (151) **First**, as a general point, Novelis fails to acknowledge in the Fourth Extension Request that Novelis and Liberty had already had three months to close before the first extension, and that the Closing Period had already been extended four times (on 7 July, on 14 July, on 22 July and 31 July 2020, i.e. for a total extension time of almost eight weeks), without achieving Closing or even the certainty of closing. In particular, while the Commission had granted Novelis' Third Extension Request and extended the Closing Period by a full month, the sale of the Divestment Business had not closed by the end of August 2020.
- (152) **Second**, as regards the SAMR approval process, Novelis submitted that the requested extension would permit SAMR to complete its review of the suitability of Liberty. In reply to RFI 61 (question 8), Novelis also referred to indications which it claims it received from the Monitoring Trustee on 26 August 2020, [...].

⁹³

Monitoring Trustee Reasoned Opinion dated 31 August 2020 (ID4899).

- (153) However, at the same time, Novelis also expressly confirmed in the Fourth Extension Request that SAMR’s review process and timeline were outside Novelis’ control. Moreover, Novelis did not provide any evidence of the timing indication it claims it received from the Monitoring Trustee. In that regard, in its Reasoned Opinion of 31 August 2020, only a few days later, the Monitoring Trustee certainly did not assert any particular confidence that SAMR approval would be obtained within the month of September⁹⁴. On the contrary, the Monitoring Trustee emphasised that it could not confirm what position SAMR would take⁹⁵. Finally, while the Commission sought to obtain feedback from SAMR regarding its intentions, the Commission did not receive any confirmation from SAMR that it would approve Liberty or, *a fortiori*, that it would do so within the month of September.
- (154) **Third**, as regards other closing deliverables, Novelis submitted “*for completeness*” in the Fourth Extension Request that there were “*a few other outstanding closing deliverables between the parties, which need to be completed prior to Closing*” (emphasis added). As to the nature of those outstanding deliverables, Novelis confirmed in its reply to Commission RFI 61 that, on 28 August 2020, in addition to SAMR’s approval, there were other outstanding deliverables which needed to be completed prior to Closing:
- (1) Liberty and Novelis needed to finalise the **CAPEX escrow agreement** (for which the parties had exchanged drafts) and to open an escrow account each [...];
 - (2) Liberty and Novelis needed to finalise the **Carve-in APA** which had to accommodate the fact that Liberty was not able to incorporate a China entity prior to Closing (as foreseen in the November 2019 draft of the Carve-in Agreement);
 - (3) Liberty needed to finalise the process around the **carve-in of employees**, i.e. employees to be transferred to the Divestment Business;
 - (4) Liberty and Novelis needed to finalise several of the transition **and ancillary agreements**, which were with Liberty for review at the time.
- (155) Novelis indicated that these pre-closing deliverables were “*minor*” and added that Liberty had indicated to Novelis and Novelis agreed that they could be completed “*within a few days of obtaining the SAMR buyer approval*”⁹⁶. However, Novelis did not provide the Commission with any evidence to support these statements.
- (156) In addition, in its update dated 26 August 2020, the Monitoring Trustee had identified another possible obstacle to closing, related to the Divestment Business’ cash position. The HSM, in his role as Managing Director of the Divestment Business, was unwilling to sign off on a statement required for Novelis to take cash out of the Divestment Business through dividend and capital reduction, as it was the HSM’s view that the Divestment Business required a EUR [...] of cash balance. The Monitoring Trustee explained that the Transaction might not close until this matter was resolved because Novelis could not settle the accounts until the HSM signed the statement. Contrary to Novelis’ argument in footnote 49 of the Reply to the Statement of Objections, Liberty did not represent that the issue was solved but, on 28 August 2020, instead stated in its reply to the Commission’s request for

⁹⁴ Monitoring Trustee Reasoned Opinion dated 31 August 2020 (ID4899).

⁹⁵ Monitoring Trustee Reasoned Opinion dated 31 August 2020 (ID4899).

⁹⁶ Novelis’ reply to RFI 61.

information of 27 August 2020 (RFI 7) that the cash position of the Divestment Business was yet to be finalised⁹⁷. On 31 August 2020, the Commission had no guarantee that the cash position matter had been resolved. In fact, on 4 September 2020 the Monitoring Trustee confirmed that the cash position matter was resolved after Novelis had received the Extension Rejection Letter⁹⁸.

- (157) Based on Novelis' own statements, it was therefore clear to the Commission at the time of the Fourth Extension Request that, aside from the SAMR approval, there were other outstanding deliverables that were not yet completed. Moreover, any modification to the transitional and operative services and ancillary agreements would have had to be reviewed by the Monitoring Trustee and the Commission prior to Closing. Novelis and Liberty had agreed on revised versions of several of such agreements only one day before the end of the Closing Period and were still in the process of agreeing on the other transitional and operative services and ancillary agreements by the time the Closing Period expired.
- (158) By 31 August 2020, i.e. the end of the Closing Period as extended by the Fourth Extension, the closing deliverables had not been completed.
- (159) Novelis later argued in the Reply to the Statement of Objections⁹⁹ and in the Reply to the letter of 23 November¹⁰⁰ that in practice, it satisfied most closing conditions mere days after the Fourth Extension Request was rejected and even before SAMR approval was obtained. This in Novelis' view shows that by the time of its Fourth Extension Request, it was nearly ready to close and therefore the Commission should have considered that there was good cause for the Fourth Extension Request. The Commission does not agree with this view. On the contrary, the significant progress immediately following the Commission's Extension Rejection Letter suggests that in fact, Novelis could have ensured that any outstanding issues were solved before the end of the Closing Period – the burden for which was on Novelis – but failed to do so, counting on a wrongly perceived automaticity of extensions of the Closing Period. Tellingly, in its report dated 4 September 2020, the Monitoring Trustee stated under the heading "*Outstanding items for closing*": "*It appears to us that given the Commission's decision Novelis and Liberty have finally expedited their outstanding issues over the last few days, with a willingness to compromise*" and that "[a]s such we understand from Novelis, Liberty and the Divestment Business that as of 4 September 2020 the only key dependency for Closing is SAMR approval".
- (160) The Commission, exercising its discretion, found on the basis of Novelis' Fourth Extension Request and all the information available to it (including the Monitoring Trustee's Reasoned Opinion of 31 August 2020, Novelis' reply to RFI 61 and Liberty's reply to RFI 7, see paragraph 160 below), that Novelis had not shown good cause for an extension and therefore failed to meet the requirements for a request for extension of the Closing Period under paragraph 49 of the Commitments. As discussed below in Section 3.3.2.2, the Commission clearly set out the reasons for its assessment leading it to reject the Fourth Extension Request in the Extension Rejection Letter.

⁹⁷ Liberty's reply to the Commission's request for information of 27 August 2020 (RFI 7) (ID 4920).

⁹⁸ Email from the Monitoring Trustee to the Commission of 4 September 2020 (ID 5127) and Monitoring Trustee Schedule of Issues of 4 September 2020 (ID 5117).

⁹⁹ Reply to the Statement of Objections, paragraph 46.

¹⁰⁰ Reply to the Letter of 23 November, Section 6.3.

