Recent Developments in Chinese Merger Control – MOFCOM Shifts up a Gear

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The Chinese Ministry of Commerce ("**MOFCOM**") has stepped up its merger control activities on many fronts in recent weeks, issuing ground-breaking decisions in the *Glencore/Xstrata* and *Marubeni/Gavilon* cases and circulating draft procedural rules for public consultation on merger remedies and on dealing with straightforward merger control cases.

The new decisions

On April 16, 2013, MOFCOM issued approval for Glencore's acquisition of Xstrata subject to conditions. Less than a week later, on April 22, it did likewise for the takeover of Gavilon by Marubeni.

Overall MOFCOM's approach in both transactions was remarkably similar. However, there were also some key differences.

Common features

Common to both transactions is that the merger control clearance procedure with MOFCOM was very drawn out – over a year from the moment of the initial filing in the *Glencore/Xstrata* transaction, and around 10 months for the *Marubeni/Gavilon* transaction. In both transactions, the parties withdrew their notifications at the end of 'phase 3′ in the procedure (after around 180 days) – at the end of which a decision must be made according to the law – and re-filed them as new

notifications.

The nature of the underlying market sectors and the concerns voiced by MOFCOM in the two cases were also remarkably similar.

In terms of the nature of the markets, both transactions were in sectors considered sensitive by the Chinese government – natural resources (*Glencore/Xstrata*) and agriculture/food products (*Marubeni/Gavilon*).

Moreover, the combined market shares of the merging parties were low in both transactions: in *Glencore/Xstrata*, the combined market shares in terms of actual supplies of copper concentrate, zinc concentrate and lead concentrate – the three products identified by MOFCOM as the relevant markets, with the geographic scope of the market determined to be worldwide – were 9.3%, 17.9% and 7.6%, respectively. In *Marubeni/Gavilon*, the MOFCOM decision does not state the market shares of the parties in the relevant market where MOFCOM expressed concerns – the "market for soy bean imports" in China – but the sales and market-related data scattered throughout the decision allow a rough calculation of the combined market share: less than 18.6%.

In addition, a common feature of both transactions was that there was little by way of overlap between their China businesses. In other words, the market share increment in China was, for the most part, rather insignificant. In *Glencore/Xstrata*, the market share increment through Xstrata's supplies of copper concentrate in China was 3.1%, whilst Xstrata did not have any sales of zinc concentrate and lead concentrate in China. In *Marubeni/Gavilon*, the market share increment through Gavilon's sales of soy beans in China was below 0.7%.

In terms of MOFCOM's concerns, both decisions placed great emphasis on the fact that China relies on imports to a considerable extent: according to MOFCOM, China imported 68.5%, 28.7% and 27.3% of its consumption of copper concentrate, zinc concentrate and lead concentrate, respectively, and 80% of the soybeans consumed in China are imported. Likewise, both decisions stress that in both transactions a large proportion of the business of the acquirers is done in China in the markets in question.

Perhaps most importantly, the two decisions make clear that China's reliance on imports and the perceived weakness in bargaining power on the side of the Chinese customers were important factors in MOFCOM's assessment. For example,

in *Marubeni/Gavilon*, MOFCOM explicitly stated: "At present, China is largely dependent on soy bean imports. The domestic soy crushing plants are of low concentration, small production scale and weak bargaining power. The proposed concentration between business operators is likely to further undermine the bargaining power of the downstream soy crushing enterprises."

Of course, damage to customers including weak buyer power can be an important part of the substantive antitrust analysis in merger cases – whether in China or globally. At the same time, few, if any antitrust authorities worldwide would seek to impose conditions on transactions where the combined market share of the merging parties is below 10% or 20%, as was the case in *Glencore/Xstrata* and *Marubeni/Gavilon*.

Differences

There are, however, a number of key differences between the decisions in *Glencore/Xstrata* and *Marubeni/Gavilon*. For example, MOFCOM's approach to market definition was quite different. In *Glencore/Xstrata*, MOFCOM found the relevant product markets to be those of copper concentrate, zinc concentrate and lead concentrate, and the geographic market to be worldwide. In contrast, in *Marubeni/Gavilon*, MOFCOM defined the geographic market to be China only, more specifically imports into China (without further explanation on how imported soy beans would differ from domestically produced soy beans).

Equally significant, the conditions subject to which approval was granted – the "remedies" imposed – differ materially between the two cases. In *Glencore/Xstrata*, the remedies were essentially two-fold:

- First, Glencore has to sell its rights in the copper project in Las Bambas, Peru, to a buyer acceptable to MOFCOM. If Glencore fails to do so by the specified deadlines, then a third party will be appointed as divestiture trustee to sell Glencore's rights in other projects. This will put Glencore under considerable pressure to sell the rights in the Las Bambas project swiftly, and under MOFCOM's supervision. It will be interesting to see whether the buyer will be a Chinese company.
- Second, Glencore entered into a number of behavioral commitments to continue providing copper concentrate, zinc concentrate and lead concentrate to Chinese buyers under certain

specified conditions. In particular, Glencore committed to delivering a minimum amount of copper concentrate "at" or "by reference to" an annual benchmark price, and to supplying zinc concentrate and lead concentrate at fair and reasonable prices consistent with those in the international market.

