



HAN KUN LAW OFFICES

# Legal Commentary



CHINA PRACTICE • GLOBAL VISION

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## Antitrust Law

### MOFCOM Conditionally Approves Glencore's Acquisition of Xstrata

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On April 16, 2013, the Ministry of Commerce of the PRC (“MOFCOM”) released an announcement (the “Announcement”), stating that MOFCOM decided to conditionally approve Glencore International plc (“Glencore”)’s Acquisition of Xstrata plc (“Xstrata”) (the “Proposed Acquisition”), and such Announcement shall take effect from the date of release. The main contents of the Announcement are as follows:

#### Examination Process

On April 1, 2012, MOFCOM received an anti-monopoly application for concentration of undertakings regarding the Proposed Acquisition, on May 17, MOFCOM confirmed that the application documents and supplementary materials were in line with Article 23 of the PRC Anti-Monopoly Law, and it placed this concentration of undertakings on file and started a preliminary examination. On June 15, MOFCOM decided to conduct a further examination on the same. After further examination, MOFCOM considered that this concentration of undertakings may have an adverse effect of excluding or restricting competition in the market of copper concentrate, zinc concentrate and lead concentrate. On September 14, with the consent of the applicant, MOFCOM decided to extend the further examination period to November 13. During the examination period, the applicant submitted two rounds of solutions regarding the competition issues raised by MOFCOM. However, based on MOFCOM’s review, neither of the solutions could solve the perceived competition problem. On November 6, the applicant requested to withdraw its application, and re-submitted the application on November 23. MOFCOM again placed this application for concentration of undertakings on file on November 29. On December 28, MOFCOM decided to conduct a further examination on this concentration of undertakings. On March 29, 2013, with the consent of the applicant, MOFCOM decided to extend the examination period.

During the examination process, MOFCOM examined and verified the authenticity, integrity and accuracy of the application documents, solicited opinions from relevant government agencies, industry associations, downstream clients, industry competitors, convened several forums, and verified the relevant data information.

## **Analysis for Competition**

### **1. Proposed Acquisition**

The acquirer, Glencore, is the world's largest non-ferrous metals and mineral products supplier, with mature experience in global operations and marketing networks, has a strong control over the third-party trade market in the global copper concentrate, zinc concentrate and lead concentrate. The acquiree, Xstrata, is the world's fifth-largest diversified mining group and metals companies, as well as the world's fourth largest copper producer. Glencore currently holds a 33.65% shares in Xstrata, and will acquire through the Proposed Acquisition all the issued and outstanding shares of Xstrata currently not held by Glencore. After the completion of the Proposed Acquisition, Glencore shall hold 100% of the shares of Xstrata.

### **2. Relevant Market**

Based on MOFCOM's opinion, since the Chinese market is the largest market for minerals products of both Glencore and Xstrata, this concentration of undertakings will have a major impact on the Chinese market. Regarding the commodities involved in this concentration of undertakings: 1) China is a major importer of copper concentrate, lead concentrate and zinc concentrate, its import proportion of the total supply for the above three commodities is respectively high, the two parties involved in this concentration of undertakings have occupied a large proportion in both the global and Chinese product and supply market of the above three commodities, 2) the import proportion of the total supply of the Chinese market for other commodities are respectively small, while the two parties involved in this concentration of undertakings have occupied a respectively small proportion of relevant market. Therefore, MOFCOM shall focus on examining the impact on the market of copper concentrate, lead concentrate and zinc concentrate of this concentration of undertakings.

### **3. Examination Conclusion**

Through its examination, MOFCOM came to the following conclusions: this concentration of undertakings shall: 1) eliminate Xstrata, the key competitor or potential competitor of Glencore in the Chinese market of copper concentrate, zinc concentrate and lead concentrate, 2) significantly increase the corresponding mineral resources controlled by Glencore, 3) further strengthen the degree of vertical integration of Glencore in the relative industries and 4) improve Glencore's level of control over the commodities market of copper concentrate, zinc concentrate and lead concentrate. Therefore, this concentration of undertakings may have an

adverse effect of excluding or restricting competition in the market of copper concentrate, zinc concentrate and lead concentrate.

### **Negotiations on Restrictive Conditions**

During the examination process, MOFCOM pointed out to the applicant that this concentration of undertakings may have an adverse effect of excluding or restricting competition, and held several rounds of negotiations regarding how to eliminate or reduce the adverse effect on competition brought by this concentration of undertakings. Glencore responded by submitting several resolutions. After assessing these solutions, MOFCOM came to the decision that the Transaction Relief Commitment Plan for Glencore's Acquisition of Xstrata submitted to MOFCOM on April 12, 2013 may reduce the adverse effect of excluding or restricting competition brought by this concentration of undertakings.

### **Examination Decision**

After the examination, MOFCOM believed that Glencore's Acquisition of Xstrata may have an adverse effect of excluding or restricting competition on the Chinese market of copper concentrate, zinc concentrate and lead concentrate, and decided to approve this concentration of undertakings with additional restrictive conditions based on the commitments of Glencore's final relief plan. Under these restrictive conditions, Glencore and Xstrata shall perform the following obligations: 1) regarding the market of copper concentrate, Glencore shall divest all the interests held by Xstrata in the Las Bambas (a copper mine project in Peru) and close the divestment deal prior to June 30, 2015; and during the period from 2013 to the end of 2020 keep the same deal conditions with its PRC customers as negotiated prior to the Proposed Acquisition; 2) regarding the market of lead concentrate/zinc concentrate, Glencore shall during the period from 2013 to the end of 2020, continue to provide long-term contracts and spot contract offers relating to lead concentrate/zinc concentrate to its PRC customers and , the conditions (including the price related conditions) of those offers subject to certain specific circumstances shall be fair and reasonable in accordance with the then effective international market terms.

In addition, regarding the implementation of the above restrictive conditions, MOFCOM required that: Glencore shall entrust an independent monitoring trustee to supervise its performance of the Announcement obligations and commitments. Glencore shall from the date the Announcement released, within 15 days after the end of each quarter, submit a written report to MOFCOM and the monitoring trustee the status of its performance of the Las Bambas divestment obligation. Glencore shall also from the date the Announcement released, within 45 days after the end of each calendar year, submit a written report to MOFCOM and the monitoring trustee the status of its performance of the long-term supply obligations.

## **Important Announcement**

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