

**HD** What do **China's** MOFCOM's recent merger clearance decisions mean for you?

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**China's** Anti-Monopoly Law (AML) is one of the youngest antitrust laws in the world having come into effect just over five years ago.

The AML has primarily been enforced by Ministry of Commerce People's Republic of **China** (中华人民共和国商务部), or MOFCOM. In the years since the law's introduction, MOFCOM's capabilities in key areas such as competition and market analysis as well as monitoring and enforcement have grown rapidly.

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MOFCOM's latest decisions demonstrate its increasing sophistication, particularly in its willingness to consider complex behavioural and structural remedies. Also apparent, is MOFCOM's readiness to impose harsher merger remedies where key sectors of **China's** economy are involved. This is most evident in last year's conditional approval of the global mega deal between Glencore and Xstrata.

#### GELNCORE/XSTRATA1

On 16 April 2013, MOFCOM announced its conditional approval of Glencore International Plc's (嘉能可国际公司) (Glencore) USD\$35 **billion** global takeover of Xstrata Plc (斯特拉塔公司) (Xstrata). MOFCOM was the last of the regulatory authorities to approve the transaction with approval first received from the Australian Competition and Consumer Commission in Australia in July 2012, followed by the Department of Justice in the US, the Competition Commission of South Africa and the European Commission in the EU.

MOFCOM's lengthy decision, published in **Chinese** only, is relatively detailed and can be seen as a move toward greater transparency. MOFCOM focused on the overlaps between the merging parties in the markets for **copper** concentrate, zinc concentrate and **lead** concentrate. MOFCOM found the merger was likely to restrict competition in those markets and result in a significant increase in vertical integration by Glencore in those markets.

MOFCOM thus imposed a "crown jewels" structural remedy requiring Glencore to sell the US\$5.7 **billion** Las Bambas **copper** project in Peru. Failure to do so in the required time would result in the **sale** of other Glencore assets (namely Glencore's interests in the Tampakan, Frieda River, El Pachon and Alumbra projects) at prices without a reserve. Behavioural remedies were also employed including obligations to supply to **Chinese** customers at benchmark prices.

#### MEDIATEK/MSTAR2

On 26 August 2013, MOFCOM cleared the **acquisition** of MStar Semiconductor, Inc. (Cayman) (开曼晨星半导体公司) (MStar Cayman) by Media Tek. Inc. (联发科技股份有限公司) (MediaTek) more than a year after it was first notified in July 2012. The proposed **acquisition** involved the exchange of every ordinary share of MStar Cayman for 0.794 ordinary share of MediaTek plus NT\$1 in cash. The total transaction value was RMB ¥24.55 **billion** (approximately US\$4 **billion**).

The merger parties are principally engaged in the design and manufacture of integrated circuit chips for multi-media display and wireless communications devices. MOFCOM focused on the (likely) effect of the merger on the **Chinese** market for LCD TV control chips of which MStar possessed 65% market share and MediaTek 20%. MOFCOM concluded the merged entity would eliminate the remaining suppliers and the threat of new entry would not pose an effective constraint on the post merger entity.

In light of these concerns, MOFCOM imposed a set of extensive "hold-separate" behavioural remedies in order for MStar's LCD TV control chip business (Morningstar Taiwan) to be maintained as an independent competitor in the market

#### IMPLICATIONS OF MOFCOM'S APPROACH

The remedies imposed by MOFCOM in Glencore/Xstrata are much more 'draconian' compared to those in MediaTek/MStar, particularly given the significantly lower level of concentration (combined post-merger market share of 12.1% in the supply of **copper** concentrates in Glencore/Xstrata as compared with 80% of LCD chips in MediaTek/MStar).

Given the competition issues identified in MOFCOM's decision on MediaTek/MStar, it's questionable why the transaction was approved or why behavioural remedies were used instead of structural remedies such as divestiture.

Perhaps where **China's** access to key commodities is at issue, MOFCOM is more ready to intervene and impose harsher merger remedies, even remedies with an extraterritorial reach.

Whilst MOFCOM has generally been receptive to behavioural remedies, over the past few years it has become more experienced and confident in monitoring more extensive behavioural remedies. Similar to its overseas regulatory peers, MOFCOM has begun imposing more complex behavioural remedies such as the "hold separate" remedies as seen in MediaTek/MStar.

MOFCOM is also now willing to impose specific remedies targeted at the competition issues identified. For example, to ensure that Morningstar Taiwan remains independent from MediaTek, MOFCOM did not shy away from specifying the limited shareholder's rights of MediaTek in Morningstar Taiwan. A further example is the new obligation for the merger parties to submit a detailed implementation plan before deal closing (and subject to MOFCOM approval).

These decisions are likely to encourage merger parties that may have previously considered the available remedies too limiting, to notify MOFCOM and other regulators and offer more creative approaches to remedies.

#### Footnotes

1Read the MOFCOM decision on Glencore/Xstrata here (only available in **Chinese**)

2Read the English version of the MOFCOM decision on MediaTek/MStar here

The content of this article is intended to provide a general guide to the subject matter. Specialist advice should be sought about your specific circumstances.

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