- (161) Finally, it may be stressed that in any event, contrary to Novelis' belief, the extension of deadlines under paragraph 49 of the Commitments is by no means automatic. Paragraph 49 of the Commitments merely provides for Novelis to submit a "request" for the Commission's consideration. However, the Commission is under no obligation or duty to grant any request for extension. Therefore, even if Novelis had demonstrated that it had good cause for requesting a fifth extension of the Closing Period, *quod non*, the Commission would still have had a margin of discretion to accept or reject its request, in light of the need to limit the duration of closing periods as much as possible, especially in situations such as in the present case where the main transaction has already closed. This is in line with §71 of the Remedies Notice, which states that "[i]rrespective of the type of remedy, commitments will usually include a review clause. This may allow the Commission, upon request by the parties showing good cause, to grant an extension of deadlines or, in exceptional circumstances, to waive, modify or substitute the commitments" (emphasis added).
- 3.3.2.2. The Extension Rejection Letter states adequate reasons and properly assesses Novelis' Fourth Extension Request
- (162) The Commission properly assessed the Fourth Extension Request on the basis of all of the information available to it, including the Monitoring Trustee's Reasoned Opinion of 31 August 2020, Liberty's submission to the Monitoring Trustee of 23 August 2020 and reply to the Commission's RFI 7 on 28 August 2020, and Novelis' own submissions in the Fourth Extension Request and in its reply to RFI 61 on 28 August 2020, taking into account the specific circumstances of the case. Moreover, it did state adequate reasons in the Extension Rejection Letter.
- (163) More specifically, the Commission explained in the Extension Rejection Letter that the Monitoring Trustee was of the view that Closing could not have happened on 31 August 2020 irrespective of SAMR's approval of Liberty (paragraph 38). In addition, the Commission further explained that any implementation risk that arises should be immediately addressed, and not simply used as a reason to seek an extension. The Commission explained that such a strategy would prolong the uncertainty over the restoration of competitive conditions on the market, and the ability of a new player to act as a viable competitor through the acquisition and operation of the Divestment Business (paragraph 39). Furthermore, the Commission stated that the closing of the sale of the Divestment Business to Liberty had been delayed by many months and there was no certainty that it would take place by 30 September 2020 even if the requested extension were to be granted (paragraph 42). Moreover, the Commission explained that it was uncertain if (and when) SAMR would approve Liberty as a suitable buyer for the Divestment Business. Likewise, the Commission explained that it was uncertain when (or if) Novelis and Liberty would complete the other outstanding closing deliverables (paragraph 43).
- (164) On that basis, the Commission explained that, according to the information at its disposal, the extension of the Closing Period by one month, as requested, would not facilitate a timely Closing. In such circumstances, the Commission concluded that granting a fifth extension of the Closing Period would negatively affect the viability and competitiveness of the Divestment Business by further prolonging the situation of uncertainty as to the potential closing of the sale of the Divestment Business to Liberty, without providing any mechanism which would ultimately ensure the sale of the Divestment Business to a third party in case the closing of the sale to Liberty did not occur (paragraphs 44-45).

- (165) The elements put forward by Novelis in the Reply to the Letter of 23 November do not call into question the fact that the Extension Rejection Letter stated adequate reasons and properly assessed Novelis' Fourth Extension Request.
- (166) In particular, Novelis argues that competition would be restored most quickly by divesting to Liberty, that both the Monitoring Trustee and the HSM expressed serious concerns about the impact of another sales process on the Divestment Business, [...] ¹⁰¹.
- (167) However, following the logic of Novelis' arguments, the Commission would in effect always be forced to grant another extension of the closing period, whereas the legal framework expressly confers a margin of discretion to the Commission and does not confer the right to obtain an extension of the closing period. In practice, this would render the imposition of a deadline to close the sale of the Divested Business meaningless, contrary to the stated aim of ensuring that divestiture periods remain as short as feasible to ensure that effective competition is maintained on the market. Moreover, the Extension Rejection Letter did not prevent the sale of the Divestment Business to Liberty. [...] ¹⁰² The Extension Rejection Decision did not hinder the transfer of the Divestment Business to Liberty in any way, and in fact such a transfer eventually took place on 30 September 2020.
- (168) Furthermore, in the Reply to the Letter of 23 November, Novelis argues that the Commission did not consider the views of the HSM, who shortly before 20 August 2020 was not aware of any risks that could jeopardize closing on 31 August 2020 and on 30 August 2020 stated that "*further delay of 1 month on its own is something that is manageable*" ¹⁰³. This argument does not modify the Commission's assessment leading to the rejection of Novelis' Fourth Extension Request. First, the HSM's statement was merely commenting on the feasibility, from the Divestment Business' view, of remaining in its hybrid and precarious situation – held separate from Novelis/Aleris but not yet part of Liberty – for an additional month. The HSM was not commenting on whether it would be achievable to close within one more month because the HSM did not have the necessary information to make such an assessment. Indeed, the Divestment Business which was being acquired would naturally not have a role in closing its sale. To the extent the HSM addressed the question of the closing of the sale of the Divestment Business, the Monitoring Trustee reported in its Reasoned Opinion of 31 August 2020 that: "*From the HSM's submission of 30 August 2020, we note that the HSM is concerned that Closing is not guaranteed at 30 September 2020 and this in the meantime, is affecting the viability of the Divestment Business.*" ¹⁰⁴ Second, under paragraph 49 of the Commitments the Commission cannot grant an extension simply on the basis that closing was "*manageable*", but needed to assess whether the requesting party had shown that, among other things, it was sufficiently certain that closing *would* take place if the requested extension were to be granted. The Commission rejected the Fourth Extension Request because Novelis had not sufficiently demonstrated this: notably, there were substantial risks which could jeopardise closing by 30 September 2020 and, therefore, Novelis had not shown that the requested extension would facilitate the timely closing of the divestment transaction.

¹⁰¹ Reply to the Letter of 23 November, Section 6.4.

¹⁰² Commission Letters of 2 and 14 September 2020

¹⁰³ Reply to the Letter of 23 November, Section 6.3.

¹⁰⁴ Reasoned Opinion of the Monitoring Trustee dated 31 August 2020.

- (169) Finally, the Commission notes that contrary to Novelis' claim, while the Commission did remind Novelis of the existence of the possibility to request an amendment of the Commitments, it did not draw any adverse inferences from Novelis' choice not to request such an amendment. Indeed, the Commission did grant Novelis' requested extension until 31 August 2020. The Extension Rejection Letter merely takes note of Novelis' declining this option where it sets out the facts and before entering into any type of assessment¹⁰⁵ and does not draw any inferences, adverse or otherwise, from this circumstance.
- 3.3.2.3. The Commission did not act disproportionately in rejecting Novelis' Fourth Extension Request
- (170) In the Reply to the Statement of Objections Novelis claims that the Commission failed to consider less intrusive measures to ensure closing certainty.
- (171) In particular, Novelis claims that the Commission could have granted a shorter interim extension before considering whether to grant the full requested extension until 30 September 2020 to obtain feedback from SAMR or to gain additional certainty that no outstanding commercial issues between Novelis and Liberty could endanger closing¹⁰⁶.
- (172) In this respect, without needing to grant an interim extension for this purpose, the Commission had sought SAMR's feedback on its intentions regarding its possible approval of Liberty and the timing thereof. However, the Commission had not received information from SAMR or from Novelis or Liberty permitting to gain any degree of certainty that such approval would occur, let alone that it would occur within the month of September.
- (173) Furthermore, in the context of a request for an extension of a closing period, it falls on the requesting party to provide all the elements it deems useful to substantiate its request. In the present case, the Commission had extensive information at its disposal and could conclude, on the basis of the information available to it, that Novelis had not shown good cause for a fifth extension of the Closing Period.
- (174) Novelis also claims that the Commission could have followed the Monitoring Trustee's recommendation in its Reasoned Opinion that the extension could be contingent on Novelis and Liberty providing assurances that all the outstanding closing conditions under the SPA, other than SAMR's approval of Liberty, would be satisfied by mid-September 2020¹⁰⁷. While the Monitoring Trustee suggested the possibility that the Commission "*may also ask Novelis and Liberty to provide assurances that all the outstanding matters will be resolved by mid-September 2020, save for the approval of the SAMR*", the Monitoring Trustee did not go so far as to recommend that the Commission grant a fifth extension. Conversely, the Monitoring Trustee expressly stated that even if the Commission granted the extension, there was no guarantee that the sale of the Divestment Business to Liberty would close, pointing out that "*there is in our view, as matters stand, no certainty that Closing will take place by 30 September 2020 and a perceived risk that the Transaction will never Close*".

