

WHY SHOULD MERGER REGIME CONSIDERATIONS BE PLACED AT THE FOREFRONT OF TRANSACTIONS IN THE MINING SECTOR?

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Legal Briefings - By **Kyriakos Fountoukakos, Adelaide Luke** and **Josh Butler**

Merger control regimes are becoming ever more prevalent, with the consequence that a merger filing strategy is important as filings may be necessary in multiple jurisdictions across the globe.

KEY TAKEAWAYS

- The need for these filings, and the potential results if filings are not made, can have a hugely significant impact on any transaction. As the consequences for breach can consist of fines, delays to the deal, or even the deal being terminated altogether.
- Even in cases raising no competition issues, it is normally prohibited to close the deal before all clearances have been received and hence merger filings will have an impact on the deal timetable.
- As a result, merger filings should be considered at the outset of any transaction in the mining sector. So as to avoid any interference with the corporate timetable and to ensure smooth and effective deal completion.

MERGER CONTROL CLEARANCES IN THE MINING SECTOR

Over the last number of years we have seen an increase in the number of M&A transactions in the mining sector that have been notified to competition regulators. This is largely as a result of the increased presence of mandatory and suspensory merger filing regimes worldwide, and the need for companies to both comply with the rules and make timely filings to avoid complications in the corporate timetable.

Although overall the number of transactions in the mining industry has slowed over the past two years, the growing need for companies to realign their businesses has still led to transactions involving major players across the sector – for example Anglo American made a number of divestments to raise capital, including selling its Rustenberg mining operations to Sibanye¹ and its proposed sale of its Australian coal mining operations². Whatever the underlying reason for such transactions, we have seen deals ranging from infrastructure projects (e.g. the current proposed sale of Glencore's New South Wales coal-haulage rail service³), to mine acquisitions (e.g. China Molybdenum's acquisitions of Freeport-McMoRan's copper and cobalt businesses, and Anglo American's niobium and phosphates operations⁴). Deals have continued to be made on a global scale, with the aforementioned Freeport-McMoRan acquisition taking place in Zambia, Evolution Mining's bid for Glencore's Ernest Henry operations in Australia⁵, and Potash-Agrium's proposed merger of equals in North America.⁶

The ever increasing presence of mandatory regimes can impose an onerous burden on mining deals in particular given their tendency to have a large geographic spread with the products in question being sold around the world. A helpful development is that many merger control regimes have introduced so-called simplified procedures for certain cases that do not raise competition concerns, and this can alleviate the filing burden significantly.

Without a doubt, competition and merger filing issues must be considered at the outset of any deal because such issues go directly to execution risk and can give rise to financial penalties. More than ever before, it is important to have a merger filing strategy and to conduct analyses early on in the deal process to avoid complications and ensure that the timetable is not impacted adversely.

THE INCREASE OF GLOBAL MERGER REGIMES

The global competition law picture has changed over the years, with a huge increase in the number of jurisdictions that now have some level of merger regulation. In 2000 there were approximately 70 countries with merger control regimes. Since then, the number of jurisdictions with such regimes has doubled, and is now at around 140 jurisdictions. Relevant to the mining sector in particular is that a number of the countries contributing to this increase are very important to the mining industry - for example, since 2000, China, India and Kenya, amongst others, introduced merger control, and Brazil and Russia implemented major changes to existing merger regimes. There are also a number of new regulators in Africa, such as the new COMESA regime established in 2013.

This increase in the number of merger control regimes has led to a large increase in the number of filings that are necessary in any deal, because each deal potentially triggers merger filings globally, depending on the individual elements of the transaction. Each jurisdiction uses its own merger control test but common to many is a test based on turnover: this is often triggered by the parties generating a certain level of turnover in the jurisdiction in question from all their activities (not just those relevant to the particular transaction). With the increased number of regulators comes an increase in the number of different tests used by regulators when considering a proposed merger. This can be seen through the particularly active South African regulator, which employs a public interest test when assessing any merger. This test requires the regulator to consider whether the merger will have any wider effects, as opposed to only the likely effect on competition. The regulator in South Africa will consider the merger's likely impact on: employment; the ability of national industries to compete at an international level; and the impact on small businesses or firms owned by historically disadvantaged persons.

