China Clears Glencore's Acquisition of Xstrata Subject to Remedies

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China’s Ministry of Commerce (MOFCOM) on April 16, 2013 announced the clearance of the acquisition by Glencore International plc (Glencore) of Xstrata plc (Xstrata) subject to certain remedies. The review took just over one year and appears to have been the longest review period by MOFCOM of a notification taken to conclusion. Glencore filed the notification on April 12, 2012; MOFCOM six weeks later, on May 17, 2012, accepted the notification for review; and on June 15, 2012, extended the review beyond the 30-day Phase 1 into the 90-day Phase 2. During the Phase 2 review, MOFCOM determined that there were possible exclusion or restriction effects on competition in the copper, zinc and lead product markets. Because MOFCOM and the parties could not reach a resolution of MOFCOM’s concerns, MOFCOM on September 14, 2012 extended Phase 2 with Glencore’s consent for an additional 60 days to November 13, 2012.

During this period, Glencore made two proposals to address MOFCOM’s concern, but they were deemed inadequate. With the clock running out, Glencore withdrew its notification on November 6, 2012, and filed a fresh notification on November 23, 2012 to restart the clock. MOFCOM accepted the new notification for review on November 29, 2012, but it still proved impossible to agree on remedies during the new 30-day Phase 1. The review was therefore extended again to Phase 2 on December 28, 2012, and then again on March 29, 2013, for up to an additional 60 days before an agreement was reached to resolve MOFCOM's concerns.

MOFCOM’s published decision is generally more detailed than previous decisions imposing remedies in merger reviews. Such additional detail is welcome and provides additional guidance regarding the review process in China. In essence, it appears that heightened concentration in worldwide markets for production, supply and trading in the three minerals on which China is highly import-dependent aroused MOFCOM’s concerns regarding the impact on end-users. Concern was directed in particular at the potential impact on trading patterns (regarding spot contracts vs. long-term agreed quantity and price contracts, especially for copper concentrate), vertical integration (from mine to trading house) and market entry barriers in a heavily resource-focused and capital-intensive industry.

MOFCOM expressed these concerns even though the individual and combined market shares of the merger parties on a worldwide or China basis are below the thresholds that generally raise concerns regarding anticompetitive effects in other jurisdictions. Even in copper, for which China was 68.5% dependent on imports in 2011, Glencore's worldwide market share post-merger would be only 7.0% in production, 9.3% in supply and 9.5% in trading. Looking at China alone, the post-merger entity's market share in supply would rise only from 13.3% to 17.8%. The effects on zinc and lead market shares would be similarly modest.

MOFCOM nevertheless—after consultations with other government departments, relevant industry associations, downstream parties, competitors and experts—decided to impose hybrid structural and behavioral remedies to reduce the market share of the combined entity. Any pro-competitive benefits from the merger appear to have been officially discounted because they received no mention in the published decision.

MOFCOM seems to have encountered difficulty in crafting remedies acceptable to the parties that addressed its concerns and those of its constituents in a global market characterized by a high level of competition and cyclical demand. As a result, the remedies seem modest, particularly in light of the long review period. The key structural issue appears to have involved production. Glencore agreed to (i) dispose of Xstrata's Las Bambas copper mine, now under development in Peru, according to a fixed schedule at what may prove to be a below-market price, with the likely purchasers presumably including Chinese companies; (ii) guarantee a minimum supply of 900,000 tonnes of copper concentrate to Chinese purchasers through 2020, including at least 200,000 tonnes at negotiated prices; and (iii) continue through 2020 to sell zinc and lead to Chinese purchasers under both long-term and spot prices at fair and reasonable levels.

This case shows that although MOFCOM has cleared the overwhelming majority of mergers and acquisitions without remedies, those that have an impact on major domestic economic interests may continue to encounter difficulty. Although MOFCOM has published draft regulations on early clearance during Phase 1 of non-controversial transactions, and indeed has already done so in some instances, China is likely to continue to be the last major jurisdiction to clear a transaction, partly because of the agency's inexperience but also to wait to clear the transaction until clearances have been obtained in other jurisdictions (even if it delays closing by months). This case also shows that in some instances, the enforcement agency, i.e. MOFCOM, may feel the need to help achieve political-economic goals through merger review, e.g. increasing Chinese access to strategic resources or preserving the long-term contract system vs. spot pricing, even if the transaction does not raise traditional competitive concerns. The case also shows that MOFCOM may have particular concerns about mergers between foreign parties in industries on which China depends for inputs used in products that trade globally, particularly commodities, even as the Chinese government itself promotes concentrations among domestic firms in certain key industrial sectors. Finally, the extent to which behavioral remedies were specified reveals MOFCOM's determination to enforce such remedies, even though it has had difficulty doing so in the past.

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