¹⁰⁵ Extension Rejection Letter, paragraph 15.

¹⁰⁶ Reply to the Statement of Objections, paragraph 46.

¹⁰⁷ Reply to the Statement of Objections, paragraph 46.

3.3.3. *The Commission's assessment is not called into question by the further arguments put forward by Novelis in the Reply to the Statement of Objections and the Reply to the Letter of 23 November*

- (175) In addition to Novelis' arguments in the Reply to the Statement of Objections and the Letter of 23 November treated in Section 3.3.1 and Section 3.3.2, Novelis makes additional claims in the Reply to the Statement of Objections and the Reply to the Letter of 23 November that do not call into question the Commission's assessment and which are addressed in this section.
- (176) **First**, the Commission disagrees with Novelis' claims (see recital (116)(3) and Reply to the Letter of 23 November¹⁰⁸) that the Commission contributed to the delay in Closing by taking an unprecedented time to review Liberty's suitability, that the Commission's questions were burdensome and irrelevant to the assessment of Liberty's suitability as a buyer, and Liberty had responded to almost all of the questions much earlier than 18 February 2020. Novelis further argues that it is not substantiated that the financial situation of Liberty had changed since the review that took place in the context of *ArcelorMittal/Ilva* remedy case, and in any case such changes did not justify a purchaser approval process lasting 5.5 months¹⁰⁹. Novelis claims that if the Commission had conducted its review as expeditiously as possible, Closing could have been completed before the COVID-19 crisis unfolded, which disrupted the worldwide automotive supply chain along with other economic conditions, causing Liberty to develop "*a severe case of buyer's remorse*"¹¹⁰. The Commission disagrees with these views for the reasons set out in recitals (177) to (182) below.
- (177) The approval of any proposed buyer requires an appropriate investigation by the Commission and the duration of such investigation is entirely contingent on the buyer chosen by the notifying party and the delays in submitting the relevant information. Prior to Novelis' submission of the Reasoned Proposal on 26 November 2019, during the sale bidding process, the Commission orally informed Novelis that another bidder, [...], could be approved quickly, whereas the assessment of the suitability of Liberty appeared to require more time. Despite that, Novelis decided to propose Liberty, knowing that the assessment of Liberty would take more time than the assessment of other buyers.
- (178) The Commission completed its review of Liberty as expeditiously as possible considering its complex circumstances, as explained in the Buyer Approval Decision. As explained in the Buyer Approval Decision, first, Liberty's *modus operandi* to raise debt financing at parent/holding company level prevented its operating businesses from raising further funds through instruments backed by their assets, which meant that the ring-fenced aluminium structure set up to acquire the Divestment Business would not be able to finance its own investment needs. Second, Liberty claimed that its ultimate owner, Mr Gupta, could in any event meet the investment needs of the Divestment Business, making the assessment of Mr Gupta's other activities (and liabilities) a necessary part of the buyer approval process. Third, it appeared that funds obtained through debt secured by assets in one business division within the Liberty group had been used to fund activities of another division, making it thus necessary to assess all divisions within the Liberty group. Fourth,

¹⁰⁸ Reply to the Letter of 23 November, paragraph 27 *et seq.*

¹⁰⁹ Reply to the Letter of 23 November, paragraph 37.

¹¹⁰ Reply to the Statement of Objections, paragraph 6.

while the assessment of the incentive and ability of industrial buyers is typically done based on consolidated (audited) group statements, Liberty did not have those. These complex circumstances justified a close scrutiny of Liberty's financial position and the Commission's several requests for information addressed to Liberty.

- (179) The purchaser approval in the *ArcelorMittal/Ilva* remedy case was issued on 17 April 2019 (that is, 5.5 months after the submission of the buyer proposal by ArcelorMittal on 9 November 2018). Liberty's debt position had changed since the time the Commission had approved it as a purchaser in *ArcelorMittal/Ilva*, precisely because of its acquisition of the remedy asset in that case. More specifically, according to the purchaser approval decision of 17 April 2019 in *ArcelorMittal/Ilva*, Liberty contributed to [30-40]% of the purchase price with equity and would issue bonds to finance the acquisition¹¹¹. It therefore followed from Liberty's role in *ArcelorMittal/Ilva* that if it was necessary in that case to assess Liberty's suitability closely, *a fortiori* it was necessary to do so here. *ArcelorMittal/Ilva* also shows that several months to approve a remedy buyer is not unprecedented.
- (180) After Novelis' submission of the Reasoned Proposal on 26 November 2019, the Commission sent a request for information to Liberty as early as on 2 December 2019 (RFI 1). Liberty only fully replied to all the questions listed in the request for information on 18 February 2020 (i.e. 2.5 months latter). In this regard, when sending said replies to the Commission with Novelis' external counsel in copy on 18 February 2020, Liberty's external counsel indicated: "[w]ith further apologies for delay in getting these to you, I now attach the full RFI3 response on behalf of Liberty. (...) The key points from this RFI3 response are as below: Liberty has now supplemented the CY2019 figures previously provided to also include those limited actuals figures that had not been available at the time of the Response to RFIs 1&2. The Commission therefore now has a complete CY2019 set of actuals management data across all Liberty silos (...)"¹¹². This shows therefore that Liberty sent a complete set of management data across all Liberty silos only on 18 February 2020.
- (181) On 26 February 2020, the Monitoring Trustee sent Liberty a list of clarification questions on Liberty's responses of 18 February 2020, to which Liberty replied on 28 February 2020 and 3 March 2020 (when the COVID-19 crisis had already unfolded)¹¹³. On that basis, on 1 April 2020, the Monitoring Trustee submitted the final version of its reasoned opinion on Liberty's suitability as the purchaser of the Divestment Business to the Commission and, only one week later, on 7 April 2020, the Commission issued its approval of Liberty (that is, approximately 4.5 months after Novelis' Buyer Proposal, not 5.5 months later as indicated by Novelis). The Commission had suggested the possibility for Novelis to involve an independent auditor to assist the Monitoring Trustee with the verification of the financial information provided by Liberty and Novelis expressly declined to do so on 19 February 2020¹¹⁴.
- (182) Novelis was aware of the need to assess Liberty's financial position closely, as shown in an email from Novelis' counsel to the Commission in which he stated that "[w]e have been seeking urgent confirmation from Liberty that, contrary to what it has told Novelis in recent conversations and has prompted Novelis' concerns about

¹¹¹ Purchaser approval decision in M.8444 *ArcelorMittal/Ilva*, recitals 90 and 92.

¹¹² Email from [...] to the Commission on 18 February 2020 (ID 4045).

¹¹³ Email from Liberty on 28 February 2020 (ID 4071) and workshop held between the Monitoring Trustee and Liberty on 3 March 2020 as announced therein.

¹¹⁴ Email from [...] to the Monitoring Trustee on 19 February 2020 (ID 4050).

*Liberty's suitability as a buyer, Liberty in fact has readily available funds to pay the full purchase price under the SPA at closing. (...) We are also waiting for assurance from Liberty that it will meet its contractual obligations and in particular is not intending to change the financing'*¹¹⁵. It follows from the email that Novelis was aware of the need to verify whether Liberty had readily available funds as well as of the risks of Liberty developing the alleged "buyer's remorse". This was already before Novelis reassured the Commission that it still believed Liberty was suitable and that the sale of the Divestment Business would close in compliance with the Commitments in its reply to the Commission's request for information of 2 April 2020 (RFI 58)¹¹⁶.