China has a turnover-based test with relatively low thresholds in light of the size of its economy⁷. As a result the Chinese merger regulator, MOFCOM, has dealt with a large number of merger filings in mining deals. In addition to the filings already highlighted, filings have been made to MOFCOM in relation to: the China Metallurgical Group Corporation and China Minmetals Corporation merger⁸; Shenghe Resources acquisition of Ganzhou Chenguang Rare Earths New Material⁹; and China National Gold's acquisition of the Jinfeng Mine¹⁰. Another notable deal is the 2013 merger between Glencore and Xstrata, where MOFCOM's review took the best part of a year and ordered extraterritorial divestments from the post-merged entity. This demonstrates the importance of merger regimes and the impact such controls can have on the corporate timetable.

MANDATORY AND SUSPENSORY REGIMES - NO "GUN JUMPING" ALLOWED

Many of these newly implemented merger controls mirror existing controls already in place elsewhere (particularly the EU's merger control regime which has been emulated in many jurisdictions around the world, and particularly in Asia). As such, many regimes are both mandatory and suspensory such that a deal cannot complete prior to clearance by the relevant regulator. In other words, these filings have the effect of temporarily suspending the proposed deal whilst a decision is taken as to its likely effect on competition (a requirement known as the "suspensory" or "stand-still obligation").

In the event that the necessary filings are not made, and a deal closes without prior authorisation (a violation colloquially known as "gun jumping"), large fines can and have been issued. In 2012 Electrabel was fined \$27.6m by the European Commission, in 2013 Castel Frères in France was fined \$4m and Marine Harvest has recently been fined \$22.4m in relation to its acquisition of Morpol (Marine Harvest is currently challenging this fine in the General Court)¹¹. These fines, in addition to other wide-ranging powers enjoyed by many regulators (as exemplified by the extreme measure taken in 2012, where Stena's acquisition of certain DFDS assets in Ireland was declared void due to gun jumping), demonstrate the vital need to consider merger filings at the earliest opportunity. Doing so both avoids the financial risks associated with gun jumping, and prevents any unnecessary delays in completing a transaction.

A CHANGING APPROACH TO MERGER REGIMES?

As is clear, given the mandatory and suspensory nature of many merger control regimes, merger filings will have a key impact on the timetable of a transaction. As explained, this is due to the need to make necessary filings in good time so that the deal can complete with the requisite prior authorisations obtained.

Practically, and particularly in the mining sector, filings are increasingly complicated and require a significant amount of information before a regulator will deem them complete. Filings typically require information about the parties, the transaction, the relevant products, market shares, and competitive conditions. The aim is to submit a complete and clear filing: first so as to hopefully avoid any further questions or investigations from the regulator; and second, to enable the regulator to proceed to a smooth and speedy clearance.

Regulators are becoming increasingly aware of the onerous obligation that merger filings can put on the parties. Particularly in situations where there are realistically no competition concerns, it appears disproportionate to request detailed upfront information, conduct a full investigation and issue a full decision. To simplify the process, the EU implemented a simplified merger procedure to cover cases in which competition concerns were likely to be less relevant (in particular where the parties' activities do not overlap or the market shares of the parties are low or the deal is a joint venture with no or minimal activities in the EU). This procedure was amended in 2013 by increasing the thresholds under which a deal fell within the simplified procedure. This has led to a large increase in the number of cases being dealt with under the simplified procedure, with 63% in 2013, 71% in 2014 and 72% in 2015.

A number of other jurisdictions have subsequently followed the EU's lead and implemented their own simplified regime. Most notably China's simplified procedure enacted in 2014 was seen as a sign by MOFCOM of streamlining its procedures in response to criticism that Chinese filings were taking too long and were delaying deals unnecessarily. At the point of implementation MOFCOM claimed the new procedure in China would be applicable to approximately 60% of notifiable transactions, with a significant reduction in the time taken to receive approval.