By contrast, in *Marubeni/Gavilon*, the remedy in essence consists of keeping the soy bean businesses of Marubeni and Gavilon entirely separate, with firewalls in between. This commitment will stay in place for at least two years, after which Marubeni will have the right to apply to MOFCOM to waive or modify it. This remedy is very similar to those imposed by MOFCOM in the two *Hard Disk Drive* cases in 2011 and 2012.

There were also material differences in terms of the procedural approach taken by MOFCOM across the two cases. In *Glencore/Xstrata*, for the first time ever, MOFCOM published the relatively detailed 'commitment proposal' by the merging parties as an annex to its decision, while Marubeni's commitment proposal was not made public.

The draft procedural regulations

In addition to the two public decisions, MOFCOM issued two draft regulations for comment. The first regulation is a draft *Regulation on the Imposition of Restrictive Conditions on Concentrations between Business Operators*, released on March 27. The goal of this draft regulation may be to streamline and consolidate the procedure for the negotiation, drafting and supervision of remedies. The draft regulation is meant to replace the *Tentative Regulation on the Implementation of Divestiture of Assets or Businesses in Concentrations between Business Operators*, issued in 2010.

The draft regulation on remedies is a relatively long and technical document. Most companies are unlikely ever to have to deal with it, as the regulation (if enacted) would only be used in a case after MOFCOM has voiced concerns and plans to clear the transaction subject to conditions. Judging from MOFCOM's merger control track record since 2008, statistically at least, less than 5% of all transactions notified to MOFCOM will reach this point.

However, even for companies that are locked in remedy discussions with MOFCOM, the practical impact of the latter regulation (were it to become law) is not clear. As

the *Glencore/Xstrata* and *Marubeni/Gavilon* cases illustrate, the approach towards remedies taken can differ quite significantly and is essentially a case-by-case approach. The remedies imposed in past cases have been quite varied, and the draft regulation – focusing mainly on the procedural aspects – may not be enough to bring about the goal of harmonizing MOFCOM practice in this regard if past form is anything to go by.

The second draft regulation circulated for public consultation is the draft of the *Provisional Regulation on Standards Used for Simple Cases of Concentration between Business Operators*, released on April 3, 2013.

The goal of this regulation is create a category of "simple cases," which currently does not exist as a matter of law. The proposed category is defined by reference to a variety of factors, such as market share thresholds and includes certain types of joint ventures. However, the draft regulation may not provide any real value-add for businesses seeking to reduce the time spent waiting for MOFCOM's decisions in simple, non-controversial cases: unlike a prior draft, the most recent version circulated for public comment does not state what consequences flow from classification as a "simple case." In contrast, the prior draft contained a commitment by MOFCOM to accelerate the procedure for "simple cases" and issue clearance within phase 1 of the procedure (up to 30 days into the procedure), subject to certain exceptions.

Conclusions

In many ways, MOFCOM's *Glencore/Xstrata* and *Marubeni/Gavilon* decisions are a "first." The two cases are significant because they demonstrate MOFCOM's willingness to impose remedies in merger control cases where the market shares go as low as 7.6%. Moreover, it emerges from both decisions that MOFCOM takes into account the reliance on imports as a key factor in its analysis. Although not entirely explicit, the two decisions come very close to an open recognition that Chinese merger control analysis can go beyond a 'pure antitrust assessment' and into the realm of policy. In that sense, it is also a "first" for those observers who still had any lingering doubts that this was the case.

Furthermore, the two cases have the dubious distinction of being among the longest MOFCOM procedures on record since the Anti-Monopoly Law came into effect in 2008; the *Glencore/Xstrata* case is the longest ever (among the cases that ended with decisions that were made public). More generally, the concern felt

among many in the antitrust community on the ground in Beijing is that the processing time for merger control clearances is not decreasing as MOFCOM gains more experience in handling merger control cases. Hence, the interest of the business community in the draft *Provisional Regulation on Standards Used for Simple Cases of Concentrations between Business Operators* which has the potential to ease the burden upon companies notifying a concentration to MOFCOM that meets the criteria. However, the lack of any guidance on the part of MOFCOM in the current draft as to what this means in terms of processing time somewhat reduces its value to business. Companies want to have some assurance that a straightforward China merger control application will be cleared to a more definite, compressed timetable and that other parts of a global transaction are not held up by China, so that they can plan their business accordingly and concentrate on their post-transaction integration.