- (183) In any event, the duration of the buyer approval process cannot explain Novelis' delay in closing the sale of the Divestment Business before the expiry of the Closing Period, as the Closing Period started after the Commission's approval of Liberty. If anything, Novelis and Liberty gained time to complete all the closing deliverables and satisfy the closing conditions. Moreover, the Commission approved Liberty one week after the expiry of the First Divestiture Period, which suggests that the Commission was even ahead of the timeline implicitly envisaged by Novelis in the Commitments, as the review of a proposed purchaser typically lasts more than a week.
- (184) **Second**, Novelis claims that it was entirely reasonable to expect that a fifth extension of the Closing Period would be granted on 31 August 2020 in line with the Commission's previous practice in other cases¹¹⁷. However, the specific cases that Novelis refers to do not support Novelis' claim.
- (185) With regard to cases *Outokumpu/Inoxum* (2012), *Teva/Allergan Generics* (2016) and *Vivendi/Telecom Italia* (2018), Novelis argues that the Commission extended the initial divestiture period significantly. However, the Commission notes that extending a first divestiture period to identify suitable buyers is a very different scenario to the present one, where the discussion is about extending a closing period once the selected buyer and the terms of the sale have been approved.
- (186) With regard to case *Nordic Capital/Intrum Justitia* (2017), Novelis argues that, according to publicly available information, the sale of the divestment business closed around 22 May 2018, i.e. more than 5 months after the Commission issued its purchaser approval decision on 19 December 2017, which suggests an extension of the closing period by more than 2 months. However, the Commission did not grant such an extension. In fact, the divestment business was acquired by the acquirer on 20 March 2018, i.e. 2 months earlier than the date suggested by Novelis, as confirmed by the acquirer itself in a press release¹¹⁸.
- (187) With regard to case *UTC/Rockwell Collins* (2018), Novelis argues that the sale of the divestment business closed shortly before 1 March 2019, i.e. almost 6 months after the approval of the divestment purchaser, suggesting an extension of the closing period of almost 3 months. However, according to the public version of the Commitments, the closing period started from the approval of the purchaser and the terms of the sale or the obtention of all required regulatory approvals prior to the closing of the main transaction, whichever was the later. Therefore, as long as all

¹¹⁵ Email from [...] to the Commission of 27 March 2020.

¹¹⁶ Novelis' reply to the Commission's request for information of 2 April 2020 (RFI 58) (ID 4894).

¹¹⁷ Reply to the Statement of Objections, paragraph 35.

¹¹⁸ <https://www.lowell.se/foretag/james-cornell-interview/>.

required regulatory approvals were not obtained prior to the date when the divestment purchaser was approved (i.e. 6 September 2018), the date of the buyer approval decision is irrelevant for the calculation of the closing period.

- (188) With regard to case *Tronox/Cristal* (2018), Novelis argues that the sale of the divestment business closed 8.5 months after the approval of the divestment purchaser on 17 August 2018, which suggests an extension of the closing period by approximately 5.5 months. In this case, the parties asked for an extension of the closing deadline to obtain the US Federal Trade Commission's approval of the remedy purchaser after a shutdown of the US federal government. The Commission considered that Tronox had shown good cause for an extension but granted a shorter extension than the one requested as it considered it more appropriate.
- (189) **Third**, Novelis' claim (see recital (116)(4) and the Reply to the Letter of 23 November¹¹⁹) that the Commission instructed the Monitoring Trustee to withhold the submission of a revised reasoned opinion on 24 August 2020 to SAMR is wrong and unfounded. In this regard, Novelis claims that on 31 August 2020, SAMR indicated to Novelis' counsel that "[...]"¹²⁰. In addition, Novelis claims that this is confirmed by the Monitoring Trustee's Reasoned Opinion, which states that on 31 August 2020 the Monitoring Trustee had not yet submitted its Third Revised Reasoned Opinion to SAMR pending the Commission's decision on Novelis extension request. However, contrary to Novelis' claim, the Commission gave no instruction whatsoever to the Monitoring Trustee to withhold the submission of its revised reasoned opinion to SAMR. Furthermore, while it is not for the Commission to explain SAMR's indications to Novelis or the Monitoring Trustee's actions in the context of the procedure before SAMR¹²¹, there are indications in the file that explain why the Monitoring Trustee did not submit a reasoned opinion to SAMR on 24 August 2020. As explained in recital (77), on 23 August 2020, the Monitoring Trustee explained that, although it had been planning to submit a revised reasoned opinion on Liberty's suitability to acquire the Divestment Business to SAMR by 7 am CET on 24 August 2020, it was not able to do so as Liberty failed to comply with the Monitoring Trustee's request for information in a timely manner. In addition, it follows from Novelis' claim that SAMR indicated that on 31 August 2020, the Monitoring Trustee was still reviewing the suitability of Liberty. Therefore, whether the Monitoring Trustee was also waiting for the Commission's decision on Novelis' Fourth Extension Request (which was due that day) is irrelevant.
- (190) **Fourth**, the Commission disagrees with Novelis' view that the Commission acted against international best practices for the cooperation of competition authorities in merger control proceedings and that the Commission punished Novelis for observing the legal requirements in other jurisdictions (see recital (116)(5)). In this regard, the Commission cooperated with SAMR in the context of the closing of the sale of the Divestment Business to Liberty¹²². However, it was for Novelis to make sure that it respected all the commitments that it entered into in all jurisdictions. Furthermore,

¹¹⁹ Reply to the Letter of 23 November, paragraph 41.

¹²⁰ Reply to the Statement of Objections, paragraph 42.

¹²¹ Reply to the Letter of 23 November, paragraph 42.

¹²² Although the Commission cannot comment on confidential discussions with other jurisdictions, and Novelis' obligations under the Merger Regulation cannot be altered by the fact that Novelis is also engaged in SAMR's merger control procedure, the Commission took due account of developments under SAMR's procedures in its own assessment of further steps to be taken under the Merger Regulation.

the Commission did not “punish” Novelis for observing the legal requirements in other jurisdictions, since the Extension Rejection Letter and the Article 8(4) decision are not a “punishment”.

- (191) As explained in recital (27), following Novelis’ communication seeking confirmation that closing the sale of the Divestment Business to Liberty would be in compliance with the provisional interim measures decision, by letters of 2 and 14 September 2020, the Commission encouraged Novelis and Liberty to engage to obtain SAMR approval to the extent they could move to a swift sale of the Divestment Business that would mitigate the situation resulting from the failure to close the sale of the Divestment Business by the expiry of the Closing Period and that such developments would be duly taken into account by the Commission.
- (192) **Fifth**, the Commission disagrees with Novelis’ claim that Novelis pushed for SAMR’s approval of Liberty to be issued as soon as possible (see recital (116)(2)) and that it made “tireless efforts” to accelerate the review¹²³. As explained in recital (73), on 13 August 2020, SAMR requested a meeting with the Monitoring Trustee to discuss certain substantive queries and, according to the Monitoring Trustee, one of such queries related to Novelis’ non-compliance with SAMR’s requirement to propose three purchasers under Chinese legislation. In this regard, on 30 June 2020, a SAMR representative had told Novelis during a conference call¹²⁴ that “[...]” and that “[...]”. However, Novelis did not reply to this request from SAMR, which raised questions within SAMR contributing to the delay of the divestment procedure, as reported by the Monitoring Trustee¹²⁵.

4. DISSOLUTION OF THE TRANSACTION TO RESTORE THE SITUATION PREVAILING PRIOR TO ITS IMPLEMENTATION

4.1. Novelis’ views

- (193) Novelis submitted in Section 4 of the Reply to the Statement of Objections that dissolving the entire Novelis/Aleris transaction would first be impossible, second not required to restore effective competition, and third disproportionate.

4.2. Commission’s assessment

4.2.1. Dissolving the concentration now is impossible in this case

- (194) Under Article 8(4) of the Merger Regulation, the Commission’s primary means to restore the situation prevailing prior to the implementation of a concentration is ordering the dissolution of said concentration. In circumstances where it is impossible to achieve such restoration through dissolution of the concentration, the Commission can order alternative restorative measures.
- (195) In the present case, a full dissolution of the Transaction would entail that the entire Aleris business that was acquired by Novelis on 14 April 2020, including but not limited to the Divestment Business, would be carved out and removed from the control of Novelis.
- (196) At this stage however, it appears that such a carve-out of Aleris would no longer be possible, also in light of the requirements of other competition authorities, which the Commission takes note of. In particular:

¹²³ Reply to the Letter of 23 November 2020, paragraph 55.