In 2015, of the 312 unconditional merger clearances, some 77% were notified under the simplified procedure (in Q4 2015, this rose to 84%). Following the internal MOFCOM restructuring in September 2015, the clearance timetable shortened considerably with 100% of all simple form deals notified in November and December 2015 being cleared within the Phase I period of 30 working days.

Since the implementation of the simplified procedure in China, there have been a number of mining transactions filed under it, including: China National Gold's acquisition of the Jinfeng mine from Eldorado Gold Corporation¹²; Shenghe Resources acquisition of Ganzhou Chenguang Rare Earths New Material¹³.

MERGER CONTROL IMPACT ON CORPORATE TIMETABLE/DOCUMENTS

As is obvious, merger control will impact the corporate timetable. As such, it needs to be taken into account with suitable conditions precedent and, in public transactions, to fit in with the takeover timetable. In addition, any substantive merger control/antitrust risk will need to be factored in with further suitable conditions precedent, risk allocation provisions (e.g. insertion of remedies, including "hell or high water" clauses, break fees etc.), and cooperation provisions to ensure the parties are obligated to provide necessary information to make the filings and obtain clearances. Finally, merger control (and in particular the no "gun jumping" rule) will need to be taken into account during the due diligence process to ensure that any exchanges of information take place subject to sufficient safeguards (Non-disclosure agreements or, in more sensitive situations, on the basis of so-called "clean teams") and that the parties do not complete the deal, even partially (e.g. by presenting themselves to customers as already merged), prior to receiving clearance by regulators and completing the deal.

CONCLUSIONS

Although currently there are a relatively small number of mining deals taking place as compared to previous years, there is an expectation that further consolidation is necessary to reduce financial risks and this is likely to lead to an increased number of deals in the near future.¹⁴ In each of these deals a merger filing strategy will be necessary to determine where filings are triggered around the globe and how these filings will impact the corporate timetable. Even though many deals will not raise any substantive concerns, in some situations a further substantive analysis will be required to assess whether any remedies will be required to secure clearance. A filing strategy should be considered from an early stage to avoid interference with the corporate timetable and to ensure completion of the deal smoothly and successfully. While simplified procedures are becoming more applicable, as in the EU and China, the potential for competition concerns to delay or even derail a deal in the mining sector cannot be underestimated. As such we would advise that merger regime considerations are placed at the forefront when any transaction is being considered.

ENDNOTES

1. [Sibanye announces the acquisition of the Rustenburg mining and concentrating operations from Anglo American Platinum Limited.](#)
2. [Anglo American's coal mine sale down to two bidders.](#)
3. [Australian competition watchdog concerned over Glencore's sale of GRail coal haulage unit.](#)
4. [Freeport Selling DRC Mine to China Moly for \\$2.65 Billion; Anglo American agrees \\$1.5 billion sale of niobium and phosphates businesses.](#)
5. [Glencore Agrees \\$670 Million Sale of Australian Gold Output.](#)
6. [Potash-Agrium Merger Seen Likely to Clear Regulatory Hurdles.](#)
7. The China specific turnover test requires that each of at least two relevant parties generates more than RMB400 million (about US\$60 million) in China.
8. [China Widens State Commodity Overhaul as Metals Firms Merge.](#)
9. [Shenghe Resources Holding Co Ltd to acquire Hainan Winsheen New Material Technology Co Ltd, Ganzhou Chenguang Rare Earths New Material Co Ltd and stake in Sichuan Leshan Kebairui New Materials Co Ltd.](#)
10. [Eldorado Gold to sell 82% stake in China's Jinfeng gold mine for \\$300 million.](#)
11. [Mergers: Commission fines Marine Harvest € 20 million for taking control of Morpol without prior EU merger clearance; Action brought on 3 October 2014 - Marine Harvest/Commission.](#)
12. [Eldorado Gold to sell 82% stake in China's Jinfeng gold mine for \\$300 million.](#)
13. [Shenghe Resources Holding Co Ltd to acquire Hainan Winsheen New Material Technology Co Ltd, Ganzhou Chenguang Rare Earths New Material Co Ltd and stake in Sichuan Leshan Kebairui New Materials Co Ltd.](#)
14. [Mergers, acquisitions and capital raising - 2015 trends and 2016 outlook.](#)

KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.



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