¹²⁴ Novelis’ reply to the Commission’s request for information of 6 July 2020, Exhibit 8 (ID 4502).

¹²⁵ Monitoring Trustee’s Schedule of Issues of 14 August 2020 (ID 5116).

- (1) The Divestment Business, formerly part of Aleris, is no longer under the control of Novelis, given that on 30 September 2020 it was acquired by Liberty, a third party to the Transaction. This sale was closed with the express encouragement of the Commission, even though the Clearance Decision had become inapplicable.
 - (2) As mentioned above in Section 1.8, a different part of the former Aleris business – the Lewisport plant in the US – is currently the object of a divestiture trustee-led selling process. This sale was ordered by the US DOJ after Novelis failed to sell the relevant business within the timeframe allotted by the DOJ in the context of the conditions to its clearance decision on the main transaction.
 - (3) The remainder of Aleris has been part of the Novelis group for several months, during which Novelis has made progress on integrating Aleris' business into its own. For instance, Aleris' senior management team, including the CEO, the CFO and the General Counsel have all left Aleris upon the closing of the Transaction¹²⁶.
- (197) Therefore, as announced in the Letter of 23 November, the Commission concludes that, in the specific circumstances of the present case, it would be impossible to achieve restoration of the situation prevailing prior to the implementation of the Transaction through its dissolution.
- (198) Under these circumstances, in line with Article 8(4) of the Merger Regulation and as set out in the Letter of 23 November, the Commission does not order the dissolution of the Transaction and instead orders other measures to restore the situation prevailing before the implementation of the Transaction as far as possible as described in Section 5.
- 4.2.2. *The sale of the Divestment Business to Liberty and the Commission's prior assessment*
- (199) As explained above in Section 3.3, Novelis failed to meet a condition attached to the Clearance Decision by not closing the sale of the Divestment Business by the end of the Closing Period as extended by the Fourth Extension, i.e. 31 August 2020. Therefore, at the time of Novelis' sale of the Divestment Business to Liberty on 30 September 2020, the Clearance Decision dated 1 October 2019 was no longer applicable, and neither were the Commitments attached to it. Such Commitments had been made binding by the Commission in its Clearance Decision, after a full assessment of their appropriateness to remove the significant impediment to effective competition.
- (200) Similarly, the Purchaser Approval Decision, which assessed and approved Liberty as a suitable purchaser for the Divestment Business and which was based on the Commitments, had also become inapplicable. Leading up to the Purchaser Approval Decision, the Commission had run a full assessment of Liberty as a possible purchaser for the Divestment Business, and had eventually concluded that Liberty was a suitable purchaser.
- (201) While these decisions are no longer applicable, the Commission takes note of the fact that the sale of the Divestment Business was closed, and the fact that it was sold to

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As submitted by Novelis in §103 of the Reply to the Statement of Objections.

Liberty, both aspects having been assessed and approved by the Commission at an earlier stage of the procedure.

5. OTHER MEASURES TO RESTORE THE SITUATION PREVAILING BEFORE THE IMPLEMENTATION OF THE TRANSACTION AS FAR AS POSSIBLE (‘FINAL RESTORATIVE MEASURES’)

(202) As referred to above in recital (198), in the Letter of 23 November, the Commission had stated its intention to adopt other restorative measures as set out in the Statement of Objections, but only to the extent that they would still be relevant following the sale of the Divestment Business to Liberty. The Commission went on to explicitly list the measures it intended to adopt in the present Decision, measures which replicated *mutatis mutandis* the ancillary obligations Novelis would have been under had it closed the sale of the Divestment Business within the framework of the Commitments.

5.1. Novelis’ views

(203) Novelis claims in Section 5 of the Reply to the Statement of Objections that the Commission lacks the power to make any order concerning the Divestment Business as an alternative restorative measure. First, according to Novelis, there is no longer any basis for an Article 8(4) decision in light of the now completed sale of the Divestment Business to Liberty¹²⁷. Second, Novelis argues that issuing a divestment order would have to reflect what is necessary to maintain or restore effective competition based on the current market conditions, not those of 2019¹²⁸. Third, Novelis argues that there is no practical need for the imposition of ongoing obligations on Novelis with respect to the Divestment Business because that business has now been sold, Novelis has complied with its Commitments, and Novelis and Liberty have aligned their contractual agreements with those Commitments¹²⁹. In this regard, Novelis submits the following arguments:

(204) First, Novelis submits that it has deposited EUR [...] into the Capex escrow fund envisaged in the Commitments¹³⁰.

(205) Second, Novelis submits that transitional supply agreements and other ancillary agreements relating to the Divestment Business have been agreed and signed by Liberty and Novelis and are legally binding on Novelis¹³¹.

(206) Lastly, Novelis submits that there is no basis or need for the Commission to adopt a decision under Article 8(4) of the Merger Regulation to re-impose the (ten-year) re-acquisition ban that was contained in Novelis’ Commitments for the following reasons¹³²:

(1) First, Liberty is a long-term strategic investor with substantial synergies resulting from the combination of the Divestment Business and its Dunkirk smelter, and is unlikely to want to sell Duffel at any point in time.

¹²⁷ Section 5.1 of the Reply to the Statement of Objections.

¹²⁸ Section 5.2 of the Reply to the Statement of Objections and Reply to the Letter of 23 November, paragraph 15.

¹²⁹ Section 5.3 of the Reply to the Statement of Objections.

¹³⁰ Reply to the Statement of Objections, paragraph 141.

¹³¹ Reply to the Statement of Objections, paragraph 142.

¹³² Reply to the Statement of Objections, paragraph 143.

- (2) Second, given the revenues associated with the Divestment Business, any attempt by Novelis to reacquire the Divestment Business would be subject to EU or national merger control rules, so that the Commission or national authorities could assess the impact of such a re-acquisition on market conditions prevailing at the relevant time.
 - (3) Third, a 10-year ban on re-acquisition would be disproportionate given how the market in question could develop over that period. According to Novelis, a categorical re-acquisition ban would undermine the Commission's obligation to reassess commitments depending on how the market situation develops.
- (207) In its reply to the Letter of 23 November, Novelis further argues that the measures listed in the Letter of 23 November (i) lack legal basis, and (ii) are unnecessary, disproportionate and inappropriate.
- (208) As to the alleged lack of legal basis, Novelis submits the following arguments:
- (1) First, Novelis claims that any contravention of a condition would be the result of the Extension Rejection Letter, which constitutes the legal foundation of any order under Article 8(4)(b) of the Merger Regulation. According to Novelis, any Article 8(4) decision would be affected by legal error because the Extension Rejection Letter is manifestly unlawful¹³³.
 - (2) Second, Novelis argues that it did not implement its acquisition of Aleris in contravention of a condition as required to implicate Article 8(4)(b) of the Merger Regulation, because when Novelis closed the main transaction on 14 April 2020, it did so in full compliance with the Commitments¹³⁴.
 - (3) Third, Novelis reiterates that the breach of Commitments is not the result of any action by Novelis, but rather the inevitable consequence of the Commission's unlawful and unexpected refusal to extend the Closing Period in line with Novelis' application¹³⁵.
 - (4) Fourth, Novelis submits again that the Commission should establish that the measures are required to restore effective competition under the current market conditions, and that it should reassess whether Novelis' acquisition of the Divestment Business is likely to result in a significant impediment to effective competition pursuant to Article 2(2) of the Merger Regulation¹³⁶.
- (209) In support of its claim that the measures listed in the Letter of 23 November would be unnecessary, disproportionate and inappropriate, Novelis reiterates the arguments it made in the Reply to the Statement of Objections.

5.2. The Commission's assessment

5.2.1. Legal basis for the adoption of the Final Restorative Measures

- (210) As stated in recital (99) above, the Commission's authority to act when a concentration is implemented in contravention of a condition attached to a decision taken under Article 8(2) of the Merger Regulation reflects the need to ensure the effectiveness of the Union merger control regime. Such authority is paramount to achieving the objectives of the Merger Regulation. By ensuring the possibility to

¹³³ Reply to the Letter of 23 November, paragraphs 8 to 12.

¹³⁴ Reply to the Letter of 23 November, paragraph 13.

¹³⁵ Reply to the Letter of 23 November, paragraph 14.

¹³⁶ Reply to the Letter of 23 November, paragraph 15.

undo concentrations implemented in contravention of a condition attached to their clearance or to adopt other measures to restore the situation as much as possible, Article 8(4)(b) of the Merger Regulation aims at safeguarding the structure of the market and the competitive process.

- (211) The Commission's ability to adopt measures under Article 8(4)(b) was triggered by Novelis' failure to close the sale of the Divestment Business by the deadline put forward in the Commitments it undertook, as extended four times by the Commission.
 - (212) As explained above in recital (123) *et seq.*, it is in this regard irrelevant whether the breach occurs before or after closing of the transaction.
 - (213) There is also no need to re-assess the Transaction or the need for restorative measures under current market conditions. In this regard, the Commission rejects Novelis' argument in paragraphs 110 to 115 of the Reply to the Statement of Objections, according to which a Commission order under Article 8(4)(b) would have to reflect what is necessary to maintain or restore effective competition based on the current market conditions.
 - (214) The structure of Article 8 of the Merger Regulation is clear. Where a decision based on Article 8(2) of the Merger Regulation following a full investigation has found that in the absence of a given condition a transaction would give rise to a significant impediment to effective competition, and this condition has not been met, the Commission can immediately order the measures provided for in Article 8(4)(b) of the Merger Regulation, in order to restore the situation prevailing prior to implementation of the concentration (not "effective competition", as under the previous Merger Regulation¹³⁷). This is also confirmed in recital 31 of the Merger Regulation: "*Where the Commission has already found that, in the absence of the condition, the concentration would be incompatible with the common market, it should have the power to directly order the dissolution of the concentration*".
 - (215) Therefore, although the Clearance Decision is no longer applicable, its reasoning is still relevant and the Commission can order the dissolution of the concentration (or, if impossible, alternative restorative measures) under Article 8(4), without having to conduct a new assessment under current market circumstances.
 - (216) This situation is to be distinguished from that in which a waiver of commitments is requested, as in the examples of Commission decisions relied on by Novelis in paragraphs 112 to 114 of the Reply to the Statement of Objections. In the context of a waiver request, the aim is precisely to assess whether, at the time of the request, maintaining the commitments as attached to the clearance decision is still warranted. This is not the aim of the proceedings under Article 8(4)(b), which, as explained above, enable the Commission to immediately order measures to restore the situation prevailing prior to implementation of a concentration when a condition to its compatibility with the common market has not been met.
- 5.2.2. *The need to preserve the sale of the Divestment Business, its viability and competitiveness to restore the situation prevailing before the implementation of the Transaction as far as possible*
- (217) As set out in Section 3.3. above, the Commission has found that Novelis implemented the Transaction in contravention of a condition attached to the

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Article 8(4) of Council Regulation (EEC) No 4064/89 of 21 December 1989.

Clearance Decision, which found that, in the absence of such condition, the concentration would significantly impede effective competition in the internal market. Pursuant to Article 8(4)(b) of the Merger Regulation, in such cases, in circumstances where restoration of the situation prevailing before the implementation of the concentration is not possible through its dissolution, the Commission may take any other measure appropriate to achieve such restoration as far as possible.

- (218) In the present case, in order to restore the situation prevailing before the implementation of the Transaction as far as possible as required by Article 8(4)(b) of the Merger Regulation, other measures additional to the sale of the Divestment Business to Liberty are necessary. Precisely because the sale of the Divestment Business to Liberty was closed on 30 September 2020 outside the framework of the Commitments, which no longer applied on that date, similar safeguards to those contained in the Commitments for the period after closing are required in the present case to ensure the restoration of the situation prevailing in the market concerned before the implementation of the Transaction. Measures putting in place such safeguards are necessary to ensure and maintain the structural effect of the sale of the Divestment Business and to protect its viability and competitiveness. Only with such safeguards can the overlap between Novelis' and Aleris' activities that otherwise would significantly impede effective competition in the internal market be fully and effectively eliminated, as acknowledged by Novelis in the Commitments.
- (219) Novelis argues that there is no longer any need for the Commission to order any restorative measures at all, stressing (i) that the restoration of "effective competition" is ensured through the closing of the Novelis/Liberty transaction, (ii) that some of the measures in question are reflected in contractual arrangements signed between Novelis and Liberty, and (iii) that Novelis is in parallel bound by commitments vis-à-vis SAMR¹³⁸. However, the Commission finds that the final restorative measures as described in Section 5.3 below (the 'Final Restorative Measures') are still necessary. First, their aim is not merely to restore "effective competition", but pursuant to Article 8(4) of the Merger Regulation, measures adopted under this article are aimed at restoring so far as possible "the situation prevailing" prior to implementation of the concentration. The closing of the Novelis/Liberty transaction alone does not fully achieve such restoration, in particular because the situation prior to implementation was one where Novelis and Aleris had not merged and, from the moment the Commission adopted its clearance decision, one where it was clear that such a merger would only be able to be implemented under the conditions attached to the Clearance Decision. Second, in the absence of binding commitments, the Commission would not have the possibility to act if at any point there were a breach of any of the relevant contractual provisions between Novelis and Liberty or of the SAMR commitments.
- (220) In particular, the Commission considers that the Final Restorative Measures set out in Section 5.3 below are needed in order to maintain the structural effect of the sale of the Divestment Business to Liberty and to protect the viability and competitiveness of the Divestment Business after closing. By maintaining the structural effect of the sale of the Divestment Business to Liberty and protecting its viability and competitiveness, the Divestment Business will be able to exert a competitive constraint on Novelis in the long term, as it did before the implementation of the Transaction. The Commission considers that the Final

¹³⁸ Reply to the Letter of 23 November 2020, paragraph 18.

Restorative Measures as set out in Section 5.3 are proportionate and that they do not impose an undue burden on Novelis, as they do not go beyond what is necessary to preserve the effect on competition resulting from sale of the Divestment Business and reproduce, *mutatis mutandis* and to the extent that they are still relevant, the relevant conditions and obligations contained in the Commitments which Novelis offered for the Commission's clearance of its acquisition of Aleris. More specifically, the Commission considers that the following measures are necessary and proportionate:

(1) Non-re-acquisition measure

Contrary to Novelis' claim, the re-acquisition ban described below in Section 5.3 is necessary to ensure that the Divestment Business remains independent from Novelis for a sufficient time to ensure that the significant impediment to effective competition to which Novelis' acquisition of Aleris gave rise would be durably removed. The possibility that a future re-acquisition may be subject to review under the Merger Regulation or by a national authority offers insufficient protection in this regard, including because the Commission may not have jurisdiction in light of possible lower turnover figures in the future or if only a part of the Divestment Business is re-acquired. The Commission takes the view that a time-limited re-acquisition ban is a more effective and straightforward means to achieve the intended objective. In practice, such bans are a common feature of remedies in divestment cases, and in fact it was among the Commitments undertaken by Novelis itself in the present case. Furthermore, as set out in recital (213) above, there is no need to assess the need for this measure under current market conditions. Finally, the fact that a parallel commitment to SAMR exists is also insufficient, for the reason set out in recital (219) above.

(2) Non-solicitation measure

Contrary to Novelis' claim, the non-solicitation measure applicable to the Divestment Business' personnel is necessary to ensure that the Divestment Business remains able to compete effectively with established market players like Novelis. Merely relying on the Divestment Business' own ability to retain and attract personnel is insufficient in this regard. Here again, non-solicitation measures are a common feature of remedies in divestment cases precisely to ensure that divestment businesses are durably competitive and competition problems are effectively removed, and it was among the Commitments which Novelis itself had submitted in the present case. The fact that a parallel commitment to SAMR is in place does not remove the need for a parallel measure imposed by the Commission, as set out in recital (219) above. On the contrary, the fact that Novelis is already bound to an equivalent obligation vis-à-vis SAMR shows that this measure is entirely proportionate, not adding any significant additional burden on Novelis.

As for the non-solicitation measure applicable to the Divestment Business' customers, the Commission does not agree with Novelis' claim that "*it would not make any sense (or be realistic) for Novelis to try to persuade customers*" to breach their procurement commitments. As the owner of these customers' former supplier, Novelis may in fact be well placed to persuade customers not contractually bound to place their orders with Novelis instead of the Divestment Business. Again, the fact that a parallel commitment to SAMR is in place is insufficient as set out in recital (219) above.

Novelis submits that any non-solicitation measure on existing purchase orders should apply only to customers that had purchase order volumes in place with the Divestment Business as of 1 October 2019 and not be applicable to purchase order volumes that were in place after the adoption of the Clearance Decision, when the Divestment Business was held separately and confidential information was ring-fenced. The Commission takes note of this consideration and agrees, in light of the principle of proportionality and in line with what Novelis had committed to under the Commitments, to order this measure only in relation to purchase order volumes that existed on 1 October 2019.

(3) Measures on transitional supply agreements and other ancillary agreements

Contrary to Novelis' claim, for the reasons mentioned in recital (219) above, these measures are necessary in spite of the contractual arrangements that have been agreed between Novelis and Liberty and of the SAMR commitments.

(4) Measures on CAPEX funding

Contrary to Novelis' claim, the measures regarding CAPEX funding are necessary in spite of Novelis depositing EUR [...] into the Capex escrow fund pursuant to a Capex escrow agreement between a Novelis subsidiary, Liberty, and [...]. Given the importance of this funding for the competitiveness of the Divestment Business, the Commission cannot allow the risk that in the absence of binding commitments or binding restorative measures, the parties to the escrow may in the future modify their arrangements in such a way as to modify the amount of funds available to the Divestment Business, the scope or identity of the projects for which they must be used, or any other feature jeopardizing the objective that was intended.

(5) Measures on the provision of information and on the Divestiture Trustee.

These ancillary measures are necessary to ensure the effectiveness of the other measures at hand, which, contrary to Novelis' claims, remain necessary for the reasons set out above.

The Commission does not agree that the provision of information for 10 years and the appointment of a Divestiture Trustee until [...] – not 10 years as Novelis seems to have understood in its Reply to the Letter of 23 November, at Novelis' expense, places an undue and disproportionate burden on Novelis. The same applies for the Divestiture Trustee's having full and complete access to Novelis, as well as its books, records, documents, management or other personnel, facilities, sites and technical information, the need for Novelis to make itself available for meetings, and the Divestiture Trustee's ability to appoint advisors. The Commission considers that there is a clear need for continued monitoring of Novelis' compliance with the obligations that would have been part of the Commitments but will under the present circumstances be Final Restorative Measures. In fact, under the Commitments which Novelis itself submitted and committed to, equivalent obligations would have applied and the corresponding duties would have been carried out by the monitoring trustee. These ancillary measures are not any less necessary than they were under the Commitments, merely because Novelis sold the Divestment Business outside the framework of the Clearance Decision.

In this regard, Novelis also reiterates its argument according to which competition is ensured by the closing of the Novelis/Liberty Transaction, by Novelis' contractual obligations vis-à-vis Liberty, and by Novelis' post-closing commitments vis-à-vis SAMR that are identical to the ones anticipated by the

Commission. However, for the reasons already explained in recital (219) above, these considerations do not remove the need for these measures. On the contrary, the fact that Novelis is already obliged to finance a trustee with monitoring and reporting duties for [...] under the SAMR commitments and its contractual obligations, suggests that the Final Restorative Measures will not put any real additional burden, financial or otherwise, on Novelis.

Finally, Novelis also argues that it would be inappropriate and disproportionate to request that Novelis shall submit three possible candidates to fulfil the role of the Divestiture Trustee, considering that the monitoring trustee Smith & Williamson would be perfectly suitable to act as a trustee concerning the Final Restorative Measures. The Commission takes note and agrees that it would be sufficient and proportionate for Novelis to submit either only Smith & Williamson, or, in the alternative, three other candidates.

- (221) The Commission may, in exceptional circumstances, in response to a reasoned request from Novelis showing good cause waive, modify or substitute one or more of the Final Restorative Measures in this Decision.

5.3. Final Restorative Measures

- (222) The Commission considers that in the specific circumstances of this case, Novelis must comply with the Final Restorative Measures listed below, which are necessary to ensure that the sale of the Divestment Business to Liberty remains effective and that the viability and competitiveness of the Divestment Business are preserved, in order to restore the situation prevailing before the implementation of the Transaction as far as possible, within the meaning of Article 8(4)(b) of the Merger Regulation:

- (a) **Non-reacquisition measure:** Until [...], Novelis shall refrain from acquiring, whether directly or indirectly, the possibility of exercising influence (as defined in paragraph 43 of the Remedies Notice, footnote 3) over the whole or part of the Divestment Business. Nonetheless, the Commission may, following the submission of a reasoned request from Novelis showing good cause and accompanied by a report from the divestiture trustee in charge ('Divestiture Trustee') if such a Divestiture Trustee is still in place, as set out in point (g) below, find, if applicable, that the structure of the market has changed to such an extent that the absence of influence over the Divestment Business is no longer necessary. In such case, the Commission may authorise the re-acquisition of the whole or part of the Divestment Business.
- (b) **Non-solicitation measure:** Until [...], Novelis shall refrain from soliciting the key personnel of the Divestment Business as defined in Annex 1 to the Statement of Objections (the 'Key Personnel'), subject to customary limitations, and Novelis shall also refrain from soliciting any customers for the existing purchase orders volumes they had with the Divestment Business on the date of adoption of the Clearance Decision.
- (c) **Measure on the provision of information:** Until [...], the Commission may request all information from Novelis that is reasonably necessary to monitor the effective implementation of the Final Restorative Measures and Novelis shall provide the Commission with such information.
- (d) **Measure on transitional supply agreements:** For a transitional period up until [...] (the 'Transitional Period'), Novelis shall maintain all current arrangements under which the former Aleris or its subsidiaries supply products or services to the Divestment Business unless otherwise agreed with Liberty,

on terms and conditions equivalent to those prevailing at the date of the signing of the Commitments.

The period for such transitional supply arrangements may be further extended up to [...], on a [...], if reasonably justified by Liberty under the oversight of the Divestiture Trustee if applicable and the Commission to preserve the viability and competitiveness of the Divestment Business.

- (e) **Measure on other ancillary agreements:** during the Transitional Period, Novelis shall prioritise the production and services to be supplied to the Divestment Business over those to its own business and ensure a timely and effective supply. Strict firewall procedures shall be adopted so as to ensure that any competitively sensitive information related to, or arising from such supply arrangements will not be shared with, or passed on to, anyone outside the relevant unit providing the product and service operations.
- (f) **Measures on CAPEX funding:** to the extent that this has not already been done, Novelis shall make available to the Divestment Business CAPEX funding in the amounts specified below to fund the following three investment projects at the Divestment Business:
 - (1) CAPEX of EUR [...] to install at the Duffel plant a scalper [...].
 - (2) CAPEX of EUR [...] to modify the hot rolling mill currently installed at the Duffel plant (the 'Duffel Hot Roll Mill') to enable it to hot roll automotive slabs [...].
 - (3) CAPEX of EUR [...] to modify all assets utilised for the casting of slabs (casthouse) currently installed (including if necessary the addition of new equipment) at the Duffel plant (the 'Duffel Casthouse') to enable it to (a) cast aluminium slabs [...] and (b) cast, in addition to the existing capacity, an additional volume of aluminium slabs [...] in the last twelve months prior to 30 June 2019 and supplied to the Duffel plant. [...].

The CAPEX funds shall be at the disposal of Liberty, provided that: (i) Liberty demonstrates that the funds will be used to fund the three investment projects at the Duffel plant mentioned above; and (ii) Liberty is in the final stages of implementing the investment projects requiring the funds by [...]; or, irrespective of the ultimate ownership, for the benefit of the Divestment Business.

- (g) **Measures regarding the Divestiture Trustee:** Novelis shall appoint a Divestiture Trustee approved by the Commission that would receive the irrevocable and exclusive mandate to oversee the compliance with the Final Restorative Measures, under the supervision of the Commission.

The Divestiture Trustee shall: (1) at the time of appointment, be independent of Novelis and their affiliated undertakings; (2) possess the necessary qualifications to carry out its mandate; and (3) neither have nor become exposed to any conflict of interest that impairs the Divestiture Trustee's objectivity and independence in discharging its duties under the Final Restorative Measures.

Novelis shall remunerate the Divestiture Trustee in a way that does not impede the independent and effective fulfilment of its mandate.

No later than one week after the notification of the Decision, Novelis shall submit the name or names of either Smith & Williamson, currently already in

place as monitoring trustee over the Divestment Business, or three other natural or legal persons whom Novelis proposes to appoint as the Divestiture Trustee to the Commission for approval. The proposal shall contain sufficient information for the Commission to verify that the person or persons proposed as Divestiture Trustee fulfil the requirements listed above and includes: (i) the full terms of the proposed mandate, including all provisions necessary to enable the Divestiture Trustee to fulfil its duties; and (ii) the outline of a work plan which describes how the Divestiture Trustee intends to carry out its assigned tasks.

The Commission shall approve or reject the proposed Divestiture Trustee(s) and approve the proposed mandate subject to any modifications it deems necessary for the Divestiture Trustee to fulfil its obligations. If only one name is approved, Novelis shall appoint the person or persons concerned as Divestiture Trustee, in accordance with the mandate approved by the Commission. If more than one name is approved, Novelis is free to choose the Divestiture Trustee to be appointed from among the names approved. The Divestiture Trustee shall be appointed within one week of the Commission's approval, in accordance with the mandate approved by the Commission. If all the proposed Divestiture Trustees are rejected, Novelis shall submit the names of at least two more natural or legal persons within one week of being informed of the rejection.

If the Commission rejects all further proposed Divestiture Trustees, the Commission shall nominate a Divestiture Trustee, whom Novelis shall appoint, or cause to be appointed, in accordance with a trustee mandate approved by the Commission.

The Divestiture Trustee shall be appointed until [...].

The Divestiture Trustee shall oversee the compliance with the Final Restorative Measures by Novelis, under the supervision, orders and instructions of the Commission. The Divestiture Trustee shall be entitled to access confidential information proprietary to Novelis, Aleris and Liberty also through the Commission. The Divestiture Trustee shall not disclose such information and the principles contained in Article 17(1) and (2) of the Merger Regulation apply *mutatis mutandis*. Novelis shall provide and cause its advisors to provide the Divestiture Trustee with all such cooperation, assistance and information as the Divestiture Trustee may reasonably require to perform its tasks.

The Divestiture Trustee shall have full and complete access to Novelis, as well as its books, records, documents, management or other personnel, facilities, sites and technical information necessary for fulfilling its duties and Novelis shall provide the Divestiture Trustee upon request with copies of any document. Novelis shall be available for meetings in order to provide the Divestiture Trustee with all information necessary for the performance of its tasks.

Novelis shall indemnify the Divestiture Trustee and its employees and agents (each an 'Indemnified Party') and hold each Indemnified Party harmless against, and with no liability to Novelis for, any liabilities arising out of the performance of the Divestiture Trustee's duties, except to the extent that such liabilities result from the wilful default, recklessness, gross negligence or bad faith of the Divestiture Trustee, its employees, agents or advisors.

At the expense of Novelis, the Divestiture Trustee may appoint advisors (in particular for technical expertise, corporate finance or legal advice), subject to Novelis' approval (this approval not to be unreasonably withheld or delayed) if the Divestiture Trustee considers the appointment of such advisors necessary or appropriate for the performance of its duties and obligations under its mandate. Should Novelis refuse to approve the advisors proposed by the Divestiture Trustee, the Commission may approve the appointment of such advisors instead, after having heard Novelis. Only the Divestiture Trustee is entitled to issue instructions to the advisors.

- (223) The Commission may, in exceptional circumstances, in response to a reasoned request from Novelis showing good cause, waive, modify or substitute one or more of the Final Restorative Measures. This request shall be accompanied by a report from the Divestiture Trustee, who shall, at the same time send a non-confidential copy of the report to Novelis. The request shall not have the effect of suspending the application of the Final Restorative Measures.

5.4. Periodic penalty payments in case of failure to comply with any of the measures to restore the situation prevailing before the implementation of the Transaction

- (224) Pursuant to Article 15(1)(d) of the Merger Regulation, the Commission may impose periodic penalty payments not exceeding 5% of the average daily aggregate turnover of the undertaking concerned for each working day of delay, in case of failure to comply with any measures ordered by decision pursuant to Article 8(4) of the Merger Regulation.
- (225) If Novelis were to fail to comply with any of the measures set out in this Decision, Novelis shall incur a periodic penalty of up to [...] % of Novelis' average daily aggregate turnover of the business year preceding such failure to comply for each working day in which it is in breach until it complies.

6. CONCLUSION

- (226) The Commission finds that the Transaction, a concentration which as notified gives rise to a significant impediment to effective competition within the meaning of Article 2(3) of the Merger Regulation and Article 57 of the EEA Agreement in relation to the EEA market for the production and supply of Aluminium ABS, has been implemented in contravention of a condition attached to the Clearance Decision.
- (227) Pursuant to Article 8(4)(b) of the Merger Regulation, the Commission orders the measures described in Section 5.3.
- (228) Pursuant to Article 15(1)(d) of the Merger Regulation, if Novelis were to fail to comply with any of the measures set out in this Decision, Novelis shall incur a periodic penalty of up to [...] % of Novelis' average daily aggregate turnover of the business year preceding such failure to comply for each working day in which it is in breach until it complies.
- (229) As provided in the provisional interim measures decision of 1 September 2020, the interim measures ordered therein lapse with the adoption of the present Decision.

HAS ADOPTED THIS DECISION:

Article 1

By implementing the acquisition of Aleris Corporation without closing the sale of the Divestment Business within the Closing Period, Novelis Inc. has implemented a concentration in contravention of a condition attached to the Commission's decision of 1 October 2019 adopted pursuant to Article 8(2) of the Merger Regulation declaring the concentration by which Novelis Inc. intended to acquire sole control of the whole of Aleris Corporation compatible with the internal market and with the EEA Agreement subject to certain conditions and obligations.

Article 2

Pursuant to Article 8(4)(b) of the Merger Regulation, the Commission imposes on Novelis Inc. the measures described in Section 5.3 of this Decision, effective immediately.

Article 3

Should Novelis Inc. fail to comply with any of the orders set out in Section 5.3 of this Decision, it shall incur, pursuant to Article 15(1)(d) of the Merger Regulation, a periodic penalty of up to [...] % of its average daily aggregate turnover of the business year preceding such a failure to comply for each working day in which it is in breach.

Article 4

This Decision is addressed to:

Novelis Inc.

3560 Lenox Road, Suite 2000

Atlanta, Georgia,

United States of America

Done at Brussels, 18.2.2021

For the Commission

(Signed)

Margrethe VESTAGER

Executive Vice-President